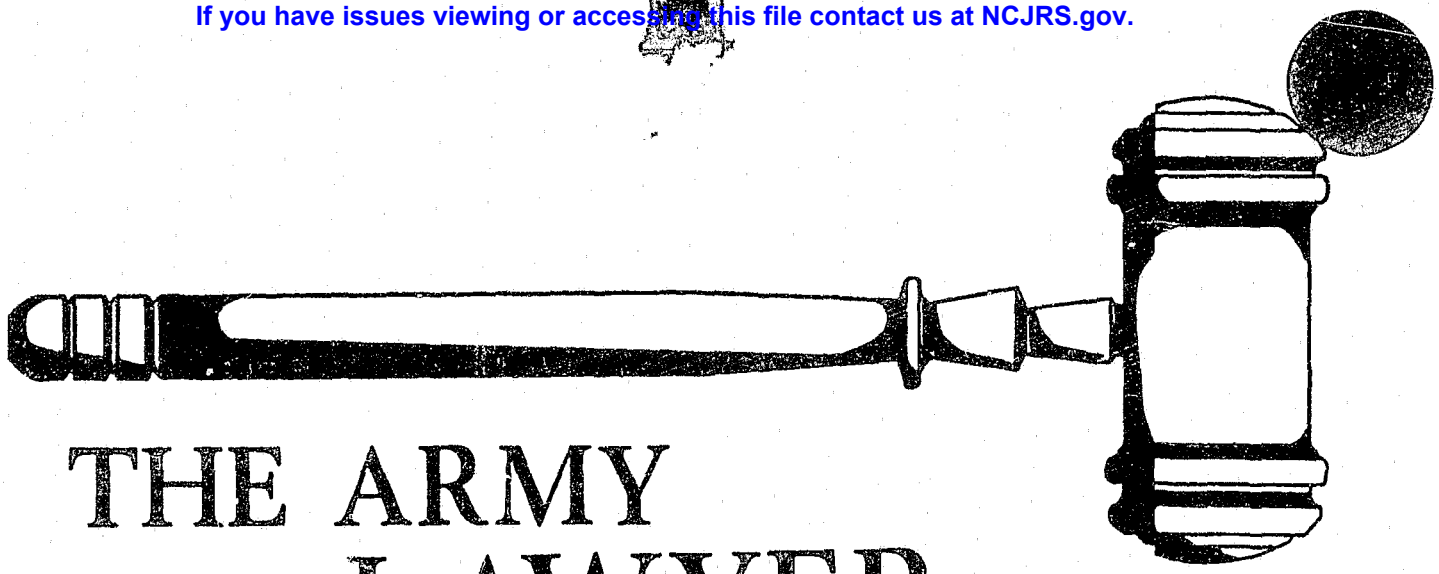

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Special Issue—The Sentencing Phase of Courts-Martial

Table of Contents

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Editor
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REPLY TO
ATTENTION OF

DAJA-ZX

14 MAY 1986

SUBJECT: Professional Organizations and Activities - Policy Letter 86-7

STAFF AND COMMAND JUDGE ADVOCATES

1. Attendance at continuing legal education (CLE) courses and participation in professional organizations and committees not only facilitate professional development, but also enhance the professional stature of the JAGC.

2. To ensure that professional development receives the attention it deserves, you should--

a. Establish as an important objective the institutionalization of professional development, through "in-house" programs and, to the extent the mission and funding will permit, through activities of professional organizations and committees.

b. Encourage participation in federal, state, and local professional organizations and committees.

c. Ensure attorneys stay in touch with new issues and trends by attending CLE courses.

d. Budget for attendance at CLE courses and professional activities.

e. Allow permissive TDY (AR 630-5) to participate in professional organizations and committees.

f. Emphasize that mandatory CLE requirements are, ultimately, the responsibility of the individual attorney.

g. Caution officers that the views of a judge advocate who participates in a professional organization or committee in uniform can be perceived to be official positions of the Army or The Judge Advocate General. Great care must be exercised in this regard.

3. Enclosed is an alphabetical list of professional associations and committees. While not all-inclusive, this list represents the types of activities available for membership.

DAJA-ZX
SUBJECT: Professional Organizations and Activities - Policy Letter 86-7

4. The Executive, OTJAG, is the point of contact for this office, and should be kept informed about matters related to official participation of judge advocates and civilian attorneys in professional organizations and committees.

William K. Suter

Encl

WILLIAM K. SUTER
Major General, USA
Acting The Judge Advocate General

PROFESSIONAL ORGANIZATIONS AND COMMITTEES

American Bar Association

American Trial Lawyers Association

Federal Bar Association

Judge Advocates Association

National Bar Association

Appellate Judges Conference and National Conference of Special Court Judges, Judicial Administration Division, ABA

Committee on Armed Services and Veterans Affairs, Administrative Law Section, ABA

Committee on Criminal Justice and the Military, Criminal Justice Section, ABA

Council on Federal Law, Agencies, and Practice, FBA

Council on Government Contracts, FBA

Council on International Law, FBA

Council on the Administration of Justice, FBA

Council on the Federal Lawyer, FBA

Labor and Employment Law Section, ABA

Law of Armed Forces Committee, International Law Division, International Law Section, ABA

Legal Education and Admissions to the Bar Section, ABA

Military Appeals Subcommittee, Litigation Section, ABA

Military Law Committee, General Practice Section, ABA

Military Law Department Subcommittee, Government Law Department Committee, Economics of Law Practice Section, ABA

Military Service Lawyers Committee, Young Lawyers Division, ABA

Patent, Trademark, and Copyright Law Section, ABA

Public Contract Law Section, ABA

Standing Committee on Law and National Security, ABA

Standing Committee on Lawyers in the Armed Forces, ABA

Standing Committee on Legal Assistance for Military Personnel, ABA

Standing Committee on Military Law, ABA

Enclosure

A Methodology for Analyzing Aggravation Evidence*

Major Larry A. Gaydos & Major Paul Capofari
Instructors, Criminal Law Division, TJAGSA

> It is clear that in promulgating the . . . 1984 Manual . . . the President intended to greatly expand the types of information that could be presented to a court-martial during the adversarial presentencing proceeding.
>
> *United States v. Harrod* [1]

Introduction

No area of court-martial practice has changed due to the 1984 Manual for Courts-Martial as much as the presentation of evidence during the sentencing portion of the trial. The evidence admissible during the government case in aggravation has been greatly expanded.

This article will survey the information available to the sentencing authority; provide a systematic analysis to determine the admissibility of government evidence in aggravation; and analyze the current areas of controversy regarding sentencing evidence.

The key to understanding presentencing evidence lies in appreciating the fact that the military relies on an adversarial presentation of evidence to the sentencing authority. Although some judges [2] and commentators [3] analogize military sentencing evidence to the federal presentencing report, [4] such generalizations are not generally useful. The Manual for Courts-Martial expressly limits the type of sentencing evidence that can be presented by the government. [5]

To understand the evidence available to the sentencing authority, a systematic analysis of the methods used to present such information is in order. There are three common methods: evidence presented on the merits of the case; information presented during the guilty plea inquiry; and information presented by the government in aggravation. Each is discussed below.

Evidence Admitted During the Trial on the Merits

All evidence admitted during the trial on the merits, [6] and reasonable inferences that can be drawn from that evidence, may be considered by the sentencing authority in arriving at an appropriate sentence. For example, a conviction admitted as impeachment pursuant to Mil. R. Evid. 609 or evidence of uncharged misconduct to show motive, opportunity, or intent pursuant to Mil. R. Evid. 404(b), may be considered by the sentencing authority even though the evidence was originally admitted for a limited purpose.

Inferences drawn from the evidence must be reasonable. In *United States v. Stevens,* [7] the accused, stationed in Panama, was convicted of larceny of one-half pound of TNT. The accused tried to detonate the TNT by rigging it to a roadside traffic sign and stretching a trip wire across the road. As rigged, the TNT was incapable of detonating. The court held that the trial counsel could argue, and the sentencing authority could consider, that serious injury might have occurred to a passerby if the TNT had exploded as the accused intended. This argument was "illustrative of the outer limits of reasonable inferences to be drawn from the facts" of the case. [8] The court held that it was error for the sentencing authority to consider that "members of the American community in Panama might have assumed that the explosion was the work of terrorists" and "would have been terrified 'for weeks and maybe for months' by the fear of a mad bomber." [9] This conjecture went beyond the outer limits of reasonable inferences to be drawn from the evidence presented at trial.

Guilty Plea Cases

Providence Inquiry

Military case law has held in the past that information elicited from the accused during the military judge's providence inquiry is not evidence and may not be argued by the trial counsel or considered in arriving at an appropriate

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*This article will be published as a chapter in Dep't of Army, Pamphlet No. 27–173, Trial Procedure, which is scheduled for publication in 1987.

[1] 20 M.J. 777 (A.C.M.R. 1985).

[2] *See, e.g.,* United States v. Hanes, 21 M.J. 647, 648 (A.C.M.R. 1985); United States v. Harrod, 20 M.J. 777 (A.C.M.R. 1985). In *Harrod,* the Army Court of Military Review outlined its liberal sentencing philosophy as follows:

> [I]t is clear that in promulgating the . . . 1984 Manual . . . the President intended to greatly expand the types of information that could be presented to a court-martial during the adversarial presentencing proceeding. . . . [W]e believe that military judges and court members are intended to have access to substantially the same amount of aggravating evidence during the presentencing procedure as is available to federal district judges in presentencing reports.

20 M.J. at 779.

[3] *See, e.g.,* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001 analysis (The presentencing provisions are intended to permit "the presentation of much of the same information to the court-martial as would be contained in a presentence report, but it does so within the protections of an adversarial proceeding.") [hereinafter cited as MCM, 1984, and R.C.M., respectively].

[4] *See generally* Fed. R. Crim. P. 32(c).

[5] R.C.M. 1001. "After findings of guilty have been announced, the prosecution and defense may present matter *pursuant to this rule* to aid the court-martial in determining an appropriate sentence." (emphasis added)

[6] R.C.M. 1001(f)(2).

[7] 21 M.J. 649 (A.C.M.R. 1985).

[8] *Id.* at 652.

[9] *Id.*

sentence.[10] Recent cases have questioned the validity of such restrictions. In *United States v. Arceneaux*,[11] the accused explained his normal drug business practices during a detailed inquiry into the providency of his plea. This included using a private from his unit as his assistant. On sentencing, the military judge used this information against the accused when questioning his character witnesses, and the trial counsel contrasted the defense information from the inquiry with the later testimony of witnesses. The Army Court of Review went even further in *United States v. Holt*.[12] Examining the precedents in the area, the court concluded there was no impairment to considering information from guilty plea inquiry. So long as the information would be admissible during the sentencing phase (see three step methodology below) the court felt that the salutory result of having the most possible information presented to the sentencing authority overcame any reluctance to use the statements against the accused. The court felt that the chilling effect on an accused who knew his statements could later be used on sentencing would be de mimmus. In light of the thorough and searching inquiries required during a guilty plea in the military, the court may not have fully considered its holding from the perspective of the defense. When the military judge, trying to forestall a possible defense, begins to question the accused on his previous actions, there will be considerable reluctance on the part of the accused to be forthright when he knows these uncharged acts will increase his sentence.

In addition, *Holt* raises procedural issues. When the sentencing authority is the military judge, he or she may consider the statements he or she heard during the plea inquiry. But what if sentencing is to be by members? Does the trial counsel present a transcript of the inquiry? Can the accused be forced to stipulate to the matters elicited during the inquiry?

Probably the easiest solution is to word the pretrial agreement stipulation of fact clause so that it may be supplemented by any admissible evidence elicited during the guilty plea inquiry. If disputes arise as to the content of the inquiry, they can easily be resolved by the trial judge.[13]

Stipulation of Fact

As a precondition to entering into a pretrial agreement, the government may require the defense to enter into a stipulation of fact.[14] This stipulation normally includes a factual summary of the accused's conduct establishing guilt, but may also properly include aggravating circumstances relating to the accused's offenses.[15] The Army Court of Military Review in the past has expressed "serious doubts" about whether the accused can be required to stipulate to other facts in aggravation, such as personnel records, or to matters that the government could only introduce in rebuttal to defense evidence in extenuation and mitigation.[16] It is also unclear whether an accused can be compelled to stipulate to matters in aggravation that would otherwise be inadmissible.[17] Several cases before the Army Court of Military Review have sharply focused on the stipulation of fact and a review of these decisions is in order.

In *United States v. Smith*,[18] the defense, pursuant to a pretrial agreement, stipulated that the accused had received nonjudicial punishment on four occasions and had received a letter of reprimand. On appeal, the accused challenged the stipulation of fact for the first time, arguing that it amounted to a waiver of the right to an independent hearing on the admissibility of the records of nonjudicial punishment and thus violated public policy. The court disagreed, finding no evidence that the government imposed waiver of a hearing as a precondition to a pretrial agreement and holding that the accused could voluntarily make such a waiver. The court cautioned that pretrial agreements could not contain conditions that limited the accused's right to contest evidence offered in aggravation.

In *United States v. Sharper*,[19] the accused was required, pursuant to a pretrial agreement, to stipulate to aggravating circumstances relating to the offenses of which he was

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[10] Mil. R. Evid. 410; United States v. Nellum, 21 M.J. 700 (A.C.M.R. 1985); United States v. Brown, 17 M.J. 987 (A.C.M.R. 1984); United States v. Richardson, 6 M.J. 654 (N.C.M.R. 1978); United States v. Brooks, 43 C.M.R. 817 (A.F.C.M.R. 1971). *But see* United States v. Holt, 22 M.J. 553 (A.C.M.R. 1986); United States v. Arceneaux, 21 M.J. 571 (A.C.M.R. 1985) (Military judge did not commit error when he considered some of the accused's admissions during the providence inquiry.).

[11] 21 M.J. 571 (A.C.M.R. 1985).

[12] 22 M.J. 553 (A.C.M.R. 1985).

[13] A suggested form in a pretrial agreement would be:

EXAMPLE: I agree upon acceptance of this offer to enter into a written stipulation with the trial counsel of the facts and circumstances directly relating to or resulting from the offenses and further agree that this stipulation may be used to inform the members of the court or the military judge if tried by him alone, of matters pertinent to an appropriate finding and/or sentence. I also agree that this stipulation may be supplemented by admissible matters that are elicited by the military judge during the factual inquiry conducted into my plea of guilty.

Only matters *admissible* on sentencing would be incorporated into the stipulation (in accordance with United States v. Holt, 22 M.J. at 536) and the military judge, who conducted the inquiry, would be available to arbitrate the contents of any statements by the accused.

[14] R.C.M. 705(c)(2)(A).

[15] United States v. Marsh, 19 M.J. 657 (A.C.M.R. 1984) (The government can require the accused to stipulate to matters that are explanatory of the charged offense.); United States v. Sharper, 17 M.J. 803 (A.C.M.R. 1984) (Where the accused was convicted of wrongfully possessing drug paraphernalia, .44 grams of heroin, 1.0 grams of hashish, and 5.0 grams of marijuana, the government could require the accused to stipulate that he intended to distribute the heroin and that when he was apprehended he possessed 1.342 grams of heroin, .84 grams of hashish, 4.83 grams of marijuana, two lockblade knives and a pocket knife (both with marijuana residue on them), $284.00, and Deutsch Mark 680). The stipulation of fact may properly contain uncharged misconduct that would have been admissible for only a limited purpose during the case-in-chief so long as the evidence is relevant to sentencing and the relevance is not outweighed by unfair prejudice to the accused.

[16] United States v. Sharper, 17 M.J. 803, 807 (A.C.M.R. 1984).

[17] *Compare* United States v. Sharper, 17 M.J. 803 (A.C.M.R. 1984); United States v. Keith, 17 M.J. 1078 (A.F.C.M.R. 1984) *certificate for review dismissed*, 21 M.J. 407 (C.M.A. 1986) *and* United States v. Smith, 9 M.J. 537 (A.C.M.R. 1980) *with* United States v. Taylor, 21 M.J. 1016 (A.C.M.R. 1986) *and* United States v. Rasberry, 21 M.J. 656 (A.C.M.R. 1985).

[18] 9 M.J. 537 (A.C.M.R. 1980).

[19] 17 M.J. 807 (A.C.M.R. 1984).

found guilty. The court held that the accused could be required to stipulate to aggravation evidence that would otherwise be admissible in presentencing. The court went on to issue the following caveat:

> [W]e do not hold that the accused may be compelled to stipulate to any other facts in aggravation, such as the existence of personnel records which adversely reflect on his character or military service, or facts the Government would attempt to prove in rebuttal to evidence presented by an accused in extenuation or mitigation. While these issues have not been raised by this case, we have serious doubts about the propriety of such a provision.[20]

United States v. Rasberry[21] arguably changed the analysis used in both *Smith* and *Sharper*. In *Rasberry*, the defense moved to excise statements concerning aggravation evidence in the stipulation of fact, alleging that they were obtained in violation of the accused's Article 31 rights against self-incrimination. The military judge ruled that he would not litigate the motion and would not require the government to excise the statements. The defense could either stipulate, and obtain the benefit of the pretrial agreement, or refuse to stipulate, and thus cancel the agreement. The Army Court of Military Review upheld the trial judge's ruling, citing a number of independent grounds for its decision. Although the precise holding of the case is unclear, the decision can be read to sanction the practice of forcing the defense to stipulate to otherwise inadmissible aggravation evidence in return for a pretrial agreement. This reading of *Rasberry* was strongly endorsed by the Army court in *United States v. Taylor*.[22]

In *Taylor*, the trial judge excised inadmissible uncharged misconduct from the stipulation of fact offered by the trial counsel pursuant to the accused's pretrial agreement. The Army Court of Military Review held that the trial judge impermissibly injected himself into the pretrial agreement negotiations, as the burden was on the parties to reach an agreement. If the accused did not want to stipulate, the government did not have to enter into a pretrial agreement. The only time the trial judge should intervene is when the "contents of the stipulation are determined to reach the level of plain error."[23] In so ruling, the Army court in *Taylor* sharply disagreed with the Air Force Court of Military Review in *United States v. Keith*.[24] In *Keith*, defense counsel were advised to use the military judge to arbitrate the admissibility of evidence contained in the stipulation of fact.

Sharper and *Keith* probably represent the better view. In *Sharper*, the court commented directly on the authority of the military trial judge to police the terms of the pretrial agreement. While the case stopped short of setting out a methodology for trial judges to follow in handling inadmissible evidence contained in a stipulation of fact, it did reiterate that the military judge has the power to modify a pretrial agreement by judicial order.

United States v. Keith did set out some guidance on how military defense counsel should handle government demands that the accused stipulate to inadmissible aggravation evidence. "[W]e recommend that trial defense counsel enter into the stipulation of fact, if true, and raise the issue of any inadmissible matters contained therein at trial for resolution by the military judge on the record."[25] The military judge should presumably excise the inadmissible matters and judicially enforce the pretrial agreement.[26]

Although the Court of Military Appeals has not directly ruled on this issue, it has decided two recent cases involving the admissibility of matters contained in the stipulation of fact in guilty plea cases. In both instances, it determined the admissibility issue without relying on any prophylactic "take-it-or-leave-it" approach to the stipulation of fact.[27]

The Case in Aggravation

The trial counsel's case in aggravation consists of matters that the sentencing authority may consider in arriving at an appropriate sentence. These matters can be presented by the trial counsel, and can be considered by the sentencing authority, regardless of what the defense counsel decides to present during the case in extenuation and mitigation.[28] The government's right to present presentencing evidence is the same in a contested case as it is in a guilty plea case. In *United States v. Vickers*,[29] the accused, in a contested case, was convicted of disobeying a commissioned officer's order to leave the scene of a disturbance. During presentencing, the trial counsel introduced aggravation evidence that the accused's disobedience actually agitated the disturbance and caused the company commander to lose control of the situation. On appeal, the defense urged that aggravation evidence was admissible only in guilty plea cases. The defense argument relied in part on the fact that para. 75, Manual for Courts-Martial, 1969, did not expressly authorize aggravation evidence in contested cases but did contain a provision authorizing aggravation evidence after a finding of guilty based upon a plea of guilty.

The court held that "regardless of the plea, the prosecution after findings of guilty may present evidence which is directly related to the offense for which an accused is to be sentenced so that the circumstances surrounding that offense or its repercussions may be understood by the sentencing authority."[30]

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[20] *Id.* at 807.

[21] 21 M.J. 656 (A.C.M.R. 1985).

[22] 21 M.J. 1016 (A.C.M.R. 1986).

[23] *Id.* at 1018.

[24] 17 M.J. 1078 (A.F.C.M.R. 1984), *certificate for review dismissed*, 21 M.J. 407 (C.M.A. 1986).

[25] *Id.* at 1080 n.*.

[26] This procedure was specifically and emphatically rejected by the Army court in *Taylor*. Yet the Taylor decision permits judge action when "plain error," without defining plain error or how the judge is to determine if the stipulation amounts to plain error.

[27] *See generally* United States v. Silva, 21 M.J. 336 (C.M.A. 1986); United States v. Martin, 20 M.J. 227 (C.M.A. 1985).

[28] *See generally* R.C.M. 1001.

[29] 13 M.J. 403 (C.M.A. 1982).

[30] *Id.* at 406.

Although R.C.M. 1001 resolves the issue by expressly authorizing the presentation of aggravation evidence after any "findings of guilty," *Vickers* can be interpreted broadly to stand for the proposition that the scope of admissible aggravation evidence is the same in both contested cases and guilty plea cases.

The case in aggravation consists of five enumerated categories of information—

(i) service data relating to the accused taken from the charge sheet;
(ii) personal data relating to the accused and of the character of the accused's prior service as reflected in the personnel records of the accused;
(iii) evidence of prior convictions, military or civilian;
(iv) evidence of aggravation; and
(v) evidence of rehabilitative potential.[31]

All evidence offered by the trial counsel during the case in aggravation must be "pigeon-holed" into one of the five enumerated categories.

These categories are further defined by the Manual,[32] department regulations,[33] and case law. Evidence offered from each of these categories must also be admissible under the Military Rules of Evidence.[34] Despite some dicta in case law to the contrary,[35] the Military Rules of Evidence are *not* relaxed for the government during the case in aggravation.[36]

Three Step Methodology for Aggravation Evidence

The proper methodology for analyzing the admissibility of matters in aggravation involves a three-step inquiry.[37] First, does the offered evidence fit one of the enumerated permissible categories listed in R.C.M. 1001(b)?[38] Second, is the evidence offered in a form admissible under the Military Rules of Evidence (*e.g.*, non-hearsay, proper authentication, qualified expert opinions, etc.)?[39] Finally, does the offered evidence satisfy the balancing test of Mil. R. Evid. 403?[40] In applying the balancing test, the court should weigh the probative value of the evidence in proving a valid sentencing consideration against the prejudicial effect of the evidence.[41] Valid sentencing considerations include the relative seriousness of the charged offense,[42] the rehabilitative potential of the accused,[43] and the type of punishment necessary to deter the accused from future misconduct.[44]

Many recent cases are confusing because they use language which blurs this three-step methodology.[45] Specific acts of misconduct that show that the accused has no rehabilitative potential are not independently admissible as aggravation evidence unless they involve circumstances surrounding the offense or repercussions of the offense.[46] At the presentencing stage of the trial, a broader spectrum of evidence becomes relevant because of the broad range of valid sentencing considerations, but the Military Rules of

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[31] R.C.M. 1001(a)(1)(A).

[32] *See generally* R.C.M. 1001(b).

[33] *See generally* Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, para. 5-25 (1 July 1984) [hereinafter cited as AR 27-10].

[34] Mil. R. Evid. 1101(a).

[35] *See, e.g.*, United States v. Martin, 20 M.J. 227 (C.M.A. 1985).

[36] Mil. R. Evid. 1101(c) provides that the rules of evidence "may be relaxed in sentencing proceedings as provided under R.C.M. 1001 and otherwise as provided in this Manual." R.C.M. 1001(c)(3) provides that the "military judge may, *with respect to matters in extenuation or mitigation* or both, relax the rules of evidence" (emphasis added). R.C.M. 1001(d) provides that *if* the rules of evidence are relaxed for the defense during the case in extenuation or mitigation, then the rules may be relaxed to the same degree during the prosecution case in rebuttal. Nowhere does R.C.M. 1001 authorize relaxation of the rules of evidence during the government case in aggravation.

[37] United States v. Martin, 20 M.J. 227, 230 n.5 (C.M.A. 1985); United States v. Wright, 20 M.J. 518 (A.C.M.R. 1985); United States v. Pooler, 18 M.J. 832 (A.C.M.R. 1984).

[38] United States v. Witt, 21 M.J. 637 (A.C.M.R. 1985). *Cf.* United States v. Arceneaux, 21 M.J. 571 (A.C.M.R. 1985) (The first step is to determine if the evidence is relevant, "*i.e.*, is the evidence important to a determination of a proper sentence.").

[39] Mil. R. Evid. 1101. The Military Rules of Evidence apply to all aspects of the court-martial except those specifically excluded in Mil. R. Evid. 1101. The presentencing case in aggravation is not exempted from coverage.

[40] United States v. Martin, 20 M.J. 227 (C.M.A. 1985); United States v. Witt, 21 M.J. 637 (A.C.M.R. 1985).
The military trial judge should sua sponte apply the Mil. R. Evid. 403 balancing test but is only required to apply the test when the defense objects to the offered evidence. United States v. Witt, 21 M.J. 637 (A.C.M.R. 1985); United States v. Green, 21 M.J. 633 (A.C.M.R. 1985).

[41] United States v. Martin, 20 M.J. 227 (C.M.A. 1985). During the presentencing proceeding, the only issue remaining in the trial is the determination of an appropriate sentence for the accused. The relevance of evidence offered at that stage of the court-martial must be measured in terms of its probative value in proving or disproving a proper sentencing consideration.

[42] *See, e.g.*, United States v. Sargent, 18 M.J. 331 (C.M.A. 1984); United States v. Vickers, 13 M.J. 403 (C.M.A. 1982).

[43] *See, e.g.*, United States v. Martin, 20 M.J. at 230 n.4 ("[T]he purpose of the presentencing portion of a court-martial is to present evidence of the relative 'badness' and 'goodness' of the accused as the primary steps toward assessing an *appropriate* sentence."); United States v. Wright, 20 M.J. 518 (A.C.M.R. 1985) (Sentencing evidence is relevant if "it provides insight into the accused's rehabilitative potential, the danger he poses to society, and the need for future deterrence."); United States v. Pooler, 18 M.J. 832 (A.C.M.R. 1984).

[44] United States v. Wright, 20 M.J. 518 (A.C.M.R. 1985); United States v. Pooler, 18 M.J. 832 (A.C.M.R. 1984); United States v. Garcia, 18 M.J. 716 (A.F.C.M.R. 1984).

[45] Court of Military Review decisions typically take a shotgun approach citing multiple grounds to support admissibility without applying a clear methodology. *See, e.g.*, United States v. Green, 21 M.J. 633 (A.C.M.R. 1985); United States v. Arceneaux, 212 M.J. 571 (A.C.M.R. 1985); United States v. Harrod, 20 M.J. 777 (A.C.M.R. 1985).

[46] R.C.M. 1001(b)(5) permits the introduction of *opinion* testimony concerning the accused's rehabilitative potential. Rehabilitative potential is not an independent ground for admitting specific acts of misconduct unless the defense first opens the door by exploring specific acts of conduct during cross-examination. *Cf.* United States v. Arceneaux, 21 M.J. 571 (A.C.M.R. 1985); United States v. Chapman, 20 M.J. 717 (N.M.C.M.R. 1985), *petition for review granted*, 21 M.J. 306 (C.M.A. 1986).

Evidence governing the form of the evidence are not relaxed during the case in aggravation.[47]

Step One—R.C.M. 1001(b)

The key to success for trial counsel is an understanding of this three-step methodology combined with an ability to articulate a theory of admissibility. The first step is to fit the evidence within one of the five categories of aggravation evidence enumerated in R.C.M. 1001(b).

Data from the charge sheet. As a preliminary matter on sentencing, the trial counsel provides the sentencing authority with the personal data on the charge sheet[48] concerning the accused's pay, time in service, and prior restraint.[49] The trial counsel should verify the accuracy of the data with the defense counsel.[50] While the normal practice is for trial counsel to read this data into the record,[51] a data sheet is also acceptable.[52]

Previous convictions. During the case in aggravation, the trial counsel may present evidence of any military or civilian conviction the accused has received.[53] Convictions already received into evidence as impeachment during the trial on the merits can be considered during sentencing without being re-introduced after findings.[54] Convictions may be proven by any evidence admissible under the Military Rules of Evidence,[55] to include direct testimony by a witness with firsthand knowledge about the conviction,[56] documentary evidence from the accused's personnel file,[57] the court-martial promulgating order,[58] or the actual record of trial.[59] Documentary evidence used to prove a conviction must be properly authenticated.[60]

Courts-martial result in a "conviction" once sentence is adjudged in the case.[61] To determine whether a civilian adjudication has resulted in a criminal "conviction," counsel should refer to the law of the civilian jurisdiction where the proceeding took place.[62]

To be admissible, the conviction must occur before commencement of the presentencing proceeding.[63] Except for summary court-martial convictions, there is no requirement that a conviction be "final" to be admissible.[64] If a conviction is pending appellate review, that fact may be brought out by the defense as a factor affecting the weight to be attributed to the conviction.[65]

To be admissible as aggravation evidence,[66] summary court-martial convictions must be "final"[67] and must meet "*Booker* requirements."[68]

Records of summary court-martial convictions must be finally reviewed to be admissible.[69] A summary court-martial is finally reviewed when reviewed by a judge advocate

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[47] Mil. R. Evid. 1101. *But see* United States v. Martin, 20 M.J. at 230 n.5 ("An appropriate analysis of proffered government evidence on sentencing is first to determine . . . is the proffered evidence admissible under either the Military Rules of Evidence or the more relaxed rules for sentencing."). This statement by Judge Cox of the Court of Military Appeals is illustrative of the confusion in this area. The rules are not relaxed during the government case in aggravation. The quoted passage from *Martin* is incorrect.

[48] Dep't of Defense, Form No. 458, Charge Sheet (Aug. 1984); MCM, 1984; app. 4.

[49] R.C.M. 1001(b)(1).

[50] The defense counsel may object to data that is materially inaccurate or incomplete R.C.M. 1001(b)(1).

[51] Dep't of Army, Pam No. 27-9, Military Judges' Benchbook, para. 2-34 (1 May 1982) (C1 15 Feb. 1985).

[52] R.C.M. 1001(b)(1).

[53] R.C.M. 1001(b)(3)(A).

[54] R.C.M. 1001(f)(2). For foundational elements necessary to admit prior convictions of the accused as impeachment, see Mil. R. Evid. 609. *See generally*, Gilligan, *Credibility of Witnesses Under the Military Rules of Evidence*, 46 Ohio St. L.J. 596, 605-08 (1985).

[55] R.C.M. 1001(b)(3)(C).

[56] *Id.*

[57] Such documentary evidence includes Dep't of Army, Form 2-2, Record of Court-Martial Convictions (Nov. 1974) (discussed in United States v. Lemieux, 13 M.J. 969 (A.C.M.R. 1982)), and Dep't of Defense, Form No. 493, Extract of Military Records of Previous Convictions (Oct. 1984) (discussed in R.C.M. 1001(b)(3)(C) discussion; *United States v. Lemieux*).

[58] United States v. Hines, 1 M.J. 623 (A.C.M.R. 1975).

[59] United States v. Wright, 20 M.J. 518 (A.C.M.R. 1985) (A record of trial can be used to prove a conviction so long as only relevant portions are considered and the probative value outweighs any prejudicial effect.). *See also* United States v. Decker, CM 444320 (A.C.M.R. 5 Oct. 1984) (It was error for the trial judge to admit over defense objection extraneous materials that accompanied the government's proof of a civilian conviction. The record of conviction impermissibly contained a case chronology showing that bench warrants had been issued after the accused failed to appear and that the accused had plea bargained to have additional charges dismissed.).

[60] *See generally* Mil. R. Evid. sec. IX.

[61] R.C.M. 1001(b)(3)(A).

[62] R.C.M. 1001(b)(3) analysis. This analysis was taken one step further in United States v. Slovacek, 21 M.J. 538 (A.F.C.M.R. 1985). In *Slovacek*, the court admitted an Ohio juvenile adjudication as a prior conviction because the Ohio courts would allow the adjudication to be considered during sentencing in Ohio courts even though it was not a "conviction" under Ohio law.

[63] Convictions are admissible under R.C.M. 1001(b)(3)(A) even though the offenses contained therein were committed at dates later than the offenses charge at trial. United States v. Hanes, 21 M.J. 647 (A.C.M.R. 1985); United States v. Allen, 21 M.J. 507 (A.F.C.M.R. 1985).

[64] R.C.M. 1001(b)(3)(B).

[65] *Id.*

[66] It is important to distinguish the admissibility of summary court-martial convictions as aggravation from the admissibility of such convictions to invoke the excalator clause in the habitual offender provisions of R.C.M. 1003(d), or to impeach the accused under Mil. R. Evid. 609. *See generally* United States v. Cofield, 11 M.J. 422 (C.M.A. 1981); United States v. Mack, 9 M.J. 300 (C.M.A. 1980); United States v. Booker, 5 M.J. 238 (C.M.A. 1978).

[67] R.C.M. 1001(b)(3)(B).

[68] United States v. Booker, 5 M.J. 238 (C.M.A. 1978).

[69] R.C.M. 1001(b)(3)(B).

pursuant to R.C.M. 1112.[70] If a promulgating order is used to prove a summary court-martial conviction, the document itself may or may not contain any entry indicating a final review by a judge advocate.[71] Even when finality is not apparent on the face of the document, the court will presume finality if sufficient time has elapsed since the conviction such that review would ordinarily have been completed.[72] This presumption may be overcome if there is conflicting evidence indicating that final review may not have been completed.[73] Where such a conflict occurs, the court must resolve the issue based on all the evidence available.[74]

For a summary court-martial conviction to be admissible in aggravation, the accused must have voluntarily consented to trial by summary court-martial *and* the accused must have been afforded the opportunity to consult with counsel regarding the right to demand trial by special court-martial.[75] If the documentary evidence used to prove the conviction is annotated with an entry indicating that the accused was afforded the opportunity to consult with counsel and was afforded the opportunity to demand trial by special court-martial, the document establishes a *prima facie* showing of compliance with *Booker*.[76] If the record of conviction does not establish these foundational requirements, the trial counsel must cure the defect with live testimony or supplementary documents that demonstrate that the accused was afforded these rights.[77] The military judge may not conduct an inquiry of the accused to establish admissibility.[78]

Personnel records reflecting the past military efficiency, conduct, performance, and history of the accused. The service secretaries have the authority to determine which personnel records are admissible during the case in aggravation.[79] Army Regulation 27–10 provides the following guidance for Army courts-martial:

> Personal data and character of prior service of the accused. Trial counsel may, in his or her discretion, present to the military judge (for use by the court-martial members or military judge sitting alone) copies of any personnel records that reflect the past conduct and performance of the accused, made or maintained according to departmental regulations. Examples of personnel records that may be present include—
>
> (1) DA Form 2 (Personnel Qualification Record—Part 1) and DA Form 2–1 (Personnel Qualification Record—Part 2).
>
> (2) Promotion, assignment, and qualification orders, if material.
>
> (3) Award orders and other citations and commendations.
>
> (4) Except for summarized records of proceedings under Article 15 (DA Form 2627–1), records of punishment under Article 15, UCMJ, from any file in which the record is properly maintained by regulation.
>
> (5) Written reprimands or admonitions required by regulation to be maintained in the MPRJ or OMPF of accused.
>
> (6) Reductions for inefficiency or misconduct.
>
> (7) Bars to reenlistment.
>
> (8) Evidence of civilian convictions entered in official military files.
>
> (9) Officer and enlisted efficiency reports.
>
> (10) DA Form 3180 (Personnel Screening and Evaluation Record).
>
> These records may include personnel records contained in the OMPF or located elsewhere, unless prohibited by law or other regulation. Such records may not, however, include DA Form 2627–1 (Summarized Record of Proceedings under Article 15, UCMJ).[80]

Prudent trial and defense counsel should do a complete review of *all* documents contained in the accused's personnel files and should not limit their investigation to the documents enumerated in AR 27–10. "Other documents" not listed in AR 27–10 may be admissible in aggravation if

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[70] R.C.M. 1001(b)(3)(B) indicates that a review must be completed under "Article 65(c)." Because Article 65(c) was deleted from the Uniform Code of Military Justice when the Military Justice Act of 1983 went into effect, the drafters probably intended for summary court-martial convictions to become final after review by a judge advocate pursuant to R.C.M. 1112.

[71] The copy of the promulgating order often contains the judge advocate's stamp and signature.

[72] United States v. Graham, 1 M.J. 308 (C.M.A. 1976) (the promulgating order was five years old). *See also* United States v. Hines, 1 M.J. 623 (A.C.M.R. 1975) (Eight months was enough time lapse to constitute *prima facie* showing of final review for a special court-martial.).

[73] *See, e.g.*, United States v. Reed, 1 M.J. 166 (C.M.A. 1975) (absence of supervisory review entry on DA Form 20B overcame the promulgating order's *prima facie* showing of finality); United States v. Hancock, 12 M.J. 685 (A.C.M.R. 1981) (absence of supervisory review entry on DA Form 2–2 overcame promulgating order's presumption of finality).

[74] *See, e.g.*, United States v. Lemieux, 13 M.J. 969 (A.C.M.R. 1982) (Although the DD Form 493 had an entry showing that the conviction was final, the DA Form 2–2, from which the DD Form 493 was supposed to be prepared, did not have any entry showing review had been completed. The DA Form 2–2 was thus held to be controlling.).

[75] United States v. Booker, 5 M.J. 238 (C.M.A. 1978) (*Booker* only applies to summary court-martial convictions after 11 October 1977). *See, e.g.*, States v. Syro, 7 M.J. 431 (C.M.A. 1979) (*Booker* applies to records of summary court-martial introduced as personnel records reflecting past conduct and performance for purpose of aggravation.).

[76] United States v. Alsup, 17 M.J. 166 (C.M.A. 1984).

[77] United States v. Kuehl, 11 M.J. 126 (C.M.A. 1981) (A supplemental advice form attached to the summary court-martial conviction satisfied *Booker* requirements.).

[78] United States v. Sauer, 15 M.J. 113 (C.M.A. 1983). Prior to 1983, there were a number of military cases that held that, during the sentencing phase of the trial, the military judge could ask the accused questions to supply information establishing the admissibility of documentary evidence. United States v. Spivey, 10 M.J. 7 (C.M.A. 1980); United States v. Mathews, 6 M.J. 357 (C.M.A. 1978). In *Sauer*, the Court of Military Appeals expressly reversed this line of cases based on the Supreme Court decision in Estelle v. Smith, 451 U.S. 454 (1981).

[79] R.C.M. 1001(b)(2).

[80] AR 27–10, para. 5–25. Other service regulations are cited in Gilligan, *Character Evidence*, 109 Mil. L. Rev. 83, 115.16 (1985).

they reflect the character of the accused's prior service and otherwise meet evidentiary foundation requirements.[81] Other documents, such as the accused's enlistment forms, may be a valuable source of information for either side and may contain information useful during the government's case in rebuttal.[82]

"Personnel records" are not limited to documents contained in files officially designated as "personnel files" but may include documents contained in other files such as the accused's finance records, reenlistment records, or confinement records.[83]

There are several limitations on admissibility of personnel documents. The primary limitation is that the copy introduced in court must be maintained in accordance with service regulations.[84] This requirement relates both to substantive procedures used in creating and processing the personnel record and to technical irregularities apparent on the face of the document offered into evidence.[85]

A second limitation is that documents introduced from the accused's personnel file must be properly authenticated.[86]

Third, personnel records prepared *solely* for use in the aggravation portion of a court-martial rather than for legitimate regulatory purposes are inadmissible.[87]

A fourth limitation relates to the completeness of the document. If the documentary evidence being introduced in aggravation is incomplete, the defense counsel may, through a timely objection, compel the trial counsel to present a complete document.[88] If the trial counsel introduces a portion of the accused's personnel records as aggravation evidence, the defense may, through a timely objection, compel the trial counsel to present the complete personnel file to include documents favorable to the accused.[89] Although the rule of completeness cases have involved objections to aggravation evidence, the rule applies to the introduction of defense evidence as well. There are two practical consequences of invoking this rule of completeness at trial. First, the party forced to introduce documents favorable to their opponent is deprived of the opportunity to rebut those documents. Second, if the offering party does not have the entire file available at trial, it may be faced with the tactical dilemma of taking a delay in the trial or foregoing introduction of its own documents.

Fifth, the defense may usually object to the admission of documents containing inaccurate information.[90] The accused may not re-litigate at trial his or her guilt or innocence regarding any misconduct mentioned in a personnel record, but the accused is free to deny his or her guilt of the misconduct for which an action was taken.[91]

Finally, personnel documents may not be used as a "backdoor" means of introducing otherwise inadmissible unfavorable information about the accused.[92] Although it is unclear how far the trial judge must go in ferreting out "backdoor" references to inadmissible information, the safest approach would be to redact collateral references to any

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[81] *See, e.g.*, United States v. Haslam, CM 446000 (A.C.M.R. 26 Nov. 1984) (Documents reflecting the accused's removal from the Personnel Reliability Program are admissible as "other personnel documents.").

[82] *See, e.g.*, United States v. Owens, 21 M.J. 117 (C.M.A. 1985) (Trial counsel could impeach the accused's sworn testimony on the merits by cross-examining the accused about omissions from his sworn warrant officer application form.).

[83] *See, e.g.*, United States v. Perry, 20 M.J. 1026 (A.C.M.R. 1985) (DD Form 508, which documented an approved recommendation for disciplinary action against the accused for disobeying a lawful order while the accused was in pretrial confinement, was admissible as a personnel record reflecting past military conduct.).

[84] R.C.M. 1001(b)(2).

[85] *See, e.g.*, United States v. Negrone, 9 M.J. 171 (C.M.A. 1980); United States v. Mack, 9 M.J. 300 (C.M.A. 1980).

[86] Mil. R. Evid., sec. IX.

[87] *See* United States v. Boles, 11 M.J. 195 (C.M.A. 1981) (administrative reprimand hurriedly prepared specifically for use in a court-martial violated regulatory provisions that defined reprimands as "corrective management tools"); United States v. Dodds, 11 M.J. 520 (A.F.C.M.R. 1981) ("The fact that a matter is properly entered into the accused's personnel records . . . does not necessarily mean that the entry is also admissible in a court-martial. The military judge should exercise sound discretion in electing whether or not to admit such material. . . . For example, matters may, on balance, seem too remote to be probative; appear to have been 'manufactured,' after the accuser had knowledge of the offenses charged, by those zealous to portray the accused as unfit; or be so insignificant as to suggest that the accused is not receiving even handed treatment.").

But see United States v. Hagy, 12 M.J. 739 (A.F.C.M.R. 1981) (Filing of reprimand on the day of trial did not affect admissibility where the subject matter was appropriate under applicable regulatory standards).

[88] R.C.M. 1001(b)(2). In United States v. Morgan, 15 M.J. 128 (C.M.A. 1983) the Court of Military Appeals held that if the defense counsel objected to the trial counsel's presentation of a portion of the accused's personnel *file*, the trial counsel could be compelled to introduce the entire *file*, to include personnel documents containing information favorable to the accused. The drafters of the 1984 Manual specifically intended for R.C.M. 1001(b)(2) to limit the application of the *Morgan* "rule of completeness" to incomplete *documents*. *See* R.C.M. 1001(b)(2) analysis.

[89] United States v. Salgado-Agosto, 20 M.J. 238 (C.M.A. 1985); United States v. Morgan, 15 M.J. 128 (C.M.A. 1983). In *Salgado-Agosto*, the Court of Military Appeals reaffirmed its rule of completeness announced in *Morgan*. The court noted that the presentencing procedure of the Manual were the specific provisions interpreted in *Morgan*, but then went on to hold that Mil. R. Evid. 106 provided an independent basis for the rule of completeness. Mil. R. Evid. 106 provides: "When a *writing* or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." (emphasis supplied). *Salgado-Agosto* and *Morgan* makes the entire personnel file a "writing" under Mil. R. Evid. 106. *Salgado-Agosto*, 20 M.J. at 239. *See also* United States v. Hardy, 21 M.J. 949 (A.F.C.M.R. 1986) (government must also offer favorable information or withdraw derogatory information).

[90] R.C.M. 1001(b)(2).

[91] United States v. Balcom, 20 M.J. 558 (A.C.M.R. 1985); United States v. Hood, 16 M.J. 557 (A.F.C.M.R. 1983).

[92] *Compare* United States v. Brown, 11 M.J. 263 (C.M.A. 1981) (Reference to three inadmissible Article 15s in an otherwise admissible bar to reenlistment constituted prejudicial error) *with* United States v. Dalton, 19 M.J. 718 (A.C.M.R. 1984) (Enclosures to a bar to re-enlistment such as counselling statements and military police reports were admissible as part of the document.).

Article 15 or summary court-martial conviction that is not otherwise admitted into evidence.[93]

One record often introduced is nonjudicial punishment. Records of nonjudicial punishment must be properly authenticated.[94] and must be prepared and maintained in accordance with the applicable service regulations.[95] In addition, records of nonjudicial punishment are admissible only if the accused was afforded the opportunity to consult with counsel and was given the opportunity to demand trial by court-martial.[96] A properly completed DA Form 2627[97] carries with it a prima facie showing of compliance with these "*Booker* requirements."[98] If the DA Form 2627 fails to establish *Booker* compliance, there are two alternate methods of establishing this foundation: The trial counsel may present the live testimony of witnesses who have first-hand knowledge that the accused was afforded the opportunity to consult with counsel and demand trial by court-martial;[99] or the trial counsel may introduce a supplementary rights advisement form. This form may be used prior to the imposition of nonjudicial punishment to inform the accused that these rights were available. It carries with it a rebuttable presumption that the rights were either exercised or waived.[100]

The military judge may not question the accused to establish compliance with *Booker*,[101] and the accused probably cannot be forced to stipulate to the admissibility of a record of nonjudicial punishment as a condition of a pretrial agreement.[102]

The Manual provides for the presentation of "personnel records of the accused."[103] If a document is being offered, the trial counsel may present the testimony of a witness to establish the foundation for the document's admissibility. The government may not, however, present evidence of the accused's past military efficiency, conduct, performance and history *solely* through the testimony of witnesses.[104]

Circumstances directly relating to the offense. Regardless of the accused's plea,[105] after findings of guilty, the trial counsel may present evidence that is directly related to the circumstances surrounding the offense *and* evidence concerning the repercussions of the offense.[106] It is useful to think of these as two separate and distinct theories of admissible aggravation evidence. Each is the subject of current case law development portending greatly expanded opportunities for the trial counsel to bring uncharged misconduct to the attention of the sentencing authority.

The courts have been innovative in defining the "circumstances directly relating to the offense." The phrase encompasses much more than a factual rendition of how the charged offense was committed, or factual details not pled or proven during findings such as the street value of

[93] The clearest case of error is represented by United States v. Warren, 15 M.J. 776 (A.C.M.R. 1983). In *Warren*, the trial counsel attempted to introduce evidence of the accused's summary court-martial conviction but was precluded from doing so because the documents failed to show *Booker* compliance. The trial counsel was then permitted to introduce DA Form 2–1, which indicated that the accused had been a trainee at the U.S. Army Retraining Brigade. The court held that once evidence of a summary court-martial conviction had been ruled inadmissible because of non-compliance with *Booker*, the government could not introduce backdoor evidence of that conviction through other personnel documents.

In United States v. Jaramillio, 13 M.J. 782 (A.C.M.R. 1982), the court seemed to create a more rigorous standard. In *Jaramillio*, the trial counsel also introduced a DA Form 2–1 that indicated that the accused had been a trainee at the U.S. Army Retraining Brigade. Unlike the situation in *Warren*, there was no apparent indication in *Jaramillio* that the accused's retraining was the result of a summary court-martial or, if it was, that the summary court-martial conviction would have been inadmissible. The court held that it was nevertheless error to admit that portion of the document.

Not all uncharged misconduct contained in personnel documents must be redacted. This requirement probably applies only to evidence of nonjudicial punishment and summary court-martial convictions where there is no showing of *Booker* compliance or to misconduct which is specifically ruled inadmissible on other grounds. *See, e.g.*, United States v. Copeland, SPCM 20818 (A.C.M.R. 11 Jan. 1985) (It was error to admit a personnel document reflecting a reduction in grade occasioned by an inadmissible vacation of a suspended Article 15.); United States v. Jaramillio, 13 M.J. 782 (A.C.M.R. 1982) (References to periods of absence without leave contained on the DA Form 2–1 do not have to be redacted.).

[94] Mil. R. Evid. Sec. IX.

[95] R.C.M. 1001(b)(2). *See, e.g.*, United States v. Negrone, 9 M.J. 171 (C.M.A. 1980); United States v. Mack, 9 M.J. 300 (C.M.A. 1980). Admission of an illegible DA Form 2627, Record of Proceedings Under Article 15, UCMJ (Aug. 1984), may constitute plain error requiring sentence reassessment even in the absence of a defense objection at trial. *See* United States v. Dyke, 16 M.J. 426 (C.M.A. 1983).

But see United States v. Sanders, CM447449 (A.C.M.R. 13 Dec. 1985) (Not error to admit DA Form 2627 which did not contain matters submitted in support of the appeal); United States v. Hufnagel, SPCM 21479 (A.C.M.R. 20 Nov. 1985) (Not error to admit "duplicate original" of DA Form 2627 in place of copy supposed to be filed in the unit personnel file.); United States v. Sager, SPCM 21627 (A.C.M.R. 18 Nov. 1985) (Not error to admit DA Form 2627 which failed to reflect the copy number).

[96] United States v. Mack, 9 M.J. 300 (C.M.A. 1980); United States v. Booker, 5 M.J. 238 (C.M.A. 1978). These requirements need not be demonstrated if the accused was embarked on a vessel. *Mack*, 9 M.J. at 320.

[97] For procedures used to administer nonjudicial punishment, see generally AR 27–10, ch. 3. A sample of DA Form 2627 is found at fig. 3–2.

[98] United States v. Wheaton, 18 M.J. 159 (C.M.A. 1984); United States v. Mack, 9 M.J. 300 (C.M.A. 1980).

[99] The trial counsel cannot present evidence of the accused's nonjudicial punishment through a witness whose testimony is hearsay. United States v. McGill, 15 M.J. 242 (C.M.A. 1983).

[100] United States v. Wheaton, 18 M.J. 159 (C.M.A. 1984).

[101] United States v. Sauer, 15 M.J. 113 (C.M.A. 1983); United States v. Cowles, 16 M.J. 467 (C.M.A. 1983) (The prohibition against a military judge inquiry applies to guilty plea cases as well as contested cases.). *But see* United States v. Hardy, 21 M.J. 198 (C.M.A. 1986) where judge's inquiry was unnecessary as the documents were complete on their face, no error to admit the documents).

[102] *See supra* notes 14–27 and accompanying text. The court of military review's "serious doubts" are probably misplaced at least insofar as the government wants the defense to stipulate to past nonjudicial punishment that was in fact administered in full compliance with applicable regulations.

[103] R.C.M. 1001(b)(2).

[104] United States v. Yong, 17 M.J. 671 (A.C.M.R. 1983). *But see* United States v. Albritton, SPCM 18914 (A.C.M.R. 28 Dec. 1983) (Proving an Article 15 through oral testimony alone was permissible).

[105] United States v. Vickers, 13 M.J. 403 (C.M.A. 1982).

[106] R.C.M. 1001(b)(4).

the illegal drugs possessed[107] or the black market value of merchandise possessed in violation of regulations.[108] Instead, the "circumstances directly relating to the offense" may include collateral matters indirectly related to the charged offenses and uncharged misconduct that circumstantially relates to the accused's state of mind regarding the charged offenses.

When the trial counsel attempts to introduce an expansive factual account of the events leading up to the charged offense, the court must draw a line between circumstances directly relating to the offense and circumstances that only indirectly or tangentially relate to the offense. This issue most commonly arises in the context of drug offenses. In a typical drug case, the accused sells illegal drugs to a confidential informant or covert agent. The sale is generally accompanied by negotiations and perhaps a series of otherwise "innocent" informal contacts designed to cultivate a relationship of trust. During these discussions, the accused often admits to past uncharged drug transactions and expresses a willingness to engage in future illegal transactions. The trial counsel obviously would like to have this uncharged misconduct admitted in aggravation as circumstances directly relating to the charged offenses.

The court decisions that address this issue tend to be fact specific and fail to set out precise guidance on when drug negotiations are admissible aggravation evidence.[109] If a general rule can be distilled from the cases it seems to be that the accused's statements are admissible as *res gestae* if they are inextricably related in time and place to the charged offense or to the negotiated arrangements leading to the charged offense.[110] General negotiations, statements made during the course of social contacts designed to cultivate trust between the accused and the agent, or statements made by the accused after apprehension are not admissible under the *res gestae* theory.[111]

Prior to 1985, there was disagreement among the courts of review about whether uncharged misconduct, which would have been admissible for a limited purpose during the case-in-chief, was admissible for the first time during presentencing pursuant to Mil. R. Evid. 404(b).[112] In a contested case, uncharged misconduct admitted for a limited purpose during the case-in-chief could be considered by the sentencing authority in deciding an appropriate sentence.[113] Some court of military review judges reasoned that in a guilty plea case, the sentencing authority should have no less information available and hence uncharged misconduct was automatically admissible during presentencing if the evidence would have been admissible during the merits pursuant to Mil. R. Evid. 404(b).[114] Other court of military review judges took the opposite position, holding that uncharged misconduct which would have been admissible for a limited purpose during the case-in-chief was never admissible during presentencing of a guilty plea case because the only purpose of such evidence was to show that the accused was a bad person.[115]

The Court of Military Appeals resolved the issue in *United States v. Martin*[116] by applying a three-step methodology

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[107] *See, e.g.*, United States v. Witt, 21 M.J. 637, 640 (A.C.M.R. 1985) ("In interpreting what type of evidence is 'directly related to' a given offense, this court will liberally construe R.C.M. 1001(b)(4).").

[108] United States v. Hood, 12 M.J. 890 (A.C.M.R. 1982).

[109] *Compare* United States v. Reynolds, CM 444270 (A.C.M.R. 29 Feb. 1984) *with* United States v. Acevedo, CM 444146 (A.C.M.R. 14 May 1984), United States v. Harris, CM 444086 (A.C.M.R. 27 Dec. 1983), United States v. Van Boxel, SPCM 18605 (A.C.M.R. 9 Sept. 1983), *and* United States v. Farwell, SPCM 18791 (A.C.M.R. 15 July 1983).

In *Reynolds*, the accused pled guilty to possession and distribution of marijuana. As aggravation, the government introduced the testimony of the undercover agent who negotiated the charged distribution. The agent testified that, during the negotiations, the accused said he could not reduce his price because he had already sold some marijuana earlier that day at the offered price. When the agent inquired about possible future sales, the accused stated he would soon be picking up a large quantity of marijuana and could sell the agent a quarter pound for $175. The court held that because these statements were made during the negotiations concerning the charged offenses, they were *res gestae* inextricably related in time and place to the charged offense.

In *Acevedo*, the accused also pled guilty to possession and distribution of marijuana. During presentencing, the trial counsel introduced two statements the accused made outlining his role as a drug dealer over a five month period. The court held that because the statements were general and provided no direct nexus with the charged offense, they were not admissible as *res gestae*. It is not clear whether these statements would have been admissible if they had made it clear that the charged offenses occurred during the five month period of drug dealing mentioned in the statements or if the accused's statements had been made contemporaneous with the negotiations concerning the charged offenses.

In *Van Boxel*, the accused pled guilty to possession and sale of LSD. The government aggravation evidence consisted of testimony that at the time the charged offenses occurred the accused expressed a willingness to sell LSD at some undisclosed future time. The court held that this was inadmissible aggravation concerning uncharged misconduct unrelated to the charged offense.

[110] *See, e.g.*, United States v. Doss, SPCM 19552 (A.C.M.R. 5 Mar. 1984) (After the accused sold the drugs he told the agent "he would have more to sell on Friday." This uncharged misconduct was admissible because the statement was very specific in nature, and was contemporaneous with the charged offense.); United States v. Carfang, 19 M.J. 739 (A.F.C.M.R. 1984) (During negotiations with an undercover agent and a confidential informant, the accused stated he was able to get "coke," "grass," "speed," and "acid." These statement were held to be so closely intertwined with the charged offense as to be part and parcel of the entire chain of events.); United States v. Keith, 17 M.J. 1078 (A.F.C.M.R. 1983), *certificate for review dismissed*, 21 M.J. 407 (C.M.A. 1986). (During preliminary negotiations which eventually lead to the charged cocaine sale, the accused told the agent that he knew of terrorist groups who would be willing to purchase stolen military night vision goggles.)

[111] *See supra* note 109.

[112] *Compare* United States v. Silva, 19 M.J. 501 (A.F.C.M.R. 1984), United States v. Keith, 17 M.J. 1078 (A.F.C.M.R. 1983), *certificate for review dismissed*, 21 M.J. 407 (C.M.A. 1986), United States v. Martin, 17 M.J. 899 (A.F.C.M.R. 1983), United States v. Taliaferro, 2 M.J. 397 (A.C.M.R. 1975), *and* United States v. Potter, 46 C.M.R. 529 (N.C.M.R. 1972) *with* United States v. Harrod, 20 M.J. 777 (A.C.M.R. 1985), *and* United States v. Thill, CM 444507 (A.C.M.R. 13 July 1984).

[113] R.C.M. 1001(f)(2).

[114] *See, e.g.*, United States v. Harrod, 20 M.J. 777 (A.C.M.R. 1985).

[115] *See, e.g.*, United States v. Silva, 19 M.J. 501 (A.F.C.M.R. 1984); United States v. Martin, 17 M.J. 899 (A.F.C.M.R. 1983).

[116] 20 M.J. 227 (C.M.A. 1985). *Accord* United States v. Silva, 21 M.J. 336 (C.M.A. 1986). *But see* United States v. Green, 21 M.J. 633 (A.C.M.R. 1985) (The Army Court of Military Review sanctioned the admissibility of uncharged misconduct during sentencing *because* it would have been admissible on the merits pursuant to Mil. R. Evid. 404(b), even though the Court of Military Appeals had rejected that approach four months earlier in *Martin*.).

outlined in this article.[117] The first step is to determine whether the uncharged misconduct is a circumstance directly relating to the offense. If the uncharged misconduct tends to prove the accused's state of mind at the time of the offense, that is arguably a circumstance directly relating to the charged offense. The second step is to ensure that the offered evidence is in a form admissible under the Military Rules of Evidence. Finally, the evidence should be tested for relevance by applying the balancing test of Mil. R. Evid. 403. The accused's motive for committing the crime will generally be a relevant sentencing consideration helpful in understanding the relative seriousness of the crime, assessing the rehabilitative potential of the accused, and predicting the likelihood of future misconduct.[118] The potential prejudice to the accused lies in the possibility that the sentencing authority will improperly punish the accused for the acts of uncharged misconduct. In each case, the balancing test is properly left to the sound discretion of the trial judge.[119]

In a number of Army Court of Military Review decisions, uncharged misconduct has been ruled admissible aggravation evidence because it was probative of the accused's attitude toward the charged offense.[120] These cases employed a two-step theory of relevance. First, the accused's attitude toward the charged offense was a circumstance directly related to the offense. Second, evidence that the accused committed *similar* offenses in the past or expressed a willingness to commit *similar* offenses in the future was circumstantial evidence probative of the accused's attitude toward the charged offense.[121]

This theory of aggravation can be used to bring a great deal of uncharged misconduct to the attention of the sentencing authority. The key limitations on admissibility are that the uncharged misconduct must be similar to the charged offense,[122] the evidence offered must be in an admissible form,[123] and the probative value of the evidence must outweigh its prejudicial effect.[124] In the typical drug case, for example, the admissions the accused makes during the negotiations leading up to the drug sale will be admissible to show that the accused's attitude toward illegal drugs demonstrates a lack of rehabilitative potential and a substantial likelihood of future drug involvement necessitating lengthy incarceration.

In addition to evidence about the accused, the trial counsel can present a broad spectrum of victim impact evidence during the case in aggravation. The drafters of the 1984 Manual encouraged an expansive interpretation for victim impact evidence, providing that:

> Evidence in aggravation may include evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.[125]

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[117] In *Martin*, Judge Cox described the proper methodology as follows:

> An appropriate analysis of proffered government evidence on sentencing is first to determine if the evidence tends to prove or disprove the existence of a fact or facts permitted by the sentencing rules. . . . If the answer is yes, then is the proffered evidence admissible under either the Military Rules of Evidence or the more relaxed rules for sentencing. . . . Of course, the military judge must apply the Mil. R. Evid. 403 test to determine if the prejudicial effect of the evidence outweighs the probative value.

20 M.J. at 230 n.5.

[118] In *Martin*, Chief Judge Everett illustrated the application of these standards to a drug distribution case by opining that it would be helpful to "the sentencing authority to learn whether the accused distributed the drug to a friend as a favor or whether he did so as part of a large business that he operated." *Martin*, 20 M.J. at 232.

It is important to note that when the military trial judge applies the Mil. R. Evid. 403 balancing test, "the probative value" of the evidence refers to the tendency of the evidence to prove a valid sentencing matter, *not* just the tendency of the evidence to prove one of the items listed in Mil. R. Evid. 404(b). For example, evidence of uncharged misconduct tending to prove "motive" may be relevant to deciding an appropriate sentence, but uncharged misconduct tending to prove "opportunity to commit the offense" will not generally be relevant during sentencing. *Cf.* United States v. Harrod, 20 M.J. 777 (A.C.M.R. 1985).

[119] United States v. Martin, 20 M.J. 227, 230 (C.M.A. 1985) (Military trial judges exercise their discretion in applying Mil. R. Evid. 403 balancing test; court of military review can substitute its own balancing if the trial judge abused his or her discretion.); United States v. Witt, 21 M.J. 637, 642 (A.C.M.R. 1985) (The accused has the burden of going forward with conclusive argument that the trial judge abused his discretion in applying the balancing test.).

[120] United States v. Wright, 20 M.J. 518 (A.C.M.R. 1985); United States v. Pooler, 18 M.J. 832 (A.C.M.R. 1984).

In *Wright*, the accused pled guilty to distribution and attempted distribution of cocaine. During presentencing, the trial counsel offered the record of trial from the accused's prior court-martial where he was convicted of marijuana offenses. The record of trial included portions in which the accused expressed remorse for his drug involvement, and the military judge admonished the accused that he was being given a second chance to make it as a soldier. The Army Court of Military Review specifically declined to apply an overly restrictive definition to the phrase "evidence directly related to the offense for which an accused has been convicted" and instead held that "an accused's attitude toward his offense is *a fortiori* related to that offense and is relevant in determining an appropriate sentence as it provides insight into the accused's rehabilitative potential, the danger he poses to society, and the need for future deterrence." *Wright*, 20 M.J. at 520.

In *Pooler*, the accused pled guilty to possession and distribution of marijuana. In aggravation, the government introduced testimony that the accused was willing to engage in a future drug transaction. The court upheld the admissibility of this uncharged misconduct based on the following rationale:

> A criminal state of mind is a fundamental component of our society's definition of crime. . . . [I]t follows that a person's attitude toward the crime of which he has been convicted is directly related to that offense. Evidence of the offender's attitude toward similar offenses, past or future, is reliable circumstantial evidence, and often the only available evidence, on this issue. . . . [T]he relevance to the sentencing process of an offender's attitude toward his offense can hardly be exaggerated. . . . [It impacts on the] . . . rehabilitation of the offender, protection of society from the offender, and deterrence of the offender.

Pooler, 18 M.J. at 833.

[121] United States v. Wright, 20 M.J. 518, 521 (A.C.M.R. 1985) ("[W]e do not suggest that sentencing authorities may consider information similar to the type at issue from a trial involving a different and unrelated offense.").

[122] United States v. Wright, 20 M.J. 518 (A.C.M.R. 1985); United States v. Pooler, 18 M.J. 832 (A.C.M.R. 1984). If the accused is convicted of a drug related offense, any other drug related offense is probably "similar" even if it involves a different category of drug or a different type of transaction.

[123] Mil. R. Evid. 1101(a).

[124] Mil. R. Evid. 403.

[125] R.C.M. 1001(b)(4) discussion.

The appellate courts have been liberal[126] in sanctioning a wide variety of evidence in each of the areas cited in the Manual. "Financial impact" can include anything from the hospital costs paid by the victim of an assault,[127] to evidence establishing the black market value of items illegally possessed overseas.[128] "Social impact" can include either specific past impacts — such as testimony concerning the loss felt by a family or community for a homicide victim,[129] or potential impacts — such as expert testimony concerning the general effects of rape trauma on a rape victim's social life.[130] "Psychological impact" can include mental anguish felt by a victim,[131] by a victim's family,[132] by a victim's community,[133] or by a victim's military unit.[134] Mental trauma suffered by a victim can include the indignity and humiliation the victim experiences by having to testify at trial.[135] "Medical impact" includes actual injuries others suffer as a result of the accused's charged offenses[136] and evidence concerning the potential for such injuries.[137] Finally, the courts have recognized that many crimes directly[138] and indirectly[139] impact on the military unit's discipline and mission.

There must be a reasonable connection between the accused's offense and the alleged impact, but it is not necessary to show that the impact was foreseeable. "Repercussions of an offense" are admissible in aggravation if the accused's misconduct "reasonably can be shown to have contributed to those effects."[140]

Evidence of rehabilitative potential. As part of the case in aggravation, the trial counsel can present opinion testimony concerning the character of the accused's past duty performance and the accused's rehabilitative potential.[141] The trial counsel cannot explore specific incidents of misconduct during direct examination, but if the defense inquires into specific instances of conduct during cross-examination, the "door would be open" for the trial counsel to explore specific incidents of misconduct during re-direct.[142] Witnesses can express an opinion that the accused has no rehabilitative potential based solely on the seriousness of the charged offense.[143]

Step Two—Proper Form

Although evidence may fit one of the required categories listed in R.C.M. 1001(b), it may still be inadmissible because it is in an improper form, or violates one of the rules against hearsay or privilege. Prior convictions must be proved by use of a proper method; documents from the accused personnel files must be properly authenticated. Other infirmities in the form of the evidence may exist that render the evidence inadmissible.

In *United States v. Henson*,[144] the accused, a first sergeant, pled guilty to violation of regulations by using his unit's orderly room to sell used automobiles. The government sought to introduce evidence that the accused had discussed his business arrangements with an attorney and was fully aware that he was acting illegally. This evidence clearly satisfied step one; it fit within R.C.M. 1001(b)(4) as a circumstance directly related to the offense. In ruling the evidence inadmissible, the Army Court of Military Review focused on the form of evidence. Finding that the testimony

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[126] *See, e.g.*, United States v. Harrod, 20 M.J. 777 (A.C.M.R. 1985).

[127] R.C.M. 1001(b)(4) discussion.

[128] United States v. Hood, 12 M.J. 890 (A.C.M.R. 1982) (Permissible aggravation included "expert" testimony from a Criminal Investigation Division agent that the accused could double or triple his money by selling the illegally possessed goods on the black market.).

[129] United States v. Pearson, 17 M.J. 149 (C.M.A. 1984). While aggravation evidence properly includes the impact of the crime on the victim, the victim's family, etc., the sentencing authority cannot impose a punishment to satisfy the desires of others.

[130] United States v. Hammond, 17 M.J. 218 (C.M.A. 1984).

[131] United States v. Marshall, 14 M.J. 157 (C.M.A. 1982) (psychological evidence concerning the long term residual effects the rape is likely to have on the victim); United States v. Body, CM 446257 (A.C.M.R. 8 Apr. 1985) (mental anguish and suffering of child victim who had been raped and sodomized).

[132] United States v. Pearson, 17 M.J. 149 (C.M.A. 1984) (impact that death of child due to accused's negligent homicide had on the victim's family members).

[133] *Id.*

[134] *Id.*

[135] United States v. Garcia, 18 M.J. 716 (A.F.C.M.R. 1984).

[136] United States v. Sargent, 18 M.J. 331 (C.M.A. 1984) (drug purchaser's drug overdose death resulting from the accused's sale or transfer of illegal drugs).

[137] United States v. Witt, 21 M.J. 637 (A.C.M.R. 1985) (expert testimony concerning the potential psychiatric consequences of taking LSD); United States v. Needham, 19 M.J. 614 (A.F.C.M.R. 1984) (Dep't of Justice periodical tracing the history, use, and physical/psychological effects of illegal drugs); United States v. Corl, 6 M.J. 914 (N.C.M.R. 1979).

[138] United States v. Vickers, 13 M.J. 403 (C.M.A. 1982) (the effects that the accused's charged disobedience of orders had in exacerbating a larger disruption).

[139] United States v. Fitzhugh, 14 M.J. 595 (A.F.C.M.R. 1982) (effect that the accused's removal from the Personnel Reliability Program had on the unit's military mission). *Cf.* United States v. Cano, 20 M.J. 770 (A.F.C.M.R. 1985) (The fact that the accused lied about his involvement in criminal activity was not admissible to show that the investigative agency had to expend additional resources to solve the crime.).

[140] United States v. Witt, 21 M.J. 637 (A.C.M.R. 1985). In *Witt*, the accused was convicted of unlawfully distributing LSD. During presentencing, the trial counsel introduced evidence that one of the soldiers who ingested the accused's LSD went wild and stabbed other soldiers with a knife. The court held that, although the accused should not be "held responsible" for a never-ending chain of repercussions from the sale of LSD, it was proper for the government to introduce evidence of repercussions that were reasonably linked to the accused's offense. The foreseeability of the repercussions was irrelevant.

[141] R.C.M. 1001(b)(5).

[142] *Id.* Obviously, the military judge has broad discretion in limiting collateral inquiries into specific instances of conduct.

[143] United States v. Horner, SPCM 21591 (A.C.M.R. 31 Oct. 1985) (A government witness can base his or her opinion about the accused's rehabilitative potential solely on the seriousness of the offense, e.g., distribution of marijuana. Lack of personal knowledge about the accused goes to the weight to be accorded the opinion.). *Accord* United States v. Boughton, 16 M.J. 649 (A.F.C.M.R. 1983) (The witness' opinion can be based on reports provided by subordinates).

[144] 20 M.J. 620 (A.C.M.R. 1985).

of the attorney constituted a violation of the attorney-client privilege, the Army court found error. Had the evidence been in a different form, perhaps an admission from the accused that "JAG told me this was illegal," then the evidence would have been admissible.

In *United States v. Jaramillio,*[145] the Army court found error in the admission of a record of prior conviction. Although admissible under step one (R.C.M. 1001(b)(3)), the form of the evidence was improper. The authenticating certificate was defective because it was prepared for the signature of the captain who was the custodian of the document, but instead it was signed by a warrant officer whose duty position and relationship to the document was not indicated. In the absence of any evidence that the authenticating certificate was signed by someone who had a duty to maintain the record, the certificate was defective (M.R.E. 902(4a)).

Prior convictions must be proven by evidence admissible under the Military Rules of Evidence.[146] Unauthenticated letters[147] or other documents that do not conform to the rules against heresay may not be used to prove a prior conviction.[148]

Step Three—Balancing Under Mil. R. Evid. 403

Even if the evidence fits one of the "pigeon holes" of R.C.M. 1001(b) and is presented in proper form, the military judge may exclude the evidence. Upon request by the defense, or sua sponte, the judge may balance the probative value of the evidence against the danger of unfair prejudice to the accused.[149] The balancing test of Rule 403 applies equally to evidence received during findings and sentencing.[150]

In examining the probative value of the evidence, the court should focus on how closely the evidence relates to the permissible objectives of the sentencing process.[151] Generally these objectives have been recognized as rehabilitation of the soldier, protection of society from the wrongdoer, and deterrence, both individual and general.

Is the evidence indicative of an isolated incident or an overall plan? Information that permits the sentencing authority to determine how the changed offense fits into the general behavior of the accused is valuable in determining his rehabilitative potential, as is evidence that demonstrates the attitude of the accused.

The prejudicial effect of aggravation evidence comes from the potential that the evidence will be misused by the members. Punishment is for the charged offense; the sentencing authority uses aggravation evidence as a barometer to punish the accused for the charged offense. Where there is great risk that the accused will be punished for the uncharged misconduct, rather than for the crime charged, the prejudicial value of the evidence is great and caution must be used.[152] For this reason, the defense should clearly indicate to the judge the potential for prejudice. Generalized statements by the defense that the evidence is "inappropriate" or "needless and wrongful" do not alert the trial judge to the dangers of the evidence.[153]

Conclusion

The admissibility of evidence that enhances the sentence of the accused will continue to be a topic of judicial interest. Such information can reach the sentencing authority through the stipulation of fact, during the guilty plea, and after findings. Before admitting evidence in aggravation, the court should identify which provision of Rule 1001(b) applies, examine the form of the evidence, and then balance the value of the evidence in determining a sentence objective against the prejudicial effect. By following the three-step procedure outlined above, counsel and the military judge can properly focus on any inadequacies of the evidence and restrict such evidence to its proper use.

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[145] 13 M.J. 782 (A.C.M.R. 1982).

[146] R.C.M. 1001(b)(3)(C).

[147] United States v. Pitts, 18 M.J. 522 (A.C.M.R. 1984).

[148] United States v. May, 18 M.J. 839 (N.M.C.M.R. 1984) (Extensive review of the Military Rules of Evidence).

[149] United States v. Greene, 21 M.J. 633 (A.C.M.R. 1985).

[150] United States v. Martin, 20 M.J. 227, 232 (C.M.A. 1986) (Everett, C.J., concurring in the result) ("Whether the evidence of prior misconduct is offered for findings, for sentence, or for both purposes, the limitations of Mil. R. Evid. 403 apply; and the judge must weigh the probative value of the evidence against its prejudicial effect.").

[151] United States v. Arceneaux, 21 M.J. 571 (A.C.M.R. 1985).

[152] United States v. Martin, 20 M.J. 227, 233 (C.M.A. 1985).

[153] United States v. Hardy, 21 M.J. 198 (C.M.A. 1986). In *Hardy*, the defense objected to references to marijuana in a letter of reprimand that was ostensibly given to correct the accused's failure to clean his barracks room. The defense objection to the evidence failed to adequately alert the trial judge to the unfair prejudice of the evidence.

The Army's Clemency and Parole Program in the Correctional Environment: A Procedural Guide and Analysis

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Introduction

"For defendants in criminal cases, the bottom-line question often is how much time must be spent in confinement. If this can be reduced by any means—including probation at the time of trial or subsequent release on parole—the defendant usually is anxious for this to be done."[1] This assertion by Chief Judge Everett in the case of *United States v. Hannan* is not subject to contradiction. In fact, during my thirty month tenure as Deputy Staff Judge Advocate at the United States Army Correctional Activity (USACA), Fort Riley, Kansas, the Army's medium-term correctional facility, in no instance, in more than a thousand, can I recall a prisoner not able to immediately respond with his or her anticipated minimum release date (MRD) from confinement when asked when he or she was "getting out." Parental, spousal, and child birth dates and anniversaries may be forgotten, but his MRD is foremost on a prisoner's mind. Prosecutors and trial defense counsel understandably focus most, if not all their efforts, on the disposition of an accused in the courtroom setting. Once "safely" incarcerated within the Army's correctional system, the accused is sometimes perceived by trial counsel as "out of sight and out of mind." The administration and operation of the Army correctional system is generally considered to be a military police responsibility. Interest in a prisoner's well being by previously zealous courtroom judge advocates is the exception and not the rule. Whereas all prosecutors and trial defense counsel are readily familiar with the opportunities for judicial relief available in the appellate courts, many are less cognizant of alternate avenues which may lead to sentence reduction or an improvement in the conditions under which a prisoner is confined that exist within the Army correctional system. In *Hannan,* Chief Judge Everett advised legal counsel that:

> Because of the importance of such matters to an accused, his defense counsel should be aware of the rules and policies which will affect the practical impact of sentences to confinement. Indeed, valuable service may be rendered by a lawyer in assisting his client to receive more favorable treatment in connection with a sentence to confinement.[2]

The purpose of this article is to inform judge advocates of the procedures that govern the Army's clemency and parole programs in the correctional environment. A comprehensive step-by-step procedural guide to the disposition process of clemency and parole actions originating from within Army correctional facilities will be supplemented by commentary and analysis where appropriate. Primary focus will be on the disposition of actions pertaining to the medium-term military prisoner currently being incarcerated at USACA.[3]

Clemency and Parole Program Authority

The authority for the clemency and parole programs that function within the Army correctional system is derived from a variety of statutes, Army regulations, and local correctional facility policies. The Secretary of the Army is authorized by federal statute to provide a system of parole for offenders who are confined in military correctional facilities and who were subject to his authority at the time of commission of their offenses[4] Pursuant to this statutory authority, the Secretary of the Army has established policies and procedures for the conditional release on parole of Army prisoners. Although originally only applicable to the United States Disciplinary Barracks (USDB) at Fort Leavenworth, Kansas, the parole procedures set forth in AR 190–47, chapter 12, are also applied at USACA by local policy.[5] Army Regulation 15–130[6] reflects the delegation of authority from the Secretary of the Army to the Army Clemency Board (ACB) to make parole determinations. Apart from parole, section 953 of Title 10, United States Code, requires the Secretary of the Army to establish a functional clemency system within military correctional facilities. This has been accomplished and clemency procedures are prescribed in AR 15–130 and AR 190–47, chapter 6. Although the ACB is not empowered to make clemency determinations, the Secretary of the Army has delegated authority to the ACB to make clemency and restoration to duty recommendations to be acted upon by the Deputy Assistant Secretary of the Army (Military Review Boards, Personnel Security and Equal Employment Opportunity Compliance and Complaints Review).[7]

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[1] United States v. Hannan, 17 M.J. 115, 122 (C.M.A. 1984).

[2] *Id.*

[3] USACA was designated the Army's medium-term confinement/correctional facility pursuant to Dep't of Army, Reg. No. 190–47, Military Police—United States Army Correctional System, para. 4–2*b*(1) (1 Oct. 1978) (I04, 17 Aug. 1984) [hereinafter cited as AR 190–47]. Since February 1984, USACA has received enlisted prisoners (both male and female) with sentences to confinement of four months or more, but not in excess of two years.

[4] 10 U.S.C. § 952 (1982).

[5] Policy Number ZX–25–84, United States Army Correctional Activity, U.S. Army, subject: Parole of Prisoners from the United States Army Correctional Activity (USACA) (3 April 1984) [hereinafter cited as USACA Policy ZX–25–84].

[6] Dep't of Army, Reg. No. 15–130, Boards, Commissions, and Committees—Army Clemency Board, para. 5*b* (15 April 1979) [hereinafter cited as AR 15–130].

[7] AR 15–130, para. 5*a*.

Correctional facility commanders[8] have been entrusted with broad discretionary authority to grant clemency. Both the Commandant of the USDB and the USACA Commander have been designated general court-martial convening authorities by the Secretary of the Army. The Army's two correctional facility commanders may mitigate, remit, or suspend, in whole or in part, any unexecuted portion of a court-martial sentence, to include all uncollected forfeitures, other than sentences extending to death or dismissal or affecting a general officer.[9] Timely clemency disposition of military prisoners through the exercise of the correctional facility commander's authority to mitigate, remit, or suspend court-martial sentences is deemed essential to the Army correctional program.[10] Contrary to the belief of many prisoners and some defense counsel, select prisoners do receive reductions in their sentences to confinement, upgraded punitive discharges, and restoration to duty as a result of the clemency process. Although empowered to approve forms of clemency pertaining to confinement, forfeitures, and punitive discharges, the correctional facility commander cannot direct a prisoner's restoration to duty, reappointment to an enlisted grade above private (E–1), or authorize direct substitution of an administrative discharge for a punitive discharge. Recommendations regarding these forms of clemency are forwarded to the Army Clemency Board.

Clemency

Clemency Eligibility and Consideration

All prisoners incarcerated at either the USDB or USACA are eligible for automatic clemency consideration at a three tiered process. They are initially considered for clemency at a three member disposition board convened at the correctional facility, then by the correctional facility commander, and finally at the Army Clemency Board sitting in Washington, D.C. Prisoners are initially considered for clemency in accordance with the chart set forth at Appendix A.[11] These speedy processing times are imposed by regulation and work both for and against the prisoner.[12] For the shorter-term prisoner with a sentence to confinement of less than eight months, only forty-five days of observation and evaluation by professional counselors is generally available prior to the convening of the correctional facility disposition board. The confinement facility then has only thirty days to process the clemency action from the board's adjournment, to action by the commander, and mailing to the Army Clemency Board. Although the evaluation period in these cases is abbreviated, these processing times are necessary to enable the shorter-term prisoner to have the opportunity to receive meaningful clemency that will actually reduce his or her sentence.

For example, a prisoner with a sentence to confinement of six months is scheduled, after reduction of good conduct time, to reach his MRD five months (150 days) after the date his sentence was adjudged (assuming no pretrial confinement was served). The prisoner's clemency action is due to arrive at the ACB no earlier than 75 days, nor later than 105 days, from the date of sentencing. Allotting the ACB thirty days to reach a decision and communicate it to USACA results, in most cases, in an elapsed time of four and one-half months (135 days). In the event the ACB granted clemency in the form of a remission or suspension of confinement, the prisoner would realize, at most, only a fifteen day reduction in confinement time to be served.

A further constriction of the processing times will only reduce the period available for the correctional facility staff to adequately evaluate a prisoner's progress. During 1984, as expected, not all clemency and parole actions reached the ACB within the strict regulatory time constraints. Ensuring timely delivery of the clemency action at the ACB during the thirty day window set by Army regulation is further complicated in instances where the prisoner has served pretrial confinement. The prisoner's initial clemency and parole eligibility date is advanced by the period of pretrial confinement. For example, where a prisoner has served eighty days of pretrial confinement and received an eighteen month sentence to confinement, presuming he arrived at USACA on the date of his trial (a rare occasion because it ignores interim confinement at an installation detention facility and travel time to Fort Riley, Kansas), the correctional facility disposition board is already five days overdue. When confronted with this type scenario, defense counsel should alert the client to expect to appear before a disposition board evaluating his potential for clemency and parole (if eligible) within thirty days after his arrival at USACA. Providing the accused a copy of favorable matters raised by the defense in extenuation and mitigation prior to his departure to USACA or by mail to arrive shortly after he reports at Fort Riley, may bolster his chances for favorable clemency and/or parole consideration. Do not expect the record of trial to be available at the disposition board. I found a record of trial to be available for perusal by board members in approximately fifty percent of the cases.

The significance of a prisoner's promulgating orders cannot be overstated. Clemency powers by either the correctional facility commander or the ACB may not be exercised prior to initial action by the convening authority.[13] Convening authorities are required to forward a copy of the initial promulgating order to the commander of the proper confinement facility immediately.[14] Notification of convening authority action is to be accomplished, by electrical means, if necessary, within twenty-four hours of the time

[8] In accordance with AR 190–47, para. 2–1 (C1 1980) there are only two Army correctional facilities, the USDB and USACA. Army correctional facilities should not be confused with installation detention facilities which incarcerate pretrial and post-trial prisoners serving a sentence to confinement of less than four months.

[9] Uniform Code of Military Justice art. 74, 10 U.S.C. § 874 (1982) [hereinafter cited as UCMJ]; Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1108(b) (hereinafter cited as MCM, 1984, and R.C.M., respectively); AR 190–47, para. 6–19*f*(3).

[10] AR 190–47, para. 6–14*a*.

[11] USACA Policy ZX–16–84, United States Army Correctional Activity, U.S. Army, subject: Clemency Actions (29 Feb. 1984) [hereinafter cited as USACA Policy ZX–16–84].

[12] AR 190–47, para. 6–4*e*(2).

[13] *Id.* para 6–14*f*.

[14] Dep't of Army, Reg. No. 27–10, Legal Services-Military Justice, para. 12–3 (1 Aug. 1984) [hereinafter cited as AR 27–10].

the action is taken.[15] Effective January 1, 1986, the Commander, United States Army Finance and Accounting Center, authorized finance officers worldwide to accept requests from staff judge advocates and command judge advocates for transmission of notice of convening authority action via electronic mail through the JUMPS teleprocessing system (JTELS) to the finance officers serving the USDB or USACA.[16] Use of JTELS provides an additional, expedited means to meet the twenty-four hour notice requirement. Defense counsel who monitor the government's compliance with this regulatory notification requirement only to speculate on its negative impact on the accused's pay, may also want to calculate the effect of its absence on the processing of their client's clemency and parole action. As a matter of practice, USACA will schedule and conduct a prisoner's clemency and parole disposition board based on the sentence reflected on the Results of Trial (to include an adjustment for any reduction to occur based on a pretrial agreement). A disposition board will be convened and the action will be processed just short of presentation to the correctional facility commander. Upon receipt of either a copy of the initial promulgating order or an electrical message, the clemency action will be provided to the Activity commander for his action and then forwarded to the ACB.

In *United States v. Powis,*[17] the petitioner claimed that he was prejudiced by being denied the opportunity to obtain clemency in the regular course of clemency and parole procedures provided for sentenced prisoners. The petitioner was found to have been prejudiced by the deprivation of an inchoate right to appear before a clemency disposition board. His scheduled appearance before a USDB disposition board was postponed awaiting receipt of initial action by the convening authority. The Navy court noted that AR 190–47 prohibited clemency action prior to an initial action in the record of trial by the convening authority. Although finding prejudice to the petitioner, the court found that "the extent to which a substantive right may be affected cannot be determined presently because it is a derivative both of disposition board recommendation and Naval Clemency and Parole Board action. The course of normal review is still available for purging prejudicial effects."[18] The court ruled that the petitioner was entitled to relief in the nature of mandamus and directed that the convening authority take action and notify the USDB of the action within six days of the court's decision.[19]

Timely receipt of initial promulgating orders and electrical messages by correctional facilities remains a continuing problem. Despite explicit regulatory requirements, worldwide message reminders by HQDA, post cards sent from USACA, periodic telephone inquiries from correctional facilities, and letters from the SJA, USACA to convening authorities, correctional facilities routinely do not promptly receive these two items.[20] The criticality of USACA's receipt of notice of action is magnified by the fact that I found that the ACB will generally not consider a case for clemency after the term of confinement expires unless the individual has an approved punitive discharge and seeks restoration.

Conduct of Clemency Review

The clemency program functioning within the correctional system is a two track system. A prisoner is eligible to receive clemency consideration in either of two ways. As previously discussed, all prisoners incarcerated at the USDB or USACA are eligible to receive automatic regulatory clemency consideration. Alternatively, any prisoner assigned to a correctional facility with any part of an approved court-martial conviction remaining unexecuted, unapplied, or unserved, or someone acting on the prisoner's behalf, is eligible to submit a special petition for clemency at any time.[21]

The special petition for clemency must specifically state the form of clemency requested and all grounds that may justify special clemency consideration. At USACA, recommendations as to disposition of a special petition of clemency are provided by the prisoner's company and battalion commanders as well as the Chief, Disposition and Assignments Branch. If the activity commander determines no special grounds exist, the special petition is denied and the matter is neither referred to a disposition board nor forwarded to the ACB.[22] The activity commander's decision regarding the existence of special grounds is final and not subject to appeal.[23] If the activity commander finds sufficient grounds for special clemency consideration, the petition is submitted to a USACA Clemency Disposition Board for review and recommendation as to disposition. The petition is then forwarded to the activity commander who may elect to either approve clemency within the scope of his authority or refer the petition to the ACB for disposition with a recommendation for approval or denial. Prisoners pending automatic regulatory clemency review may not submit an independent special petition for clemency prior to receipt of notice that final action has been taken by the ACB. Only one correctional facility clemency action is permitted to be under consideration at any time.[24] A special petition for clemency, or any new evidence of a change of circumstances pertaining to a prisoner pending automatic regulatory clemency consideration, is joined with the ongoing clemency action wherever it may be situated in the

[15] *Id.*, para. 12–3*a*(1).

[16] Message, DAJA–CL, DA, Washington, D.C., for Staff Judge Advocates, Judge Advocates, Trial Defense Service, Military Judges, Legal Counsel, subject: Notification of Convening Authority action to the US Disciplinary Barracks (USDB) and the USA Correctional Activity (USACA), dated 24 Dec. 1985.

[17] 10 M.J. 649 (N.C.M.R. 1980).

[18] *Id.* at 650.

[19] *Id.*

[20] Compliance with the 24 hour notification requirement is included as a special interest item for Article 6, UCMJ inspections by general officers. *See* paragraph 13a of Article 6 Inspection Checklist, *reprinted in* The Army Lawyer, Feb. 1986, at 6.

[21] AR 190–47, para. 6–14g.

[22] *See* USACA Policy ZX–16–84, para. 8.

[23] *Id.* at 3.

[24] *See id.* at 3–4.

disposition process. Some prisoners erroneously view special petitions as a second bite at the clemency apple. Few special petitions for clemency are successful. Special petitions should be used in that rare instance when an unexpected catastrophic event occurs requiring the prisoner's immediate long-term presence at home or meriting the granting of monetary relief. An example of a circumstance that might justify the submission of a special petition would be a surprise death of a spouse or parent adversely affecting the care provided dependent children or the prisoner. A special petition for clemency should only be used when the normal automatic clemency process has either already been completed with unfavorable results or will not provide timely relief. A special petition is not appropriate for a prisoner, beyond his original expiration of term of service (ETS), who seeks relief in the area of forfeitures. Relief of forfeitures may not be granted as a matter of clemency to any prisoner who has passed his original ETS.[25] Special petitions for clemency submitted by prisoners awaiting action on their court-martial by their convening authority are not acted upon by correctional facility commanders. Such requests are redirected to the original convening authority for his consideration when taking action.[26]

Upon final action by the ACB on a prisoner's initial clemency proceeding, successive annual clemency reviews repeating the disposition board process are due twelve months from the initial clemency review date for prisoners remaining in a confined status. The annual review date is adjusted by any intermediate clemency reviews resulting from a delayed parole request or special petition for clemency which had been considered by the ACB. Prisoners released on federal parole remain eligible for automatic clemency consideration eleven months from the date of their initial release and annually thereafter. These clemency reviews will continue until such time as the parolee's full sentence expires or until he or she is released from parole supervision, whichever is latest. Prisoners reincarcerated as parole violators are again eligible for automatic regulatory clemency consideration twelve months after their return to prison and annually thereafter. Former prisoners on excess leave pending completion of appellate review and no longer in a prisoner status do not receive automatic annual clemency reviews. Former prisoners on excess leave may submit a special petition for clemency in an attempt to upgrade an approved punitive discharge, however.[27] Upon completion of appellate review, former prisoners on excess leave as well as those still imprisoned are provided an additional opportunity to obtain a punitive discharge upgrade from the correctional facility commander. In instances where more than six months has elapsed since approval of the sentence by the original convening authority, the officer exercising general court-martial jurisdiction over the accused must consider the advice of his staff judge advocate as to whether retention of the soldier would be in the best interest of the Army before ordering the discharge to be executed.[28] Such advice includes: the findings and sentence as finally approved; whether the individual has been on active duty since the court-martial, and if so, the nature and character of that duty; and a recommendation whether the discharge should be executed.[29]

Prisoner Introduction to Clemency

Upon arrival at a correctional facility, all prisoners begin to undergo continuous evaluation. At USACA, an initial assignment screen is conducted within twenty-four hours after a prisoner's arrival. During a prisoner's initial month at USACA, he or she is carefully evaluated by various USACA staff elements, including the social work division, finance office, company chain of command, education center, primary counselor, and work/vocational employment section. The evaluations generated during this in-processing period are reviewed by an assignment board that is tasked, among other things, to develop an individualized correctional treatment program for each prisoner. The assignment board has a limited clemency function in that it is empowered to recommend to the correctional facility commander that the forfeiture of pay and allowances of a deserving prisoner in need of immediate financial relief be suspended.[30]

Shortly following arrival at USACA, a prisoner attends a mandatory information briefing on the Army's clemency and parole programs. A comprehensive fact sheet is distributed to each prisoner. A particular clemency and parole case analyst is assigned to handle a prisoner's action from beginning to end. The case analyst notifies each prisoner, in writing, of his or her initial clemency and parole eligibility date, the date of his or her USACA disposition board, and the date an interview is to occur with his or her assigned case analyst.

During the clemency process, prisoners are automatically considered for all forms of clemency available with the exception of restoration to duty. Clemency is not limited to that requested by the prisoner. At the interview with his or her case analyst or at the disposition board, a prisoner may request a particular form of clemency. I found that specific requests, limited in scope and well supported, had a better chance for success. For example, a prisoner seeking a suspension of a period of two or three months of confinement to attend an educational institution stands a better chance of attaining clemency than a prisoner who seeks remission of all remaining confinement.

Return to Duty and Restoration

One area of particular confusion pertains to clemency in the form of "return to duty" or "restoration to duty." Individuals unfamiliar with the corrections process often misunderstand these two terms. These are terms of art and should be viewed as mutually exclusive. "Restoration to duty" is a term used to describe procedures taken in connection with an individual who was sentenced to confinement and a punitive discharge or dismissal by court-

[25] Dep't of Defense Military Pay and Allowances Entitlement Manual, para. 10317e (1 Jan. 1967) (C84, 1 Nov. 1985).

[26] USACA Policy ZX–16–84, para. 10.

[27] *See id.* at para. 9.

[28] R.C.M. 1113(c)(1).

[29] *Id.*

[30] AR 190–47, para. 6–4*d*.

martial and where a discharge or dismissal has been executed.[31] "Return to duty" is a term used to describe procedures taken in connection with a prisoner whose sentence includes confinement without a punitive discharge or whose punitive discharge has been remitted or suspended by the convening authority or appellate review agencies, or who is still pending the appellate process and whose discharge has not yet been executed.[32]

Prisoners with a sentence including a punitive discharge will automatically be considered for clemency in the form of return to duty. Prisoners must, however, submit a voluntary written application to be considered for restoration to duty. In the absence of exceptional circumstances, conviction of a felony equivalent offense ordinarily disqualifies prisoners from restoration or return to duty.[33] When a prisoner is "returned to duty," the unexecuted portion of his sentence is suspended or remitted. Prisoners returned to duty will complete their previous unfulfilled service obligation or be required to extend, at the discretion of the approving authority, to serve for a period of at least one year.[34] Whereas, the Commander, USACA has the independent power to direct a return to duty, only the Secretary of the Army can direct restoration. Restoration creates a new term of service, generally in the lowest enlisted grade. It leaves unaffected the earlier service terminated by the punitive discharge and has no bearing on appellate review of the court-martial occurring in the preceding term. Restoration is a form of clemency that enables a prisoner to earn an honorable discharge subsequent to a previously executed punitive discharge.

In rare instances, the ACB has approved, prior to completion of appellate review, restoration of a prisoner whose discharge has not been executed. In order to execute such a restoration directive, USACA awaits completion of appellate review and then commences a new one year enlistment. Subject to further guidance received from the ACB, recipients of this type restoration await completion of appellate review by either voluntarily remaining at USACA in a nonprisoner status, staying in an excess leave status, or being reassigned to a new duty station.

Preparation of Clemency Action

At their information briefing, prisoners are advised to immediately begin to obtain written statements to support their clemency and parole actions. Prisoners are informed that letters from their family, former or prospective employers, former military supervisors, and statements from USACA staff members may be helpful. The case analyst's role is critical to the clemency and parole process. The case analyst discusses clemency and parole opportunities, assists the prisoner in gathering documentation in support of his or her clemency action, and orients the prisoner as to what to expect at the disposition board. The case analyst makes a preliminary recommendation for or against clemency to the disposition board. These interviews by case analysts are conducted with the prisoner without the assistance of counsel. Prisoners do not have the right to assistance of legal counsel at proceedings pertaining to clemency and parole matters which are not considered to be adversary in nature.[35] The case analyst assembles a clemency action packet and its contents include, among other items, the prisoner's entire military personnel records jacket (MPRJ), correctional treatment file, mental hygiene report prepared by a USACA social worker, record of trial (if available), post-trial SJA recommendation and judge advocate review, company and battalion commanders' recommendations, results of a records check with the Federal Bureau of Investigation concerning prior criminal activity, and any matters submitted by the prisoner.

Prior to September 1, 1984, and the implementation of the 1984 Manual,[36] post-trial reviews of the staff judge advocate required by paragraph 85, Manual for Courts-Martial, United States, 1969 (Rev. ed.) were one of the most useful documents considered by the correctional facility disposition board and the ACB. The previously required, more comprehensive post-trial review, although thought to be an unnecessary administrative burden by many, proved invaluable to the clemency and parole evaluation process because of its summary of the evidence. The post-trial reviews were required to be transmitted to the gaining Army correctional facility.[37] A copy of the review was included with the clemency and parole actions and was forwarded to the ACB. Today, along with being attached to each copy of the record of trial, one additional copy of the abbreviated SJA recommendations and judge advocate review is required to be sent without delay to the commander of the confinement facility to which the accused is being or has been transferred.[38] These documents, however, are much more laconic in content and provide minimal input to the clemency evaluation process. When the record of trial is available for perusal by the disposition board, the presence of today's more concise SJA recommendation is not that significant. Disposition board members are often able to review the record of trial to ascertain the circumstances of the prisoner's criminal acts. A copy of the accused's record of trial is not included in the clemency action forwarded to the ACB. Consequently, the breath of information previously readily available to ACB members has diminished somewhat. It has been my experience that, like the untimely arrival of initial promulgating orders and electrical messages, SJA recommendations and judge advocate reviews are received by the correctional activity directly from the field in only about fifty percent of the cases.

Clemency packets are presented to the USACA disposition board by the prisoner's assigned case analyst.[39] The

[31] *Id.*, Appendix A, at A–2.

[32] *Id.*

[33] *See id.* at para. 6–15*b*.

[34] *Id.* at para. 6–17*c*(1).

[35] United States v. Moles, 7 M.J. 604, 606 (N.C.M.R. 1979).

[36] R.C.M. 1106.

[37] AR 190–47, para 4–9*g*.

[38] AR 27–10, para. 5–30.1.

[39] USACA Policy ZX–16–84, para. 12f.

case analyst is available to provide administrative assistance to the board when evaluating a prisoner's case and to respond to any inquiries that board members may have regarding the prisoner's case. Case analysts are nonvoting participants in the disposition proceeding and are not present during the deliberative process. During the clemency case preparation period prior to the convening of the disposition board, a defense counsel may find it worthwhile to contact his or her client's designated case analyst by telephone or mail, and discuss the prognosis for clemency. This is an often neglected opportunity for a defense counsel to advocate the interests of his or her client with an individual involved in the clemency process.

USACA Clemency Board Proceedings

A prisoner being considered for clemency appears before a clemency disposition board convened at the correctional facility. The board is composed of three voting members with military police or corrections experience. One is a field grade officer or senior captain who serves as board president, one is a company grade officer, and the third member is usually a senior non-commissioned officer. The disposition board may also include other nonvoting members; *i.e.*, social worker, legal advisor, or reporter. Voting members are to be impartial and without personal interest or involvement in the prisoner's case or with any relevant evidence.

Board proceedings are nonadversial in nature.[40] A prisoner may personally appear before the board or waive attendance. My experience is that most prisoners chose to attend the proceedings. Prisoners are not entitled to have legal counsel present at the board sessions. Board procedures generally comply with Army Regulation 15–6.[41] Although the formal rules of evidence are not adhered to, the proceedings are conducted to ensure that the highest quality of evidence obtainable and available is considered. All relevant and material evidence may be heard. At the start of the proceeding, the president informs the prisoner of all written evidence that the board will consider, thereby giving the prisoner an opportunity to object to any inaccuracies. The board will hear reasonably available, noncumulative, military and Department of the Army civilian witnesses requested by the prisoner. Prisoners are normally not allowed to call in excess of two witnesses to testify on their behalf unless the board president determines that additional witnesses are necessary for a fair presentation of the prisoner's case for clemency. All live testimony is presented under oath. Although the proceedings are generally open to the public, relatives and friends of the prisoner are not authorized to attend the board proceeding as witnesses or spectators on a government reimbursable basis.[42] Their testimony is normally submitted by affidavit or letter. The board is concerned only with the substance of the evidence submitted and not its form.

The prisoner may elect to testify under oath. The majority of prisoners appearing at their board elect to make a sworn oral statement. Before doing so, they are advised of their rights under Article 13*b*, UCMJ. Board members may only question prisoners who volunteer to testify. In my opinion, it is advantageous to the prisoner to make an oral statement. Oral statements should focus board members' attention on the specific form of clemency sought by the prisoner and why. Board members who make further inquiries of a prisoner regarding his or her basis for clemency generally can better develop facts supporting or undermining the prisoner's case for clemency.

Generally, I found that the duration of a clemency board proceeding was from a minimum of twenty minutes to two hours. The average clemency proceeding (where parole is not an issue), where no live testimony from anyone other than the prisoner was presented, was thirty to sixty minutes. There is much material to be reviewed by three board members in a short period of time. It is essential for the prisoner to make a good impression and to highlight specific facts to support his or her case for clemency. The board members deliberate in closed session to prepare written and signed findings and recommendations agreed to by majority vote. A minority opinion and report by a dissenting member is included in the final report of board proceedings. The basis for the board's findings and recommendations must be clearly stated in the report of proceedings. When considering clemency, the board is required to specifically address the recidivist risk to society and the military community when evaluating dangerous prisoners.[43]

The standards and criteria used by disposition boards in determining whether clemency is appropriate are general in nature. There is no prescribed or defined combination of facts which, if shown, mandate a clemency decision favorable to the prisoner. The clemency proceeding is a purely subjective appraisal by disposition board members, commanders, and the ACB. A noninclusive list of some basic factors that may be considered by disposition boards convened at USACA is at Appendix B.[44] Although no one factor is dispositive, the nature of the prisoner's offense weighs heavily in the minds of most board members. I found that clemency was less likely where the offense was serious, where victims of the crime suffered personal injury, or where the prisoner had a history of misconduct. It was my experience that prisoners electing not to attend the clemency disposition board proceeding were generally not favorably considered for clemency. These prisoners who appeared before disposition boards and denied guilt, lied to the board on any matter, attempted to direct responsibility for their actions to others, had their adjudged sentence significantly reduced already per a pretrial agreement, or attempted to relitigate the adverse results of their courts-martial, were generally unsuccessful in their bid for clemency. Board members tended to favorably evaluate the prisoner who exhibited good behavior while in confinement, demonstrated rehabilitative progress by participating in correctional treatment programs and extracurricular activities available at the institution, and who was recommended for clemency by officers and NCOs in his or her prison unit of assignment. Board members also looked very carefully at

[40] *Id.* at para. 13c.

[41] Dep't of Army, Reg. No. 15–6, Boards, Commissions, and Committees—Procedure for Investigating Officers and Boards of Officers (24 Aug. 1977) (C1, 15 June 1981).

[42] USACA Policy ZX–16–84, para. 15d.

[43] *Id.* at para 15i(7).

[44] *Id.* at para. 15i(2).

pre-action recommendations for clemency submitted by a military judge or court member, even when those recommendations were not favorably acted upon by the convening authority. Boards paid particular attention to circumstances adversely affecting the prisoner or his or her dependents that did not exist and were, therefore, not considered when the court adjudged a sentence or the convening authority took action. Live or written testimony originating from USACA commissioned officers or senior noncommissioned officers generally produced the most favorable results for a prisoner. One of the objectives of the ACB is to effect uniformity in sentences for similar offenses throughout the Army.[45] A prisoner receiving a disproportionately severe sentence for the offense for which convicted could receive a recommendation that his or her sentence be adjusted and reduced accordingly.

The disposition board is tasked with the responsibility to specifically recommend whether return to duty, restoration to duty, deferment, suspension, or remission of unserved confinement at hard labor, discharge, and/or forfeitures or excess leave are appropriate to accomplish a recommended clemency action. A recommendation regarding restoration to duty will be made by the board only if the prisoner has an approved punitive discharge and has voluntarily applied for restoration. If the prisoner has not requested restoration, but in the opinion of the board members possesses potential for further military service, the prisoner will be questioned as to the reason for not applying.[46] The board may also make recommendations regarding suspension of forfeited good conduct time, change in custody grade, special treatment programs, or work detail. Board members are specifically advised to disregard the fact that relief may or may not result from any other appellate review provided under the Uniform Code of Military Justice, alternate federal government forums, or the federal courts.[47] All proceedings are normally tape-recorded and a report of the proceedings summarizing all testimony is prepared by the Disposition and Assignments Branch.[48] The assigned case analyst assembles the complete report of proceedings and forwards the action to the USACA Staff Judge Advocate Office where it is reviewed for legal sufficiency and then forwarded to the activity commander for action. The correctional facility commander may choose to exercise his or her authority as a general courts-martial convening authority and order immediate commutation, suspension or remission of the prisoner's sentence, or a portion thereof. If the USACA commander does not grant full and complete clemency on all remaining unexecuted or unserved parts of a prisoner's sentence, the action is forwarded to the ACB for final disposition. The disposition board's findings and recommendations and the correctional facility commander's recommendation, when not granting immediate clemency, are not revealed to the prisoner.

Clemency Action by ACB

The final rung in the clemency ladder is the ACB sitting in Washington, D.C. The clemency action is assigned an ACB case analyst to conduct an independent evaluation of the entire matter prior to presentation to the ACB itself. I found these case analysts to be highly professional and experienced in the field of corrections. The recommendation made by the ACB case analyst tended to carry significant weight in the final evaluation process by the ACB. The ACB case analysts usually effected close coordination with their counterparts at the correctional facilities if additional information was needed to resolve an ambiguity in the report of proceedings. Defense counsel continuing to monitor the clemency process of a client may find it worthwhile to show their interest by communicating with the ACB case analyst reviewing their client's case. Timing is important when attempting to contact someone at the ACB. Appeals and inquiries made directly to the ACB prior to the convening of a disposition board and action by the correctional facility commander will normally be referred back to the appropriate correctional facility.

Personal appearances by or on behalf of prisoners during official sessions of the ACB are not permitted. When the ACB convenes, the clemency action contains recommendations from a correctional facility case analyst, the prisoner's company and battalion commanders, a three member disposition board, the activity commander, an ACB case analyst, and a legal review by the activity's staff judge advocate. Prisoners can be assured that the ACB and no less than nine other individuals skilled in the field of corrections have reviewed their clemency file.

Upon completing its review, the ACB does not have the independent power to approve clemency. The ACB makes recommendations to the Deputy Assistant Secretary of the Army (Military Review Boards, Personnel Security and Equal Employment Opportunity Compliance and Complaints Review), who has been delegated the power to grant clemency by the Secretary of the Army.[49] The Deputy Assistant Secretary's action completes the clemency process. The prisoner is promptly notified of the ACB's action by his USACA case analyst, normally within seventy-two hours of the activity's receipt of the ACB final action. The clemency process is repeated in its entirety twelve months subsequent to the initial review date should the individual remain a prisoner.

The lengthy clemency process is performed yearly on every prisoner incarcerated at the USDB and USACA. There are some minor variations in the disposition process occurring within USACA and the USDB. The key common denominators are the correctional facility disposition boards and the equilibrating role fulfilled by the ACB to ensure uniformity of treatment throughout the Army's correctional system. Although a prisoner may be surprised that his or her disposition board convened and adjourned in less than an hour, clemency proceedings are not summarily acted upon. There are too many checks and balances in the system. With few exceptions, the final decision is well-reasoned and in the best interests of the Army, American society, and the prisoner. Convening authorities should not

[45] AR 15–130, para. 6*a*.

[46] AR 190–47, para. 6–*e*(2)(a).

[47] USACA Policy ZX–16–84, para. 15i(5).

[48] *Id.* at para. 15j.

[49] Berkowitz, *Project: The Administrative Consequences of Courts-Martial*, 14 The Advocate 260 (1982).

conclude that this elaborate administrative clemency process produces an undeserved bounty of clemency which undercuts the judicial court-martial process. Annual statistics compiled in Calendar Year 1984 at USACA showed that some form of clemency was granted by either the activity commander or the ACB in approximately five to ten percent of the cases.[50] In many of these cases, clemency amounted to the remission or suspension of periods of confinement or relief in the area of forfeitures. In a few instances, punitive discharges were either remitted, commuted, or suspended, or the individual was restored to duty and given an opportunity to earn an honorable discharge. Some prisoners mistakenly view the relatively low favorable clemency rate as indicative of pro forma treatment. The fact is that the records of most prisoners do not justify favorable clemency treatment.

Parole

Although intertwined in the disposition process, parole is a matter separate and distinct from clemency. Parole has no connection with the pardon or forgiveness of a prisoner's conviction and is not provided solely as a reward for good conduct in a correctional facility. Parole can best be defined as a form of conditional release from physical confinement. Prisoners are often initially surprised to learn that parole does not constitute the completion of the correctional treatment process, but is, instead, a continuation of a prisoner's sentence in an alternate form.

The purpose of parole is to restore a measure of freedom to the prisoner, to provide guidance and supervision after a prisoner's return to a civilian community environment, and to help a prisoner to again become a useful member of society. Parole is granted to carefully selected prisoners when it is considered to be in the best interest of the prisoner, the United States Army, and the American society. When in conflict, the best interests of the American society and United States Army take precedence over the interest of the prisoner. Parole evaluation of prisoners incarcerated at USACA is predicated upon due consideration of the severity of the confining offense(s), the individual's background history developed at USACA, behavioral changes as manifested by institutional adjustment and response to correctional treatment programs, current family conditions, and expected adjustment in the civilian community.[51]

Parole Eligibility

All military prisoners with an approved unsuspended punitive discharge, a dismissal, an administrative discharge, or in a retired status, confined pursuant to a sentence or aggregate sentence of more than one year and not more than three years, are eligible for parole consideration after having served one-third of their term of confinement, but in no case less than six months.[52] Those confined pursuant to a sentence of more than three years who have served not less than one year will become eligible for parole consideration at such time as the ACB may determine. Such a time may not be more than one-third of the sentence approved, or not more than ten years, when the sentence is life or in excess of thirty years.[53] Prisoners confined pursuant to a death sentence are not eligible for parole consideration. USACA prisoners, although satisfying all other eligibility criteria, will not be considered for parole if they arrive at the activity with less than four months remaining on their sentence to confinement, have not previously submitted a parole statement requesting consideration of parole and have a period of confinement of ninety days or less to be served, or action has not yet been taken in their case by a convening authority.[54] Where exceptional circumstances exist, the ACB may waive these eligibility requirements.[55] At USACA, when prescribed eligibility requirements are not met, only meritorious cases receiving a favorable recommendation for a waiver by a USACA disposition board may, at the activity commander's discretion, be forwarded to the ACB for final disposition.[56]

In *United States v. Surry*,[57] the accused was sentenced by the military judge to a bad-conduct discharge, confinement at hard labor for eighteen months, a partial forfeiture of pay, and reduction to the lowest grade Pursuant to the terms of a plea bargain, the convening authority reduced the confinement from eighteen months to one year and approved the remainder of the sentence. At the Army Court of Military Review, the appellant contended that he had been deprived of equal protection of the laws, espousing the view that a prisoner whose sentence to confinement does not exceed one year is, per se, ineligible for parole. The appellant further asserted that the military judge failed to assure that the appellant understood that his plea bargain would deprive him of parole eligibility. Both contentions were rejected as the court found that the appellant was not ineligible for parole and that he could apply for parole consideration at any time. The court noted that AR 190–47 "did not limit in any way the eligibility requirement that the ACB may waive."[58] The court went on to say that, in instances where prescribed eligibility requirements were not otherwise met, "parole will be granted only if the board deems that exceptional circumstances exist. Given the purposes, conditions and duration of parole, this does not unreasonably discriminate against the short-term prisoners."[59]

In a footnote, the court alluded to "some misunderstanding as to the proper interpretation of the regulations" on

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[50] Fact Sheet, United States Army Correctional Activity, U.S. Army, subject: USACA's Assignment, Clemency, and Parole Programs (15 April 1985) [hereinafter cited as USACA Parole Fact Sheet (15 April 1985)].

[51] USACA Policy ZX–25–84, at 1.

[52] AR 190–47, para. 12–5*a*(1).

[53] *Id.* at para. 12–5*a*(2).

[54] USACA Policy ZX–25–84, para. 3f.

[55] AR 190–47, para. 12–5*c*.

[56] USACA Policy ZX–25–84, para. 3c.

[57] 6 M.J. 800 (A.C.M.R. 1978), *petition denied*, 7 M.J. 62 (1979).

[58] *Id.* at 802 (citing AR 190–47, para 12–5*c*).

[59] *Id.*

this issue.[60] Evidence as to this misunderstanding was noted in affidavits that disclosed that there had been no parole applications from prisoners situated as the appellant. In my experience there continues to remain few, if any, applications for parole submitted by prisoners situated as Surry. This is due primarily to the fact that parole statements are not routinely solicited from prisoners whose sentences do not include both a punitive discharge and confinement of at least one year and a day. The court concluded in *Surry* that as there was "no long-standing executive interpretation in conflict with"[61] its holding, the fact that there were no parole applications from prisoners with sentences to confinement of one year or less was not determinative. Defense counsel may desire to advise clients with sentences to confinement of eight to twelve months, who are good candidates for parole and may be able to demonstrate exceptional circumstances, to complete a parole statement and initiate an action leading to parole consideration making reference to facts supporting the existence of exceptional circumstances and seeking a waiver from the ACB.

There is no definition for the term "exceptional circumstances" in AR 190–47. Although the term has never been explicitly defined in the parole context, the circumstances of the appellant in *United States v. Hannan,* in the words of Chief Judge Everett, "could be viewed as 'exceptional'."[62] *Hannan* demonstrates the potential adverse consequences awaiting defense counsel who are not adequately informed on the subject of an accused's parole eligibility. In *Hannan,* the appellant contended that his approved sentence was too short. The military judge sentenced Hannan to dismissal, forfeiture of $1,100.00 pay per month for two years, and confinement at hard labor for one year and one day.[63] Hannan and his well-intentioned defense counsel had negotiated a pretrial agreement that provided a punishment ceiling of confinement at hard labor for a period of one year, dismissal, and total forfeiture of pay and allowances for a period of one year.[64] After adjudging the appellant's sentence, the judge became aware of the sentence limitations within the pretrial agreement and perceived its possible impact on the parole eligibility which the judge had intended for Hannan. The trial judge submitted a clemency recommendation to the convening authority in which he asserted the appellant merited an opportunity to be considered for parole based on his conduct while serving his sentence.

The convening authority when taking action, reduced the sentence to that specified in the pretrial agreement.[65] Hannan or his counsel never took any formal action to release the convening authority from this obligation under the pretrial agreement and never requested that the convening authority refrain from reducing the confinement to one year. Hannan urged before the Court of Military Appeals "that if his sentence had remained at a year and a day rather than being reduced to only a year, he probably would have been paroled and released from confinement earlier than the date on which he was released."[66] Hannan further alleged that, while incarcerated at the USDB, he submitted a parole plan and attempted to obtain a determination regarding his eligibility for parole. The response he received from the parole officer "(was that 'with an approved sentence of confinement for one year you are not eligible for parole.')"[67]

The appellant raised four parole related issues before the appellate courts: that he was denied effective assistance of counsel when his military defense counsel erroneously assured him that he would be eligible for parole; that the military judge failed to discuss the effect that the sentence limitation provision found in his pretrial agreement would have on his eligibility for parole; that the convening authority approved a sentence which, as a matter of law, was in excess of the sentence adjudged; and that the appellant was denied due process of law when his request for a determination of parole eligibility was summarily denied. The Court of Military Appeals found that any expectation of Hannan and his lawyers that he would be eligible for parole was not an inducing cause of his guilty pleas. Second, the court held that the trial judge has little occasion "to raise the question of parole eligibility during the providence hearing, since at that time he quite properly had not apprised himself of the ceiling on punishment."[68] On the third issue, the court found "that the failure of the defense counsel to seek clarification of the Staff Judge Advocate's review should be construed as a waiver of any complaint about the convening authority's action.[69] On the final issue, the court referenced the exceptional circumstances waiver provision of para. 12–5*c*, AR 190–47, and asserted that "presumably appellant could have been considered for parole under this proviso."[70] The court then cited the decision in *United States v. Surry* and continued by stating, "Certainly, the circumstances of his case—including the effort by Judge Wold, the original sentencing authority to make him eligible for parole—could be viewed as 'exceptional'."[71] Unfortunately for Hannan, neither he nor his legal advisors brought these unusual circumstances to the attention of correctional officials or sought explicitedly to invoke the exception in the parole regulations. As a result, the court found that the failure to consider Hannan's application for parole on its merits could not be attributed solely to the government. The Court of Military Appeals refused to grant any relief beyond that which it had given earlier, and

[60] *Id.* at 802 n.4.

[61] *Id.* at 802.

[62] 17 M.J. 115, 125 (C.M.A. 1984).

[63] *Id.* at 118.

[64] *Id.*

[65] *Id.* at 119.

[66] *Id.* at 116.

[67] *Id.* at 120.

[68] *Id.* at 123.

[69] *Id.* at 124.

[70] *Id.* at 125.

[71] *Id.*

affirmed its decision. The court of military review had, in view of appellant's being "misled" as to his parole eligibility and "in an abundance of caution," reduced Hannan's forfeitures by one month in order to grant him some sentence relief.[72]

Parole Consideration

Normally, requests for parole will be considered by disposition boards convened at the USDB or USACA and forwarded to the ACB to arrive not later than thirty days prior to the prisoner's parole eligibility date. Requests may be considered as much as 120 days in advance of eligibility date when such action will permit concurrent clemency consideration.[73] At USACA, a single disposition board will generally consider a prisoner for both clemency and parole, if eligible and requested.[74] This means that a prisoner eligible for parole, with a sentence to confinement of less than two years, will have both clemency and parole actions due at the ACB not later than four and one-half months from his or her date of sentencing, less any pretrial confinement time. Prisoners sentenced to a period of confinement of one year and a day are eligible for release onto parole after serving six months confinement. At USACA, there have been instances where prisoners sentenced to confinement of one year and a day have been released on parole after serving six months of confinement, to include pretrial confinement.

Previous backlogs in the processing of parole cases, as existed in 1982, have been reduced.[75] Previous experience had suggested that, due to delays in the administrative processing of cases, the chance for parole of a prisoner with fifteen months or less confinement was minimal.[76] Prisoners with sentences of one year and a day, while technically eligible for parole at six months, could not accomplish the necessary steps to attain parole until ten to twelve months had elapsed, thereby causing favorable parole consideration to be of no value to the prisoner. Without parole, the prisoner would ordinarily be scheduled for release after nine months and eighteen days, less any extra good time work abatement. The necessary steps for parole are now being accomplished to ensure release at the earliest date in many cases.

Parole Procedures

Unlike clemency, parole consideration is not automatic. All parole eligible prisoners are required to complete DA Form 1704–R (Parole Statement) and indicate whether parole is or is not desired. Not all eligible prisoners request parole consideration. Some prefer to be released from confinement at their scheduled MRD, followed by discharge from the Army or placement onto excess leave pending completion of appellant review, rather than seeking earlier release on parole. These prisoners do not wish to remain subject to the conditions of parole until the end of their full sentence to confinement (not adjusted by any good conduct time or work abatement). For instance, a routine condition in approved paroles for drug and alcohol related offenders is the participation and successful completion of a drug/alcohol related treatment program while on parole in the civilian community. A prisoner may also realize that if parole is later revoked, no credit towards service of his or her sentence will be allowed for the time spent on parole.

Parole Plan

Prisoners seeking parole consideration submit a tentative parole plan prior to their disposition board. A tentative parole plan reflects a prisoner's plans for employment and residency. The tentative parole plan may reflect only the unconfirmed assertions of the prisoner or it may be supported by documentation. Adequate proof of residency is a letter signed by an individual with whom the prisoner intends to reside, stating the street address and telephone number (if available). The employment requirement for parole can be satisfied by a prospective employer executing a tender of employment letter. The likelihood of a prisoner receiving a favorable recommendation for parole from the board is enhanced when the prisoner presents adequate documentation to support his or her plans for employment and residency rather than relying only on unconfirmed, self-serving oral statements. Actual release on parole is conditioned on the completion of a verified parole plan considered to be satisfactory to the Commander, USACA, and acceptable to the Division of Probation, Administrative Office of the United States Courts.[77] Federal probation officers of the Division of Probation supervise the parolee while on parole. Prior to appearing before a disposition board, the case analyst assists the prisoner in selecting a probation officer, also known as a parole advisor, located in his or her intended place of residency, from the Directory of United States Probation Officers. The prisoner may communicate with the potential parole advisor and seek additional guidance when preparing for parole.

A waiver of employment may be granted by the Commander, USACA, only after parole has been approved by the ACB.[78] Justification for an employment waiver includes alternative participation in a job training program, attendance at an education institution, or demonstration that, although employment opportunities within the parolee's new locale are nonexistent at the moment, he or she will receive assistance in conducting a search for a job. Before receiving a waiver, the prisoner is required to show an adequate means of support until eventual employment is obtained.

The disposition board procedures at USACA for parole are nearly identical to those pursued at a board where only clemency is considered. Prisoners eligible for parole are simultaneously considered for both parole and clemency by one disposition board in accordance with the previously discussed time frames for clemency. The liberal regulatory

[72] *Id.* at 122.

[73] AR 190–47, para. 12–8.

[74] USACA Policy ZX–25–84, para. 6d.

[75] Memorandum, JALS–ZA, United States Army Legal Services Agency to Senior Judges, Division/Office Chiefs, subject: Eligibility for parole (6 July 1982) [hereinafter cited as Memo, JALS–ZA, dated 6 July 1982].

[76] Memo, JALS–ZA, dated 6 July 1982.

[77] USACA Policy ZX–25–84, para. 5c.

[78] *Id.* at para. 5b(2).

procedures applicable to a proceeding for clemency alone satisfy constitutional due process requirements for parole consideration. A prisoner being considered for parole is entitled to an opportunity to be heard and, when and if parole is denied, notice as to why he or she fell short of qualifying for parole.[79] Although not constitutionally required,[80] military prisoners at USACA considered for parole are afforded by regulation and policy the opportunity to receive a personal hearing and call witnesses in their behalf, receive notice of all information, both favorable and adverse, being considered by the board, and to become familiar with applicable parole criteria and standards in advance of the disposition board.

A noninclusive list of criteria and factors set forth in USACA's parole policy to be considered by board members when reviewing a request for parole is at Appendix C.[81] As with clemency, there is no objective test for parole. Chief Justice Burger, in delivering the opinion of the United States Supreme Court in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, stated, "The decision turns on a discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done."[82] After the disposition board makes a recommendation regarding parole and clemency, the joint action is forwarded to the USACA Commander. Lacking the authority to approve parole, the Activity Commander makes an independent personal recommendation to the ACB.

Action by the ACB

Upon receipt of the action, an ACB case analyst reviews and separately evaluates the action for clemency and parole. The ACB case analyst prepares one recommendation regarding clemency disposition and another pertaining to parole consideration. The ACB evaluates the action for clemency and approves or disapproves the parole application.[83] If has been my experience that the recommendations of the disposition board, correctional facility commander, and ACB case analyst, are given equal weight before the ACB. When all three agree on disposition, seldom have I seen the ACB disapprove the recommended course of action. Where only one of the three key recommending entities favors release on parole, there exists a good possibility that the ACB will grant parole. It was my experience that in cases where offenders were convicted of non-trafficking, drug possession offenses, the ACB was more willing to grant parole despite receiving unfavorable recommendations from USACA. Prisoners denied parole are provided written notification of the reasons their requests were denied by the ACB, normally within fifteen days of the board's action.[84] Prisoners denied parole may submit an appeal to their case analyst within thirty calendar days of receipt of written notification.[85] New or additional information not previously considered may be included in the appeal. The prisoner's company, battalion, and activity commanders review the appeal, indicate whether factors raised by the prisoner are sufficient to change previous recommendations, and recommend disposition. The entire matter is then sent to the ACB for referral to the Deputy Assistant Secretary of the Army (Military Review Boards, Personnel Security and Equal Employment Opportunity Compliance and Complaints Review) for a final decision. I would estimate that at USACA, approximately one-half of the unsuccessful parole applicants pursue an appeal. Very few of these have their appeals sustained.

Approved Parole Requests

Approximately fifteen to twenty percent of the cases processed for parole at USACA are granted parole.[86] When approving parole, the ACB prescribes an "on or after" parole release date which provides some discretion as to the actual release date to the activity commander. Prior to release, the prisoner executes a written parole agreement setting forth all the specific conditions of parole. Effective February 1, 1985, per a memorandum of understanding between the Commander, USACA and the Commandant, USDB, all USACA prisoners granted parole are administratively reassigned from USACA to the USDB on the initial date of their parole.[87] Sole responsibility for post-release administration of Army parolees is now vested exclusively in the USDB. While on parole until completing the full term of his or her sentence to confinement, the parolee remains under the jurisdiction of the Division of Probation, Administrative Office of the United States Courts. In the event the parolee completes the full term of his or her sentence and appellate review remains incomplete, the individual is placed on an excess leave status pending finality of his or her sentence.

Conclusion

Most accused convicted at courts-martial receive a sentence making them eligible for regulatory clemency consideration and, in many instances, parole as well. Yet, judge advocates have traditionally remained uninformed on the intricacies inherent to these proceedings. Defense counsel are doing their clients a disservice when they summarily discount the potential for favorable clemency and parole consideration that can occur during the period of incarceration at either the USDB or USACA. When a guilty plea is being tendered and the terms of the pretrial agreement satisfy the prisoner transfer criteria to either USACA or the USDB, defense counsel should discuss opportunities for

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[79] Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 2100 (1979).

[80] *See* Franklin v. Shields, 569 F.2d 784 (4th Cir. 1977), *cert. denied*, 435 U.S. 1003 (1978).

[81] USACA Policy ZX-25-84, para. 8k(1), at 12-13.

[82] 442 U.S. at 2105.

[83] AR 190-47, para. 12-9*a*.

[84] *Id.* at para. 12-9*a*(2).

[85] USACA Policy ZX-25-84, para. 11a.

[86] USACA Parole Fact Sheet (15 April 1985).

[87] Memorandum of Understanding between the Commander, USACA and the Commandant, USDB, Subject: Post-Release Assignment/Supervision of Prisoners Released on Parole from the US Army Correctional Activity (21 Jan. 1985).

clemency and parole with their clients in advance of the trial date. The availability of these proceedings offers hope to clients beyond the trial and should moderate the despair associated with an adjudged sentence to confinement.

Appendix A

Initial Clemency and Parole Review at USACA

Sentence (CHL)	Date Eligible for Initial Clemency Review	USACA Disposition Board Convening Date	Action Due at ACB
Less than 4 months	Not Eligible	N/A	N/A
4 mo. or more but less than 8 mo.	DA – PTC + 90 days	DA – PTC + 45 days	DA – PTC + (between 75 days – 105 days)
8 mo. but less than 2 yrs.	DA – PTC + 120 days	DA – PTC + 75 days	DA – PTC + (between 105 days – 135 days)
2 yrs.	DA – PTC + 180 days	DA – PTC + 135 days	DA – PTC + (between 165 days – 195 days)

KEY:
DA = Date sentence adjudged
PTC = Number of days pretrial confinement served
CHL = Confinement at hard labor
ACB = Army Clemency Board

Appendix B

Factors for Clemency Consideration at USACA

For Clemency	Against Clemency
Youth at time of offense.	Serious nature of offense.
Situational nature of offense.	Relatively short sentence.
Clean prior military and civil record.	Prior civil and/or military offenses. (Courts-martial, Article 15's)
Length of military service to include combat time.	Effect of release upon military service.
Verified family need.	Short period of military service.
Development of occupational skills.	Short period of confinement served or remaining to be served.
Increased maturity.	Poor adjustment to confinement.
Length of confinement.	Remaining portion of sentence can best be served under installation parole supervision.
Meaning of clemency to offender.	Effect upon prisoner population.
Effect of clemency upon the prisoner population.	Meaning clemency has for the offender.
Evidence of leadership ability and commendations awarded.	Mental health recommendation that continued confinement may aid in prisoner's maturation and/or rehabilitation or continued confinement is indicated because of danger and/or defect in character as indicated by murder, rape, aggravated assault, arson, child abuse, sex offense convictions.
Mental health recommendation to the effect that clemency will aid in rehabilitation, or that prolonged confinement may prove detrimental to the prisoner's health or mental well-being.	

Appendix C

Factors for Parole Consideration at USACA

For Parole	Against Parole
This is optimum time for release.	Further confinement appears appropriate.
Good response to the institutional program at USACA.	Poor response to the institutional program at USACA.
Clean prior military and civilian record.	Prior military and/or civil criminal record.
Stable employment record.	Unstable employment record.
Social work and psychiatric recommendations to the effect that parole will aid in rehabilitation or that prolonged confinement may prove detrimental to the prisoner's health or mental well-being.	Social work or psychiatric recommendation that continued confinement may aid in the prisoner's maturation process and/or rehabilitation or continued confinement is indicated because of danger and/or defect in character as indicated by murder, rape, aggravated assault, arson, child abuse, sex offense convictions, or other matters.
First time offender	
Nature of offense(s)	
Youth at time of offense(s)	
Verified family need	Psychiatric indication of impairing personality disorder, alcoholism, drug addition, etc.
Development of occupational skills	Remaining portion of sentence can best be served under confinement conditions.
Increased maturity	
Meaning of parole to the offender	Short period of confinement served or remaining to be served.
Effect of parole upon the prisoner population at USACA.	Prisoner's failure to put forth best efforts in formulating a parole plan.
	Negative effect of release upon the military service.
	Recidivist risk to society.

Automated Legal Support in Litigation Division*

Captain Chester Paul Beach, Jr.
Military Personnel Branch, Litigation Division, OTJAG

Automation has revolutionized the conduct and management of litigation involving the Army and its officials. This article briefly describes the development of automated legal support within the Litigation Division, Office of The Judge Advocate General, and how automation has enhanced our ability to protect the Army's interests in litigation. We hope that sharing our automation experience will assist other judge advocate offices to identify operational needs that are susceptible to efficient automated solutions, and to design their own automated systems.

Automation—Phase I: The Automated Case/Fraud Tracking System

The automated legal support system in Litigation Division developed in two phases. By 1984, the existing case management system based upon index card files had proven to be an inadequate source of information about particular cases and an inefficient means of managing workload.[1] Accordingly, the first phase of automation focused on developing a database management and reporting system.

In July 1984, an IBM 5520 Administrative System was installed to support the database. It consisted of a central processing unit with twenty-nine megabytes of hard disk storage and a single diskette drive, supporting five display terminals, an IBM PC, and two printers. One terminal was installed in each of the five branches of the division located in the Pentagon.[2]

The Litigation Division developed the Automated Case/Fraud Tracking Systems (ACTS and AFTS) using the 5520's "built-in" database management program. ACTS and AFTS are simply fancy names for databases, or "files," that contain one standardized "record" for each litigation or contract fraud case.

Each record contains a series of "fields," in which specified data pertaining to the case are entered. Records can be counted or displayed from the file based upon a specified value in a particular field or a combination of fields. Printed reports can also be designed to display either a count of selected records or the information contained in specified data fields from each selected record.[3]

The ACTS/AFTS database has dramatically enhanced the case and workload information available to action attorneys and managers. Before ACTS/AFTS, management information regarding pending individual cases was maintained on index cards, and was generally limited to the style of the case, the forum and case number, and perhaps a brief summary of the complaint. ACTS/AFTS enables both the individual attorney and the branch chief to obtain lists of upcoming suspense dates for any period desired. The branch chief can monitor the workload of action attorneys with regard to the total number of cases assigned, the role of the action attorney, the status of individual cases, and the number of suspenses coming due. The division chief, in turn, can obtain branch workload data of the same quality to support internal allocations of attorneys among branches, manpower requests, and other division-level management needs.

ACTS/AFTS has also greatly reduced the time action attorneys must spend reporting developments in their cases through the division chief and The Judge Advocate General to other DA agencies. The division is required to submit a weekly report to the Army General Counsel summarizing new litigation and contract fraud actions, and The Judge Advocate General provides the Secretary of the Army with a quarterly report on developments and current status of all "significant litigation." Prior to ACTS/AFTS, action attorneys were deeply involved in drafting and editing text for these reports because they alone possessed the necessary data. With ACTS/AFTS, the action attorney is obligated only to provide initial entry data for each new case and then update the record as developments warrant. The weekly report of new cases is now prepared at division level with assistance from the branch chiefs; it consists solely of selected data fields[4] for the cases entered in the system during the preceding week. The quarterly report of significant cases, which formerly contained more than twenty pages of

*Seventh in a series of articles discussing automation. This series began in the January 1986 issue of *The Army Lawyer*.

[1] Litigation Division includes more than 30 attorneys organized in six branches: Military Personnel, Civilian Personnel, Tort, General Litigation, Special (Environmental) Litigation, and Contract Fraud. We respond to over 600 new filings annually in state and federal courts, and initiate in excess of 200 contract fraud actions. At any moment, approximately 1200 cases and 300 contract fraud actions are pending. The Special Litigation Branch, located outside the Pentagon, maintains a separate automated litigation support system devoted to the Army's affirmative claim in *United States v. Shell Oil Co.*, in which we seek to recover costs to be incurred under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601–9657, in the cleanup of hazardous wastes at Rocky Mountain Arsenal. A description of that automated system is beyond the scope of this article.

[2] The 5520 system is equipped with unique database management and word processing software; this software can be used only on the 5520, and the 5520 cannot run any other program. Database management programs like D-Base III, approved by the Information Management Office, OTJAG, for use on personal computers (PCs), have similar capabilities. Text documents and files created in the 5520 system can be transferred to the PC and converted into standard ASC II or MS-DOS files. This enables them to be transmitted to other systems through the telecommunications capability of the PC, and to be revised or archived to PC diskettes through word processing programs residing on the PC.

[3] Each record in the ACTS database contains 39 data fields, recording: branch, entry date of the record, plaintiff's name, defendant's name, court/docket number, filing date, amount sought, Army's role, action attorney, action attorney's role, Justice Department attorney, judge, type of case (3 fields), whether significant, whether delegated, local SJA office involved, opposing counsel, whether a class action, whether the class has been certified, individual defendant names, whether the Army General Counsel, DOD or the other services are interested in the case, date and description of significant events in the case (4 fields), date of next action due, case disposition, citation (if published), amount of judgment or settlement, basis and amount of attorney fees, case status, higher or lower court docket number, and the date closed. Two text fields, 500 characters each, are provided for a summary of the complaint and any remarks or notes the action attorney wishes to enter in the record. The AFTS database is similar.

[4] Case name, court, case type, summary of complaint, and opposing counsel.

single-spaced narrative, now consists of a five-to-six-page executive summary of important developments and litigation trends, supported by a list of selected data fields from cases entered as "significant."[5] The executive summary requires revision by the branch chiefs, but the entire report is otherwise prepared at division level. These periodic reporting requirements no longer distract action attorneys from their primary duties. Development of ACTS/AFTS has also enabled us to provide other special and periodic reports that would be virtually impossible without such a database.[6]

Automation—Phase II: Integrated Word Processing, Telecommunications, Legal Research, and Litigation Support

ACTS/AFTS quickly proved to be a success, and we found the hardware supporting it to be very reliable. Faced with inadequate word processing equipment and limitations on civilian and military personnel strength, we determined in February 1985 to seek to expand the 5520 system to provide word processing, telecommunications, automated legal research, and litigation support capability as well as maintenance of the ACTS/AFTS database. With strong support from The Judge Advocate General and the Information Management Office, OTJAG, we completed installation of the expanded system in November 1985.

The expansion centered on an upgrade of the central processing unit to provide 130 megabytes of hard disk storage and support more display terminals, PCs and word processors. We added thirty-three display terminals, one for each attorney, paralegal specialist, and legal clerk. We also provided one IBM PC–XT and one IBM Displaywriter for each branch. Documents can be transferred between the 5520 system and the PCs, which enables us to use telecommunications to transmit and receive text documents between our system and modem-equipped word processors and PCs located elsewhere. Documents can also be transferred between the 5520 system and the Displaywriters. This enables each branch to archive its own work product from central system storage to Displaywriter diskettes, preventing the overloading of the system storage capacity and ensuring against any possible catastrophic failure of the hard disk storage units. It also provides each branch a stand-alone word processing capability in the event of failure or unavailability of the 5520 system.

This expanded system is still being developed, but has already paid huge dividends in a number of areas. The ACTS/AFTS database is easier to maintain because it is now immediately accessible to attorneys and support personnel at their desks. Word processing is much more efficient for the same reason, because attorneys who like to type drafts of their work can do so without the need for retyping into the word processing system by a typist. Attorneys also have the option of making revisions directly. Even more importantly, the system enables operators to assemble documents from pages or sections of other documents stored on the system. It is no secret that certain areas of defensive federal litigation lend themselves to "cutting and pasting," and the automated system enables us to do this electronically. The time savings in preparing drafts of motions, pleadings, and briefs are dramatic, and will allow action attorneys to spend more time on research and on "offensive" tactics, such as taking early written discovery of plaintiffs and pressing motions for sanctions against frivolous claims and appeals. We are presently developing an electronic brief bank in each branch to maximize these advantages.

We have also begun to use the PCs to transmit draft declarations prepared under 28 U.S.C. § 1746 to field SJA offices for review, editing, and signature by declarants. This is faster than expedited mail or courier service, eliminates retyping by the recipient, and substantially enhances our ability to make a substantive response to emergency requests for injunctive relief. As more SJA offices obtain telecommunications capability, such transactions will become routine. We also now use the telecommunications ability of branch PCs to provide WESTLAW service in each branch, and can access other Army and civilian databases as well.

Finally, the database capability of both the 5520 system and the PCs enables us to provide direct automated litigation support for complex or cumbersome litigation. In one pending case, the plaintiff named 130 federal defendants in their individual capacities. We created a file containing records pertaining to each of them, which enabled us to completely automate the production of individual notice letters, requests for federal representation, and scope of employment statements.[7] In class action litigation involving allegations of racial discrimination in hiring and promotions at an installation, several hundred individual claimants have filed claims involving hundreds of job announcements. We have created a database at the installation, accessible through telecommunications, that enables us to track multiple claims by each claimant, and establish "track records" for the various selecting officials. This information is critical in ensuring that no claimant successfully attempts to establish entitlement to more than one position, and in preparing selecting officials for trial. Although contractor litigation support will still be needed in exceptional circumstances, like *United States v. Shell Oil Co.*, our system will be more than adequate for the vast majority of cases.

Conclusion

Automation has already improved the quality of life in the Litigation Division and the quality of our work product. Command emphasis and a willingness to invest adequate personnel resources are indispensable to successfully implementing a major automation initiative.[8] We

[5] This printout contains the same data as the weekly report of new cases, except that opposing counsel data is deleted and the four significant event data fields are added.

[6] Examples include: a monthly report on the status of all equal opportunity/equal employment opportunity litigation; lists of medical malpractice litigation by hospital, medical specialty, and plaintiff's attorney; and reports on litigation relating to particular installations provided as input to briefing books for installation visits by JAGC general officers and other DA officials.

[7] *See* Dep't of Army, Reg. No. 27–40, Legal Services-Litigation, para. 3–2 (4 Dec. 1985).

[8] *See also* Letter, HQDA, DAJA–IM, 11 Apr 86, subject: JAGC Automation Standards, *reprinted in* The Army Lawyer, June 1986, at 3.

have found the return on that investment bountiful, and look forward to using telecommunications and automated support increasingly in the future to enhance participation by attorneys in offices throughout the Corps in defending the Army's interests in litigation.

USALSA Report

United States Army Legal Services Agency

Table of Contents

The Sentencing Argument: A Search for the Fountain of Truth

Major James B. Thwing
Trial Counsel Assistance Program

> The unique nature of military service is the key to the character of the discipline of its several forces. In the United States, we have fallen into the sloppy habit of saying that a soldier, sailor, airman, or coastguardsman is only an American civilian in disguise. The corollary to this quaint notion is that all military organization is best run according to the principles of business management. Both of these ideas are to be disputed on two grounds: they are contrary to truth and they sell human nature short.[1]

Servicemen and women, whether they are members of the Army, Navy, Marines, Air Force, or Coast Guard, have always needed and will always need to believe that the ideals of military service are grounded on the truth, and that there is therefore worth in their common purpose in defending this nation. The ideals of military service—duty, honor, loyalty, and fidelity—do not usher forth from contemporary vogue, but rather from a tradition of learned truths about these ideals that teach that all military service is a matter of devotion to selflessness rather than selfishness. Military justice has a paramount role in the military because, in depicting that all offenses against the good order and conduct of the military represent the converse of this simple truth, it demonstrates the unambiguous and unchanging value of the ideals of military service.

In carrying out this role, the military justice system is vested with the unquestioned responsibility of assuring the greatest amount of protection of the individual rights of the service member within the context of the needs of military service. Whenever military law has operated in such a way as to disturb this delicate balance, it has undergone harsh criticism. The harshest criticism has developed when military law has operated to the extreme prejudice of individual rights. For nearly a decade following the Vietnam War, because of harsh criticism directed at the military justice system during that era, military law developed in a way that nearly sanctified the individual rights of service members to the exclusion of the needs of military service to the extent that the values, traditions, and ideals of military service were largely overlooked, blurring the marked difference between selflessness and selfishness. Since 1980, the growth and development of military law has gradually operated to restore the paramount role of the military justice system and the balance between the individual rights of soldiers and the needs of military service. Perhaps the final step in this process is the recent growth and development of military law concerning the sentencing phase of military trials.

The recent changes in the sentencing process brought about the 1980 Court of Military Appeals decision in *United States v. Lania,*[2] which provided that military prosecutors could argue general deterrence as a factor for consideration in the sentencing of an accused, and the court's 1983 decision in *United States v. Vickers,*[3] which provided that military prosecutors could introduce evidence of aggravation concerning the offenses for which the accused was found guilty, stand in stark contrast to such cases as the 1976 Court of Military Appeals decision in *United States v. Mosely,*[4] which held that it was error for military prosecutors to argue general deterrence, and opinions by the various courts of military review that construed paragraph 75(b) of the 1969 Manual for Courts-Martial[5] as a proscription against introducing evidence of aggravation in a contested court-martial.[6] Also establishing a clear departure from this past precedent is the 1984 Manual for Courts-Martial, which makes clear that the prosecutor's function during the sentencing phase of the trial includes the right to present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty,[7] to present evidence concerning the accused's rehabilitative potential,[8] and to recommend "a specific lawful sentence and . . . also refer to generally accepted sentencing philosophies, including . . . social retribution."[9] As a consequence of these changes, military prosecutors now stand in a unique and privileged position; one most certainly not enjoyed by their predecessors. For this reason, the opportunity to fully and actively participate in the sentencing process provides the

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[1] *The Armed Forces Officer,* DOD GEN–36, 22 July 1975, at 126.

[2] 9 M.J. 100 (C.M.A. 1980).

[3] 13 M.J. 403 (C.M.A. 1982).

[4] 1 M.J. 350 (C.M.A. 1976).

[5] Para. 75(b)(3), Manual for Courts-Martial, United States, 1969 (Rev. ed.), provided that: "If a finding of guilty of an offense is based upon a plea of guilty and available and admissible evidence as to any aggravating circumstances was not introduced before the findings, the prosecution may introduce that evidence after the findings are announced."

[6] United States v. Schreck, 10 M.J. 563 (A.F.C.M.R. 1980); United States v. White, 4 M.J. 628 (A.F.C.M.R. 1977); United States v. Peace, 49 C.M.R. 172 (A.C.M.R. 1974); United States v. Allen, 21 C.M.R. 609 (C.G.C.B.R. 1956).

[7] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(b)(4) [hereinafter cited as R.C.M.].

[8] R.C.M. 1001(b)(5).

[9] R.C.M. 1001(g).

military prosecutor with the vital role and duty of advocating the interests of the military commonweal and the ideals of military service.

The purpose of this article is to provide military prosecutors with a comprehensive framework for planning and making effective sentencing arguments, whether before a military judge alone or court members, and to encourage commanders to fill courtrooms with their soldiers to observe the proceedings in order to advance the paramount purpose of military justice.

Understanding Military Service

It is practically impossible for a military prosecutor to make an effective sentencing argument without an understanding of the intricacies of the service he or she represents. Any attorney representing a large company or institution is expected to understand the company or institution from top to bottom, and no less should be required of the military prosecutor. Yet, this is one dimension of trial work which is often lacking, especially for the military prosecutor without prior military experience. A military prosecutor without this knowledge is often at a loss in understanding the true seriousness and impact of an offense. Every military prosecutor should have a basic understanding of what makes good soldiers, good units, and successful combat actions. As representatives of particular jurisdictions within a military organization, a military prosecutor should also understand the combat mission and peacetime goals of the units of the jurisdiction and how these units train to prepare to fulfill their combat mission and peacetime goals. This basic knowledge will allow the military prosecutor a fuller appreciation of the impact and seriousness of an offense committed by a soldier upon the welfare of other soldiers, upon the unit, and upon the service they represent. To gain this kind of understanding, military prosecutors should attend command information briefings, be acquainted with military terminology and current developments, visit and observe units during training, and study available basic literature which discusses military history, military values, and current developments. Such basic sources readily available to Army prosecutors include *The Armed Forces Officer,*[10] *Army* magazine,[11] and Field Manual 22–100.[12] It is essential to remember that today's soldiers if called into combat will be required to engage in the fiercest, most technologically complex form of warfare in the history of the world. In order to fulfill this function, today's soldiers must be thoroughly trained. Such training requires firm discipline that can only be attained through an unselfish and obedient adherence to the ideals of military service. When examining a particular offense committed by a soldier through this perspective and placing it into context with a fuller understanding of military service, the military prosecutor has taken the first step towards preparation of an effective and purposeful sentencing argument.

Planning the Sentencing Argument

Experienced military judges frequently comment that they would rather not have the prosecutor advance a sentencing argument in a trial before them alone. Much of the underlying basis for this observation is that these same trial judges understand that prosecutors frequently arrive at a sentencing argument for the first time following the presentation of evidence during sentencing and anticipate that the prosecutor will advance nothing more than has been adduced during the trial. Also, because many trials are based on identical charges, prosecutors who do not plan their sentencing arguments frequently rely on past arguments advanced before the same trial judge or court panel, presaging the notion that military justice is really a matter of routine. Ultimately, this form of trial effort renders military justice meaningless.

As with any aspect of trial work, the formulation of an effective sentencing argument begins well in advance of the trial. A military prosecutor must evaluate a particular act of misconduct from two different vantage points. First, the prosecutor must analyze the context of the offense in terms of its nature, its impact upon the victim, its impact upon the unit to which the accused is assigned, and its impact upon the service to which the accused belongs. Second, the prosecutor must understand the underlying considerations of the sentence itself, that is, the possible punishments to which the accused can be exposed to, such as reduction in rank, forfeiture of pay, confinement, and discharge from the service, and how these punishments may serve the ends of good order and discipline, the needs of the accused, and the welfare of society. By evaluating an offense in this manner, the prosecutor is enabled in the sentencing argument to relate the evidence gained from this approach to the central issue in the sentencing process: What is the "legal, appropriate, and adequate" sentence?[13] A matrix for understanding this process is set forth at the conclusion of this article at appendices A and B.

Context of the Offense

Analysis of the context of an offense involves first viewing the nature of the offense itself. Much information is conveyed in a criminal charge which is of distinct value in the formulation of a sentencing argument. Those factors most important about a charge, such as whether it involves an intentional, willful, or premeditated act, deserve full attention by the military prosecutor because they ultimately provide the prosecutor with the ability to focus on the accused's thinking at the time an offense involving these elements is committed. It must be remembered that a prosecutor is entitled to argue *any* reasonable inference which flows from these elements as shown by the evidence.[14] For example, a larceny is an intentional offense. The element of intent, when proven, allows the prosecutor to argue that the accused did not merely act on impulse, or was compelled to act by some external force, but rather that he or she

[10] DOD GEN–36, 22 July 1975.

[11] *Army* Magazine is monthly publication of the Association of the United States Army and is widely circulated within the Army. Its most valuable edition is the October "Green Book." In this edition, the major army commanders set forth their goals for the following year and establish what problems need to be overcome. This information can provide a wealth of valuable information for an Army prosecutor.

[12] Dep't of Army, Field Manual 22–100, Military Leadership (31 Oct. 1983).

[13] United States v. Combs, 20 M.J. 441, 442 (C.M.A. 1985).

[14] United States v. Hutchinson, 15 M.J. 1056 (N.M.C.M.R. 1983).

planned to do an act which had as its purpose a criminal goal. Such thinking, it is arguable, involves weighing *all* the circumstances surrounding the plan and the goal. Such circumstances could include the possibility of being caught, the effects of being caught, and the potential effects to be suffered by the victim. It is arguable that the accused, even in a moment of time, understood the ramifications of his or her actions and, despite these, purposely chose to obtain the criminal goal he or she planned. Willfulness and, of course, premeditation, involve the identical reasoning process. These are factors that need to be forcefully advanced in argument to a trial judge or court members. This is not to suggest that similar criminal behavior is not present in general intent crimes. For example, in cases involving criminal use, possession, and distribution of drugs, while it is clear that there is no specific intent necessary to be proved, it is also clear that a military accused embarked upon such criminal activity is involved in a thinking process that goes beyond mere happenstance. Prosecutors are clearly allowed to argue facts of contemporary history, even though evidence of such facts has not been formally admitted. Further permissible are comments on common knowledge within the community.[15] Consequently, an accused who embarks upon criminal activity involving drugs is involved in pursuing a form of criminal activity that has been, is, and always will be inimical to good order and discipline in the military. The seriousness of such offenses is thus made obvious, and the prosecutor need not tread on the clearly unlawful argument that illicit drug activity is contrary to a particular service's policy.[16] Instead, the implication voiced by the prosecution in highlighting the criminal choice made by the accused is that he or she manifests a near total disregard of the binding spirit of fidelity to which a soldier, sailor, marine, airman, or coastguardsman is expected by his or her service to manifest.

The next consideration a prosecutor must examine is the circumstances under which the offense was committed. For instance, was the offense committed during the cover of darkness?; was it committed in the barracks?; was it committed in an adjacent civilian community exposing the service or the installation to disrepute?; or was it committed in the company of other soldiers?

Each of these circumstances brings into focus facets of military life that are essential to the welfare of soldiers, their units, and the general military community. For example, a crime committed under the cover of darkness exacerbates the crime because it shows that the accused clearly understood the wrongfulness of the act. It should clearly be advanced during the sentencing argument that the accused used the darkness as a haven for his or her criminal goal, taking advantage of a time and hour when other soldiers rightfully assume a sense of safety and security from the wrongs of others. Another example is a crime committed in the barracks. Such a crime unquestionably interrupts the security and harmony of barracks life. For the soldiers who live in the barracks, a barracks larceny decreases the confidence they should have that their living areas and possessions are protected. Under such circumstances, a military prosecutor should confer with the accused's unit commander and determine what effects a crime in the barracks has upon the soldiers who reside in the barracks. A personal inspection should be made by the prosecutor to determine whether the soldiers have responded to a crime in the barracks in such a way as to manifest a lack of trust or harmony in barracks life. For example, following a barracks larceny, soldiers may feel compelled to place their possessions and their living areas under lock and key *even while they are present in the barracks.* Such extra security precautions often evidence a lack of trust among members of a unit. This divisive force should be brought to the attention of the sentencing authority during the sentencing argument.

A military prosecutor should next consider the nature of the offense and the circumstances under which it was committed within the context of its impact on the victim. In so doing, the prosecutor should consider the existence of physical, as well as psychological, injuries. Too often, prosecutors relying on photographs or the physical presence of scars limit their argument on sentencing to these visual injuries. This is important evidence. Yet, beyond the observable injuries are injuries to the victim that are much deeper. These "invisible" injuries are as important towards formulating an effective sentencing argument as are the visible injuries. For instance, in considering the death of the victim, a prosecutor should point out what death actually means. It is an end to even the small miracles that humans often take for granted: the enjoyment of a sunrise or a sunset; the smell of the air on a spring day; the physical exhilaration of a long walk or a jog in the park; the laughter of children; the consolation of a wife after a hard day's effort. Physical scars not only manifest the violence visited on the victim, but also the lifetime reminder of violence and the physical marring of one's appearance. A child who has been sexually abused may bear no physical scars—but the mental picture of this aberration will live in the child forever. So, too, will the impairment of natural relationships between the child and his or her parents, as well as other relationships as the child grows into adulthood. Consequently, a prosecutor must devote an appropriate amount of effort before trial in assessing the real as well as the inferential damage suffered by the victim in formulating a sentencing argument to include any physical and psychological injury and the effects of both in terms of predictable non-observable consequences such as the victim's loss of virginity, long term physical problems, fear, distrust, hate, and likely impairment of natural and institutional relationships.

A final consideration of the context of an offense should involve the use of the military prosecutor's understanding of the intricacies of military service including its history and values in placing before the sentencing authority the impact of the offense on the accused's or victim's unit and upon the service represented by the accused. Within this perspective, the prosecutor can relate the impact of an offense to its actual or probable effect upon the unit's mission, morale and *esprit de corps.* Likewise, the prosecutor can determine whether an offense detracts from the Army's goal of combat readiness as well as the values and traditions of military service. For example, a barracks larceny impacts upon the victim in terms of decreasing the victim's trust in other soldiers. This element of distrust will unquestionably effect the harmony and the general morale of the unit. A

[15] United States v. Campbell, 8 M.J. 848 (C.G.C.M.R. 1980).

[16] United States v. Allen, 43 C.M.R. 157 (1971).

barracks larceny causes other soldiers to be wary of their fellow soldiers. This, in turn, directly effects how such a unit may be able to work and train together and operate under combat conditions, which requires unquestioned mutual trust between fellow soldiers. Frequently, it is argued that such crimes as illicit drug use are "victimless." Such arguments belie the obvious effects upon units where, because of the commission of such "victimless" crimes, entire units may be exposed to frequent inspections for the presence of drugs. Such inspections, while necessary to ensure the proper health, welfare, and combat worthiness of the soldiers, are, after all, evidence of a generalized lack of faith by higher authority that soldiers are living according to the clear standards set before them. Good soldiers know this and resent such intrusions. They are the innocent "victims" of an allegedly "victimless" crime.

When a military prosecutor undertakes the time to carefully analyze an offense and fully understands its context, he or she is next prepared to examine how the context of the offense applies to the proper considerations underlying a legal, appropriate, and adequate sentence.

Sentencing Considerations

The Military Judge's Benchbook sets forth the following concluding sentencing instructions which, in part, provide that "[Y]ou should select a sentence which best serves the ends of good order and discipline in the military, the needs of this accused, and the welfare of society." [17] These instructions form the basic guidelines which a military prosecutor may use in applying the context of the offense to the four factors (rank, pay, confinement, and discharge) inherent in the sentence of an accused. Such an approach comprehends a three-step analysis.

The first part of the analysis requires a full consideration of the basic truths embraced in military rank and military pay, as well as a firm understanding of the meaning of confinement at hard labor and basis of a discharge from the service. The second part of the analysis requires the prosecutor to apply what he or she has learned about the separate facets of the accused's offense through an analysis of its context in establishing a recommendation for an appropriate sentence as to each of these sentencing factors. The final step of the analysis requires the prosecutor to analyze how the recommended punishment of the accused will best serve the sentencing considerations outlined in the military judge's concluding instructions on the sentence.

As an example, consider a case in which a staff sergeant has been charged with the nighttime theft of $25.00 from the barracks room of one of his enlisted subordinates. In viewing the sentencing considerations in this example, the military prosecutor should begin by analyzing the issue of reduction in rank. The first consideration in this step would be a full analysis of what underlies the meaning of staff sergeant. Excellent sources for this understanding are the accused's oath of enlistment and the orders promoting the accused to staff sergeant. Both the oath of enlistment and promotion orders speak of the correlative rights and duties expected of such a soldier. The rights, duties, and appellation of rank should be argued to the fact finder. The second consideration would be to apply what has been examined in terms of the aggravating and circumstantial factors of the offense. In other words, that larceny is an offense of specific intent, that it was committed under the cover of darkness, and in a place recognized in military life as a sanctuary. This affords the prosecutor an opportunity to ask and to answer a seemingly limitless number of questions that penetrate the core of military service: did the accused understand the rightful expectations that the victim, other subordinates, his peers, and his superiors would have in the accused by virtue of his rank? When the accused committed the criminal acts charged, did he live up to the expectations and appellations of his rank? Does the specific intent aspect of the crime indicate that the accused considered the trust conveyed in his rank, the impact upon the victim and subordinates and superiors in terms of the welfare, morale and *esprit de corps* of the unit if he were discovered to be a thief in the night, and the possible consequences of this discovery upon the combat readiness of the unit? It is clearly arguable that the accused did and disregarded these effects in concluding that his criminal desires were more important. How does such thinking auger for this staff sergeant's loyalty, fidelity, reliability, and endurance under conditions of combat when such ideals are essential, especially in performing a mission which requires unselfish dedication to the interests of the unit including the accused's subordinates, peers, and superiors? Is such thinking so errant, so selfish, as to rightfully punish him by removing all indicia of his rank?

This final question brings into focus the third step necessary towards arguing an appropriate sentence, that of demonstrating how a just punishment for each specific sentencing factor serves the three basic sentencing considerations outlined in the concluding sentencing instructions. For instance, with regard to the above example, the prosecutor in answering the final question posed above would be availed of the opportunity of placing before the sentencing authority the essential ideals of military service underlying each sentencing factor and arguing how punishment as to each would serve the ends of good order and discipline, the needs of the accused, and the welfare of society. Accordingly, the prosecutor could argue that the rank of staff sergeant held out to the accused's subordinates the promise and privileges of authority and leadership, to his peers, the fulfillment of responsibility and trust, to his superiors, the enjoyment of mutual respect and reliability, and to the service the hope of fidelity, obedience, and perseverance. Here the prosecutor can fairly define for the sentencing authority what each of these ideals mean in their military context. Such ideals should not be left to the imagination of the sentencing authority because, against the background of the probable evidence in mitigation and extenuation that the accused has been an outstanding soldier, that he made a simple "mistake," that he only took $25.00, that he is, after all, "human" and capable, as are all good people, of succumbing to temptation, such values may be made to seem merely transitory. For this reason, the military prosecutor must define for the sentencing authority each of the values and ideals at stake in a criminal case and make clear that an essential goal in adjudging an appropriate punishment is to confirm their vital importance, not only on behalf of the accused but also to the dutiful soldiers who may learn of the offense and to society that rightfully expects soldiers to embrace them until the moment they are

[17] Dep't of Army, Pam. No. 27-9, Military Judges' Benchbook (1 May 1982) (15 Feb. 1985), para. 2-39.

no longer soldiers. Other simple truths underlie each of the other sentencing factors.

Forfeiture of pay connotes the truths of receiving pay that are often forgotten or taken for granted. Soldiers are simply not expected to become materially enriched in military service. The life of a soldier is made up of spartan living and sacrifice. Soldiers must therefore learn to be wise in utilizing their pay and benefits. This wisdom teaches thrift and the appreciation for the fruits of one's efforts. Too often during the sentencing phase of the trial, these truths are simply laid aside. More often, the soldier is made to appear as though, rather than enjoying the security offered in military life, he is a victim of a system whose object is to deprive him of "the good life." Military prosecutors should bring forth these simple truths of military life in arguing for the punishment of forfeiture of pay because it confirms for the accused as well as well as the dutiful soldier realities of military life both may certainly have taken for granted or completely forgotten. In this regard, it is nearly always essential for the prosecutor to have the accused's finance records present in court. Frequently, accuseds are allowed to characterize their life as impoverished because of various allotments and other extractions from their pay. In reality, the accused has often chosen to impoverish himself through extravagant spending. Many times, this fact alone is the contributing factor in the commission of an offense. The presence of the accused's finance records in court allows the prosecutor to make this fact clear.

Confinement at hard labor carries with it the value of freedom. No other punishment is as instructive as confinement because it vividly provides for the accused the precious value of freedom. But freedom imposes responsibility—responsibility to one's self and responsibility towards others. A military prosecutor should be prepared to make this truth clear to court members. A soldier's freedom consists in acting for the will of his service. He is free to make choices that benefit himself so long as those choices are consistent with his military service. In contrast to civilian life, a soldier is not left in the dark as to what the responsibilities of his freedom are. There are no gray areas. For example, a civilian worker may have duty requirements, he or she may work for an institution with a rank and file similar to military service, and he or she may even wear a uniform. But, there are two things clear about his or her work which contrast the civilian with a soldier. He does not take an oath of allegiance to his or her job and he or she does not enjoy the status of being a representative of his or her company whether he or she is on or off the job. Simply put, a civilian employee enjoys a different kind of freedom than a soldier. He or she may commit acts such as illicitly using drugs, making false statements, stealing, all without compromising his company. A soldier cannot commit such offenses without compromising his or her service. Consequently, while a soldier certainly has freedom, it is not unbridled. Yet, while the soldier is compelled to act responsibly, he or she enjoys the esteem and the presumptions of his or her service earned by others who have served courageously, faithfully, and honorably that has no counterpart. Too often, this fact is laid aside and instead military trials more frequently express the accused's service or duty in terms such as he or she has done a good *job* or is a good worker. Such evidence is more often mistaken as evidence that the accused is dutiful. Performing well on the job is merely one aspect of being dutiful. A military prosecutor should make this manifestly clear during a sentencing argument. If a soldier has so clearly abused his or her freedom as to bring self, the unit, and the service into a position of compromise through the abuse of the responsibilities of his or her freedom, then a prosecutor should be prepared to place before the sentencing authority the value of the punishment of confinement. That is, that confinement will tend to restore for the accused, the dutiful, and society, the values and ideals underscored in the concept of freedom.

As a form of punishment, a punitive discharge embraces the total essence of military service. In viewing a soldier who has embarked upon criminal activity serious enough to warrant an ignominious end to his or her military service, a military prosecutor must understand and be fully able to set forth before the sentencing authority the answer to how a good soldier claims the right to the appellation of honorable service. Such an answer will convey why a punitive discharge is appropriate for an accused. A good soldier earns the right to have his or her service characterized as honorable because of faithful, honest service. Such service is earned at the expense of persevering through the bad times and bad days and of confronting and overcoming criminal temptations when to do the opposite would at least seem "fair" or plainly "human." Honorable service has been earned by those who have given their life for their country as well as those who have not; by those who have been heroic and those who have not. But each of these qualities has one salutary effect—the placement of duty before self. This effect is exactly the opposite of a criminal act. This is the central point which a military prosecutor needs to bring to the fore during the sentencing argument and particularly in a case where part of the punishment includes a punitive discharge.

By planning the sentencing argument around these two avenues of approach, a military prosecutor not only avails the sentencing authority of basis for an appropriate sentence but also obtains a full understanding of his or her case and an opportunity to preview the available evidence and to determine whether additional evidence is necessary to provide form to the planned argument. Such an idealistic form of argument exposes the prosecutor to the counter-argument that no soldier can be expected to perfectly manifest every ideal. In a sense this is true. Yet, the simple truth is that every soldier whether he or she is an officer or enlisted is gauged against these ideals. The principle is that if a soldier aspires to embrace them, then at the most critical points in his or her service, he or she will *perfectly* manifest them in a way that will not only benefit the service, but also himself or herself, fellow soldiers, and the unit. One such clear example of this principle is an inscription outside the VII Corps Trial Center, Wallace Barracks, Stuttgart, Germany, that relates to PFC Wallace. The inscription relates the story of PFC Wallace, who died in combat during World War II by falling on an anti-personnel land mine. The mine was of the type that activated after being stepped on. Its effect, once set off, was to propel from under the ground and to rise to the elevation of three to four feet and explode, spraying fragments of metal in all directions. While on patrol with several members of his unit, PFC Wallace stepped on the land mine and, knowing that it could potentially kill him as well as his fellow soldiers, and further knowing that he could avoid injury but that others would certainly be killed if he jumped away from the mine,

fell on the mine and was instantly killed. This truly unselfish act earned PFC Wallace the Congressional Medal of Honor. But, more than that, it established a pattern of honor, courage, and devotion which to a very great extent is born from the basic training and precepts of military service. Such aspirational traits require constant reaffirmation for the dutiful as well as the undutiful. A court-martial is an appropriate forum for that purpose.

Formulating the Argument

The organization of a sentencing argument is as important to the argument as its content. Frequently, military judges remark that while prosecutors arguments are not lacking in content, they are lacking in direction. An effective sentencing argument should be organized and delivered in the following order: a recommendation for a specific appropriate sentence; a justification for the recommendation; and a summation of the crucial points of the case. Length of the argument should be taken into consideration in terms of the importance of what must be set forth before the sentencing authority without unnecessary dramatization, gloss, or hyperbole. Even so, a prosecutor who evokes the simple basic truths of a criminal case in a manner that is relevant to the legal, appropriate, adequate bases for a sentence need not be concerned with the length of the argument so long as it is logically organized and effective.

Recommendation for Specific Sentence

Rule for Court-Martial 1001(g) specifically provides that a military prosecutor may recommend a specific lawful sentence. While the prosecutor may not speak for the convening authority in this regard, military law now recognizes that a prosecutor can use his or her judgment and experience after assessing all the evidence at trial in recommending a specific sentence. This should be accomplished at the beginning of the sentencing argument as it will be the aim of the prosecutor to justify this recommendation. Thus, the inception of the sentencing argument could be stylized as follows: "Members of the court [Your honor], it is the position of the government that the just, adequate, and appropriate punishment for the crime(s) you have found the accused guilty of is. . . ." Military prosecutors should note that they are not constrained by any ceiling placed upon the punishment by a pretrial agreement. In the case of *United States v. Rich,*[18] the Army Court of Military Review held that it regarded a prosecutor's argument for an appropriate sentence which happened to exceed the limit agreed to by the convening authority in negotiations for a plea of guilty as "being permissible."[19]

Justification of the Sentence Recommendation

The justification for the sentence recommendation should incorporate the prosecutor's planned analysis of the accused's offenses as discussed above. This is, of course, the keystone to the sentencing argument. Like the sentencing argument in total, the justification portion should be organized, coherent, and logical presenting the total context of the offense(s) and applying them to the sentencing considerations. Matching this latter portion of the argument to the military judge's concluding instructions to the members of the court will assist the prosecutor in effectively overcoming the blurring effect the defense argument and other instructions by the military judge frequently have upon a prosecutor's sentencing argument. It is equally important for the prosecutor to remember that a sentencing argument is most effective when it sets forth the simple basic truths of the accused's criminal acts and establishes a truthful foundation for a realistic sentence. Such an argument should never, nor needs to, anticipate the defense argument or requires overreaching on the part of the prosecutor. The transition from the sentence recommendation to the justification for the recommendation may assume the following stylized form: "Members of the court [Your honor], the justification for this recommended sentence lies in the basic simple truths underlying the context of the accused's offenses and in the considerations you must make in arriving at an appropriate sentence. Let us first examine the offense(s). . . . Next, let us examine the considerations you must make in arriving at the accused's sentence. . . ."

The Summation

The summation of the sentencing argument should present a brief analysis of the crucial aspect of the case; uniting the context of the offense and the sentencing considerations in a manner which affords the sentencing authority a total understanding of the thrust of the case. A graphic illustration of this suggestion is found in the sentencing argument made by Captain Carl M. Wagner, trial counsel, VII Corps, Stuttgart, Germany, in the case of *United States v. Derr.*[20] In *Derr,* the accused was charged with five specifications of forcible sodomy and four specifications of indecent acts; all offenses were committed against the accused's four-year-old daughter. After detailing the specific and agonizing acts underlying the offenses and demonstrating their impact upon the victim, Captain Wagner closed his argument by centering on the crux of the case. In so doing, he caused the court members to view the stark realities of the case by first causing them to focus on the accused as he was at the time of the offenses, not as he appeared in court:

> Look at the accused in the court today. He looks good sitting there in his uniform, his E–7 stripes and all his awards and decorations on. He probably didn't look that good with his pants pulled down shoving his penis into little Faith [the accused's daughter]. . . .

Captain Wagner then presented the crucial point of the case:

> What position in our society does a father hold? In a child's small world, a father is everything. A father is a symbol of fairness. *A father is a symbol of justice.* A father is one who protects small children from the horrors and harsh realities of the world. But . . . not for little Faith. This father was one of those horrors. A child trusts a father. A child needs time to be a child, to play, to have fun, to do the things that little kids do. This man stole Faith's childhood. Her years of innocence are gone forever. Children rightly trust people. They believe that they will be protected and cared for.

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[18] 12 M.J. 661 (A.C.M.R. 1981).

[19] *Id.* at 662.

[20] CM 446863, affirmed by the Army Court of Military Review 12 July 1985.

How did this accused repay that trust. He shoved his penis into little Faith's anus . . . and . . . smothered her with a pillow.[21]

This is a statement of simple truth. It is neither lengthy, aggrandized, nor exaggerated. As the court members retired to deliberate and vote upon the sentence, surely they must have recalled the very simple truth that for a child, a father *is* a symbol of justice—a view that not only held true for the victim but also for the accused's family, his unit, and the Army. Ultimately, the court members sentenced the accused to be reduced to the rank of Private E–1, to forfeiture of all pay and allowances, to be discharged with a dishonorable discharge, and to be confined at hard labor for 100 years.

The summation may also be used to dispense with any themes that tend to blur the essential nature of the case, such as its seeming "routine" nature. Cases involving illicit drug activity are such examples. Military judges, law enforcement personnel, prosecutors, commanders, and soldiers often think because illicit drug activity in the military is common that such cases are routine. Such thinking has done much in the way of making the sentencing process seem routine—especially for military judges. A prosecutor should take time during the summation of the sentencing argument to displace this potential. One clear approach to achieve this result is to address a problematical theme head on and show its effect. The following is an example:

We arrive at this point in the trial knowing that a case involving drugs, especially in the military today, has achieved a certain routine value. The facts seem predictable, even the sentence seems predictable. Yet, have we been dulled by the same drugs that for years have crept into all parts of our society—our schools, our business institutions, even our cherished sports? Is it now so much a part of our life that we must assume that the possession, use, and sale of drugs is normal? Is this simply another drug case that we can dispense with and toddle off to the club in time for a beer? Surely, in the Army we cannot afford to listen to such a sad commentary on our life, and then like baseball fans who find out their heroes are drug users say . . . even so, let the games go on! The accused is not singly responsible for this aura of moral complacency and ambivalence, but he is part of it. It is as clear today as it was generations before that the simple truth is that illicit drug activity saps the vitality of any society and in the military such activity is destructive of the very values which have carried this nation through the most critical moments of our history. Therefore, let us now evaluate the final crucial point of this case. . . .

Ultimately, a sentencing argument that has been planned in advance of trial, is formulated and presented in an organized and logical manner, and is based upon the simple truths derived from the evidence of the case and the foundations of military service, serves the best interests of justice by providing the sentencing authority with a sound basis for an appropriate sentence. Such an approach obviates the traps unwary and unprepared prosecutors set for themselves when they rely on or exploit the passions, emotions, or biases of the sentencing authority.[22]

Conclusion

"Say to the righteous that it shall be well with them, for they shall eat the fruit of their doings." Isaiah 3:10

Captain Charles E. Lance, in his article entitled *A Criminal Punitive Discharge—An Effective Punishment?*,[23] provides the following captivating account, drawn from Lieutenant Colonel S. V. Benet's *Treatise On Military Law and the Practice of Courts-Martial*,[24] the execution of the punishment of a discharge with ignominy upon a soldier in 1876:

At Adobe Wells, Texas in 1876, on a typically hot dry day the garrison troops at this tiny western cavalry post are assembled to witness what any man "with honor" prays will never happen to him. The men of the troop stand rigid in a solemn formation while a "dirt devil" whirls dust on their freshly polished boots and the noonday sun continues to beat down upon them. Sweat beads begin to pour out from underneath their wide brimmed hats before the post commander briskly steps into the center of their vision and calls for attention to orders.

The accused, under guard, is marched into his place of infamy as all eyes center upon him and then upon the Colonel as his words cut through the hush. Private Doake has been found guilty by a court-martial and has been sentenced to be discharged from the Army with a Dishonorable Discharge. Everyone at the formation knows it but nonetheless strains to capture every word as the Colonel reads the general court-martial order which recapitulates the crimes of the accused and his ignominious conduct.

As the commander virtually spits out the words "dishonorable discharge" the Sergeant Major steps forward and strips off Doake's buttons, facings, ribbons, and all other distinctions and identifying insignia of his now shabby uniform. His coat is taken from him and is torn in two and deposited at his feet. An aide brings Doake's enlistment and it is torn into pieces in

[21] Record at 61–68 (emphasis added).

[22] To illustrate, the following arguments of trial counsel have been condemned by the Court of Military Appeals as exceeding the bounds of fair comment: an appeal to the court to predicate its verdict upon the probable effect of its action on relations between the military and the civilian community (United States v. Mamaluy, 10 C.M.A. 102, 27 C.M.R. 176 (1959); an appeal to the court members to equate a victim to a brother (United States v. Boberg, 17 C.M.A. 401, 38 C.M.R. 199 (1968); urging court members to consider the victim to be their child (United States v. Wood, 18 C.M.A. 291, 40 C.M.R. 3 (1969); a threat that the court members would be risking contempt or ostracism if they rejected his appeal for a severe sentence (*Id.*); suggesting that court members picture themselves as a rape victim's husband who was held in a helpless position while three men raped his wife (United States v. Shamberger, 1 M.J. 377 (C.M.A. 1976); likening defense witness' tactics to those practiced by Adolph Hitler (United States v. Nelson, 1 M.J. 235 (C.M.A. 1975). *See also* Hance v. Zant, 696 F.2d 940 (11th Cir. 1983), where the prosecutor manifested a belief that the accused was an "animal" and that he would sleep better at night if the accused were given the death penalty—among other things.

[23] 79 Mil. L. Rev. 1 (1978).

[24] 5th Edition, 1866.

his face and is left to be blown to the ground and trampled into the dirt. The Sergeant Major then grasps Doake's sword in both hands, raises it high above his head for all to see, and in one swift deliberate motion breaks it over Doake's head.

The now humbled renegade is marched past his former comrades-in-arms as the drums beat out the "rogues march." The little procession heads inevitably toward the main gate where representatives of his troop, unable to conceal their contempt, physically eject him from the stockade. The Colonel then steps forward and orders Doake never to return to the post upon penalty of death and issues a somber order to those assembled to have no future contact with him upon fear of court-martial.

Such a punishment, now seemingly uncivilized and intolerable under our system of justice, must have stood as strong testimony in the minds of both the accused and those soldiers who stood witness to the punishment of the grave importance and dignity of the indicia of the accused's military service: his military insignia, his uniform, the buttons of his uniform, his rank, and the enlistment papers which represented the mutual bond between himself and his service. Certainly, those soldiers who stood witness to such a punishment appreciated the fact that they were still soldiers. As much as this was a punishment for the accused, it was an indelible reminder to the dutiful of the sanctity of their profession.

Some would say, even today, that we should return to this form of punishment. It is not necessary to do so. Military prosecutors today, by exercising their experience and understanding of military law, can achieve the same fundamental and necessary impact through a carefully planned and proper sentencing argument. Unfortunately, today, courts-martial are largely being carried out in a setting where the only persons in attendance are the accused, counsel, and the military judge. Even in this setting, it is important for the accused to understand why he or she has been brought to trial and to understand the ramifications of his or her criminal acts. Every court-martial should be attended, however, by at least a representative constituency of the accused's unit. A trial by court-martial ought to transcend the bare dimensions of the court room. If not, the paramount importance of military justice is lost if the accused's trial and punishment is a matter of record to only a minute portion of the service.

Military prosecutors now having the privilege of fully participating in the sentencing process should use this advantage responsibly both in preparing an effective statement regarding the accused's acts and in assuring that such a statement is instructive to the undutiful as well as the dutiful. Such an effort will in turn assist in building a common faith among those who are dutiful that the values and ideals of military service are not simply to be ushered forth on ceremonious occasions but to be earnestly lived out—on all occasions.

Appendix A

Sentencing Argument Worksheet

[The Context]

I. Nature of the Offense:	Impact on the Victim	Impact on the Army	Impact on the Unit
A. Aggravating Factors. 1. If intentional, define intent; Discuss what choices accused would make under these circumstances. 2. If willful, define willfullness; Discuss what choices accused would make under these circumstances. 3. If premeditated, define premeditation; Discuss what choices accused would make under these circumstances.	1. Physical injury: a. death—what does that mean? b. physical disability? c. internal damage? d. scars? e. burns? f. loss of virginity? 2. Psychological injury? a. internal (1) fear (2) distrust b. external (1) impairing of natural relationships (2) impairing of ideals and expectations c. emotional damage	Combat readiness	Mission of Unit
B. Circumstantial Factors. 1. Committed during time of duty? 2. Committed during nightime? 3. Committed in the barracks? 4. Committed in post-housing? 5. Committed off-post? 6. Committed with other service members?	1. Loss in confidence of established authority? 2. Loss of faith in established principles regarding the sanctity of: a. self b. privacy c. security	Sanctitity of Traditions, Morals, Values	Morale
C. Social Factors. 1. What is the historical perspective of the offense? 2. To what extent will the offense affect others (besides the victim)?	Effect on established relationships: a. chain-of-command b. superior-subordinate c. fellow servicemembers d. marriage e. parent-child	Sanctity of Military Community	Espirit de Corps

Appendix B

Sentencing Argument Worksheet

[The Considerations]

II. A Sentence Which Serves:	Ends of Good Order and Discipline	Needs of the Accused	Welfare of Society
A. Reduction in rank: [Themes] 1. Duty, Honor, Country 2. Dedication 3. Subordination 4. Obedience 5. Endurance/Perseverance	a. What is a soldier? b. What is rank? c. Place the definition of a soldier within the context of rank. d. What purpose does rank serve among the community of good soldiers? e. How does reduction in rank for acts of misconduct serve the ends of discipline?	a. What rank does the accused presently hold? b. Does his rank carry with it any special privileges and responsibilities? c. What relationship does his misconduct bear to these qualities? d. How will losing this rank serve the needs of the accused?	a. What are the rightful expectations of society? [A Special confidence in soldiers to fulfill duties] b. How will loss of rank serve welfare of society?
B. Forfeiture of Pay: [Themes] 1. Spartan Life 2. Sacrifice 3. Thrift 4. Trust	a. What ideals are associated with pay? b. How is the offense related with pay? c. How does loss of pay serve the ends of good order and discipline?	a. How has the accused used his pay? b. How should he have used his pay? c. How will loss of pay serve the accused's "needs"?	a. What are the rightful expectations of society? [Rightful expectation that increase in pay assures a better soldier] b. Does loss of pay serve society?
C. Confinement at hard labor: [Themes] 1. Freedom imposes a responsibility to others as well as self; 2. Confinement constrains accused to consider the responsibility of freedom.	a. Within in the context of being a soldier, what is freedom? b. What is the purpose of confinement? c. How would confinement serve good order and discipline of the Army? What length?	a. How has the accused used his freedom? b. How will loss of his freedom serve the accused's "needs"? c. What length of confinement will serve this purpose?	How will confining the accused serve the best interests of society? [Restoration of a dutiful citizen WHICH IS THE ACCUSED'S RESPONSIBILITY]
D. Discharge from the Service: [Theme] Simple fullfillment of duty and the OATH OF ENLISTMENT achieves the appellation or HONORABLE SERVICE and the reward of and Honorable Discharge.	a. What is a discharge? b. What is a punitive discharge? c. How does a soldier claim the right to honorable service? d. How does the characterization of service serve good order and discipline in the Army?	a. Has the accused earned the right to be discharged non-punitively from the Army? b. How will a punitive discharge benefit the accused? c. What kind of discharge?	How will a punitive discharge serve the best interests of society? [Society's faith in soldiers is increased by fullfillment of sworn duty]

A Review of Supreme Court Cases Decided During the October 1985 Term

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Introduction

The Supreme Court has already decided more than twenty criminal law cases during this term. The purpose of this article is to provide an easily accessible summary of those cases[1] that are applicable to military criminal law or of special interest to military personnel. Where pertinent, discussion of current military law is included. The facts and underlying rationale are summarized in some of the cases for a better understanding of the holding. Because the article's purpose is to serve as a quick research guide, it should not be used as a substitute for defense counsel's own comprehensive analysis and judgment in determining the applicability of the Supreme Court decision to a particular case.

Right to Counsel

Waiver

In *Edwards v. Arizona,*[2] the Supreme Court established the "bright line" rule that once a suspect has invoked his right to counsel during custodial interrogation, the fifth amendment bars further questioning until counsel has been made available, unless the suspect himself initiates further communication. This rule has now been extended to the sixth amendment context in the case of *Michigan v. Jackson.*[3] There, the defendant had requested appointment of counsel at the arraignment.[4] Three days later, before he had an opportunity to consult with counsel, the police interrogated the defendant and obtained a confession.[5] Although the questioning was preceded by a *Miranda* rights advisement[6] and the defendant agreed to be questioned without the presence of counsel, the waiver was nevertheless held to be invalid under the sixth amendment.[7] The holding was based on the rationale that the "Sixth Amendment right to counsel at a postarraignment interrogation requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation."[8] In fact, the reasons for prohibiting the interrogation of an uncounseled suspect who had invoked his right to counsel were deemed even stronger after he had been formally charged with an offense than prior to indictment.[9]

The Court rejected the government's argument that the defendant's request for appointment of counsel be construed to apply only to representation in formal legal proceedings.[10] Additionally, the Court stated that sixth amendment principles required knowledge of one state actor to be imputed to another state actor, *i.e.,* the police may not claim ignorance of the defendant's request for counsel made to the court when the detective in charge of the investigation present at the arraignment.[11] Although the general relationship between fifth and sixth amendment waivers remains largely undefined,[12] it is now clear that once the right to counsel is invoked, acquiescence by the suspect to police initiated interrogation, either prior or subsequent to arraignment, does not constitute a valid waiver.

In another waiver case, *Moran v. Burbine,*[13] the Supreme Court refused to require law enforcement agents to inform a suspect held in custody of efforts by an attorney retained by a third party to reach him. The defendant was arrested on a burglary charge but was also questioned about an unrelated murder.[14] He waived his *Miranda* rights, never invoked his right to counsel, and made three inculpatory statements admitting to the murder.[15] While the defendant was in custody, his sister had called the public defender's office attempting to contact the attorney who had handled the defendant's unrelated burglary charge.[16] Failing to reach that attorney, she obtained the assistance of another

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[1] This article includes cases that were decided prior to 30 April 1986. Cases decided during the remainder of the term will be discussed in a followup article in a later issue.

[2] 451 U.S. 477 (1981). For an extensive discussion of *Edwards,* see Finnegan, *Invoking the Right to Counsel: The* Edwards *Rule and the Military Courts,* The Army Lawyer, Aug. 1985, at 1.

[3] 106 S. Ct. 1404 (1986).

[4] *Id.* at 1406.

[5] *Id.*

[6] *See* Miranda v. Arizona, 384 U.S. 436 (1966).

[7] 106 S. Ct. at 1411.

[8] *Id.* at 1409.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 1410.

[12] *See id.* at 1411 n.10.

[13] 106 S. Ct. 1135 (1986).

[14] *Id.* at 1138–39.

[15] *Id.* at 1139.

[16] *Id.*

public defender who immediately called the police station where the defendant was held.[17] In response to the call, the police confirmed that the defendant was there, but told the public defender that they were through with defendant for the night.[18] In fact, police questioning on the murder did not commence until *after* the attorney's call.[19]

The Supreme Court ruled that the defendant's waiver of his fifth amendment rights was not invalidated by the police failure to inform him of the attorney's call nor by the police deception of the attorney.[20] The Court stated that "[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right."[21] Even if the additional information might have been useful and might also have affected the suspect's decision to waive his rights, the Constitution does not require that the police "supply a suspect with a flow of information to help him calibrate his self interest in deciding whether to speak or stand by his rights."[22] The 6–3 majority of the Court deemed the *Miranda* warnings to be sufficient to dispel the compulsion inherent in custodial interrogation.[23] In the Court's view, any further extension of *Miranda* by requiring the police to inform a suspect of an attorney's effort to reach him would "muddy" the application of *Miranda*.[24] Such a requirement would also upset the subtle balance struck in the *Miranda* decision between the need for police questioning to elicit confessions and the inherently coercive atmosphere of custodial interrogation.[25] The Court further held that there was no due process violation because "the challenged conduct falls short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States."[26]

Justice Stevens' dissenting opinion noted that the type of police deception which the majority sanctioned violated the American Bar Association's Standards for Criminal Justice.[27] Furthermore, the prevailing view in the state courts condemns police interference with the attorney-client relationship.[28] It now appears that there must be an egregious case of police misconduct, beyond the deception that occurred in *Moran*, before the Supreme Court will condemn the conduct as violative of the Constitution.

Sixth Amendment Violation

In *Maine v. Moulton*,[29] a 5–4 majority of the Supreme Court found erroneous the admission of a defendant's incriminating statements that were obtained by use of electronic surveillance through the co-defendant who had turned undercover informant. Because the statements were made after the defendant's indictment,[30] the sixth amendment right to counsel had clearly attached. It was also clear that the co-defendant's role as a state agent rendered any communication between him and the defendant, without the presence of counsel, a violation of the sixth amendment.[31]

The majority and the dissenters could not agree on the issue of whether the police motive to investigate other unrelated crimes justified this intrusion on the defendant's "right to rely on counsel as a 'medium' between him and the State"[32] after the initiation of formal charges. The accused and his co-defendant were initially indicted on four counts of theft.[33] As a result of the co-defendant's cooperation, the police learned that the accused had suggested killing one of the government witnesses and had planned to present false alibis at trial.[34] Furthermore, the co-defendant admitted to additional offenses of theft, arson, and burglary, in which the accused had also participated.[35] To investigate these other offenses, the police used the co-defendant to elicit incriminating statements from the accused.[36] The Supreme Court precluded the admission of these statements as evidence on the original theft charges even though the same statements would be admissible to convict the accused of the other offenses.[37] Thus, the Court avoided the more complicated analysis of whether the investigation was in fact in good faith, or simply a ruse by the police to uncover more evidence, and the related question of what constitutes related or separate crimes.

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[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 1140.

[21] *Id.* at 1141.

[22] *Id.* at 1142.

[23] *Id.* at 1143.

[24] *Id.*

[25] *Id.* at 1144.

[26] *Id.* at 1147–48.

[27] *Id.* at 1151–52 (Stevens, J., dissenting).

[28] *Id.*

[29] 106 S. Ct. 477 (1985).

[30] *Id.* at 480.

[31] *Id.* at 488.

[32] *Id.* at 487.

[33] *Id.* at 480.

[34] *Id.* at 480–82.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 490 n.16.

Effective Assistance of Counsel

The two-part analysis adopted in *Strickland v. Washington*[38] for evaluating claims of ineffective assistance of counsel has been extended to apply to guilty plea challenges based on inadequate representation. In *Hill v. Lockhart*,[39] the petitioner based his claim on the attorney's misadvice on his parole eligibility date. Petitioner pled guilty to charges of first-degree murder and theft in an Arkansas court.[40] His court-appointed attorney advised him, prior to the plea hearing, that he would be eligible for parole after serving one-third of the sentence.[41] In fact, because petitioner had a previous Florida conviction, he was classified under Arkansas law as a "second offender" and was required to serve one-half of his sentence before becoming eligible for parole.[42]

Justice Rehnquist's opinion reaffirmed the *Strickland* standard which required a showing that: counsel's representation fell below an objective standard of reasonableness; and there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[43] Without addressing the question of whether the misadvisement of petitioner's parole eligibility date by his counsel constituted "constitutionally ineffective performance," the Court focused on the "prejudice" part of the *Strickland* standard to reject petitioner's claim.[44] "[T]o satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[45]

This is an extremely heavy burden for the defendant to sustain. It is not enough for him to allege subjectively that he would not have pled guilty if the representation had been adequate. It must also be demonstrated that counsel would not have recommended that defendant plead guilty in the absence of the unprofessional errors.[46] This, in turn, would require a showing that the outcome of trial would probably have been different if counsel had rendered competent representation.[47] For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination of whether the error was prejudicial will depend on the likelihood that discovery of the evidence would have led counsel to change his or her recommendation as to the plea.[48] This assessment, in turn, will depend mostly on a prediction of the likelihood that the evidence would have changed the outcome of trial in a contested case.[49]

The Court of Military Appeals has yet to squarely apply the *Strickland* standard.[50] Both the Army[51] and the Navy-Marine Corps[52] Courts of Military Review, however, have applied the *Strickland* standard in their review of claims of ineffective assistance of counsel in guilty plea cases even prior to the *Hill* decision.

In another decision, the Court held that the sixth amendment right to effective assistance of counsel was not violated when an attorney refused to cooperate with the defendant in presenting perjured testimony at trial. The attorney in *Nix v. Whiteside*[53] was presented with the dilemma of a defendant who wished to color his testimony in order to bolster his claim of self-defense. During preparation for trial on a murder charge, the defendant consistently told his attorney that although he had not actually seen a gun in the victim's hand when he stabbed the victim, he was convinced that the victim had a gun.[54] Shortly before trial, however, the defendant told counsel for the first time that he had seen "something metallic" in the victim's hand and added, "If I don't say I saw a gun I'm dead."[55] In response to the defendant's insistence on adding this fact to his testimony, counsel told defendant that if he testified falsely, the counsel would advise the court that he felt the defendant was committing perjury, would probably be allowed to impeach that perjured testimony, and would seek to withdraw from representation.[56] The defendant was successfully dissuaded and ultimately testified as originally

[38] 466 U.S. 668 (1984). For a further discussion of *Strickland* and military appellate decisions, see Schaefer, *Current Effective Assistance of Counsel Standards*, The Army Lawyer, June 1986, at 7.

[39] 106 S. Ct. 366 (1985).

[40] *Id.* at 367.

[41] *Id.* at 368.

[42] *Id.*

[43] *Id.* at 369.

[44] *See id.* at 370.

[45] *Id.* (footnote omitted).

[46] *Id.*

[47] *Id.*

[48] *Id.* at 370–71.

[49] *Id.* at 371.

[50] *See* United States v. DiCupe, 21 M.J. 440 (C.M.A. 1986) (because defense counsel's performance was determined to be adequate under Article 27(a), Uniform Code of Military Justice, 10 U.S.C. § 827(a), appellant's constitutional right to counsel was not considered).

[51] *See* United States v. Kidwell, 20 M.J. 1020 (A.C.M.R. 1985) (defense counsel's failure to submit timely application for administrative discharge when accused had complied with terms of bargain with prosecutor constituted conflict of interest); United States v. Davis, 20 M.J. 1015 (A.C.M.R. 1985) (defense counsel's failure to submit the trial judge's recommendation for suspension of the bad-conduct discharge to the convening authority was ineffective assistance of counsel); United States v. Jackson, 18 M.J. 753 (A.C.M.R. 1984) (defense counsel's failure to raise statute of limitations defense constituted inadequate representation).

[52] *See* United States v. Huxhold, 20 M.J. 990 (N.M.C.M.R. 1985).

[53] 106 S. Ct. 988 (1986).

[54] *Id.* at 991.

[55] *Id.*

[56] *Id.* at 992.

contemplated.[57] After his conviction, he moved for a new trial claiming he had been deprived of a fair trial by counsel's admonitions.

The Supreme Court held that the attorney's conduct was within the range of reasonable professional assistance. Stating that "[u]nder the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel,"[58] the Court compared the attorney's admonitions with various standards of ethical conduct and found the attorney's conduct to be within those standards.[59] The Supreme Court noted that "[i]t is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct."[60] The attorney's threats to reveal the defendant's perjury to the court and to withdraw from the case were also found to have been within reasonable professional conduct because both of those actions, if the defendant had in fact committed perjury, were permissible under the applicable Iowa Code of Professional Responsibility.[61] The Court also noted that it would be virtually impossible for this defendant to satisfy the second *Strickland* requirement of showing prejudice, because the net effect of the attorney's action was to prevent perjured testimony.

A recent decision from the Army Court of Military Review, *United States v. Roberts,*[62] sets forth a step-by-step approach for the trial defense counsel to use when faced with the problem of client perjury.[63] This approach provides for

> defense counsel investigation to make certain what facts are true; strong discouragement of the client from committing perjury; withdrawal, if possible, when the client insists on taking the stand to testify falsely; if withdrawal is not possible, making memoranda for record of the advice counsel has given the client; and finally, allowing the client to testify without actively aiding the testimony.[64]

If defense counsel seeks to withdraw from the case, the request must be timely.[65] Furthermore, whether or not defense counsel moves for withdrawal, counsel must not reveal to the trier of fact that the accused has committed or intends to commit perjury.[66] Therefore, contrary to *Nix*, counsel may not impeach defendant's perjured testimony nor bring to the attention of the court that the testimony is perjured. The military judge may be alerted to the fact that the client is considering perjury only if it is necessary to provide a reason for a withdrawal request that is timely made before trial.

Right to Confrontation

In a per curiam opinion, the Supreme Court held, in *Delaware v. Fensterer,*[67] that the admission of testimony of the prosecution's expert witness who was unable to recall the basis for his expert opinion did not deny the defendant his sixth amendment right to confrontation. The expert testified that one of the victim's hairs, found on a cat leash with which the victim was strangled, had been forcibly removed.[68] The expert could not recall, however, which of three possible methods he had used to reach that conclusion.[69] Defense counsel was able to bring the expert's faulty recollection to the attention of the jury, and, through the defense's own expert, suggest that the prosecution expert had relied on a theory that the defense considered baseless.[70]

The case did not fall into either of the two broad categories of confrontation clause cases involving the admission of out-of-court statements or involving restrictions imposed on the scope of cross-examination.[71] The Supreme Court stated that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[72] The instant case was not

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[57] *Id.*

[58] *Id.* at 994.

[59] *Id.* at 994–96.

[60] *Id.* at 996.

[61] *Id.* Although the majority opinion written by Chief Justice Burger explicitly found that there was neither a breach of professional duty by counsel nor any prejudice to the defendant, thereby meeting both prongs of the *Strickland* inquiry, Justice Blackman's concurring opinion pointed out that the case could have been decided on the lack of prejudice alone. *Id.* at 1003–04. Albeit *Strickland* sets forth a two-prong standard, it is not necessary that both prongs be addressed in every case. *Id.* Certainly if the performance of counsel is found to fall outside the range of reasonable professional conduct, then it is necessary to proceed to the prejudice part of the analysis. In some cases, though, it is possible to determine the lack of prejudice without addressing the adequacy of counsel's representation. This latter approach, where appropriate, avoids the more sensitive question of rating an attorney's professional competence. Such approach is useful not only to the reviewing courts but also to the appellate defense counsel when faced with the always difficult decision of raising ineffective assistance of counsel.

[62] 20 M.J. 689 (A.C.M.R. 1985). *See also* United States v. Elzy, CM 445163 (A.C.M.R. 22 May 1986).

[63] *See* Gaydos, *Client Perjury: A Guide for Military Defense Counsel,* The Army Lawyer, Sept. 1983, at 13, for an extensive discussion in this area.

[64] *Roberts,* 20 M.J. at 693 (footnote omitted).

[65] *See* United States v. Radford, 14 M.J. 322, 327 (C.M.A. 1982) (defense counsel's withdrawal request was untimely when made after the accused had testified and where it was apparent that counsel was not caught by surprise by the testimony).

[66] *See id.;* United States v. Winchester, 12 C.M.A. 74, 30 C.M.R. 74 (1961); United States v. Roberts, 20 M.J. at 693.

[67] 106 S. Ct. 292 (1985).

[68] *Id.* at 293.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 294.

[72] *Id.* at 295 (citation omitted).

one where the witness' lapse of memory frustrated any opportunity for cross-examination.[73] "[T]he expert's inability to recall the basis for his opinion went to the weight of the evidence, not its admissibility."[74] The Court further held that the prosecution's foreknowledge of the expert's inability to give the precise basis for his opinion did not impose an obligation on the government, as a matter of due process, to refrain from introducing the testimony.[75]

In *United States v. Inadi*,[76] the Supreme Court clarified that *Ohio v. Roberts*[77] did not establish an unavailability requirement for *all* hearsay exceptions. The Third Circuit Court of Appeals erred by requiring a showing of unavailability as a condition to the admission of a co-conspirator's recorded out-of-court statements.[78] The Supreme Court noted that the lower court's reliance on *Roberts* was misplaced because *Roberts* and all of the cases cited therein concerned the admissibility of former testimony from a prior judicial proceeding.[79] The value of prior testimony was distinguished from hearsay statements made during a conspiracy.[80] Former testimony was viewed only as a "weaker substitute for live testimony, [i]t seldom has independent evidentiary significance of its own."[81] Thus, "[w]hen two versions of the same evidence are available, long standing principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence"[82] in the form of live testimony, thereby justifying the unavailability requirement for former testimony. On the other hand, co-conspirator's statements have a unique value because of the context in which they were made. "[I]t is extremely unlikely that in-court testimony will recapture the evidentiary significance of statements made when the conspiracy was operating in full force."[83] Additionally, the Court noted that an unavailability rule would place a significant practical burden on the prosecution in terms of tracking down witnesses and ensuring their availability for trial.[84]

Due Process Concerns

Doyle v. Ohio[85] established that *Miranda* warnings carry an implicit assurance that the exercise of the right to remain silent will carry no penalty. Thus, as a matter of fundamental fairness, the prosecution may not use the defendant's post-*Miranda* warnings silence to impeach the defendant's testimony.[86] This bar against prosecution comment has been extended, in *Wainwright v. Greenfield*,[87] to apply to prosecution use of that silence to rebut an insanity defense. The Supreme Court was unpersuaded by the government's attempt to distinguish *Doyle* and its progeny on the basis that the silence was used as affirmative proof in the prosecution's case-in-chief to rebut the insanity defense rather than for impeachment purposes.[88] Due process was violated by the government's use of the defendant's invocation of his rights to show the unlikelihood that the accused was insane.[89]

The defendant in *Holbrook v. Flynn*[90] claimed that he was denied his right to a fair trial because the presence of four uniformed state troopers sitting in the front row of the spectators' section of the courtroom drew undue attention to his plight as the accused. The Supreme Court rejected the defendant's suggestion to apply a presumption of prejudice to the use of placing identifiable security guards in the courtroom; instead, the Court indicated that a case-by-case approach should be utilized.[91] If an unacceptable risk of prejudice exists, then the government's interest in the use of the disputed practice is balanced against the prejudicial impact.[92]

The Supreme Court found it unnecessary to balance the conflicting interests because it determined that the presence of the uniformed troopers did not unduly draw the jurors' attention to the defendant's status as the accused.[93] In reaching this conclusion, the Court noted that prejudicial impact is determined by the range of inferences that can be made from the practice in question.[94] "While shackling and prison clothes are unmistakable indications of the need to

[73] *Id.*
[74] *Id.* at 296 (citation omitted).
[75] *Id.*
[76] 106 S. Ct. 1121 (1986).
[77] 448 U.S. 56 (1980).
[78] *Inadi*, 106 S. Ct. at 1124.
[79] *Id.* at 1125.
[80] *Id.* at 1126.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 1126–27.
[84] *Id.* at 1128–29.
[85] 426 U.S. 610 (1976).
[86] *Id.*
[87] 106 S. Ct. 634 (1986).
[88] *Id.* at 639.
[89] *Id.*
[90] 106 S. Ct. 1340 (1986).
[91] *Id.* at 1346.
[92] *Id.*
[93] *Id.* at 1346-47.
[94] *See id.* at 1346.

separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable."[95] Therefore, because the troopers' presence did not tend to brand the defendant with guilt, there was no deprivation of a fair trial.[96]

Search and Seizure

In *New York v. Class*,[97] the Court held that police officers' seizure of a gun from defendant's automobile in the course of searching for the Vehicle Identification Number (VIN) did not violate the fourth amendment. Justice O'Connor, delivering the opinion of the Court, began by determining that there was no reasonable expectation of privacy in the VIN because of the important role it played in the governmental regulation of automobiles and the corresponding efforts made to ensure that the VIN was placed in plain view.[98] Then she tested the legality of the search and seizure by balancing the governmental interests against the intrusion with the use of three factors, *i.e.*, necessity for the intrusion, scope of the search, and probable cause.[99]

Probable cause was based on the officers' observation of the defendant's commission of traffic violations by speeding and driving with a cracked windshield.[100] The intrusion was deemed minimal.[101] After not finding the VIN inside the door jamb, one of the officers looked to the other possible location for the VIN, atop the dashboard, at which point he spotted a gun under the driver's seat.[102] Finally, the safety of the officers justified conducting the search for the VIN under papers that obscured it rather than have the defendant, who had exited the vehicle voluntarily, return to the car to uncover the VIN.[103] Although a VIN inspection may not be used as a pretext for searching a vehicle for contraband or weapons,[104] such items found incidental to a proper search for the VIN are seizable under the fourth amendment.

In New York v. P.J. Video,[105] the Court ruled that seizure of books and films for the purpose of preserving them as evidence was subject to the same probable cause standard used to review warrant applications generally. The Court rejected the defendant's argument that a higher probable cause standard was required for issuance of warrants authorizing the seizure of materials presumptively protected by the first amendment. The obscenity charges against the defendants arose out of an investigation by a New York district attorney's office.[106] An investigator was assigned to view ten videocassette movies rented from the defendants' store by a member of the sheriff's department.[107] The investigator viewed the films in their entirety and summarized, in affidavits, the movies' themes and conduct depicted.[108] These affidavits were attached to an application filed by the police department for a warrant to search the defendants' store.[109] Applying the correct standard of "fair probability that contraband or evidence of a crime will be found in a particular place,"[110] the Court ruled that the requisite probable cause was established and the warrant was properly issued.

Double Jeopardy

The double jeopardy clause bars the conviction, on retrial, of a lesser included offense of a crime of which a defendant has been acquitted.[111] In *Morris v. Mathews*,[112] however, the Supreme Court held that the reduction to a nonjeopardy-barred lesser included offense by the Ohio Court of Appeals was an adequate remedy for a double jeopardy violation. Mathews initially pled guilty to aggravated robbery.[113] Two days after his plea, he admitted to shooting his accomplice after the bank robbery and was subsequently convicted of aggravated murder based on the robbery.[114] Simple murder, which was a lesser included offense of aggravated murder, was not jeopardy-barred by the aggravated robbery conviction.[115] Although evidence of the robbery was admitted during the trial of the jeopardy-barred aggravated murder offense, this did not necessarily

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[95] *Id.*

[96] *See id.* at 1346–47.

[97] 106 S. Ct. 960 (1986). *See also Gilligan, Vehicle Identification Numbers*, The Army Lawyer, Apr. 1986, at 56.

[98] *Id.* at 966.

[99] *Id.* at 968.

[100] *Id.* at 963, 968.

[101] *See id.* at 968.

[102] *Id.* at 963, 968.

[103] *Id.* at 968. It should be noted that if the defendant had remained in the car, the police should have first requested him to remove the papers obstructing the VIN before searching for it themselves. *See id.* at 970 (Powell, J., concurring).

[104] *Id.* at 970 (Powell J., concurring).

[105] 106 S. Ct. 1610 (1986).

[106] *Id.* at 1612.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.* at 1616 (quoting Illinois v. Gates, 462 U.S. 213, 235 (1983)).

[111] *See* Price v. Georgia, 398 U.S. 323 (1970) (second conviction of manslaughter could not stand where defendant was retried on a murder charge for which he had originally been acquitted); Benton v. Maryland, 395 U.S. 784 (1969) (acquittal of larceny offense barred retrial on same offense).

[112] 106 S. Ct. 1032 (1985).

[113] *Id.* at 1035.

[114] *Id.*

[115] *Id.* at 1037.

mandate a new trial to remedy the double jeopardy violation.[116] The Court noted that the defendant bore the burden of demonstrating a "reasonable probability"[117] that he would not have been convicted of the non-jeopardy-barred offense absent the presence of the jeopardy-barred offense.[118] The Sixth Circuit Court of Appeals erred by finding that Mathews had made the necessary showing of prejudice because its reasonable possibility standard was too lenient.[119] Therefore, the Court of Appeals of Ohio granted sufficient relief by reducing his aggravated murder conviction to simple murder.[120]

The dual sovereignty doctrine provides that when a defendant, in a single act, violates the "peace and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct offenses for double jeopardy purposes.[121] Although it has been well settled that individual states are separate sovereigns with respect to the federal government,[122] it has been unclear whether the states are separate sovereigns with respect to each other. The Supreme Court answered that question in the affirmative in *Heath v. Alabama.*[123] In that case, the defendant's negotiations with the hired killers occurred in Georgia, but the kidnapping and killing of the defendant's wife took place in Alabama.[124] Heath initially pled guilty in Georgia to "malice" murder in exchange for a sentence of life imprisonment.[125] He was then convicted in Alabama of the capital offense of murder during a kidnapping for which he was sentenced to death.[126] In upholding the Alabama conviction, the Supreme Court rejected the defendant's argument that the application of the dual sovereignty principle should be restricted to cases where two governmental entities, with concurrent jurisdiction, pursued different interests.[127]

Appellate Review[128]

While few legal errors, even those of constitutional magnitude, now escape the scrutiny of the harmless error analysis, there remain certain transgressions that still mandate automatic reversal. In *Vasquez v. Hillery,*[129] the Supreme Court refused to abandon its "long commitment to a rule of reversal"[130] where racial discrimination tainted the judicial process. The exclusion of blacks from the pool of grand jury members could not be deemed harmless merely because the grand jury's determination of probable cause was confirmed in hindsight by a conviction on the indicted offense.[131] The 5–4 majority of the Court rejected the fact it was "almost a quarter-century"[132] since the indictment and the defendant's conviction for murder as a relevant consideration in determining whether the harmless error analysis should replace the mandatory reversal rule for this type of error. The "overriding imperative to eliminate this systemic flaw in the charging process"[133] outweighed the costs for the government to obtain a new indictment and retry the defendant at this late date.

Not surprisingly, the reach in the application of the harmless error analysis has continued in other areas.[134] In *Delaware v. Van Arsdall,*[135] the Supreme Court held that the Delaware Supreme Court erred by applying an automatic reversal rule to a confrontation clause violation where the trial court improperly restricted the defense counsel's cross-examination that was designed to show bias on the part of a government witness.

Edmund v. Florida[136] held that the eighth amendment forbids the imposition of the death penalty on "one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill,

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[116] *Id.*

[117] Reasonable probability in this context is defined as in the *Strickland* standard, *i.e.*, "a probability sufficient to undermine confidence in the outcome." *Id.* at 1038 (citing *Strickland,* 466 U.S. at 695).

[118] *Id.*

[119] The Court stated that the circuit court's standard "which could be satisfied by 'an exceeding small showing,' was not sufficiently demanding." *Id.*

[120] The case was remanded to the Sixth Circuit Court of Appeals for further review. *Id.* at 1039.

[121] *See* United States v. Lanza, 260 U.S. 377, 382 (1922).

[122] *See* Westfall v. United States, 274 U.S. 256, 258 (1927).

[123] 106 S. Ct. 433 (1985).

[124] *See id.* at 435.

[125] *Id.*

[126] *See id.* at 436.

[127] *Id.* at 439.

[128] In the nebulous area of factual determination versus matters of law, the Supreme Court has held that the voluntariness of confessions is a legal determination. Miller v. Fenton, 106 S. Ct. 445 (1985). This holding was decided in the context of a habeas corpus proceeding where, under 28 U.S.C. § 2254(d), the findings of fact by the state court are presumed to be correct. Id. at 447.

[129] 106 S. Ct. 617 (1986).

[130] *Id.* at 625.

[131] *See id.* at 623. In United States v. Mechanik, 106 S. Ct. 938 (1986), however, the Court did apply the harmless error analysis to excuse violations of grand jury secrecy procedures specified in Rule 6 of the Federal Rules of Criminal Procedure. *See* Stewart, *Supreme Court Report,* 72 A.B.A.J. 88 (1986) for an extended discussion of the likely impact of *Mechanik* on the grand jury process.

[132] 106 S. Ct. at 632 (Powell, J., dissenting).

[133] *Id.* at 624.

[134] In United States v. Lane, 106 S. Ct. 725 (1986), the Supreme Court resolved a conflict among the federal circuits as to whether a misjoinder under Rule 8 of the Federal Rules of Criminal Procedure was subject to the harmless error rule and answered the question in the affirmative. *See* Manual for Courts Martial, United States, 1984, Rule for Courts-Martial 812 for the military counterpart to Rule 8.

[135] 106 S. Ct. 1431 (1986).

[136] 458 U.S. 782 (1982).

attempt to kill, or intend that a killing take place or that lethal force will be employed."[37] The Supreme Court decided in *Cabana v. Bullock*,[38] however, that *Edmund* did not dictate at what point in the proceedings the requisite intent must be determined. Therefore, where the Mississippi Supreme Court made a finding sufficient to satisfy *Edmund* in the course of its direct review, the Fifth Circuit Court of Appeals erred by ordering a new sentencing rehearing upon the determination that erroneous instructions precluded a finding of the defendant's requisite intent at trial.[39] Applying *Cabana* in the military context, a finding of the requisite intent by the Courts of Military Review, albeit absent from the findings of the trial court, would appear to satisfy the *Edmund* requirement.

Standard of Review of Military Regulations

In upholding the Air Force's decision not to grant a uniform exemption to permit a commissioned psychologist to wear his yarmulke indoors, the Supreme Court, in *Goldman v. Weinberger*,[40] basically deferred to the determinations of the Air Force in regulating the apparel of its service members.[41] After reiterating the unique nature of military society with its special needs, the majority opinion stated, "Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."[42] Because "[u]niforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank,"[43] the Air Force's distinction between permissible and prohibited religious apparel based on visibility was deemed reasonable and evenhanded "in the interest of the military's perceived need for uniformity."[44]

Conclusion

Of the criminal cases decided this Term, the only significant wins for the defense were *Michigan v. Jackson*[45] and *Maine v. Moulton*.[46] These two cases extend the protections afforded by the sixth amendment right to counsel and will undoubtedly be key cases for defense counsel to consider and rely on when dealing with right to counsel issues. On the other hand, these wins are counterbalanced by the defense loss in *Moran v. Burbine* where, in the words of Justice Stevens "it is the fear that an individual may exercise his rights that tips the scales of justice for the Court today"[47] because "it blinks of reality to suggest that misinformation which prevented the presence of an attorney has no bearing on the protection and effectuation of the right to counsel in custodial interrogation."[48]

The other cases cover a wide spectrum of issues that cannot be generalized. One conclusion that can be made is that the Supreme Court has continued to extend the application of harmless error analysis to all types of errors, except for the most offensive errors. Given the extensive application of harmless error analysis, trial defense counsel are urged to be as thorough as possible in laying the foundation in the record for showing prejudice that results from errors raised but lost at trial. It is not enough to preserve the error by making conclusory assertions; prejudice must be established in the record. The most persuasive of arguments made before appellate courts fall to the wayside for lack of a showing of prejudice.

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[37] *Id.* at 797.

[38] 106 S. Ct. 689 (1986).

[39] *See id.* at 695, 698.

[40] 106 S. Ct. at 1310 (1986).

[41] *See id.* at 1324 (O'Connor, J., dissenting). "The Court rejects Captain Goldman's claim without even the slightest attempt to weigh his asserted right to the free exercise of his religion against the interest of the Air Force in uniformity of dress within the military hospital. No test for Free Exercise claims in the military context is even articulated, much less applied." *Id.*

[42] *Id.* at 1313.

[43] *Id.*

[44] *Id.* at 1314.

[45] 106 S. Ct. 1404 (1986).

[46] 106 S. Ct. 477 (1985).

[47] 106 S. Ct. at 1161 (Stevens, J., dissenting).

[48] *Id.* at 1163 (Stevens, J., dissenting).

DAD Notes

Sentence Limitations On Rehearing

In a recent argument before the Court of Military Appeals, Judge Cox posed a question to counsel to the effect that, if the case at bar was remanded for a full rehearing, what would be the sentence limitation on rehearing considering the fact that the original sentence was approved in 1983 and the rehearing would take place in 1986?[1] An analysis of the current and past rules governing limitations on sentences after rehearings demonstrates the unusual predicament that may arise under these facts.

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[1] United States v. Brown, USCMA Dkt. No. 51,972/AR, argued 27 March 1986.

The current rule on the limit on a sentence on rehearing is that it may not exceed the original sentence as approved or reduced by higher authority unless the sentence prescribed for the offense is mandatory.[2] The exception to this rule is that, if the original sentence was reduced pursuant to a pretrial agreement and the accused fails to comply with the agreement on rehearing, the sentence is limited to the original sentence adjudged.[3] Previously, the rule was that the sentence on rehearing was limited to the sentence approved, regardless of whether it was based on a pretrial agreement.[4]

As demonstrated by Judge Cox's question, different results might occur depending upon whether the old or the new rule is applied. This could be particularly important when the original sentence adjudged under the 1969 Manual for Courts-Martial was very high and then greatly reduced by a pretrial agreement and the appellant for various reasons is unable to fulfill the agreement for the rehearing. If the current rule is applied, the sentence would be limited to the substantially greater sentence originally *adjudged,* while under the old rule it would be limited to the lesser sentence ultimately *approved.*

Defense counsel dealing with current rehearings of courts-martial that were approved under the old Manual should argue that the old rule should apply when calculating the limitation on the sentence. Counsel should take the position that sentence limitations are a substantive change affecting the maximum impossible punishment and not merely a procedural change.[5] Captain Scott A. Hancock.

No Confinement, No Total Forfeitures, Unless . . .

Trial defense counsel should ensure that the convening authority does not approve a sentence that includes total forfeitures when no confinement has been adjudged: "[t]he convening authority will consider in taking his action that an accused who is not serving confinement should not be deprived of more than two-thirds of his pay for any month as a result of one or more sentences by court-martial or other stoppages or deductions, unless requested by the accused."[6]

Counsel should be mindful that, under *United States v. Nelson,*[7] a pretrial agreement wherein the accused agrees to total forfeitures without confinement is a "request by the accused" which abrogates the Manual's prohibition:

> An accused is not required to use any special format for submitting a request to be deprived of more than two-thirds pay per month for any given month. There exists no fundamentally fairer procedure for submitting such a request than that of a formally-executed and court-examined pretrial agreement. Thus, normally when an accused negotiates with a convening authority for a more severe forfeiture than that allowed by the Department of Defense policy . . ., this court will not interfere.[8]

Moreover, under a *Nelson* analysis, a defense counsel's argument on sentencing that total forfeiture be imposed in lieu of confinement could be construed as a "request" waiving the protection of the manual provision. Judge Carmichael, concurring with the result in *Nelson,* disagreed with the majority, believing that unless there was a compelling reason in law or equity for refusing to apply it, the Manual policy should be applied to reduce forfeitures.[9] Until this issue is decided by the Court of Military Appeals, counsel should be wary of any action that might be construed as a "request" knowingly and intelligently made by the accused. Captain Craig E. Teller.

Too Much Providency?

Until recently, it could be fairly generalized that a defense counsel need not concern himself or herself about whether an accused disclosed "too much" information in a providence inquiry.[10] Simply stated, the information disclosed in the providence inquiry was not evidence. It could neither be argued by trial counsel on sentencing,[11] nor properly considered in determining an appropriate sentence.[12] Moreover, argument based on information derived from the providence inquiry had been held to be so improper that it justified treatment as plain error even though defense counsel failed to object.[13] "The military judge had an obligation to stop the argument *sua sponte,*" even in a judge alone trial.[14]

Two recent decisions of the Army Court of Military Review have cast doubt regarding the use of providency inquiry information. In *United States v. Holt,*[15] the court held that, notwithstanding the government's concession of

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[2] Uniform Code of Military Justice art. 63, 10 U.S.C. § 863 (1982); Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 810(d)(1) [hereinafter cited as MCM, 1984, and R.C.M., respectively].

[3] R.C.M. 810(d)(2).

[4] Uniform Code of Military Justice art 63(b), 10 U.S.C. § 863(b) (1976); Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 81(d) [hereinafter cited as MCM, 1969].

[5] *See generally* Weaver v. Graham, 450 U.S. 24 (1981); Lindsey v. Washington, 301 U.S. 397 (1937).

[6] MCM, 1969, para. 88(b). This provision was unchanged in the new Manual. *See* R.C.M. 1107(d)(2) discussion; United States v. Johnson, CM 447090 (A.C.M.R. 20 Dec. 1985).

[7] United States v. Nelson 22 M.J. 550 (A.C.M.R. 1986)

[8] *Id.* at 551 (footnotes omitted).

[9] *Id.* at 552 (Carmichael, J., concurring in the result).

[10] The providence inquiry is conducted pursuant to United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (1969), and Article 45 of the Uniform Code of Military Justice, 10 U.S.C. § 845 (1982).

[11] United States v. Brooks, 43 C.M.R. 817 (A.C.M.R. 1971).

[12] United States v. Richardson, 6 M.J. 645 (N.C.M.R. 1978).

[13] United States v. Brown, 17 M.J. 987 (A.C.M.R. 1984).

[14] *Id.* at 989.

[15] 22 M.J. 553 (A.C.M.R. 1986).

error, the "use of information arising during the providence inquiry is not *per se* impermissible for sentencing purposes."[16] Following suit, another panel of the court held that information disclosed by an accused in the providence inquiry "is within the wide range of matter now subject to consideration for sentencing purposes."[17] In both cases, the departure from prior precedent was premised on changes in the Manual for Courts-Martial, United States, 1984.

At this point, the debate over the correctness of these decisions is not important. What is important, however, is the fact that these decisions directly impact on the counseling that occurs between an attorney and an accused before trial, and on an attorney's actions at trial. It is clear that the importance of being aware of any "skeletons" in an accused's closet is greatly increased, particularly where the charged offense is merely the last in a series of offenses. Distribution of controlled substances, blackmarketing, and child abuse are prime examples. Thorough preparation is essential if counsel is to avoid disclosure of damaging information that is not otherwise available to the government. An accused must be counseled against getting cold feet in the course of the providence inquiry. Any hesitation or waiver on an accused's part could potentially generate additional inquiry that could lead to disclosure of damaging information. Additionally, if it appears that an accused's responses will open the door to a discussion of a potential defense such as entrapment, an attorney must determine whether it is possible to sidestep the issue or whether it must be met head on. If the latter course is required, an attorney should counsel his or her client to attempt to respond with more conclusionary answers, such as, "I was predisposed," rather than disclose specific facts that would indicate predisposition. Knowledge of the manner in which the particular military judge conducts a providence inquiry is obviously important.

At trial, counsel must be alert for, and prepared to object to, a providence inquiry that goes beyond that which is reasonably necessary to establish commission of the offense to which the accused is admitting guilt. This may be a delicate situation, to say the least. Counsel must also remember that a military judge will have great leeway in determining how far an inquiry must go before he or she has satisfied his or her responsibility to ensure that a plea is provident. When necessary to object to further inquiry, however, one possibility is to urge that any further inquiry would infringe on the accused's allocution rights. The military judge should be reminded that the accused has a right to remain silent on sentencing that is independent of his or her surrendered right to remain silent as to the particular offense. Such an approach may at least result in the military judge offering to not consider the information on sentencing, a result not vastly different than that which previously has existed.

Finally, counsel must be attentive to trial counsel's cross-examination of sentencing witnesses and trial counsel' argument on sentencing. Counsels should object if trial counsel utilizes or argues matters derived from the providence inquiry. While the law concerning use of this information may not be totally settled, there generally has been a clear trend toward waiver as a result of the changes brought about by the Military Justice Act of 1983 and the MCM, 1984. Even if the decisions in *Holt* and *Vale* are reversed or modified on further appeal, it is highly unlikely that the sua sponte obligation of the military judge to stop such an argument will apply to any other than the most egregious of cases. Lieutenant Colonel Paul J. Luedtke.

[16] *Id.* at 556.

[17] United States v. Vale, CM 448196, slip op. at 2 (A.C.M.R. 25 Apr. 1986).

Trial Judiciary Note

Issues in Capital Sentencing

Lieutenant Colonel Robert T. Jackson, Jr.
Military Judge, Office of the Chief Trial Judge

> Aggravating circumstances . . . are procedural standards that ensure against arbitrary imposition of the death penalty and categorically narrow the class of offenders eligible for that sentence. . . .[1]

Introduction

The Supreme Court observed in *Gregg v. Georgia*[2] that the concerns of *Furman v. Georgia*[3] that the death penalty not be imposed in an arbitrary or capricious manner were satisfied by a sentencing scheme that ensures the sentencing authority receives adequate information and guidance. The military death penalty scheme set out in Rule for Courts-

[1] *Adamson v. Ricketts*, 758 F.2d 441, 451 (9th Cir. 1985).

[2] 428 U.S. 153 (1976).

[3] 408 U.S. 238 (1972).

Martial 1004[4] represents an effort to establish constitutionally adequate standards and procedures for capital sentencing.

Rule for Court Martial 1004 has been in place just under two years and to date there have not been any military appellate cases that have examined the sentencing factors listed in R.C.M. 1004(c). Further, since the current Manual became effective, no Supreme Court cases have been decided that have examined the constitutionality of the aggravating circumstances used in state death penalty statutes. By contrast, circuit courts of appeals have decided several cases that have involved the constitutionality and correct application of aggravating circumstances in state statutory death schemes.

This article will review some of the issues raised in recent circuit courts of appeals cases that have examined the application and validity of aggravating circumstances in state death penalty schemes. Moreover, this article will discuss the significance and applicability of these decisions to the military death penalty provisions.

Vague Aggravating Circumstances

In *Adamson v. Ricketts,*[5] the Ninth Circuit rejected a habeas corpus petitioner's claim that the Arizona heinous, cruel and depraved aggravating factor was vague and capricious. The Ninth Circuit noted that the Arizona Supreme Court took extensive measures to ensure correct application of this statutory provision by giving precise definition on it. In support of its holding, the Ninth Circuit relied on *United States v. Bohonus,*[6] which was cited for the proposition that judicial explication of a statute which provides sufficient clarity to give fair notice obviates a vagueness challenge.

Rule for Courts-Martial 1004(c)(7)(I) indicates that death may be adjudged if the members find beyond reasonable doubt that "[t]he murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim." This aggravating factor is open to the attack that it is unconstitutionally vague. Exactly what is meant by "intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim"? The analysis[7] states that this aggravating factor is more objective than that found invalid in *Godfrey v. Georgia.*[8] Notwithstanding the position of the drafters, without some clarifying interpretation, R.C.M. 1004(c)(7)(I) cannot be applied objectively without great difficulty. Using *Adamson* as guide, it would appear that the Court of Military Appeals must give some precise definition to R.C.M. 1004(c)(7)(I) to ensure correct application of that provision to enable it to withstand constitutional attack. Otherwise, you can expect to see a lot of litigation involving this aggravating factor.[9]

Effect of Constitutionally Invalid Aggravating Factor on Adjudged Death Sentence

In *Watson v. Blackburn,*[10] the jury recommended the death penalty after finding three aggravating circumstances: the offender was engaged in the perpetration of aggravated rape; the offender was engaged in the perpetration or attempted perpetration of armed robbery; and the offender had a significant prior history of criminal activity.

After noting that the Louisiana Supreme Court found the sentencing factor that the offender had a significant prior history of criminal activity was unconstitutionally vague, the Fifth Circuit, citing *Zant v. Stephens*[11] and Fifth Circuit authority,[12] held that a death sentence supported by at least one valid aggravating circumstance should not be set aside because another aggravating factor was invalid.

In the Eighth Circuit, a different result was reached. In *Collins v. Lockhart,*[13] one aggravating circumstance found by the jury was that the murder was committed for pecuniary gain. This duplicated the element of the crime itself, that the murder was committed in the course of robbery. This double counting violated the eighth and fourteenth amendments because the pecuniary gain aggravating circumstance failed to narrow the class of persons already guilty of robbery-murder, as required before the penalty of death could be imposed. Notwithstanding the fact that only one of three aggravating circumstances found by the jury was invalid, under Arkansas law the death sentence had to be reduced to life without parole unless the state chose to retry the punishment part of trial before a new jury. The Eighth Circuit distinguished the Supreme Court cases of *Zant v. Stephens*[14] and *Barclay v. Florida.*[15] The Eighth Circuit observed that Georgia, unlike Arkansas, did not require weighing aggravating circumstances against mitigating circumstances. Further, the Eighth Circuit stated that Florida not only did not employ a balancing procedure, but applied instead a harmless error analysis wherein it examined all the evidence and upheld a death

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[4] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1004 [hereinafter cited as MCM, 1984, and R.C.M., respectively].

[5] 758 F.2d 441 (9th Cir. 1985).

[6] 628 F.2d 1167, 1174 (9th Cir.), *cert. denied,* 447 U.S. 928 (1980).

[7] MCM, 1984, analysis, at 21–66. Godfrey v. Georgia, 446 U.S. 420, (1980) (sentencing factor that authorized the death penalty when the murder was outrageously or wantonly vile, horrible, or inhuman was held to be too vague as applied to a murder in which there was no torture or aggravated battery.).

[8] 446 U.S. 420 (1980).

[9] In one case pending appellate review, United States v. Turner, NMCMR No. 854044, R.C.M. 1004(c)(7)(I) has already been challenged for vagueness. Although the appellant does not face death on appeal, the appellant contends that because R.C.M. 1004(c)(7)(I) was the only aggravating factor on which the government could rely for capital referral, that referral was erroneous as the appellant was denied the right to select trial by military judge alone.

[10] 756 F.2d 1055 (5th Cir. 1985).

[11] 462 U.S. 862 (1983).

[12] Knighton v. Maggio, 740 F.2d 1344, 1351–52 (5th Cir 1984); Moore v. Maggio, 679 F.2d 381, 388–90 (1982). (5th Cir. 1980).

[13] 754 F.2d 258 (8th Cir. 1985).

[14] 462 U.S. 862 (1983). (Court upheld death sentence although Georgia Supreme Court found one of the three aggravating factors invalid).

[15] 463 U.S. 880 (1983) (Consideration of nonstatutory aggravating factors along with authorized statutory factors did not invalidate the death sentence. Court held that state could find harmless error.).

sentence only when it actually found the error harmless.[16] Stated differently, if the evidence established that the invalid nonstatutory aggravating circumstance was properly before the jury for some purpose (i.e., the evidence related to the circumstances of the crime or of the offender), the appellate court could properly consider it, and it was free under state law to affirm the death sentence if persuaded that the finding of invalid aggravating circumstance had no appreciable effect on the verdict.[17]

In the military, death cannot be adjudged unless the members find beyond a reasonable doubt, the existence of one or more aggravating circumstances;[18] and unless any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances including circumstances under R.C.M. 1004(c) that the members found existed.[19]

Clearly, the military balancing procedure resembles the balancing procedure followed in Arkansas. It would appear that if death was adjudged in a military case where the members found more than one aggravating factor listed in R.C.M. 1004(c), but one of them was later declared invalid, the death sentence should be vacated. In support of its holding, the Eight Circuit pointed out a caveat recited in *Zant v. Stephens:*

> And at the conclusion of its opinion the Court warns that "in deciding this case we do not express any opinion concerning the possible significance of holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion it imposed the death penalty."[20]

It would appear that the Eighth Circuit stands on good legal footing and that the military would have to employ ingenious legal reasoning to adopt the harmless error analysis.

Relying on the Same Facts To Find Two Aggravating Circumstances

Straight v. Wainwright[21] and *Collins v. Lockhart* discuss the issue of doubling, *i.e.,* relying on the same facts to find two aggravating circumstances. In *Straight,* a habeas corpus petitioner's claimed that the trial judge violated Florida law in finding two aggravating circumstances while relying on the same facts. Specifically, the petitioner claimed that the trial court found from the death of the victim followed by the taking of his wallet, that the murder was committed in the course of a robbery, and that the murder was for personal gain.[22] The Eleventh Circuit recognized that this "doubling" was in violation of Florida law; however, the Eleventh Circuit found the error harmless.[23] Moreover, the Eleventh Circuit noted that the Florida Supreme Court determined that the petitioner in *Straight* would have received the death sentence even if both the robbery and pecuniary gain aggravating factors were excluded.

Applying the logic of *Collins* and *Straight* to the military, it would appear that a finding by members that the circumstance of R.C.M. 1004(c)(7)(B) existed (an accused committed murder while engaged in or attempting a robbery or burglary), together with a finding the the circumstance of R.C.M. 1004(c)(7)(C) existed (the murder was committed for the purpose of receiving money or a thing of value) would be subject to challenge based on the same legal reasoning as *Collins* and *Straight* that such finding would constitute doubling. This would also be the case if members found that the accused committed a murder after the commission or the attempt to commit an offense listed in R.C.M. 1004(c)(7)(B), in addition to finding that the murder was committed with the intent to avoid or prevent lawful apprehension or effect an escape from custody or confinement, R.C.M. 1004(c)(7)(E). In an actual court-martial, if the posture of the evidence indicated that doubling could result, it would be appropriate for the military judge to give a special instruction to the members to avoid such a result.

Conclusion

Until the military develops some precedent in the capital sentencing under the R.C.M. 1004, periodic review and study of the capital cases decided by the circuit courts of appeals will be very useful to military attorneys and other military law practioners. A lot of interesting issues are being litigated in the circuit courts and warrant careful study. The Eleventh and Fifth Circuit are especially active. Except for the balancing procedure, the Georgia statute looks like a blueprint for the military penalty schedule. Understandably, Georgia cases decided in the Eleventh Circuit merit scrutiny. Further, Eighth Circuit decisions involving the balancing procedures in Arkansas cases also merit watching as this weighing or balancing procedure is similar to the military provision requiring balancing. Even after a significant number military appellate decisions interpreting R.C.M. 1004 have been decided, court of appeals cases involving capital sentencing should still be followed. There will always be more litigation in the courts of appeals than in the military and the law will develop at a faster pace.

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[16] Collins v. Lockhart, 754 F.2d at 266.

[17] *Id.*

[18] *Id.*

[19] R.C.M. 1004(b)(4)(B).

[20] 754 Fed.2d at 266 (quoting *Stephens,* 463 U.S. at 890) (citation omitted).

[21] 772 F.2d 674 (11th Cir. 1985).

[22] *Id.* at 679.

[23] *Id.* (Citing Straight v. State, 397 So. 2d 903 (Fla. 1981)).

The *Blockburger* Rule: A Trial by Battel[1]

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Trial counsel, contain your enthusiasm and guard against open displays of glee. The President has navigated the Sargasso Sea of multiplicity, heard your cries in the darkness, and engaged the spirits in a battle to set simple rules for charging, finding, and punishing multiple offenses emanating from a soldier's "one act or transaction." The battle is about to unfold over the foundations of our criminal justice system: what offenses may a prosecutor plead, of which offenses may the court find the accused guilty, and for which offenses may the court punish him? The state of the law on these most fundamental principles of criminal justice is, in a word, confused.

This confusion is simply illustrated by the following statistics reported by the Navy-Marine Corps Appellate Government Division in the case of *United States v. Jones,* currently before the Court of Military Appeals. From October 1983 to February 1986, the Court of Military Appeals has decided 835 cases; in 441 of those cases multiplicity was the *sole* issue.[2] Practitioners have thus been inundated by a confusing set of rules which the Court of Military Appeals has attempted to explain in over half (52%) of its recent decisions. These rules govern the most basic tenets of a criminal justice system: with which offenses can we charge the soldier and hold him to account, of which offenses may the court convict him and thus document his conduct in the public record, and for which offenses may society punish the soldier in order to achieve a more disciplined armed force?

Faced with this chaos, the President has thrown the trial counsel a lifeline; but a tug of war over this lifeline is imminent. In his 1984 Manual for Courts-Martial, the President has returned to the *Blockburger*[3] rule for determining whether a soldier may be lawfully convicted, and separately punished, under one, two, or more criminal provisions for the same conduct.[4] The *Blockburger* rule represents a simple test of statutory construction to determine whether Congress intended to punish a soldier twice or several times for the same conduct.[5] If Congress so intended, then the soldier may be punished separately for each statutory provision he or she violated.[6] What follows is an argument that such a rule was adopted in the 1984 Manual, and an explanation of the trial procedure and charging rules under the *Blockburger* rule. Finally, several examples of the rule will be outlined using fraud and controlled substance offenses which trial counsel face daily.

Preface

The President's action in re-adopting the *Blockburger* rule for multiple convictions and sentencing is lawful and prescribes sound practice for the armed forces. First, the United States Constitution permits separate and multiple punishments for one act or transaction if Congress intended such multiple punishments. Second, congressional intent is judged by the rule of statutory construction announced in *Blockburger* in the absence of stated congressional intent, and by assessment of congressional intent *de novo* if such intent is so recorded in the statutes or legislative history. Third, the President can prescribe rules for separate punishment, as long as the rules are not violative of congressional intent, under his powers as Commander in Chief and his delegated powers under Articles 36 and 56, Uniform Code of Military Justice.[7] Fourth, any abuses of congressional intent through overcharging by prosecutors may be prevented by current Standards of Professional Responsibility applicable to armed forces trial counsel, and may be remedied through dismissal of charges as violative of the accused's right to a "fair trial."

Blockburger Lawfully Adopted

The United States Constitution permits multiple punishment of two crimes committed in one act or transaction by a criminal when "Congress intended to authorize separate punishments for the two crimes."[8] "Where Congress intended . . . to impose multiple punishments, imposition of

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[1] "The trial by wager of battel was a species of trial introduced into England, among other Norman customs, by William the Conqueror, in which the person accused fought with his accuser, under the apprehension that Heaven would give the victory to him who was in the right." Black's Law Dictionary 1750 (4th ed. 1968); 3 W. Blackstone, Commentaries *337.

[2] Government's Motion to File Supplemental Citations of Authority, para. 7 at 3, United States v. Jones, No. 53223 (C.M.A. filed 8 April 1986). The data is from the court's published annual reports and volumes 16–21 of the Military Justice Reporter.

[3] Blockburger v. United States, 284 U.S. 299, 304 (1932).

[4] The President has prescribed that "punishment may be imposed for each separate offense," and defines offenses as "not separate if each does not require proof of an element not required to prove the other." Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1003(c)(1)(C) [hereinafter cited as MCM, 1984, and R.C.M. respectively].

[5] Ball v. United States, 105 S. Ct. 1668, 1672 (1985).

[6] *E.g.*, United States v. Woodward, 105 S. Ct. 611, 612 (1985) (per curiam).

[7] The MCM, 1984, was promulgated by the President pursuant to his constitutional authority as Commander-in-Chief of the Armed Forces (U.S. Const. art. II, § 2.) and pursuant to statutory delegation of Congress's power to "make rules for the Government and Regulation of the land and naval forces" (U.S. Const. art. I, § 8, cl. 14.). Uniform Code of Military Justice art. 36 10 U.S.C. § 836 (1982) [hereinafter cited as UCMJ], delegates to the President authority to prescribe procedural and evidentiary rules governing trial by court-martial. Article 56, UCMJ delegates to the President authority to prescribe the maximum sentence for each "offense" prescribed by the Code.

[8] Albernaz v. United States, 450 U.S. 333, 344 (1981). *See* Whalen v. United States, 445 U.S. 684, 688–89 (1980).

such sentences does not violate the [double jeopardy clause of the] Constitution."[9]

Under this constitutional parameter then, the focus is on congressional intent. The Supreme Court "has consistently relied on the test of statutory construction stated in *Blockburger v. United States* to determine whether Congress intended the same conduct to be punishable under two criminal provisions."[10] The appropriate inquiry then is "whether each provision requires proof of a fact which the other does not."[11]

The *Blockburger* test for congressional intent is based on the simple assumption that when Congress takes the time to enact two different statutory provisions, those provisions are meant to punish different offenses and punish them separately.[12] After applying the *Blockburger* test, the Supreme Court often goes on to examine the legislative history of the provisions at issue in order to ascertain directly from the record whether there is any evidence "that Congress did not intend to allow separate punishment for the two different offenses."[13] This simple analysis quickly provides the legislative intent at issue and, in *United States v. Woodward,* revealed that Congress intended to punish Woodward *twice*—once for a false statement and once for a currency violation—when he answered "no" to one question on a customs form.[14] Of course the Supreme Court has made it clear that a conviction in and of itself is punishment, and so convictions on each specification can only stand when Congress has intended multiple punishment.[15] Finally, the Supreme Court has made the procedure clear: after findings are entered, the military judge will vacate the findings on specifications for which Congress has not intended multiple punishment.[16] In sum, the rule for findings and sentencing multiplicity is the same.[17]

Because Congress can constitutionally punish a soldier twice for one act if it so intends, the issue now turns on whether the President has prescribed a more lenient rule for trials in the armed forces. The President has the power to prescribe a more lenient rule by using his power as Commander-in-Chief of the Armed Forces under art. II, § 2 of the Constitution and under the powers Congress has delegated to him through Articles 36 and 56 of the UCMJ. The President has not done so, however.

In the 1984 Manual, the President has returned to the *Blockburger* rule for ascertaining whether multiple punishment for one act or transaction is lawful.[18] The *Blockburger* rule "was the only test specifically authorized by the President in the 1951 Manual."[19] The 1969 Manual abandoned the simple *Blockburger* rule, however, by altering paragraph 76*a*(8) to recite "the general rule" as opposed to "[t]he test," and to recite several rules and examples which were not in the 1951 Manual.[20] For reasons known only to the drafters, the 1969 Manual replaced the simple *Blockburger* "test" with the convoluted rules and examples found in paragraph 76*a*(5) in an apparent attempt to adopt a general rule and a series of exceptions from the Court of Military Appeal's decisional law.[21] It was upon this new Manual provision, the decisional law the provision sought to codify, and public policy, that the Court of Military Appeals founded its opinion in *United States v. Baker.*[22]

Faced with the confusion in the armed forces regarding charging, findings, and sentencing,[23] the President has returned to the simplicity of the *Blockburger* rule. R.C.M. 1003(c)(1)(C) states that "punishment may be imposed for each separate offense." It defines offenses as "not separate if each does not require proof of an element not required to prove the other." This rule is the "black letter" law.[24] This restatement of the *Blockburger* rule is not obscured by discussion sections that follow the Rules for Courts-Martial cited above. These discussion sections are "supplementary materials [that] do not create rights or responsibilities that are binding on any person, party, or other entity."[25] Further, the discussion sections do not reflect policy or

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[9] *Albernaz,* 450 U.S. at 345, 345 n.3 (footnote omitted). *See* Brown v. Ohio, 432 U.S. 161, 165 (1977).

[10] *Ball,* 105 S. Ct. at 1672 (citation omitted).

[11] *Id.* (citation omitted).

[12] *See id.*

[13] *Woodward,* 105 S. Ct. at 612. *See also Albernaz,* 450 U.S. at 340.

[14] *Woodward,* 105 S. Ct. at 612.

[15] *Ball,* 105 S. Ct. at 1672, 1674.

[16] *Compare Ball,* 105 S. Ct. at 1674 (findings vacated where Congress *did not* intend multiple punishment) *with Woodward,* 105 S. Ct. at 613, 612 (findings permitted to stand where Congress *did* intend multiple punishment).

[17] *Ball,* 105 S. Ct. at 1672, 1674; *Woodward,* 105 S. Ct. at 612–13.

[18] R.C.M. 1003(c)(1)(C) (multiple punishment), 906(b)(12) (motion to determine proper punishment), 907(b)(3) (motion to dismiss a multiplicious specification), 307(c)(4) (preferral of offenses).

[19] United States v. Baker, 14 M.J. 361, 371 (CMA 1983) (Everett, C.J., concurring) (citation omitted). *See* McAtamney, *Multiplicity: A Functional Analysis,* 106 Mil. L. Rev. 115, 137, 137 n.84 (1984) [hereinafter cited as McAtamney]

[20] *Compare* Manual for Courts-Martial, United States, 1951, para. 76*a*(8) [hereinafter cited as MCM, 1951], *with* Manual for Courts-Martial, 1969 (Rev. ed.), para. 76*a*(5) [hereinafter cited as MCM, 1969].

[21] Dep't of Army, Pam., No. 27–2, Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised Edition, para. 76*a*(5), at 13–8—13–9 (July 1970). *See* Manual, 1969, para. 76*a*(5) at 13–10—13–12.

[22] *Baker,* 14 M.J. at 369–70, 371 (Fletcher, J.) (Everett, C.J., concurring). *See* United States v. Holt, 16 M.J. 393 (CMA 1983).

[23] *See* Raezer, *Trial Counsel's Guide to Multiplicity,* The Army Lawyer, Apr. 1985, at 21 (confusion abounds) [hereinafter cited as Raezer]; Uberman, *Multiplicity Under the New Manual for Courts-Martial,* The Army Lawyer, June 1985 at 31, 31 n.2 (confusion acknowledged) [hereinafter cited as Uberman]; McAtamney, *supra* note 19, at 136–50 (confusion documented).

[24] R.C.M. 1003(c)(1)(C), 307(c)(4), 906(b)(12), 907(b)(3)(B). Federal cases interpreting the *Blockburger* rule are digested in West's Federal Practice Digest, Volume 57, *Indictments and Informations* §§ 128, 129, 130, 126–27 (3d ed. 1985).

[25] MCM, 1984, Part I, Preamble Discussion, at I–2.

directive of the President as they are not part of his Executive Order.[26] The discussion portion of the 1984 Manual is the supplementary materials from the Departments of Defense and Transportation which serve as the drafter's "guidance"; it has no "force of law."[27] The analysis portion of the 1984 Manual represents the "nonbinding views of the drafters" and "does not necessarily reflect the views of the President."[28]

Thus, the President's rule for multiple offenses from one act or transaction in pleading, findings, sentencing, and appellate review of those actions, is the *Blockburger* rule as it appears in the Rules for Courts-Martial. The Navy-Marine Corps Court of Military Review has found that the President has promulgated the *Blockburger* rule as the military rule of multiplicity.[29] This position also has been adopted by two commentators.[30]

Finally, the President's return to *Blockburger* comports with his intent that the Rules for Courts-Martial "shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay."[31]

Trial Procedure

Trial procedure under *Blockburger* is quite simple. First, the Supreme Court recently reaffirmed that the prosecution may charge several offenses from one act or transaction, and has "broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case."[32] In *Ball,* the Supreme Court expressly approved the charging of, and deliberating upon, two offenses that were necessarily included offenses under *Blockburger,* even though there were no exigencies of proof.[33] Of course, exigencies of proof permit multiple pleading and deliberating.[34]

Second, all offenses for which there is "some evidence which together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged" will be sent to the trier of fact for deliberation.[35] Third, the trier of fact may return a finding of guilty on all offenses sent to it for deliberation.[36]

Fourth, once the trier of fact returns its findings, the military judge shall sua sponte vacate the conviction of the accused on any charge and/or specification which violates the intent of Congress, *and* is unnecessary to enable the prosecution to meet the exigencies of proof through the appellate courts.[37] The intent of Congress is determined according to the Congress' express statements by statutory language, the record in the statute's legislative history, and finally the *Blockburger* test—in that order.[38] Although the Supreme Court often begins its analysis of congressional intent with the *Blockburger* test, and then moves to statutory language and history, statutory language and history if contrary are dispositive of the issue.[39]

Fifth, the government may offer evidence in aggravation; the defense may offer evidence in extenuation and mitigation, and the military judge "shall" instruct on such matters.[40] Sixth, the sentencing authority may then impose the "maximum authorized punishment" for each separate offense remaining before the court.[41]

Unreasonable Multiplication of Charges

A final concern in the military justice system has been the perceived overcharging by trial counsel in the armed forces. Chief Judge Everett has stated that a return to the *Blockburger* rule "might lead to sentences that were inappropriately severe and to overreaching by prosecutors in an effort to induce plea bargains."[42] This concern is addressed

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[26] *Id.*

[27] Manual, 1984, analysis, para. *b(1),* at A21–2—A21–3.

[28] *Id.* at *b(2).*

[29] United States v. Jones, 20 M.J. 602, 602 (N.M.C.M.R.) *petition granted,* 21 M.J. 305 (C.M.A. 1985) (Issue: "Can the Court of Military Review refuse to follow a precedent of this Court?"); United States v. Meace, 20 M.J. 972, 973 (N.M.C.M.R. 1985). *See generally* United States v. Wells, 20 M.J. 513, 516, 517 n.2 (A.F.C.M.R. 1985). *Cf.* United States v. Cox, 18 M.J. 72, 74 (C.M.A. 1984).

[30] Raezer, *supra* note 23, at 24; Uberman, *supra* note 23, at 32, 32 n.9.

[31] R.C.M. 102.

[32] *Ball,* 105 S. Ct. at 1671 (citations omitted); United States v. Goodwin, 457 U.S. 368, 382 (1982); United States v. Nixon, 418 U.S. 683, 694 (1974); Confiscation Cases, 74 U.S. (7 Wall.) 454, 457–59 (1869).

[33] *Ball,* 105 S. Ct. at 1671 (prosecution under both statutes for the possessing and the receiving of the same gun at the same time is proper); *id.* at 1676 (these offenses are "necessarily" included in one another).

[34] *Ball,* 105 S. Ct. at 1671 n.8; United States v. Gaddis, 424 U.S. 544 (1976).

[35] R.C.M. 917(d).

[36] *Ball,* 105 S. Ct. at 1674; R.C.M. 918(a)(1).

[37] *Ball,* 105 S. Ct. at 1674 (motion timely after findings are entered); R.C.M. 907(b)(3)(B) (Standard).

[38] *Albernaz,* 450 U.S. at 336 ("Absent a 'clearly expressed legislative intent to the contrary, that [statutory] language must ordinarily be regarded as conclusive.' Consumer Product Safety Comm'n v. GTE Sylvania, Inc. 447 U.S. 102, 108 (1980)"); 450 U.S. at 340 (The *Blockburger* "rule should not be controlling where, for example, there is a clear indication of contrary legislative intent" in the legislative history.); 450 U.S. at 337–44 (where two statutes authorize separate punishment for one act or transaction, where the statute is silent on multiple punishment, where the legislative history is silent on multiple punishment, the *Blockburger* rule is applied and separate, cumulative punishment is authorized as each statute requires proof of an element that the other does not.). *See* United States v. Turkette, 452 U.S. 576, 580, 593 (1981) (Actual language of statute is the "most reliable evidence" of legislative intent.). Garcia v. United States, U.S. 105 S. Ct. 479 (1984) (After the statutory language is reviewed and is found to be unambiguous, judicial inquiry is complete, "except in rare and exceptional circumstances;" whereupon "only the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the 'plain meaning' of the statutory language." The authoritative source for legislative intent is the committee reports.).

[39] *Woodward,* 105 S. Ct. at 612–13; *Ball,* 105 S. Ct. at 1672–73.

[40] R.C.M. 1001(b)(4), 1001(c)(1)(A), 1005(e) and (e)(4).

[41] *Woodward,* 105 S. Ct. at 612, 613; R.C.M. 1003(c)(1)(C).

[42] *Baker,* 14 M.J. at 371 (Everett, C.J., concurring).

by the Standards of Professional Responsibility applicable to prosecutors in the military, and the remedy of dismissal for deprivation of a fair trial which, taken together, will substantially reduce and adequately remedy any overcharging by trial counsel.

First, the Model Code of Professional Responsibility and the American Bar Association Standards for Criminal Justice apply to the armed forces' prosecutors.[43] The Prosecution Function is detailed in Chapter 3 of the ABA Standards; section 3–3.9 provides that it is "unprofessional conduct" to institute a prosecution not supported by probable cause, and further that a prosecutor "should not" continue a criminal proceeding without evidence to support a conviction.[44] Further, Disciplinary Rule 7–103(A) prohibits the institution of criminal charges that are not supported by probable cause.[45] The "prosecutor is not obliged to present all charges which the evidence might support," however, and he or she must use sound prosecutorial discretion to avoid "over charging" by instituting charges carefully and dismissing lesser charges at a later date when appropriate.[46] Joinder and severance of offenses is governed by Chapter 13 of the ABA Standards, which provides that "[a]ny two or more offenses committed by the same defendant . . . may be joined in one accusatory instrument, with each offense stated in a separate count."[47] Joint trial of related offenses is endorsed by the Standards,[48] unless "severance is 'appropriate to promote' or 'necessary to achieve' a fair determination of the defendant's guilt or innocence of each offense."[49] The military prosecutor must be conscious of his or her duty to promote and achieve "a fair determination of the defendant's guilt or innocence" when charging the military accused because Ethical Consideration 7–13 to Disciplinary Rule 7–103 mandates that the prosecutor "use restraint in the discretionary exercise of governmental powers," and that "his duty is to seek justice and not merely to convict."[50] It is manifest that the trial counsel cannot "seek justice" with his or her "discretionary exercise of governmental powers" if he or she charges so many offenses from the same conduct that he or she deprives the accused of a "fair determination" of guilt or innocence.[51] These Standards of Professional Responsibility are enforced through the Code, and in the Army's system by regulatory provisions, and thus overcharging can be as effectively policed under the *Blockburger* rule as it is in the federal district courts.[52]

Second, the doctrine of due process provides a severe remedy for overcharging which the Court of Military Appeals and the Courts of Review may apply—dismissal of charges because of the "unreasonable multiplication of charges."[53] The federal courts of appeals have also embraced this doctrine when judging whether a defendant's right to a fair trial had been denied.[54] In sum, the evil of overcharging can be prevented, and if not prevented, remedied effectively without subverting multiplicity doctrine long used in federal courts.

Finally, multiple preferral *and* deliberation is sound practice for three reasons:

(1) The sovereign has a right to present all statutory violations of an accused (for which there is sufficient evidence and which Professional Standards permit) to the fact finder so that all permissible crimes are documented and punished.[55]

(2) The military judge needs many facts fully presented and determined in order to make an informed decision in applying *Blockburger.* Both arraignment and an Article 39*a* session prior to findings are premature stages.[56] Also, the judge *shall* vacate findings *sua sponte* because to permit multiple convictions to stand violates congressional intent and hence the doctrine of double jeopardy.[57]

(3) The armed forces' blue ribbon court-martial panels will follow the instructions of the military judge during sentencing and will not adjudge a more severe sentence than they otherwise would because of the number of

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[43] Dep't of Army, Reg. No. 27–10, Legal Services—Military Justice, para. 5–8 (10 Dec. 1985); Dep't of Army, Reg. No. 27–1, Legal Services—Judge Advocate Legal Services, para. 5–3 (1 Aug. 1984) [hereinafter cited as AR 27–10 and 27–1, respectively]; Dep't of Transportation, United States Coast Guard Military Justice Manual, ch. 600 (CMDTINSTM 5810.1A) (10 Apr. 1985); Dep't of Navy, Manual of the Judge Advocate General of the Navy, Para. 0165, at 74–84 (17 July 1984); Dep't of Air Force, Reg. No. 111–1, Military Justice Guide, paras. 1–8*d*, 1–9, 1–8c, 13–11 (1 Aug. 1984).

[44] Standards for Criminal Justice § 3–3.9(a) and (b) (1986).

[45] Model Code of Professional Responsibility DR 7–103(A) (1980).

[46] *Id.* § 3–3.9(b) and § 3–3.9 commentary at 3–59.

[47] *Id.* § 13–2.1.

[48] *Id.* § 13–2.1 commentary at 13–12 and 13.

[49] *Id.* § 13–3.1(c).

[50] *Id.* § 13–3.1(c); Model Code of Professional Responsibility EC 7–13 (1980).

[51] Model Code of Professional Responsibility DR 7–103(A) (1980).

[52] *See* UCMJ arts. 6, 15, 32, 37, 92, 98, 134; R.C.M. 109; AR 27–10, chapter 16 (Implementation of RCM 109: "Allegations of Misconduct and Suspension of Counsel and Military Judge's."). *See also* Model Code of Professional Responsibility E.C. 7–13, 7–14, 7–19, and 7–20 (1980).

[53] United States v. Sturdivant, 13 M.J. 323, 330, 325 n.3 (C.M.A. 1982) (Issue: "Whether the unreasonable multiplication of charges precluded the accused from receiving a fair trial.").

[54] *See* United States v. Earley, 657 F.2d 195, 197 (8th Cir. 1981) (Defendant properly charged and convicted of Count I (committing bank larceny and killing A during the course of the larceny) and Count III (committing same bank larceny and killing B during the course of the larceny), and properly charged with two counts (Counts II and IV) of bank burglary and killing A and B in the course of the burglary (dismissed by Prosecution prior to deliberation); held: no violation of "his rights to a fair trial by unnecessarily compounding the crime."). *See also* United States v. Hearod, 499 F.2d 1003, 1005 (5th Cir. 1974) ("Repeated assertion of the details of a singular course of conduct in multiple counts will prejudice the defendant and confuse the jury by suggesting that not one but several crimes have been committed."); United States v. Ketchum, 320 F.2d 3, 8 (2d Cir.), *cert. denied,* 375 U.S. 905 (1963); Fed. R. Crim. P. 7(c), 8(a).

[55] *See Ball,* 105 S. Ct. at 1671.

[56] *Id.*

[57] *Albernaz,* 450 U.S. at 344, 344 n.3.

charges on the charge sheet or the number of convictions which are later vacated.[58] Court members are well-disciplined soldiers who are dedicated to performing their duty competently, and are presumed to comply with the instructions of the military judge.[59]

Application of *Blockburger*

The first inquiry in determining whether two offenses are separately punishable is whether the offenses arose from the same "act or transaction." Under *Blockburger,* separate offenses arising out of separate transactions are separately punishable.[60] The same rule was applied under the former multiplicity doctrine of *Baker.*[61]

Having determined that the two or more offenses were committed during "one act or transaction," the issue turns to whether the offenses are "separate" under the President's Manual rule and whether Congress intended multiple convictions and punishments for the commission of these offenses during one act or transaction.[62] "Separateness" and congressional intent must now be ascertained, and three categories of offenses are evident.

First, when the two offenses committed during "one act or transaction" violate "two distinct statutory provisions," *Blockburger* clearly applies and its statutory elements test is dispositive.[63] Second, when the two offenses committed during "one act or transaction" violate several provisions of one statutory section, *Blockburger* likewise applies through the President's Manual and decisional law by the Court of Military Appeals.[64] Third, when the two offenses committed during "one act or transaction" twice violate one provision of one statutory section, *Blockburger* applies through the President's Manual, but the analysis must also focus on whether Congress intended the two violations to authorize multiple convictions and sentences as the "rule of lenity" may apply.[65] In each of the three categories, congressional intent—if expressed in the statute or legislative history—takes precedence over the *Blockburger* rule of statutory construction[66] because separate, cumulative punishment for one act under two statutes violates the double jeopardy clause of the fifth amendment where Congress did not intend such separate, cumulative punishment.[67] The following three examples illustrate and, hopefully illuminate, the *Blockburger* rule now in effect in the armed forces.

Violations of Two Distinct Statutory Sections: Larceny and Forgery

Simultaneous forgery by uttering a false check in violation of Article 123 and larceny by receiving funds for that false check in violation of Article 121 are separately punishable as violations of distinct statutory sections.[68]

First, each offense requires the proof of facts not required to prove the other offense.[69] Second, the legislative history of these Code provisions reveals that Congress intended larceny and forgery to be separate offenses, and that they be punished separately. The amendment of Article 121 in 1950

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[58] The Military Justice Act of 1983 Advisory Commission was directed by Congress to study sentencing by members and judge alone, among other issues. The Commission "strongly recommend[ed] against mandatory judge alone sentencing," and concluded that court-martial members "clearly comprise a 'blue-ribbon' decision making body when compared to civilian juries." The Military Justice Act of 1983 Advisory Commission, Advisory Commission Report, 6, 19, 27 (1984).

[59] United States v. Strand, 574 F.2d 993 (9th Cir. 1978); United States v. Vaughn, 546 F.2d 42 (5th Cir. 1977); United States v. Ricketts, 23 C.M.A. 487, 490, 50 C.M.R. 567, 570 (1975).

[60] *Blockburger,* 284 U.S. at 301–02 (Sales of contraband on consecutive days to the same person are "distinct and separate," and because the statute prohibits "the individual acts" and not a course of conduct, they are separately punishable by separate conviction.); R.C.M. 1003(c)(1)(C). *See, e.g.,* United States v. Lartey, 716 F.2d 955, 967 (2d Cir. 1983) (Each distribution in violation of 21 U.S.C. § 841(a)(1982) is a "distinct offense; [c]ourts resolving this issue have uniformly held that separate unlawful transfers of controlled substances are separate crimes under § 841, even when these transfers are part of a continuous course of conduct." (citations omitted)); United States v. Goodman, 605 F.2d 870, 885 (5th Cir. 1979) (Separate conviction and punishment was lawful under 21 U.S.C. § 841(a)(1) for manufacturing methaqualone and possession with intent to distribute methaqualone as convictions were "not based on a single transaction, and required proof of different facts for each offense."); United States v. Davis, 564 F.2d 840, 847–48, n.9 (9th Cir. 1977), *cert. denied,* 434 U.S. 1015 (1978) ("Successive prosecutions for separate offenses arising out of separate transactions are not violative of due process;" held: not multiplicious to charge and convict on 20 counts of distribution of contraband when each distribution is a separate prescription even when two, four, two, and three prescriptions were written on the same days.); United States v. Sanchez, 341 F.2d 225, 229 (9th Cir.), *cert. denied,* 382 U.S. 856 (1965) (successive prosecutions in two trials for separate drug sales arising from separate transactions were not violative of due process).

[61] *Baker,* 14 M.J. at 369; United States v. Gibbons, 11 C.M.A. 246, 29 C.M.R. 62 (1960); United States v. Kellner, 16 M.J. 524, 525 (A.C.M.R. 1983) (Offenses "separate in time, continuity, and actions" were not multiplicious for any reason.).

[62] R.C.M. 1003(c)(1)(C). *See supra* note 9 and accompanying text.

[63] *Blockburger,* 284 U.S. at 304; Gore v. United States, 357 U.S. 386 (1958) (Narcotics and Tax Code violations); R.C.M. 1003(c)(1)(C). *See* United States v. Costello, 483 F.2d 1366 (5th Cir. 1973) (21 U.S.C. § 844(a) and § 841(a)(1)).

[64] R.C.M. 1003(c)(1)(C); United States v. Zubko, 18 M.J. 387, 393 (C.M.A. 1984) (*Blockburger* rule adopted for multiple offenses committed under one UCMJ section). *See* United States v. Davis, 656 F.2d 153, 156 n.2 (5th Cir. 1981), *cert. denied,* 456 U.S. 930 (1982) (explaining United States v. Hernandez, 591 F.2d 1019 (5th Cir. 1979) (en banc); *Hernandez,* 591 F.2d at 1022 (*Blockburger* analysis applies, but possession with intent to distribute and distribution in violation of 21 U.S.C. § 841 (e)(1) in a single delivery of contraband was not punishable separately as proof showed one offense committed.); United States v. Stevens, 521 F.2d 334, 337 n.2 (6th Cir. 1975); Normandale v. United States, 201 F.2d 463 (5th Cir.), *cert. denied,* 345 U.S. 999 (1953).

[65] R.C.M. 1003(c)(1)(C); United States v. Davis, 656 F.2d 153 156–160 (5th Cir. 1981) (holding separate conviction and punishment was intended by Congress for simultaneous possession of marijuana and possession of qualudes in violation of section 401 of the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. § 841(a)(1) (1982)); *Normandale,* 201 F.2d at 464 (Simultaneous purchase of heroin and raw opium in violation of predecessor to 21 U.S.C. § 841(a)(1) was separately punishable as proof of different drug was required.). *But see Albernaz,* 450 U.S. at 342 ("Rule of lenity" only applies when congressional intent as to separate, cumulative punishment is truly ambiguous as the " 'touchstone' of the rule of lenity 'is statutory ambiguity.' " (quoting Bifulco v. United States, 447 U.S. 381, 387 (1980)); Bell v. United States, 349 U.S. 81, 83 (1955) (Simultaneous transport of *two* women in violation of the Mann Act was punishable only *once* as congressional intent was ambiguous, and thus ambiguity "resolved in favor of lenity.").

[66] *See supra* note 38.

[67] *Ball,* 105 S. Ct. at 1672; *Albernaz,* 450 U.S. at 344, 345 n.3.

[68] *Jones,* 20 M.J. at 602. *See Meace,* 20 M.J. at 973.

[69] UCMJ arts. 121, 123; MCM 1984, Part IV, para. 46*b* and 48*b*.

was intended to include only the simple common law frauds of larceny by asportation, larceny by false pretences (trick or device), and larceny by embezzlement, which were not separately proscribed as offenses under the UCMJ. Article 121 was not intended to include complicated statutory frauds that were separately proscribed as offenses in Articles 107, 123, 132 and 134.[70] The complex statutory frauds proscribed under the UCMJ—Articles 107, 123, 132 and 134—were derived from "[a]n Act [of Congress] to prevent and punish frauds upon the Government of the United States" of 12 March 1863; these offenses are separate and complete without respect to whether any actual taking of property occurs as a result of the offenses.[71]

In short, the President's *Blockburger* rule demonstrates Congress' intent to punish larceny and forgery separately, and analysis of legislative history beyond the rule confirms that intent.[72]

Violations of Two Provisions of One Statutory Section: Controlled Substance Offenses Under Article 112a

Violations of controlled substance statutes continue to perplex appellate courts and close attention is necessary—but not necessarily sufficient—to understand and apply the law. Multiple violations of different provisions of Article 112a are separately punishable if they are separate under the *Blockburger* test—which both the President and the Court of Military Appeals have adopted for such cases.[73] In *United States v. Zubko,* the Court of Military Appeals announced that the *Blockburger* rule would be used in the armed forces to determine whether contraband offenses under Article 134, are included within each other, and thus not separately punishable.[74] The court rejected as inapplicable "the merger-of-convictions" analysis engendered by Chief Justice Warren in *Prince v. United States* and applied in some circuits.[75] Thus when a soldier violates two distinct provisions of one section of the UCMJ *Blockburger* applies to assess whether separate punishment is lawful.

Of course, the combinations of offenses under Article 112a are varied. To be sure, simultaneous possession and distribution of a controlled substance are *not* separately punishable as possession is necessarily a lesser included offense of distribution.[76] Yet, all other combinations appear to be separately punishable because they all have different elements, and because Congress used the disjunctive "or," which indicates alternatively punishable conduct.[77] "Canons of construction indicate that terms connected in the disjunctive in this manner be given separate meanings."[78] Finally, the legislative history of Article 112a demonstrates that Congress intended separate convictions and punishment for each drug offense because of the insidious and debilitating effects of controlled substances on the readiness of our armed forces.[79] In sum, separate punishment has been authorized by Congress, and implemented by the President.

Multiple Violations of One Provision of One Statutory Section: Article 112a

When a soldier twice violates one provision of one Code section during "one act or transaction," he or she faces separate punishment for each violation. The *Blockburger* rule applies through R.C.M. 1003(c)(1)(C), and certainly any express congressional intent also applies to determine whether a soldier may be separately punished under the double jeopardy clause of the fifth amendment.[80] If congressional intent is truly ambiguous, however, the "rule of

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[70] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House of Representatives Comm. on Armed Forces,* 81st Cong., 1st Sess. 1232 (1949) (original Morgan draft); *id.* at 1244–45 (Testimony of Mr. Felix Larkin, Assistant General Counsel, Dep't of Defense); *id.* at 812 and 823 (Testimony and Statement of Robert D. L'Heureux, Chief Counsel, Senate Banking and Currency Committee); H.R. Rep. No. 491, 81st Cong., 1st Sess. 104 (1949) (Morgan draft Article 121 reported out of House in H.R. 4080, a clean bill); *Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services,* 81st Cong., 1st Sess. 276 (1949) (Amendment to H.R. 4080 by MG Thomas H. Green to Article 121 to include wrongful appropriation); Conf. Rep. No. 1946, 81st Cong., 2d Sess. 4–5 (1950) (wrongful appropriation amendment agreed upon).

[71] W. Winthrop, Military Law and Precedents 697–99, 702–03 (1920). *See also Index and Legislative History of the Military Justice Act of 1983* (1984–85) (Articles 121 and 123 not considered) [hereinafter cited as Index and Legislative History, 1983]; *Index and Legislative History of the Military Justice Acts of 1968* (1969, 1985) (Articles 121 and 123 not considered).

[72] *See Woodward,* 105 S. Ct. at 612–13 (falsely answering "no" on government form resulted in separate conviction and punishment for false statement and for a currency violation); *Albernaz,* 450 U.S. at 344 (one conspiracy punishable cumulatively under two different conspiracy code sections).

[73] R.C.M. 1003(c)(1)(C); *Zubko,* 18 M.J. at 384.

[74] *Zubko,* 18 M.J. at 382–86.

[75] Prince v. United States, 352 U.S. 322, 328–29 (1957); *Zubko,* 18 MJ. at 384.

[76] " 'Distribute' means to deliver to the possession of another," MCM, 1984, Part IV, para. 37c(3), and the definitions of possession and distribution are the same ones interpreted by the Court of Military Appeals in *Zubko,* 18 M.J. at 384–85, 379. These definitions have been approved by Congress. S. Rep. No. 53, 98th Cong., 1st Sess. 29 (1983) ("The definitions and terms set forth in Executive Order 12383 are consistent with the committee's intent with respect to Article 112a.") [hereinafter cited as 1983 Senate Report].

[77] R.C.M. 1003(c)(1)(C). *See Garcia,* 105 S. Ct. 479, 482; FCC v. Pacifica Foundation, 438 U.S. 726, 739–40 (1978); *See also* 1A J. Sutherland, Statutes and Statutory Construction § 21.14, n.2 (4th ed. 1973) (Use of the disjunctive "or" indicates alternatives and requires those alternatives to be treated separately unless such a construction renders the provision repugnant).

[78] *Garcia,* 105 S. Ct. at 482.

[79] 1983 Senate Report, *supra* note 77, at 11, 29, *reprinted in Index and Legislative History, 1983, supra* note 72, at 537, 555; H.R. Rep. No. 549, 98th Cong., 1st Sess. 17, 19 (1983), [hereinafter cited as 1983 House Report], *reprinted in Index and Legislative History, 1983, supra* note 72, at 664, 666; *Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services,* 97th Cong., 2d Sess. 108 (1982) (testimony of Robinson O. Everett, Chief Judge, Court of Military Appeals) (controlled substances are a tremendous problem in the military and a menace to discipline) [hereinafter cited as 1982 Senate Hearings]; 129 Cong. Rec. S.5614 (daily ed. Apr. 28, 1983) (statement of Sen. Stevens), *reprinted in Index and Legislative History, 1983, supra* note 72, at 591. *See* United States v. Trottier, 9 M.J. 337, 345–46 (1980).

[80] Congressional intent regarding punishment is always in issue under the doctrine of double jeopardy. *Albernaz,* 45 U.S. at 344, 344 n.3. *See, e.g.,* United States v. Davis, 656 F.2d 153, 156–60 (5th Cir. 1981), *cert denied,* 456 U.S. 930 (1982). (held: separate conviction and punishment was intended by Congress for simultaneous possession of marijuana and possession of qualudes in violation of section 401 of the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. § 841(a)(1) (1982)).

lenity" applies and the soldier may be punished only once.[81]

For example, simultaneous possessions of two controlled substances (*e.g.*, marijuana and cocaine) are separately punishable as each requires the proof of a different controlled substance.[82] R.C.M. 1003(c)(1)(C) requires proof of a different "element" which the Supreme Court has made clear is the "statutory element[] of the offense"—notwithstanding the pleadings or the proof at trial offered on one or both offenses.[83] The different elements in this case are the distinct controlled substances.[84]

The U.S. Court of Appeals for the Fifth Circuit has considered such a case in *United States v. Davis*,[85] and held that Congress intended separate conviction and punishment for simultaneous possession of marijuana and qualudes in violation of the Comprehensive Drug Abuse Prevention and Control Act.[86] In resolving the issue in *Davis*, the court focused on congressional intent and concluded that Congress "intended . . . to provide trial judges with maximum flexibility in sentencing and therefore intended to permit separate punishment for possession of each controlled substance."[87]

Prior to enacting Article 112a, Congress was asked by the Department of Defense to provide the military "the greatest possible flexibility and the simplest possible tools" to permit the military to continue its "aggressive effort to rid the services of persons who traffic in illegal drugs."[88] Congress enacted Article 112a in order "to provide express guidance on drug offenses" and to remedy "[a]buse of controlled substances [which] is one of the most significant disciplinary problems facing the armed forces."[89] Article 112a is derived from the President's 1982 Executive Order on drug offenses,[90] which was based on the Comprehensive Drug Abuse Prevention and Control Act. Further, Article 112a(b)(3) specifically defines a controlled "substance" as any "listed in schedules I through V" in 12 U.S.C. § 812 (1982) which is part of the Comprehensive Drug Abuse Prevention and Control Act. Finally, the "punishments under 21 U.S.C. §§ 841 and 844 were used as a bench mark" for the President's punishments in the 1984 Manual.[91]

Congress' intent in enacting Article 112a and using the Comprehensive Drug Abuse and Prevention and Control Act as a guide was threefold. Congress sought to provide comprehensive and express guidance in one punitive article on controlled substances.[92] Congress sought to punish drug abuse sternly in the armed forces as it had in the Comprehensive Drug Abuse and Prevention Control Act because it is a significant and menacing problem in the military.[93] Finally, Congress sought to provide multiple punishments for simultaneous possession of two drugs just as it did in the Comprehensive Drug Abuse and Prevention Control Act because judges need "flexibility" in sentencing, and stern punishment was needed to meet the drug menace.[94] Thus, the purpose of Article 112a is the same as the Comprehensive Drug Abuse and Prevention Control Act, and that "is to provide for multiple sentencing for simultaneous possession of different types of drugs."[95] In the face of this clear congressional intent, soldiers are to be separately punished for each violation of Article 112a, and the "rule of lenity" does not apply.

Conclusion

Although the *Blockburger* multiplicity doctrine is not a panacea, it prescribes a fair and simple method of determining separate punishments that conform to the intent to Congress. Against a silent Congress, the elements test is simple to administer. Of course, if Congress has spoken through statutory language or legislative history, its express intent must be heeded.

Whispering in the background of some Court of Military Appeals decisions is the argument that the President has no power to prescribe the *Blockburger* rule for separate punishment. Some observers have advocated a form of "code" double jeopardy under Article 44, which controls double jeopardy in the armed forces and looks not to the statutory elements of the offense as the Supreme Court does, but to the elements as pled in the specifications and proved at trial

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[81] *Albernaz*, 450 U.S. at 342; *Bifulco*, 447 U.S. at 387.

[82] R.C.M. 1003(c)(1)(C). *See Normandale*, 201 F.2d at 464.

[83] Brown v. Ohio, 432 U.S. 161, 166 (1977); Ianelli v. United States, 420 U.S. 770, 785 n.17 (1975).

[84] *See Normandale*, 201 F.2d. at 464; UCMJ, art. 112a; MCM, 1984, Part IV, para. 37a.

[85] 656 F.2d at 156–60.

[86] 21 U.S.C. § 841(a)(1) (1982).

[87] *Davis*, 656 F.2d at 160.

[88] 1982 Senate Hearings *supra* note 80, at 44 (statement of William H. Taft IV, General Counsel, Dep't of Defense), *reprinted in Index and Legislative History, 1983, supra* note 72, at 281.

[89] 1983 Senate Report, *supra* note 77, at 11, 29, *reprinted in Index and Legislative History 1983, supra* note 72, at 537, 555. *See* 1983 House Report, *supra* note 80, at 17, 19, *reprinted in Index and Legislative History, 1983, supra* note 72, at 664, 666.

[90] 1983 Senate Report, *supra* note 77, at 11, *reprinted in Index and Legislative History, 1983, supra* note 72 at 537; 1982 Senate Hearings, *supra* note 80, at 133 (statement of Chief Judge Everett), *reprinted in Index and Legislative History, 1983, supra* note 72, at 370; Exec. Order No. 12,383, 47 Fed. Reg. 42,317 (1982).

[91] MCM, 1984, analysis, para. 37 at A21–93.

[92] *See supra* note 90; *See Davis*, 656 F.2d at 159.

[93] *See supra* note 80.

[94] *Davis*, 656 F.2d at 159; *see supra* note 90.

[95] *Davis*, 656 F.2d at 159. The Court of Appeals for the Sixth Circuit has likewise held that simultaneous distribution of two packets of drugs on the same day to the same agent were separately punishable when the drugs were destined for two separate users. United States v. Noel, 490 F.2d 89, 90 (6th Cir. 1974).

in order to determine whether two convictions violate Article 44.[96] These issues are left for another campaign as the Trial by Battel ensues.

For those of us who swim the Sargasso Sea of multiplicity, the President may not have manufactured full order out of chaos, but he has shed some light, and created form in the void. Whether the President can haul us in from the stormy seas remains to be seen. His new rule may simply turn out to be another cruel twist adding to the existing chaos of multiplicity law. The new rule (offering simplicity) may be dashed on the rocks of judicial review as the courts may insist irrationally on maintaining the status quo—no matter how disordered. The resolution of the *Jones* case now before the Court of Military Appeals,[97] and the disposition of the Joint Service Committee's work on explicitly adopting the *Blockburger* rule are the next skirmishes in the Trial by Battel. Whether we are doomed to further torment by the siren song of "judicial economy," unsupported references to the "interests of justice," legal reasoning undergirded by mirrors, and pseudo intellectual analysis supported by enfeebled props that collapse under the weight of their distant remove from reality, remains to be seen.

[96] *See Zubko*, 18 M.J. at 382 n.6; United States v. Zupancic, 18 M.J. 387, 389 n.1 (C.M.A. 1984); United States v. Duggan, 4 C.M.A. 396, 399–400, 15 C.M.R. 396, 399–400. *But see* cases cited *supra* note 84 (Supreme Court uses statutory elements).

[97] 20 M.J. 602 (N.M.C.M.R.) *petition granted*, 21 M.J. 305 (C.M.A. 1985).

Trial Defense Service Note

Relief From Court-Martial Sentences at the United States Disciplinary Barracks: The Disposition Board

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United States Disciplinary Barracks, U.S. Army Trial Defense Service

From the Walls of the powerful, fortress'd house
From the clasp of the knitted locks
From the keep of the well closed doors
Let me be wafted

—*Walt Whitman*
"The Last Invocation"

Introduction

The United States Disciplinary Barracks (USDB) is the "temporary home" for inmates serving certain sentences imposed by courts-martial. After sentence has been imposed, the immediate concern of inmates is to keep their term of confinement as short as possible. Each inmate is entitled to automatic appellate review before the respective court of military review. Even during the pendency of this appeal, the inmate is given the opportunity to seek sentence relief by requesting a pardon[1] or clemency[2] from the secretary of the respective service. In addition, the inmate may seek to reduce his or her punishment through requested review of his sentence before the USDB Disposition Board. The Disposition Board makes recommendations to the Commandant of the USDB with regard to restoration to duty, clemency, and parole.[3]

As a practical matter, the Disposition Board may be the most realistic chance an inmate has of receiving sentence relief outside of the appellate process. After receiving a recommendation from the Disposition Board, the Commandant and cadre of the USDB make recommendations for relief, if any, to the Army Clemency Board.[4] As the frontline of the military correctional system, it is the responsibility of the Commandant cadre to rehabilitate inmates and prepare them to reenter society as law-abiding citizens. A recommendation from one or both of these parties that a particular inmate is deserving of sentence relief will be one of the strongest forms of evidence available in support of such a request.

This article will review steps that a defense attorney may take to enhance his or her client's chances at a Disposition Board, the Disposition Board procedure, criteria used by the Disposition Board when arriving at its recommendations, and the success rate of each form of relief.

Defense Attorney Input

For the Disposition Board to make informed recommendations, it needs all evidence available on the inmate. The length of confinement at the inmate's former station, processing requirements, non-receipt of court-martial orders,

[1] Uniform Code of Military Justice art. 74, 10 U.S.C. § 874 (1982).

[2] *Id.*

[3] This board also considers requests for federal transfers, suspension of forfeiture of pay and allowances, custody elevation, detail changes, and suspension of forfeited good conduct time. *See* United States Disciplinary Barracks, Reg. No. 600–1, Manual for the Guidance of Inmates, para. 2–28*a*(1)–(8) (25 May 1984) [hereinafter cited as USDB Reg. 600–1].

[4] Dep't of Army, Reg. No. 190–47, The United States Army Correctional System, para. 6–14*e* (1 Nov. 1980) [hereinafter cited as AR 190–47].

completeness of records, and availability of information[5] can cause delay in the convening of a Disposition Board. To give your client the best chance of success, it is important that his record be as complete as possible. Following are the areas where our efforts may best serve our client's interests.

Promulgating Order

No action can be taken by the Disposition Board until the final action taken by the convening authority is received by the USDB.[6] Efforts to expedite forwarding of this action may enhance an inmate's prospects of relief by giving him or her more appearances before the Disposition Board.

Civilian Charges

On occasion, an inmate will be pending charges in a civilian jurisdiction. These charges may be related to the confining offense, but most often stem from a separate offense. It is important that this be brought to the attention of the USDB Trial Defense Service office[7] early in the inmates's term of confinement. Delays in receipt of this information may foreclose the opportunity to take advantage of the provisions of the Speedy Trial Act[8] or to get concurrent sentencing. Delay in resolution of this situation will also postpone any relief available through the Disposition Board.

Stipulation of Fact

One of the most difficult determinations the Disposition Board has to make is the nature of the inmate's confining offense. The charge sheet is usually an inadequate method of understanding the circumstances surrounding the inmate's confining offense. To assist the Disposition Board, you should draft a stipulation of fact indicating the mitigating circumstances surrounding the confining offense. In guilty plea cases, a stipulation probably already exists. In contested cases, it will require additional effort on the part of both counsel. If counsel cannot come to agreement, an affidavit by the Trial Defense Service attorney will still be helpful. It is a worthwhile effort. Without this information, the Disposition Board must rely on the terse rendition of facts on the charge sheet and the description provided by the inmate.[9] The former is insufficient and the latter may be viewed as suspect.

Pretrial Credit

Inmates must be given credit for time served in pretrial confinement, illegal pretrial confinement, and restriction tantamount to pretrial confinement. When a determination has been made at an inmate's court-martial that he is entitled to some form of pretrial credit, the USDB and the Disposition Board must be made aware of this fact. At times, notice of this credit is only in the record of trial. This practice requires someone in the USDB to read the inmate's record of trial to verify an inmate's request for such credit, and confusion can result. To alleviate this problem, it is recommended that pretrial credit be included as a part of the promulgating order or that a stipulation of fact be drafted indicating the credit to be applied to the inmate's term of confinement.

The Soldier's Behavior

One of the most difficult experiences for any inmate is the initial culture shock of confinement at the USDB. Every inmate starts the confinement in reception. He is treated as a maximum security inmate in this status. He is rarely let out of his cell, constantly observed, and barraged with the rules and regulations of the USDB. From the first day of confinement, the soldier is under constant scrutiny from members of the USDB cadre and the other inmates confined at the USDB. His or her attitude and behavior is monitored and recorded constantly and affect all decisions made concerning treatment during confinement. The inmate must make a conscious decision at the outset to conform to the rules of the institution. The inmate must understand that if he or she desires relief from his sentence through the Disposition Board, he must demonstrate that he or she is deserving of the trust and confidence inherent in the granting of such a request. The Disposition Board only grants relief to the most deserving. To qualify for relief, an inmate must prove himself over time in both word and deed.

The Disposition Board

Procedure

The Disposition Board has three members. It consists of at least two officers, one of whom must be a field grade officer. The third member of the board may be a civilian or noncommissioned officer. At least one member of the Disposition Board must be from the inmate's branch of service. Members are drawn from the cadre of the USDB.[10]

After listening to the evidence presented by the inmate and reviewing his or her Correctional Treatment File,[11] a recommendation is made to the Commandant of the USDB.[12] The Commandant then makes an independent review of the available information and makes his own recommendation.[13] The recommendations of the Disposition Board and the Commandant of the USDB, both favorable and unfavorable, are then forwarded to the Army

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[5] USDB Reg. 600–1, para. 2–28*d*(1).

[6] AR 190–47, para. 6–14*f*.

[7] Address: Trial Defense Service, United States Disciplinary Barracks, Combined Arms Center and Fort Leavenworth, Fort Leavenworth, Kansas 66027–7100.

[8] 18 U.S.C. § 3161 (1982).

[9] *See* United States Disciplinary Barracks, Memorandum 15–1, Directorate of Classification, para. 9–4 (1 June 1981) [hereinafter cited as USDB Mem. 15–1].

[10] USDB Reg. 600–1, para. 2–28*a*.

[11] This file contains an inmate's record of mental hygiene reports, work reports, domicile reports, rules infractions, favorable incident reports, court-martial data, and military history.

[12] AR 190–47, para. 6–14*e*; USDB Reg. 600–1, para. 2–28*a*.

[13] AR 190–47, para. 6–14*e*; USDB Reg. 600–1, para. 2–28*a*.

Clemency Board, which is the official designee for the Secretary of the Army and has the power to approve or disapprove any requests or recommendations for parole, restoration to duty and clemency.

The inmate appears before the Disposition Board within the first six to eight months of confinement at the USDB. Thereafter, there is an annual board.[14] The inmate may request a special board which is held six months from the date of this annual Disposition Board.[15] This request is only granted in rare circumstances. Granting this request will result in an eighteen month lag between the special Disposition Board and the inmate's next Disposition Board.[16]

The Disposition Board is held within the walls of the USDB. The inmate personally appears before the Disposition Board without counsel. Witnesses from outside the USDB may not appear before the Disposition Board in person, although written statements may be submitted. Cadre from the USDB may appear in person at the Disposition Board on the inmates' behalf.[17] The type of evidence that is presented by the inmate depends upon the type of relief being requested.

Parole

To be eligible for parole, an inmate must have unsuspended punitive discharge, dismissal, or an approved administrative discharge, and be serving an aggregate sentence in excess of one year.[18] Because all enlisted Army prisoners must have a sentence in excess of two years to be confined at the USDB, their only possible barrier to consideration for parole is the lack of a punitive discharge. The inmate must also satisfy the following threshold requirements before he may be considered for parole by the Disposition Board:

(a) If an inmate has a sentence in excess of one year but less than three years, he is eligible for parole after he has served one-third of his sentence; under no circumstance can he be eligible for parole if he has served less than six months of his sentence.

(b) If the sentence is in excess of three years, to include life sentences, the inmate is eligible for parole after he has served one-third of his sentence. Prisoners serving sentences in excess of thirty years, including those with life sentences, are eligible for parole after they have served ten years in confinement. Prisoners serving a death sentence are not eligible for parole.

(c) Where exceptional circumstances exist, the Army Clemency Board may waive the eligibility requirements [stated above].[19]

A staff member in the Parole Division of the USDB assists the inmate in preparing his or her parole plan for submission to the Disposition Board. The parole plan must include the following:

1. Residence. A letter from the inmate's spouse, parents, other family, reputable friends or organizations stating where and with whom the inmate will live. This list does not include fiance(e) or girl/boy friends.
2. Employment. Unless waived by the Commandant for cogent reasons, no inmate will be released on parole until satisfactory evidence has been furnished that he will have a reputable occupation.[20]

The Disposition Board is guided by the following non-exclusive factors when arriving at its recommendations for parole:

For Parole	Against Parole
This is optimum time for release	Further confinement appears appropriate
Good response to the institutional program	Poor response to the institutional program
First offender	Previous offenses
Clear civil record	Civilian criminal record
Nature of offense	
Youth at time of offense	Psychiatric indication of impairing personality disorder, alcoholism, drug addiction, etc.
Stable employment record	Unstable employment record[21]

Once parole has been recommended by the Disposition Board and the Commandant and approved by the Army Clemency Board, the U.S. Probation Office that will be in charge of the inmate on parole must approve the parole plan.[22] If the designated U.S. Probation Office approves the parole plan, the inmate will be transferred to the residence designated in the parole plan and begin serving his or her term of parole.

When accepting parole, the inmate signs an agreement that no credit will be applied against the term of confinement for time spent on the streets if parole is later revoked. Further, the inmate must also agree that, by accepting parole, he relinquishes any good time credits or extra good time credits he has earned against his term of confinement. An inmate earns credits every month that are subtracted from the term of confinement and permit him or her to be released from the USDB at an earlier date than if he served his full term of confinement. The credits he or she may earn are based on his sentence and are as follows:

[14] USDB Reg. 600–1, para. 2–28*c*.

[15] AR 190–47, para. 6–14*g*.

[16] *Id.*

[17] USDB Reg. 600–1, para. 2–28*a*.

[18] *Id.*

[19] USDB Reg. 600–1, para. 2–28*b*.

[20] USDB Reg. 600–1, para. 2–28*e*.

[21] USDB Mem. 15–1, ch. 13 at 2–3.

[22] AR 190–47, para. 12–11*a*.

Sentence	Good Time
Less than 1 year	5 days per month
1 year but less than 3 years	6 days per month
3 years but less than 5 years	7 days per month
5 years but less than 10 years	8 days per month
More than 10 years except life and death penalty	10 days per month[23]

Extra good time credits may be earned for semi-skilled work and skilled work on details within the USDB and for successful completion of education courses offered in the USDB.[24] The longer an inmate's sentence and the longer he or she spends in confinement, the more good conduct time and extra good conduct time he must relinquish for parole. For some inmates, parole is no longer appealing when they build up a substantial number of good-time credits and extra good-time credits. These inmates are unwilling to trade a shorter period of confinement for a longer period of parole.

Parole is the form of relief most often realized by inmates. From 1 October 1984 to 30 September 1985, 517 Army inmates were eligible for and did request to be considered for parole. Of this group, 124 inmates were applying for the first time and 393 inmates were applying for a second time or more. The Disposition Board recommended parole for 116. The Commandant of the USDB recommended 105 inmates for parole. The Secretary of the Army approved 90 inmates for parole, and 125 cases were left pending.[25]

Restoration

To be eligible for restoration to duty, an inmate must have served one-third of the sentence or six months confinement, whichever is less.[26] The inmate will be given the opportunity to apply for restoration once he or she is eligible, and he must request that he be considered. In arriving at its recommendation the Disposition Board is guided by the following non-exclusive checklist:

For Restoration	Against Restoration
Demonstrated capability for further service	Failure to meet current physical and intellectual standards
	Poor service adjustment
Favorable prior service record	Relatively short period of prior service
Possesses skills needed by the service concerned	Lacking in aptitude and skills needed by service concerned
Meaning restoration has for individual	Inmate not motivated for restoration
Strong motivation toward restoration	Inmate ambivalence
Evaluation of inmate by former Commander and SJA	Effect upon community and/or military service[27]

All inmates discharged or dismissed from the service may apply for restoration. Restoration to active duty status is rarely granted. From 1 October 1984 to 30 September 1985, 501 Army inmates applied for restoration; 233 inmates were applying for the first time, while 268 inmates were applying for a second time or more. No soldiers were recommended for restoration to duty by the Disposition Board. The Commandant of the USDB recommended none for restoration to duty, and none were restored by the Secretary of the Army.[28]

Clemency

An inmate is eligible to apply for clemency at his or her first Disposition Board. Clemency is the reduction of an inmate's sentence to confinement, change in the type of discharge, remission of the sentence to confinement, or advancement of an inmate's parole eligibility date.[29] If an inmate requests that the Disposition Board recommend clemency, the following non-exclusive checklist is used by the Disposition Board in making its determination:

For Clemency	Against Clemency
Youth at time of offense	Serious nature of offense
Situational nature of offense	Relatively short sentence
Clear prior military and civil record	Prior military and civil offenses
Length of military service, to include combat time	Effect of release upon military service
Verified family need	Short period of military service
Development of occupational skills	Short period of confinement served or remaining to be served
Increased maturity	Poor adjustment to confinement
Length of confinement	Effect upon inmate population
Effect of clemency upon inmate population	Meaning clemency has for the offender

[23] USDB Reg. 600–1, para. 2–16.

[24] *Id.*

[25] Annual Historical Summary—United States Disciplinary Barracks (Fiscal Year 1985), Table VIII, at 107 [hereinafter cited as FY 85 Summary].

[26] AR 190–47, para. 6–15*a*.

[27] USDB Mem. 15–1, para. 11–5*a*.

[28] FY 85 Summary, *supra* note 25, at 85.

[29] USDB Reg. 600–1, para. 2–38*b*(1); USDB Mem. 15–1, para 12–1*c*.

Psychiatric recommendation to the effect that clemency will aid in rehabilitation, or that prolonged confinement may prove detrimental to the inmate's health or mental well-being	Psychiatric recommendation that continued confinement may aid in inmate's maturation and/or rehabilitation, or continued confinement is indicated because of defect in character[30]

One of the most intriguing forms of clemency is the establishment of an earlier parole eligibility date. As a general rule, an inmate is not eligible for parole until after serving one-third of the term of confinement.[31] If the Disposition Board or Commandant determines that the inmate satisfies the terms of parole at an earlier date, however, they may recommend to the Army Clemency Board that the inmate's parole eligibility date be moved up.[32] If this recommendation is approved, the inmate may serve most of his or her confinement in the community on parole status.

Clemency is rarely granted. From 1 October 1984 to 30 September 1985, 1184 Army inmates applied for some form of clemency. Of these, 387 inmates were applying for clemency for the first time, and 797 inmates were applying for the second time or more. The Disposition Board recommended that 29 inmates be given some form of clemency. The Commandant of the USDB recommended that fifteen inmates be given some form of clemency. The Army Clemency Board approved some form of clemency for four inmates.[33] No statistics were kept detailing what form of clemency was granted in these cases.

Conclusion

The Disposition Board offers an inmate a unique opportunity to reduce his or her sentence. Success is directly related to the satisfaction of strict criteria. To enhance his chances of success, the inmate must demonstrate these deserving qualities over a sustained period of time. The reward for this behavior can be very great: restoration to duty; return to society; and reduction of sentence. The inmate must make a concerted effort to earn his or her requested relief from the first day of confinement. For the inmate who earns relief, it will have been well worth the effort.

[30] USDB Mem. 15–1, para. 12–2.

[31] USDB Reg. 600–1, para. 2–28*a*.

[32] USDB Reg. 600–1, para. 2–38*b*(1); USDB Mem. 15–1, para. 12–1*c*.

[33] FY 85 Summary, *supra* note 25, at 85. There were 291 cases pending at the end of FY 85.

Clerk of Court Note

Court-martial processing times for cases received by the Army Judiciary during the second quarter of Fiscal Year 1986 (January-March 1986) increased over those shown for cases received in the first quarter. General courts-martial experienced an increase of six percent in time from the earliest date of charges or restraint to the date of the convening authority action; BCD special courts-martial, a ten percent increase. Comparisons with the preceding quarter and fiscal year follow:

General Courts-Martial

	FY86–2	FY86–1	FY85
Number of records received	404	396	1767
Days from charges/restraint to sentence	51	48	51
Days from sentence to action	55	52	52

BCD Special Courts-Martial

	FY86–2	FY86–1	FY85
Number of records received	220	198	892
Days from charges/restraint to sentence	36	33	31
Days from sentence to action	51	46	47

As expected, post-action times show little change. The average number of days from the convening authority action until the reported dispatch of the record remains six days. Average mail transmission time—that is, the number of days remaining from the date of action until the record is received by the Clerk of Court—was twelve days from Eighth Army jurisdictions, ten days from USAREUR jurisdictions, and six days from CONUS jurisdictions. These averages can be distorted by faulty reporting. For example, a jurisdiction may regularly report the date of dispatch of the record as being the same day as the convening authority's action or within one or two days following. However, when the mail transmission time for cases from that jurisdiction averages three to five times the average for all other jurisdictions in the same area, it is clear that the reported dates of record dispatch are being misstated. We did not include such jurisdictions in calculating the mail transmission times shown above.

A New Generation: Automation of Courts-Martial Information

Major John Perrin & Major Gil Brunson
Information Management Office

Beginning in August 1986, the courts-martial information component of the Legal Automation Army-Wide System (LAAWS)[1] will be put into operation by the U.S. Army Legal Services Agency (USALSA). The courts-martial information component of LAAWS is known as the Army Courts-Martial Information System (ACMIS). ACMIS is a computerized system designed to record the history of all special and general courts-martial cases and to track the status of all cases which are subject to appellate review. The information stored in the new system will be available to attorneys at the Office of The Judge Advocate General (OTJAG), The Judge Advocate General's School (TJAGSA), the U.S. Army Legal Services Agency, major Army commands (MACOMS), and to judge advocate offices in the field. This article briefly summarizes the operation of ACMIS and the advantages offered by the new system to all judge advocates involved in criminal law.

ACMIS will record detailed information about the accused, the offenses charged, significant legal issues raised by the case at trial and on appeal, the attorneys and judges involved, and the current status of the case. Initial information about each case will be prepared by the trial counsel and military judge at the trial level. This information will be supplemented at USALSA as appellate review of the case proceeds. Using this data, ACMIS will provide statistical management reports and answer inquiries about specific courts-martial cases.

ACMIS is being prepared to replace and expand the current computer reporting system, Courts-Martial and Disciplinary Statistical Management System (CDMIS). Unlike CDMIS, which was operated exclusively by the Office of the Clerk of the Court, USALSA, ACMIS will store and retrieve information for the following organizations:

OTJAG: Criminal Law Division
International Law Division

TJAGSA: Criminal Law Division
International Law Division

USALSA: Army Court of Military Review
Office of the Clerk of the Court
Government Appellate Division
Defense Appellate Division
Trial Judiciary
Trial Defense Service
Trial Counsel Assistance program

MACOM Staff Judge Advocate Offices
Installation Division Staff Judge Advocate Offices

ACMIS is being developed from commercial software called DOCKETRAC by a private contractor, INSLAW, Inc. Each of the supported offices at OTJAG, USALSA, and TJAGSA has had an opportunity to contribute to the system design and development.

The ACMIS software will be operated using a minicomputer at USALSA that will be connected to a mainframe computer operated by the U.S. Army Information Systems Command located at the Pentagon. The USALSA minicomputer will serve as a communications link, permitting on-line entry and retrieval of information from the mainframe computer using approximately thirty USALSA terminals. Other supported offices will be able to connect to the mainframe computer using personal computer terminals and telecommunications software.

ACMIS has been designed as a versatile management tool and is capable of meeting the specific information requirements of the different organizations using it. The Army Court of Military Review will use the new system to keep track of its docket calendar, schedule filing dates, and determine the present status of a case under review. The court will also use the system to prepare processing time, workload, and workflow reports. The distribution of caseloads among the panels and judges will be controlled through ACMIS. The court will be able to identify and keep track of significant legal issues appearing in its cases by noting them on the computer terminal.

ACMIS support for the Clerk of the Court will expand the categories of information maintained by the current CDMIS database. The new system will continue to compile routine trial and appellate statistics on substantive, procedural, and sociological data about courts-martial cases. It will also increase the ability of the clerk's office to respond to requests from Congress and other federal agencies for specialized criminal law statistics. The clerk's office will be able to maintain notes on the computer describing unusual features of an individual case and keep a "tickler file" of suspense dates. The system will streamline the control, retirement, and retrieval of records of trial from the storage facility at the National Records Center. ACMIS will maintain a list of the names and addresses of attorneys involved in courts-martial cases and a roster of all attorneys admitted to the bar of the Army Court of Military Review. The new database will also keep track of cases on appeal to the Court of Military Appeals and the United States Supreme Court.

ACMIS terminals will be installed in the government and Defense Appellate Divisions of USALSA to monitor cases pending appellate review. The database will keep track of

[1] LAAWS is an automation project directed by the Office of The Judge Advocate General. The project will determine the information systems architecture needed to implement future automation of The Judge Advocate General Corps. For further information concerning LAAWS, contact the LAAWS project manager, LTC Daniel L. Rothlisberger, Automation Management Officer, Office of The Judge Advocate General.

scheduled future events in the appellate review cycle and prepare reports on processing time, attorney workload, and office workflow. Defense Appellate Division will use the system to identify companion cases while assigning new cases to attorneys, thus avoiding conflicts of interest. Both divisions will be able to prepare and follow up on standard form correspondence concerning appellate cases. The system will also identify and report on cases involving selected significant legal issues.

The Criminal Law Divisions at OTJAG and TJAGSA will be able to generate reports from the ACMIS database for each MACOM, general courts-martial jurisdiction, or selected strategic or tactical organizations in the Army. These reports will show the number of cases involving specific factual characteristics, such as a certain jurisdictional basis, location (by state or country), the sociological background of the accused (educational level, sex, race, marital status, etc.), or a specific victim profile. The reports will also list the total number of cases that are drug/alcohol related, involve senior/subordinate relationships, sexual harassment, or other offense categories. Reports can be prepared showing the categories of error identified by appellate courts in selected cases. Status checks on particular cases will be another feature available to the Criminal Law Divisions on the new database.

The International Law Divisions at OTJAG and TJAGSA will use ACMIS to prepare legal advice and lesson materials on international affairs and operational law matters. Advice and lesson materials will be enhanced by using courts-martial information based on offense location, trial location, combat-related categories, and victim characteristics. Both divisions will be able to check on the current status of any court-martial case.

The Trial Counsel Assistance Program (TCAP) will use ACMIS to prepare instructional materials and advise trial counsel of significant legal issues appearing in cases tried and pending appeal.

The Trial Judiciary will use ACMIS management statistics reports on processing time, workload, and workflow. These reports will assist in personnel and staffing decisions with regard to the assignment of trial judges throughout the Army. Trial Judiciary will be able to monitor the preparation and timeliness of Military Judge Case Reports and the accuracy of the information in those reports.

Like the Trial Judiciary, the Trial Defense Service will receive processing time, workload, and workflow reports. These ACMIS reports will supplement the information available from the present Trial Defense Service reporting system. The new reports will assist in determining the appropriate staffing levels and locations for Trial Defense Service field and regional offices. ACMIS terminals can be consulted to determine the name and location of defense counsel who have experience handling cases involving a specific category of offense or factual background.

Staff judge advocates will be able to obtain information from ACMIS either directly by computer terminal connection or through the mail from the Office of the Clerk of the Court. The database will provide specific, verifiable information to be used during Article 6, UCMJ visits. Staff judge advocates will be able to inquire through TCAP about similar courts-martial cases and obtain the name and location of the trial counsel in similar cases.

Major Army staff judge advocates will use ACMIS to prepare processing time, workload, and workflow reports. Each MACOM will be able to generate statistics on substantive, procedural, and sociological facts about courts-martial cases within the MACOM.

The ACMIS system will be expanded in the future to accommodate new reporting requirements and a broader user base.[2] For more information concerning implementation of the ACMIS system,[3] contact the project manager, Major John Perrin, Chief, Information Management Office, USALSA, at AUTOVON 289–1374 or commercial (202) 756–1374.

[2] Under the LAAWS project, USALSA is developing enhancements to its SJA Office Military Justice System, which will be incorporated into ACMIS. The expanded ACMIS system will become the sole courts-martial information system available to all Army attorneys.

[3] Implementation of ACMIS will require a revision of the Military Judge Case Report and changes to Army Regulation 27–10.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Table of Contents

Contract Law Note

Interpretation of the Equal Access to Justice Act by the Armed Services Board of Contract Appeals

Public Law No. 99–80, 99 Stat. 183, amended the Equal Access to Justice Act, 5 U.S.C. § 504 [hereinafter cited as the Act], to allow the award of attorneys' fees and other expenses by boards of contract appeals in proceedings under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601–618. Attorneys' fees may be awarded to a prevailing party only in a proceeding in which the position of the government was not substantially justified, as determined on the basis of the record as a whole. Section 7(c) of P. L. 99–80 provided coverage for those contractors who sought fees during the previous four years but were denied relief based on the uncertainty regarding board jurisdiction. The Armed Services Board of Contract Appeals (ASBCA) has issued several decisions applying and interpreting this new authority.

In *Maitland Brothers Company,* ASBCA No. 24032, 86–2 BCA ¶ 18796, the board strictly construed the amended language of the statute, holding that jurisdiction of the board to award fees and other expenses was specifically limited to appeals processed pursuant to the Contract Disputes Act. Maitland Brothers had elected to pursue its appeal under the 1976 disputes clause in its contract and argued that this election did not affect the jurisdiction of the board to award fees. Maitland Brothers attempted to rely on 28 U.S.C. § 2412, another section of the Equal Access to Justice Act, which applies to "any civil action brought by or against the United States" and includes any contract dispute. The board concluded, however, that 28 U.S.C. § 2412 applied only to court proceedings and not to proceedings before the boards of contract appeals. Board jurisdiction derived from 5 U.S.C. § 504 which is expressly limited to appeals from decisions "made pursuant to section 6 of the Contract Disputes Act of 1978."

In another decision, *Roberts Construction Company,* ASBCA No. 31033 (21 Feb. 1986), the ASBCA narrowly construed the scope of recovery under the Act. Roberts was found to meet the threshold for recovery of fees and other expenses, in that Roberts was the prevailing party and the position of the government was not substantially justified, but was nonetheless denied any recovery.

Roberts sought $830 for 31.5 hours of its project manager's time, $180 for two hours of attorney consultation, and $40 for mailing and express delivery expenses. The board found that no recovery was available for the costs of the project manager's time because he was a regular employee as opposed to an expert witness. Attorney fees were recoverable up to $75 per hour, but were denied here because Roberts failed to provide written sworn verification of the claim as required by the board rules. The postage and express delivery expenses were also denied based on Robert's failure to verify the claim, but the board went on to indicate that such expenses were not recoverable in any event.

The ASBCA issued another jurisdictional decision in *J.M.T. Machine Company,* ASBCA Nos. 23928, 24298, and 24536 (17 Mar. 1986). This decision interpreted section 7(c) of P.L. 99–80, which makes the provisions of the Act applicable to cases pending or commenced after 1 October 1981, in which applications for fees and other expenses were timely filed but were dismissed by the board for lack of jurisdiction. J.M.T. sought fees, under this provision, based on an appeal decided in December 1984. Under the basic provisions of the Equal Access to Justice Act, as codified at 5 U.S.C. § 504(a)(2), application for fees must be filed within thirty days of final disposition of the case. Here, J.M.T. was denied fees for failure to timely file. The board concluded that a timely application for fees was required in order that section 7(c) be invoked and that the thirty day statutory provision controlled. The board found that the statutory requirement to make application based on final adjudication was jurisdictional and that a prayer for fees made before final disposition, as was made by J.M.T. here, did not satisfy this requirement. A fee application meeting the statutory requirements was not made until nearly one year after final disposition of the original dispute and therefore no relief could be granted.

Finally, in *Pat's Janitorial Service, Inc.,* ASBCA No. 29129, (7 Apr. 1986), the board addressed the standard of "substantial justification." Under the Act, a prevailing party is entitled to fees unless the position of the government was substantially justified. 5 U.S.C. § 504 (a)(1). In applying this standard, the board followed case precedent of the Court of Appeals for the Federal Circuit. The standard is "slightly more stringent than reasonably justified" and requires "more than mere reasonableness." *Schuenemyer v. United States,* 776 F. 2d 329, 330 (Fed. Cir. 1985). The board stated, "[T]he Government is required to show that

its position, including the position taken at the agency, was clearly reasonable in view of the law and facts *then* in existence. *Gavette v. OPM,* No. 84–1286 (Fed. Cir, 28 February 1986) (en banc)."

In the instant case, the contractor prevailed on the merits because the government had withheld payments due on a contract in order to recover a previous overpayment without complying with the provisions of the Debt Collection Act of 1982. *See DMJM/Norman Engineering Co.,* 84–1 BCA ¶ 17,226. The board held here that prevailing on the merits was not enough unless it was established that the government's position was not substantially justified. While it was clear at the time the funds were withheld that the government was entitled to recover the overpayment, it was not entirely clear that the provisions of the Debt Collection Act applied to withholding of such funds. The board concluded that, due to the uncertainty at the time of the withholding, the government's position was clearly reasonable and, therefore, substantially justified. Major Post.

Criminal Law Note

Sentencing Articles

The following articles concerning sentencing have appeared in *The Army Lawyer* since the last index (December 1985):

Bross, *Dollars from Heaven,* The Army Lawyer, May 1986, at 38.

Bross, *Uncharged Misconduct on Sentencing: An Update,* The Army Lawyer, Feb. 1986, at 34.

Capofari, *Punitive Discharge Clause in Pretrial Agreements,* The Army Lawyer, Feb. 1986, at 48.

Child, *How Aggravating Can You Get? The Expanded Boundaries for Admission of Aggravating Evidence Under R.C.M. 1001(b)(4),* The Army Lawyer, Feb. 1986, at 29.

Clevenger, *The Right to be Free from Pretrial Punishment,* The Army Lawyer, Mar. 1986, at 19.

DAD Note, *Confinement Credit,* The Army Lawyer, Apr. 1986, at 44.

DAD Note, *Sentencing Instructions,* The Army Lawyer, Mar. 1986, at 45.

DAD Note, *Credit for Pretrial Confinement,* The Army Lawyer, Mar. 1986, at 45.

Gaydos, *Providence Inquiry—New Source of Prosecution Evidence?,* The Army Lawyer, June 1986, at 68.

Russelburg, *Sentencing Arguments: A View from the Bench,* The Army Lawyer, Mar. 1986, at 50.

Slade, *The Definition of Prior Convictions,* The Army Lawyer, Apr. 1986, at 44.

Tauber, *Stipulate at Your Peril,* The Army Lawyer, Feb. 1986, at 40.

Legal Assistance Items

Avoiding Malpractice

Powers of Attorney

Preparing powers of attorney is generally high volume business in legal assistance offices. Nevertheless, the preparation of powers of attorney should not be taken as a routine duty meriting little thought, but rather, it should receive the attention it deserves. One area which may not be understood, or which may be overlooked, concerns the need to include durable language in the power of attorney.

At common law, a power of attorney is rendered inoperative upon the death or disability of the principal. Thus, if a power of attorney is given to another by a soldier, and the soldier subsequently is injured and becomes incapacitated, the power of attorney is rendered ineffective. This result, however, can be avoided by including "durable language" in the power of attorney.

All fifty states now recognize the validity of durable powers of attorney by statute. A durable power of attorney is a power of attorney that includes the authorized statutory language that causes the power to continue in force despite the subsequent disability of the principal. This language will generally be found in the state's probate code, and will frequently follow the Uniform Probate Code's language found in section 5–501: "A durable power of attorney is a power of attorney by which a principal designates another his attorney-in-fact in writing and the writing contains the words "This power of attorney shall not be affected by subsequent disability or incapacity of the principal." Chapter 2 of *The Legal Assistance Officer's-Deskbook and Formbook* contains a comprehensive treatment of powers of attorney and includes sample durable language. Failure to include such language in powers of attorney being drafted for soldiers would be unfortunate, as the possibility of a soldier being injured and incapacitated is great. If durable language is not included in the power of attorney, and the soldier is later incapacitated, the soldier's family is left with no alternative but to initiate a guardianship proceeding, which will be costly, time consuming, and subject the person declared the guardian to continuing supervision of the court.

Legal assistance officers should review the power of attorney forms they are using to ensure that they include durable language. It is hard to imagine a situation when a soldier would not want a power of attorney to include durable language. Special attention should be given to form powers of attorney used during mobilization exercises or during actual mobilization. Major Mulliken.

Being Thorough

The challenge of doing competent legal work requires the attorney to be thorough in handling a client's problem. Frequently, malpractice claims are brought against attorneys for failing to be as thorough as necessary. Legal assistance officers should be careful to handle all of a client's problem, and not just a portion of it. One area in which problems of thoroughness can easily arise is in will drafting or estate planning, when the attorney fails to change all documents necessary in developing the client's estate plan.

Legal assistance officers routinely draft wills for soldiers and their family members. As part of the will drafting process, the soldier indicates to whom the property is to be passed upon the soldier's death. Drafting the will to accomplish that objective should only be one part of the attorney's consideration. The attorney must also consider disposition of property that will not be passed through the estate. A primary example is soldier's Serviceman's Group Life Insurance (SGLI) policy. If, for example, a married soldier wants his property to pass to someone other than his or her spouse, the attorney should immediately question

the soldier concerning to whom the soldier has directed that the SGLI policy proceeds be paid. It is likely that the soldier may have previously indicated "by law" or payment to the spouse on the SGLI form, VA Form 29–8286, which will not accomplish the current intentions of the soldier. It may be prudent for the attorney to obtain the soldier's personnel records to verify the elected disposition of the SGLI proceeds. Similarly, when an attorney is including a trust in the will, and the soldier intends the trust to be funded by the SGLI policy, the attorney must verify that the SGLI policy is payable to the trustee or to the estate, and not to a named beneficiary.

This type of problem can occur in areas other than estates. For example, when a soldier comes to the legal assistance office seeking assistance in obtaining a divorce, the attorney frequently advises the client to terminate joint accounts and to have a new will drafted. That advice should also include instructions to revise the SGLI election so that the spouse will not obtain the proceeds of the policy should the soldier die before a divorce becomes final. The attorney should also advise the client to update the DD Form 93 (Record of Emergency Data) to remove the spouse from that form once the divorce is final.

Legal assistance officers should be cautious to consider all aspects and ramifications of a client's problem and treat the full range of the problem, and not just the more obvious surface considerations of the problem as presented or requested by the client. Major Mulliken.

Model Rules of Professional Conduct.

The supreme courts of New Hampshire and Nevada have recently adopted a version of the American Bar Association's Model Rules of Professional Conduct, bringing the number of states which have adopted the Model Rules to twelve. The states that have adopted a version of the Model Rules are Arizona, Arkansas, Delaware, Maryland, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, and Washington. Additionally, seventeen other states are in the process of studying the Model Rules in consideration of possible adoption. The Model Rules of Professional Conduct are also under study by a Joint Services Committee made up of representatives of each of the military departments. Currently, however, the Army has, in AR 27–1 and AR 27–3, adopted the Model Code of Professional Responsibility. Major Mulliken.

"Lemon Law" Developments

New York State has been among the most active jurisdictions in providing protections to consumer purchasers of automobiles, both new and used. New York has an extensive "lemon law" statute for new cars and was the first state to pass a law providing protections for purchasers of used cars *(See New York Passes Used Car Lemon Law,* The Army Lawyer, Feb. 1985, at 57).

Following are two items of interest for legal assistance attorneys involving actions undertaken by the New York State Attorney General. One involves Ford Motor Company's extended warranty and the other the operation of Chrysler's Consumer Arbitration Program.

Deductible Charges for Extended Warranties in "Lemon Law" States

Legal assistance attorneys should be aware that the New York Attorney General's Office has filed suit against the Ford Motor Company for violating the New York state lemon law by assessing a $100 deductible charge on consumers who purchased an extended warranty on their new automobile.

New York's lemon law, which provides protections for persons who purchase defective new automobiles, requires that repairs under warranty be provided free during the first 18,000 miles or two years after purchase. Forty states and the District of Columbia now have lemon laws, and many of these statutes have a provision similar to that of New York.

Many consumers purchase an extended warranty, which provides protection beyond the life of the typical new car warranty. Many times, the cost of the extended warranty is added as a part of the amount financed by the consumer, either through a bank, credit union, or the car manufacturer's financing organization.

The lawsuit was prompted by the complaint of a woman in Albany, New York, whose 1984 Ford automobile developed a transmission leak after 15,188 miles, according to a report in the April 1986 Consumer Protection Report issued by the National Association of Attorneys General. When she consulted the dealer about making the repair, she was informed that it would be covered by the extended warranty only if she paid the deductible amount. The New York Attorney General argued that this requirement effectively "eviscerates" the state's lemon law protection because the statute requires that repairs under warranty be done at no charge to the consumer.

The lawsuit seeks restitution for consumers in New York who have paid the $100 deductible charge, $2,000 in costs against Ford, and an injunction prohibiting the practice.

Because this is a rapidly emerging area of state law (it was not until 1982 that the first state "lemon law" statute was passed), it is difficult to track recent legislative activity. For the benefit of legal assistance attorneys, however, a listing of those states that have a lemon law is provided. Where available, the statutory citation is also listed:

Alaska—Alaska Stat. § 45.45.300 (1984)
Arizona—Ariz. Rev. Stat. § 44–1261–1265 (West 1984)
California—Cal. [Civ.] Code § 1793.2 (West Supp. 1984)
Colorado—Colo. Rev. Stat. § 42–12–101 (1984)
Connecticut—Conn. Gen. Stat. § 42–179 (West Supp. 1983)
Delaware—Del. Code Ann., tit 6 § 5001 (Supp. 1983)
District of Columbia—NA
Florida—Fla. Stat. Ann. § 681.10–108 (West Supp. 1984), *amended by* Act of May 29, 1984, ch. 84–85, 1984 Fla. Ses. Law Ser. 20 (West)
Hawaii—Hawaii Rev. Stat. § 437 (1984)
Illinois—Ill. Rev. Stat. ch 121½, § 1201–08 (1983)
Iowa—Act of May 15, 1984, H. File 2234, 1984 Iowa Legis. Serv. 164 (West)
Kansas—Kan. Stat. Ann. § 50–645 (1985 Supp.)
Kentucky—Ky. Rev. Stat. § 367.860–.870 (Bobbs Merrill Supp. 1984)
Louisiana—La. Rev. Stat. § 51: 1941–46 (1984)
Maine—Me. Rev. Stat. Ann. tit. 203–A § 1161 (1983)
Maryland—Md. Com. Law Code Ann. § 14–1401 (1984)
Massachusetts—Mass. Gen Laws Ann. Ch. 90 § 7N1/2 (West 1983)

Minnesota—Minn. Stat § 325F.665 (1983 Supp.)
Mississippi—Miss. Code Ann. § 63–17–151 (1985)
Missouri—H.992, 82nd Gen. Assem., 2d Reg. Sess. 1984 Mo. Laws (1984)
Montana—Mont. Code Ann. § 61–4–501 (1983)
Nebraska—Neb. Rev. Stat. § 60–2701–2709 (Supp. 1983)
Nevada—Nev. Rev. Stat. § 598.751 (1983)
New Hampshire—N.H. Rev. Stat. Ann. § 357–D (Supp. 1983)
New Jersey—N.J. Rev. Stat. § 56:1219 (1983)
New Mexico—N.M. Stat. Ann. § 57–16A–1 (1985)
New York—N.Y. Gen. Bus. Law. § 198–a (McKinney 1983)
North Carolina—N.C. Gen. Stat. § 25–2–103(1)(d) (Supp. 1983)
North Dakota—N.D. Cent. Code § 51–07–16 (1985)
Oklahoma—Okla. Stat. Ann. § 901 (1985)
Oregon—Or. Rev. Stat. § 646.315 (1983)
Pennsylvania—Pa. Stat. Ann. tit. 73 § 2001–14 (1984)
Rhode Island—R.I. Gen. Laws § 31–5.2–1–13 (Supp. 1984)
Tennessee—1984 Tenn. Public Acts 1004
Texas—Tex. Rev. Civ. Stat. Ann. art. 4413(36) § 6.07 (Vernon Supp. 1983)
Utah—Utah Code Ann. § 13–20–1 (1985)
Vermont—Vt. Stat. Ann. tit. 9 § 4170–81 (1984)
Virginia—Va. Code § 59.1–207.7–207.12 (Supp. 1984)
Washington—Wash. Rev. Code § 19.118.010–.070 (West Supp. 1984–85)
West Virginia—W. Va. Code § 46A–6A–1–8 (Supp. 1984)
Wisconsin—Wis. Stat. § 218.015 (West Supp. 1984)
Wyoming—Wyo. Stat. Ann. § 40–17–101 (Supp. 1984)

(NOTE—The statutes of Kentucky and North Carolina are not considered true lemon laws).

Chrysler Arbitration Program Under Scrutiny

The Chrysler Consumer Arbitration Program has come under the scrutiny of the New York State Attorney General, who has complained to Chrysler that the time it takes for consumers to resolve complaints through the Chrysler program makes the program a "sham."

New York Attorney General Robert Abrams has asked Chrysler to revamp its program so that consumers are offered timely refunds or replacement vehicles, if warranted. Numerous situations were cited in which consumers who had purchased defective vehicles spent months complaining first to the dealer, then to the zone representative, and finally to a factory representative. When consumers finally arrive at the arbitration program, the typical case takes three months to resolve and the result is that often the case is referred back to the dealer for another repair. Statistics compiled by the Attorney General's office indicated that in 98% of 200 decisions over two years, the Chrysler arbitration panel declined to concede that the defect could be cured. According to the Attorney General, in only four cases was a refund or replacement ordered, which compared with a 37% buyback rate for similar programs for General Motors, Honda, Nissan, Volkswagen, and AMC/Renault, which were operated in New York by the Better Business Bureau.

Living Will Update

Appendix E of the 1986 *All-States Will Guide* contained a recitation of the statutory citations to twenty-five states which have passed "living will" provisions. These provisions, also known variously as "death with dignity" statutes, permit an individual to direct that no life-sustaining measures or other "heroic" means be used to keep that person alive. For the convenience of legal assistance attorneys who may not have a copy of this publication, the citations are republished below.

The Appendix also contained a listing of an additional eleven states that passed living will statutes in 1985, but for which no statutory citations were yet available. These citations are also listed below. Legal assistance attorneys should annotate office copies of the *Will Guide* with these citations.

States Which Enacted Statutes in 1985

Arizona—Arizona Medical Treatment Decision Act, Az. Rev. Stat. Ann. §§ 3201–3210.

Colorado—Colorado Medical Treatment Decision Act, Col. Rev. Stat. Ann. §§ 15–18–101—113.

Connecticut—Connecticut Death With Dignity Act, Pub. Act 85–606, Conn. Gen. Stat. 1986 App. Pam. (not yet codified in Connecticut General Statutes, but text is available in the pamphlet referred to above).

Indiana—Indiana Living Wills and Life-Prolonging Procedures Act, Burns Ind. Stat. Ann. §§ 16–8–11–1—16–8–11–22.

Maine—Maine Living Will Act, Me. Rev. Stat. Ann. §§ 2921–2931.

Missouri—Missouri Uniform Rights of the Terminally Ill Act, Vernon's Mo. Stat. §§ 459.010—.055.

Montana—Montana Living Will Act, Mont. Code Ann. §§ 50–9–101— 50–9–206.

New Hampshire—New Hampshire Terminal Care Document Act, N.H. Rev. Stat. Ann. §§ 137–H:1—137–H:16.

Oklahoma—Oklahoma Natural Death Act, Ok. Stat. Ann. tit. 63, §§ 3101–3111.

Tennessee—Tennessee Right to Natural Death Act, Tenn. Code Ann. §§ 32–11–101—32–11–110.

Utah—Utah Personal Choice and Living Will Act, Utah Code Ann. §§ 75–2–1101—1118.

States Which Enacted Statutes Prior to 1985

Alabama Natural Death Act. Ala. Code §§ 22–8A–1–10 (1981).
Arkansas Death With Dignity, Ark. Stat. Ann. §§ 82–3801–3804 (1977).
California Natural Death Act, Cal. [Health & Safety] Code §§ 7185–7195 (1976).
Delaware Death With Dignity Act, Del. Code Ann. tit. 16, §§ 2501–2509 (1982).
District of Columbia Natural Death Act of 1981, D.C. Code Ann. §§ 6–2421–2430 (1982).
Florida Life Prolonging Procedures Act, Fla. Stat. Chap. 84–85. §§ 765.01–.15 (1984).
Georgia Living Wills Act, Ga. Code Ann. §§ 31–32–1–12 (1984).
Idaho Natural Death Act, Idaho Code §§ 39–4501–4508 (1977).
Illinois Living Will Act, Ill. Ann. Stat. ch. 110 1/2 §§ 701–710. (Smith-Hurd 1984).
Iowa Life-Sustaining Procedures Act, Senate File 25 (1985).
Kansas Natural Death Act, Kan. Stat. Ann. §§ 65–28, 101–109 (1979).
Louisiana Life-Sustaining Procedures, La. Rev. Stat. 4 1299.58.1–.10 (1984).
Maryland Life-Sustaining Procedures Act, HB453 (1985).
Mississippi Act, Senate Bill No. 2364, Chap. 365. Laws of 1984.
Nevada Withholding or Withdrawal of Life-Sustaining Procedures, Nev. Rev. Stat. §§ 449.540–690 (1977).
New Mexico Right to Die Act, N.M. Stat. Ann. §§ 24–7–1–11 (1977).
North Carolina Right to Natural Death Act, N.C. Gen. Stat. §§ 90–320–322 (1977, amend. 1979, 1981, 1983).
Oregon Rights with Respect to Terminal Illness, Or. Rev. Stat. §§ 97.050–.90 (1977, Amend. 1983).
Texas Natural Death Act, Tex. Stat. Ann. art. 4590h (1977, amend. 1983).

Vermont Terminal Care Document, Vt. Stat. Ann. tit. 18, §§ 5251–5262 and tit. 13 § 1801 (1982).
Virginia Natural Death Act, Va. Code §§ 54–325.8:1–13 (1983).
Washington Natural Death Act, Wash. Rev. Code Ann. §§ 70.122.010–70.122.905 (1979).
West Virginia Natural Death Act, W. Va. Code Chap. 16 Art. 30 §§ 1–10 (1984).
Wisconsin Natural Death Act, Wis. Stat. §§ 154.01 et seq. as created by 1983 Wisconsin Act 202 (1984).
Wyoming Act, Wyo. Stat. 33–26 §§ 144–152 (1984).

Current plans call for the 1987 update of the *All-States Will Guide* to contain the verbatim text of state statutory living will provisions. In the interim, the text of the living will declarations for Colorado and Missouri are reproduced below. The Colorado provisions were provided by Captain Kathleen Beaty, Legal Assistance Officer, Fitzsimons Army Medical Center. The Missouri provision was provided by Alix R. Kettleson, paralegal specialist, U.S. Army Reserve Personnel Center.

Colorado Declaration as to Medical or Surgical Treatment

I, (name of declarant), being of sound mind and at least eighteen years of age, direct that my life shall not be artificially prolonged under the circumstances set forth below and hereby declare that:

1. If at any time my attending physician and one other physician certify in writing that:

a. I have an injury, disease, or illness which is not curable or reversible and which, in their judgment, is a terminal condition, and

b. For a period of forty-eight consecutive hours or more, I have been unconscious, comatose, or otherwise incompetent so as to be unable to make or communicate responsible decisions concerning my person; then

I direct that life-sustaining procedures shall be withdrawn and withheld; it being understood that life-sustaining procedures shall not include any medical procedure or intervention for nourishment or considered necessary by the attending physician to provide comfort or alleviate pain.

2. I execute this declaration, as my free and voluntary act, this —— day of ————, 19——.

By————
Declarant

The foregoing instrument was signed and declared by

————

to be his/her declaration, in the presence of us, who, in his/her presence, in the presence of each other, and at his/her request, have signed our names below as witnesses, and we declare that, at the time of the execution of this instrument, the declarant, according to our best knowledge and belief, was of sound mind and under no constraint or undue influence.

Dated at (city), (state), this ——day of ————, 19——.

————
(Name and address of witness)

————
(Name and address of witness)

STATE OF————)
)
County of————) ss.
)

SUBSCRIBED and sworn to before me by ————, the declarant, and ———— and ————, the witnesses, as the voluntary act and deed of the declarant, this —— day of ————, 19——.

My commission expires:

————
Notary Public

Missouri Terminally Ill Act Declaration

I have the primary right to make my own decisions concerning treatment that might unduly prolong the dying process. By this declaration I express to my physician, family and friends my intent. If I should have a terminal condition it is my desire that my dying not be prolonged by administration of death-prolonging procedures. If my condition is terminal and I am unable to participate in decisions regarding my medical treatment, I direct my attending physician to withhold or withdraw medical procedures that merely prolong the dying process and are not necessary to my comfort or to alleviate pain. It is not my intent to authorize affirmative or deliberate acts or omissions to shorten my life rather only to permit the natural process of dying.

Signed this —— day of ————, 19——

Signature————

City, County and State of residence————

————

The declarant is known to me, is eighteen years of age or older, of sound mind and voluntarily signed this document in my presence.

————, ————
(witness) (address)

————, ————
(witness) (address)

Revocation Provision

I hereby revoke the above declaration.

Signed————
(signature of declarant)

Date————

The two examples point out some interesting differences among the statutes. Note that the Colorado declaration requires a certification in writing by two physicians of the incurable or terminal nature of the illness, while the Missouri declaration does not. The Colorado declaration does not provide a statutory revocation form, although both statutes provide that the declaration may be revoked. Major Hemingway.

Operation Stand-By Update

As of January 1, 1986, the Legal Assistance for Military Personnel (LAMP) Committee of the ABA Operation Stand-By program is now operative in eight states and the San Diego, California area. Operation Stand-By was initially organized by the Military Law Committee of the Florida Bar. Over 260 volunteer Florida lawyers presently participate in the program. The goal of Operation Stand-By is to furnish swift, high quality legal advice to military lawyers presently located in SJA legal assistance offices.

Under this program, a military lawyer who has a question concerning state law may contact a listed volunteer civilian attorney for the answer. If the attorney cannot immediately give an answer, the attorney agrees to provide the information within twenty-four hours. Civilian attorneys who participate in "Operation Standby" do not provide representation for military clients, but serve only as a resource to answer questions posed by military attorneys.

In each state, Operation Stand-By is limited to providing information which is currently allowable under military legal assistance regulations. Where the area of advice sought is outside the scope of legal assistance, military lawyers will be advised of a local or state bar referral source.

LAMP's ultimate goal is to put Operation Stand-By in place in each of the fifty states. The state bar contacts for out on-line states or local associations are:

California—San Diego:
Michael R. Pent, Chairman
Military Liaison Committee
San Diego County Bar Association
1434 Fifth Avenue
San Diego, California 92101

Connecticut:
Hon. Richard C. Noren, Chairman
Connecticut Bar Association
Veterans and Military Affairs Committee
Box 191
Putnam, Connecticut 06821

Florida:
James P. Knox
Military Law Aid to Servicemen Committee
620 Twiggs Street
Tampa, Florida 33602

Hawaii:
James E. T. Koshiba
Koshiba and Young
820 Mililani Street
2nd Floor
Honolulu, Hawaii 96813

Maryland:
Wallace Dann, Chairman
Committee on Legal Assistance for Military Personnel
Maryland State Bar Association
305 W. Chesapeake Ave.
Chesapeake Building, Suite 517
Towson, Maryland 21204

New Jersey:
Sanford Rader, Chairman
State Military Law Committee, Operation Stand-By
Box 621
Perth Amboy, New Jersey 08862

North Carolina:
Mark E. Sullivan, Director
Special Committee on Military Personnel
c/o Sullivan and Pearson, P.A.
1306 Hillsborough Street
Raleigh, North Carolina 27605

Virginia/D.C.:
Stephen C. Glassman, Chairman
Special Committee on Military Law
Suite 350
2020 K. Street, N.W.
Washington, D.C. 20006

Washington:
Frederick O. Frederickson
Graham and Dunne
34th Floor, Ranier Bank Tower
1301 5th Ave.
Seattle, Washington 98101

If you are interested in assisting in the organization of a stand-by operation in your state, you may obtain further information by contacting:

Clayton B. Burton, Chairman
Standing Committee on Legal Assistance
for Military Personnel
2233 Nursery Road
P.O. Box 4747
Clearwater, Florida 33516

or

Constance E. Berg, Staff Liaison
Standing Committee on Legal Assistance
for Military Personnel
American Bar Association
750 N. Lake Shore DR
Chicago, Illinois 60611

The LAMP Committee welcomes comments, questions or recommendations from any persons interested in the project.

Reserve-Guard Judge Advocate Legal Assistance Advisory Committee

The Reserve-Guard Judge Advocate Legal Assistance Advisory Committee is a committee comprised of Reserve Component judge advocates, and Reserve and National Guard JAG units or offices that assist in updating publications for Army legal assistance offices worldwide.

The committee was formed in 1983–84 and has assisted with updating the *All-States Guides* published in the areas of garnishment, consumer law, marriage and divorce law, and wills. The committee is currently reviewing a proposed military statutory will.

New appointments to the committee are currently being made. Reserve Component attorneys who are interested in being considered for appointment to the Committee should send a letter of request and a resume to Major Steven K. Mulliken, Committee Coordinator, Legal Assistance Branch, Administrative and Civil Law Division, The Judge Advocate General's School, Charlottesville, Virginia 22903–1781.

Reserve Component personnel who are in Individual Mobilization Augmentee positions will be eligible to receive retirement points for work done as a committee member. Troop Program Unit personnel receive sufficient retirement points through unit participation to qualify for a good retirement year, but may also request that retirement points for their participation be awarded.

Although units that participate on the committee on behalf of their jurisdiction do not receive retirement points, the committee work serves as an excellent unit preventive law function.

Updates are currently in progress, based largely on material provided by the committee, for the 1986 editions of the *All-States Marriage and Divorce Guide, Garnishment, and Consumer Law Guides.*

The goal is to have at least one committee member per state and territory.

Military Sponsored Legislation

The following state statute was passed at the behest of local military authorities. The first article of the statute regulates the sale of military property within the civilian community; the second prohibits discrimination based on an individual's status as a member of the military. Staff judge advocates should cultivate points of contact with state government officials such as the attorney general, legislative leaders, aides to the governor, etc., in an effort to obtain favorable legislation for soldiers. The use of reservists in this regard has proven to be particularly helpful.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1985

RATIFIED BILL

CHAPTER 522

SENATE BILL 635

AN ACT TO CREATE A NEW CHAPTER OF THE GENERAL STATUTES CONCERNING MILITARY AFFAIRS AND TO REGULATE MILITARY PROPERTY SALES FACILITIES AND DISCRIMINATION AGAINST MILITARY MEMBERS.

The General Assembly of North Carolina enacts:

Section 1. The General Statutes are amended by adding a new Chapter to read:

Chapter 127B.
Military Affairs.
Article 1.
Military Property Sales Facilities.

§ 127B–1. *Military property sales facility defined.*—Any person, partnership, association or corporation who engages in the business of selling, consigning, purchasing, transferring or in any way acquiring military property for resale, is a "military property sales facility." Specifically excluded are facilities operated by the United States Government, the State of North Carolina or any of its agencies and persons, partnerships, associations or corporations selling or purchasing military property pursuant to a contract with the United States Government, the State of North Carolina or any of its agencies.

§ 127 B–2. *Military property defined.*—"Military property" means property originally manufactured for the United States or State of North Carolina which is a type and kind issued for use in, or furnished and intended for, the military service of the United States or the militia of the State of North Carolina.

§ 127B–3. *License.*—No person, partnership, association or corporation shall engage in the business of selling military property or purchasing military property for resale without first having obtained a license to do so from the local governing body of the city, town, or county in which it is located and by paying the county, State, and municipal tax required by law, and otherwise complying with the requirements made in this and succeeding sections. The license shall be posted in a prominent place, easily visible to the public, on the designated premises.

§ 127B–4. *Local governing authorities to grant and control license; bond.*—(a) The governing body of any city, town, or county in this State may grant to such person, partnership, association or corporation as who shall produce satisfactory evidence of good character, a license authorizing such person, partnership, association or corporation to carry on the business of a military property sales facility. The license shall designate the building in which the person, partnership, association or corporation shall carry on the business, and no person, partnership, association or corporation shall carry on the business of a military property sales facility without being duly licensed, nor in any other building than the one designated in the license.

(b) Any person or the principal officers of any association or corporation or all the partners of any partnership applying for a license shall furnish the governing body the following information:

(1) Full name, and any other names used by the applicant during the preceding five years, or in the case of a partnership, association or corporation, the applicant shall list any partnership, association or corporate names used during the preceding five years;

(2) Current address, and all addresses used by the applicant during the preceding five years;

(3) Physical description;

(4) Age;

(5) Driver's license number, if any, and state of issuance;

(6) Recent color photograph;

(7) Record of felony convictions; and

(8) Record of other convictions during the preceding five years.

(c) Every person, partnership, association or corporation so licensed to carry on the business of a military property sales facility shall, at the time of receiving a license, file with the governing body of the city, town, or county granting the license, a bond payable to the city, town, or county in the sum of one thousand dollars ($1,000), to be executed by the person licensed and by two responsible sureties, or a surety company licensed to do business in the State of North Carolina, to be approved of by the governing body. The bond shall be for the faithful performance of the requirements and obligations pertaining to the business licensed. The governing body, may revoke the license and sue for forfeiture of the bond upon a breach of the licensee's duties under the bond. Any person who may obtain a judgment against a military property sales facility and upon which judgment execution is returned unsatisfied may maintain an action in his own name upon the bond of the military property sales facility, in any court having jurisdiction of the amount demanded to satisfy the judgment.

§ 127B–5. *Perjury; punishment.*—Any person who shall willfully commit perjury in any application for a permit pursuant to this Article shall be guilty of a misdemeanor.

§ 127B–6. *Records to be kept.*—(a) Every military property sales facility owner shall keep a book in which shall be legibly written, at the time of each transaction involving the acquisition by any means of used or new military property by the military property sales facility owner, his employee or agent, from any person, partnership, association or corporation, the following information:

(1) An account and description of the used or new military property including if applicable, the manufacturer's name, the model, the model number, the serial number of the property, and any engraved numbers or initials found on the property. Property lacking any identifying mark or characteristic shall be marked by the military property sales facility owner in such a way as to allow clear identification of the property.

(2) The amount of money paid;

(3) The date of the transaction; and

(4) The name and residence of the person selling, consigning or transferring the used or new military property.

(b) The military property sales facility owner, or his employee or agent shall require that the person selling the new or used military property, to present two forms of positive identification to him before the military property sales facility personnel may complete any transaction regarding the buying, consigning or acquiring of new or used military property. The presentation of any one state or federal government issued identification containing a photographic representation imprinted on it shall constitute compliance with the identification requirements of this paragraph. The military property sales facility owner or his employee or agent shall legibly record this identification information next to the person's name and residence in the book required to be kept. Both the military property sales facility owner, his employee or agent

and the seller, consignor or transferor of the military property shall sign the record entry.

(c) The book shall be a permanent record to be kept at all times on the premises of the place of business of the military property sales facility and shall be made available, during regular business hours, to any law enforcement officer who requests to inspect the book. A copy of the records required to be kept by this section shall be filed within 48 hours of the transaction in the office of the local law enforcement agency serving the city, town, or county which issued the license to the military. Mailing the required copy to the local law enforcement agency within 48 hours shall constitute compliance with this section.

§ 127B-7. *Penalties.*—Any dealer who violates the provisions of this Article shall be guilty of a misdemeanor and upon conviction shall be fined not more than five hundred dollars ($500.00) or imprisoned for not more than six months, or both. In addition, any dealer convicted of violating this Article shall be ineligible for a dealer's permit for a period of three years from the date of conviction. Each violation shall constitute a separate and distinct offense.

§ 127B-8 and § 127B-9. Reserved for future codification.

Article 2.
Discrimination Against Military Personnel.

§ 127B-10. *Purpose.*—The General Assembly finds and declares that military personnel in North Carolina vitally affect the general economy of this State and that it is in the public interest and public welfare to ensure that no discrimination against military personnel is practiced by any business.

§ 127B-11. *Private discrimination prohibited.*—No person shall discriminate against any officer, warrant officer or enlisted person of the military or naval forces of the State or of the United States because of their membership therein. No member of these military forces shall be prejudiced or injured by any person, employer, officer or agent of any corporation, company or firm with respect to their employment, position or status or denied or disqualified for employment by virtue of their membership or service in the military forces of this State or of the United States.

§ 127B-12. *Public discrimination prohibited.*—No officer or employee of the State, or of any county, city and county, municipal corporation, school district, water district, or other district shall discriminate against any officer, warrant officer or enlisted person of the military or naval forces of the State or of the United States because of their membership therein. No member of the military forces shall be prejudiced or injured by any officer or employee of the State, or of any county, city and county, municipal corporation, school district, water district, or other district with respect to their employment, appointment, position or status or denied or disqualified for or discharged from their employment or position by virtue of their membership or service in the military forces of this State or of the United States.

§ 127B-13. *Refusing entrance prohibited.*—No person shall prohibit or refuse entrance to any officer, warrant officer or enlisted person of the military or naval forces of this State or of the United States into any public place of entertainment, of amusement, or accommodation because the officer or enlisted person is wearing the uniform of the organization to which they belong or because of their membership or service in the military forces of this State or of the United States.

§ 127B-14. *Employer discrimination prohibited.*—No employer or officer or agent of any corporation, company, or firm, or other person shall discharge any person from employment because of the performance of any emergency military duty by reason of being an officer, warrant officer or enlisted person of the military or naval forces of this State or the United States.

§ 127B-15. *Penalties.*—Any person who violates the provisions of this Article shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than five hundred dollars ($500.00) or imprisoned for not more than six months, or both. Each violation shall constitute a separate and distinct offense.

Sec. 2. All local laws governing military property businesses in counties or towns which are inconsistent with this act are repealed.

Sec. 3. This act shall become effective October 1, 1985.

In the General Assembly read three times and ratified, this the 1st day of July, 1985.

ROBERT B. JORDAN III
Robert B. Jordan III
President of the Senate

LISTON B. RAMSEY
Liston B. Ramsey
Speaker of the House of Representatives

All States Guides

The *All States Guides* are currently being updated and will be distributed to the field in the next few months. In the future, these guides will be updated on a page basis, so legal assistance offices should put these new guides in a three-ring binder to facilitate posting of future page updates. The Air Force has advised that it will update the 1985 *All States Income Tax Guide* using the page update system. Accordingly, legal assistance offices should retain the 1985 edition for updating in tax year 1986.

Buckle Up

Persons who intend to take a driving vacation this year should plan to buckle up. Twenty-five states and the District of Columbia now have mandatory seat belt laws. Additionally, soldiers are required to wear seat belts when driving or riding in vehicles on or off post, whether on or off duty (Msg. CSA 101900Z Mar 86, Subject: Vehicle Safety). Seat belts save lives. Because of these recent seat belt laws and Army policy, their use will also avoid legal problems. OTJAG Legal Assistance.

Criminal Law Notes

Criminal Law Division, OTJAG

Collection of Fines Adjudged at Courts-Martial

Occasionally, assertions are made that fines are inappropriate forms of punishment because they are often uncollectable. In fact, effective procedures are in place at the U.S. Army Finance and Accounting Center (USAFAC) to collect court-martial fines that are adjudged and ordered executed. Paragraphs 70501 through 70504, Army Regulation 37–104–3, set forth fine collection procedures. Fines are considered to be a debt owing to the United States and should, when possible, be collected from the current or final pay of the soldier. A recent statutory change authorizes the collection of a fine from the current pay of an officer (37 U.S.C. § 1007(c)). The Department of the Defense Pay Manual will be updated to reflect the statutory change.

While collecting some fines may prove to be administratively difficult, USAFAC pursues collection efforts even after a soldier leaves active duty. There are several methods of collecting such fines, including collection from retired pay. If a soldier does not retire but is receiving federal funds (such as a tax refund or civilian pay as a federal employee) collection by setoff may be possible under the Debt Collection Act of 1982 (Pub. L. No. 97–365). For ex-soldiers who are not receiving federal funds, collection may be pursued under the Federal Claims Collection Act (31 U.S.C. § 3711).

The Discussion of Rule for Court-Martial 1003(b)(3) states that a fine should not be adjudged unless an accused was unjustly enriched as a result of the offense of which convicted. Major Thomas J. Leclair.

Error in Change 2 to the 1984 Manual for Courts-Martial

P 041550Z JUN 86
FM DA WASHDC//DAJA-CL

FOR SJA/TDS/MIL JUDGE/LEGAL COUNSEL
SUBJ: ERROR IN CHANGE 2, MANUAL FOR COURTS-MARTIAL

1. Change 2, MCM, 1984, is now being distributed. A printing error has been found in RCM 909(c)(2), which reads, "Trial may not proceed. . . ."

2. As promulgated by the President in Executive Order 12550, RCM 909(c)(2) correctly reads. "Trial may proceed. . . ." See 51 Fed. Reg. 6497, 25 Feb 86; 1986 U.S. Code Cong. & Ad. News, page B15.

3. Users should annotate change 2 by string the word "not," citing this MSG and 51 Fed. Reg. 6497.

4. Change 3, when issued, will correct the error.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP–OPS–JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903–1781 (Telephone: AUTOVON 274–7110, extension 293–6286; commercial phone: (804) 293–6286; FTS: 928–1304).

2. TJAGSA CLE Course Schedule

August 4–22 May 1987: 35th Graduate Course (5–27–C22).

August 11–15: 10th Criminal Law New Developments Course (5F–F35).

September 8–12: 85th Senior Officers Legal Orientation Course (5F–F1).

September 15–26: 109th Contract Attorneys Course (5F–F10).

October 7–10: 1986 Worldwide JAG Conference

October 14–17: 6th Commercial Activities Program Course (5F–F16).

October 20–24: 8th Legal Aspects of Terrorism Course (5F–F43).

October 20–24: 5th Advanced Federal Litigation Course (5F–F29).

October 20–December 19: 111th Basic Course (5–27–C20).

October 27–31: 34th Law of War Workshop (5F–F42).

October 27–31: 19th Legal Assistance Course (5F–F23).

November 3–7: 86th Senior Officers Legal Orientation Course (5F–F1).

November 17–21: 17th Criminal Trial Advocacy Course (5F–F32).

December 1–5: 23d Fiscal Law Course (5F–F12).

December 8–12: 2d Judge Advocate and Military Operations Seminar (5F–F47).

December 15–19: 30th Federal Labor Relations Course (5F–F22).

1987

January 12–16: 1987 Government Contract Law Symposium (5F–F11).

January 20–March 27: 112th Basic Course (5–27–C20).

January 26–30: 8th Claims Course (5F–F26).

February 2–6: 87th Senior Officers Legal Orientation Course (5F–F1).

February 9–13: 18th Criminal Trial Advocacy Course (5F–F32).

February 17–20: Alternative Dispute Resolution Course (5F–F25).

February 23–March 6: 110th Contract Attorneys Course (5F–F10).

March 9–13: 11th Admin Law for Military Installations (5F–F24).

March 16–20: 35th Law of War Workshop (5F–F42).

March 23–27: 20th Legal Assistance Course (5F–F23).

March 31–April 3: JA Reserve Component Workshop.

April 6–10: 2d Advanced Acquisition Course (5F–F17).

April 13–17: 88th Senior Officers Legal Orientation Course (5F–F1).

April 20–24: 17th Staff Judge Advocate Course (5F–F52).

April 20–24: 3d SJA Spouses' Course.

April 27–May 8: 111th Contract Attorneys Course (5F–F10).

May 4–8: 3d Administration and Law for Legal Specialists (512–71D/20/30).

May 11–15; 31st Federal Labor Relations Course (5F–F22).

May 18–22: 24th Fiscal Law Course (5F–F12).

May 26–June 12: 30th Military Judge Course (5F–F33).

June 1–5: 89th Senior Officers Legal Orientation Course (5F–F1).

June 8–12: 5th Contract Claims, Litigation, and Remedies Course, (5F–F13).

June 9–12: Legal Administrators Workshop (512–71D/71E/40/50).

June 15–26: JATT Team Training.

June 15–26: JAOAC (Phase IV).

July 6–10: US Army Claims Service Training Seminar.

July 13–17: Professional Recruiting Training Seminar.

July 13–17: 16th Law Office Management Course (7A–713A).

July 20–31: 112th Contract Attorneys Course (5F–F10).

July 20–September 25: 113th Basic Course (5–27–C20).

August 3–May 21, 1988: 36th Graduate Course (5–27–C22).

August 10–14: 36th Law of War Workshop (5F–F42).

August 17–21: 11th Criminal Law New Developments Course (5F–F35).

August 24–28: 90th Senior Officers Legal Orientation Course (5F–F1).

3. Mandatory Continuing Legal Education Requirement

Twenty states currently have a mandatory continuing legal education (MCLE) requirement. The latest additions are Texas and Virginia.

In these MCLE states, all *active* attorneys are required to attend approved continuing legal education programs for a specified number of hours each year or over a period of years. Additionally, bar members are required to report periodically either their compliance or reason for exemption from compliance. Due to the varied MCLE programs, JAGC Personnel Policies, para. 7–16 (Oct. 1985) provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE for military personnel vary from jurisdiction to jurisdiction and are subject to change. TJAGSA *resident* CLE courses have been approved by all of these MCLE jurisdictions with the exception of Oklahoma and Texas, which have not yet given blanket approval to all courses.

Listed below are those jurisdictions in which some form of mandatory continuing legal education has been adopted with a brief description of the requirement, the address of the local official, and the reporting date:

State	Local Official	Program Description
Alabama	MCLE Commission Alabama State Bar P.O. Box 671 Montgomery, AL 36101 (205) 269–1515	—Active attorneys must complete 12 hours of approved continuing legal education per year. —Active duty military attorneys are exempt but must declare exemption annually. —Reporting date: on or before 31 December annually.
Colorado	Executive Director Colorado Supreme Court Board of Continuing Legal and Judicial Education 190 East 9th Avenue Suite 410 Denver, CO 80203 (303) 832–3693	—Active attorneys must complete 45 units of approved continuing legal education (including 2 units of legal ethics) every three years. —Newly admitted attorneys must also complete 15 hours in basic legal and trial skills within three years. —Reporting date: 31 January annually.

State	Local Official	Program Description
Georgia	Executive Director State Bar of Georgia 84 Peachtree Street Atlanta, GA 30303 (404) 522–6255	—Active attorneys must complete 12 hours of approved continuing legal education per year. Every three years each attorney must complete six hours of legal ethics. —Reporting date: 31 January annually.
Idaho	Idaho State Bar P.O. Box 895 204 W. State Street Boise, ID 83701 (208) 342–8959	—Active attorneys must complete 30 hours of approved continuing legal education every three years. —Reporting date: 1 March every third anniversary following admission to practice.
Iowa	Executive Secretary Iowa Commission of Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 281–3718	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 1 March annually.
Kansas	Continuing Legal Education Commission 301 West 10th Street Topeka, KS 66612 (913) 296–3807	—Active attorneys must complete 10 hours of approved continuing legal education each year, and 36 hours every three years. —Reporting date: 1 July annually.
Kentucky	Continuing Legal Education Commission Kentucky Bar Association W. Main at Kentucky River Frankfort, Kentucky 40601 (502) 564–3793	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 30 days following completion of course.
Minnesota	Executive Secretary Minnesota State Board of Continuing Legal Education 875 Summitt Ave St. Paul, MN 55105 (612) 227–5430	—Active attorneys must complete 45 hours of approved continuing legal education every three years. —Reporting date: 1 March every third year.
Mississippi	Commission of CLE Mississippi State Bar PO Box 2168 Jackson, MS	—Attorneys must complete 12 hours of approved continuing legal education each calendar year. —Active duty military attorneys are exempt, but must declare exemption. —Reporting date: 31 December annually.
Montana	Director Montana Board of Continuing Legal Education P.O. Box 4669 Helena, MT 59604 (406) 442–7660	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 1 April annually.
Nevada	Executive Director Board of Continuing Legal Education State of Nevada P.O. Box 12446 Reno, NV 89510 (702) 826–0273	—Active attorneys must complete 10 hours of approved continuing legal education each year. —Reporting date: 15 January annually.
North Dakota	Executive Director State Bar of North Dakota P.O. Box 2136 Bismark, ND 58502 (701) 255–1404	—Active attorneys must complete 45 hours of approved continuing legal education every three years. —Reporting date: 1 February submitted in three year intervals.
Oklahoma	Oklahoma Bar Association Director of Continuing Legal Education 1901 North Lincoln Blvd. P.O. Box 53036 Oklahoma City, OK 73152	—Active attorneys must complete 12 hours of approved legal education per year. —Active duty military are exempt, but must declare exemption. —Reporting date: 1 April annually, beginning in 1987.

State	Local Official	Program Description
South Carolina	State Bar of South Carolina P.O. Box 2138 Columbia, SC 29202 (803) 799–5578	—Active attorneys must complete 12 hours of approved continuing legal education per year. —Active duty military attorneys are exempt, but must declare exemption. —Reporting date: 10 January annually.
Texas	Texas State Bar Attention: Membership/CLE P.O. Box 12487 Capital Station Austin, TX 78711 (512) 463–1382	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: Depends on birth month.
Vermont	Vermont Supreme Court Committee of Continuing Legal Education 111 State Street Montpelier, VT 05602 (802) 828–3279	—Active attorneys must complete 10 hours of approved legal education per year. —Reporting date: 30 days following completion of course. —Attorneys must report total hours every 2 years.
Virginia	Virginia Continuing Legal Education Board Virginia State Board 700 East Main Street, Suite 1622 Richmond, VA 23219 (804) 786–2061	—Active attorneys must complete 8 hours of approved continuing legal education per year. —Reporting date: 30 June annually beginning in 1987.
Washington	Director of Continuing Legal Education Washington State Bar Association 505 Madison Seattle, WA 98104 (206) 622–6021	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 31 January annually.
Wisconsin	Director, Board of Attorneys Professional Competence Room 403 110 E Main Street Madison, WI 53703 (608) 266–9760	Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 1 March annually.
Wyoming	Wyoming State Bar P.O. Box 109 Cheyenne, WY 82001 (307) 632–9061	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 1 March annually.

4. Civilian Sponsored CLE Courses

October 1986

5–7: AAJE, Hearsay, Durham, NH.

6–7: PLI, Managing the Corporate Law Department, San Francisco, CA.

6–7: PLI, Managing the Medium-Sized Law Firm, San Francisco, CA.

6–7: PLI, Managing the Small Law Firm, San Francisco, CA.

6–10: FPI, Government Construction Contracting, Washington, DC.

6–10: GCP, Contracting With the Government, Washington, DC.

8–10: PLI, Patent Litigation, New York, NY.

8–10: AAJE, Search and Seizure, Durham, NH.

9–11: ALIABA, Pension, Profit-Sharing and Deferred Compensation, Washington, DC.

9–11: GICLE, Workers Compensation Law, St. Simons, GA.

10–11: NCDA, Great Plains Prosecutors Seminar, Chicago, IL.

13–15: FPI, Practical Environmental Law, San Francisco, CA.

15–17: FPI, Understanding Overhead in Government Contracts, Washington, DC.

16–17: PLI, Annual Estate Planning Institute, New York, NY.

16–17: GICLE, Corporate Counsel Law Institute, Atlanta, GA.

16–17: SLF, Institute on Labor Law, Dallas, TX.

19–24: NJC, Sentencing Misdemeanants, Reno, NV.

19–31: NJC, Special Courts: Technics for Judges without Law Degrees, Reno, NV.

20–21: PLI, Section 1983 Civil Rights Litigation, San Francisco, CA.

20–21: FPI, The Competition in Contracting, Washington, DC.

20–21: FPI, The Environmental Audit, Washington, DC.

20–22: FPI, Changes in Government Contracts, Washington, DC.

20–22: FPI, Claims and the Construction Owner, Washington, DC.

20–22: FPI, Government Contract Costs, San Francisco, CA.
20–22: FPI, Subcontracting, Las Vegas, NV.
20–23: FPI, Pension Law Today, Marina del Rey, CA.
20–24: GCP, Administration of Government Contracts, Washington, DC.
22–24: FPI, Construction Contract Litigation, Washington, DC.
23–25: GICLE, Corporate and Banking Law Institute, Sea Island, GA.
23–25: ALIABA, Hazardous Wastes, Superfund and Toxic Substances, Washington, DC.
23–25: ALIABA, Litigating Medical Malpractice Claims, San Francisco, CA.
26–29: NCDA, Organized Crime, Miami, FL.
26–29: NCDA, Special Crimes, Boston, MA.
26–31: NJC, Search and Seizure, Reno, NV.
27–29: FPI, Practical Construction Law, Palm Desert, CA.
27–31: FPI, The Skills of Contract Administration, Washington, DC.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1986 issue of *The Army Lawyer.*

Current Material of Interest

1. Professor of Law, U.S. Military Academy, Sought

The Superintendent of the United States Military Academy has appointed a committee to nominate a highly qualified individual, military or civilian, to serve as the Professor and Head, Department of Law.

Applicants should have a J.D. degree and previous teaching experience at the college level. Additionally, they should possess another advanced degree or be willing and able to earn another advanced degree upon appointment.

Interested persons should request an application packet from Major Daniel L. Monken, Office of the Dean, U.S. Military Academy, West Point, New York 10996–5000, as soon as possible but not later than 2 September 1986. Telephone commercial 914–938–2105; AUTOVON 688–2105.

2. TJAGSA Publications Available Through DTIC

The following TJAGSA publications are available through DTIC: (The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

Contract Law

AD B090375	Contract Law, Government Contract Law Deskbook Vol 1/JAGS–ADK–85–1 (200 pgs).
AD B090376	Contract Law, Government Contract Law Deskbook Vol 2/JAGS–ADK–85–2 (175 pgs).
AD B100234	Fiscal Law Deskbook/JAGS–ADK–86–2 (244 pgs).
AD B100211	Contract Law Seminar Problems/ JAGS–ADK–86–1 (65 pgs).

Legal Assistance

AD B079015	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS–ADA–84–1 (266 pgs).
AD B077739	All States Consumer Law Guide/ JAGS–ADA–83–1 (379 pgs).
AD B100236	Federal Income Tax Supplement/ JAGS–ADA–86–8 (183 pgs).
AD B100233	Model Tax Assistance Program/ JAGS–ADA–86–7 (65 pgs).
AD B100252	All States Will Guide/JAGS–ADA–86–3 (276 pgs).
AD B080900	All States Marriage & Divorce Guide/ JAGS–ADA–84–3 (208 pgs).
AD B089092	All-States Guide to State Notarial Laws/ JAGS–ADA–85–2 (56 pgs).
AD B093771	All-States Law Summary, Vol I/ JAGS–ADA–85–7 (355 pgs).
AD B094235	All-States Law Summary, Vol II/ JAGS–ADA–85–8 (329 pgs).
AD B090988	Legal Assistance Deskbook, Vol I/ JAGS–ADA–85–3 (760 pgs).
AD B090989	Legal Assistance Deskbook, Vol II/ JAGS–ADA–85–4 (590 pgs).
AD B092128	USAREUR Legal Assistance Handbook/ JAGS–ADA–85–5 (315 pgs).
AD B095857	Proactive Law Materials/ JAGS–ADA–85–9 (226 pgs).

Claims

AB087847	Claims Programmed Text/ JAGS–ADA–84–4 (119 pgs).

Administrative and Civil Law

AD B087842	Environmental Law/JAGS–ADA–84–5 (176 pgs).
AD B087849	AR 15–6 Investigations: Programmed Instruction/JAGS–ADA–86–4 (40 pgs).
AD B087848	Military Aid to Law Enforcement/ JAGS–ADA–81–7 (76 pgs).
AD B100235	Government Information Practices/ JAGS–ADA–86–2 (345 pgs).
AD B100251	Law of Military Installations/ JAGS–ADA–86–1 (298 pgs).
AD B087850	Defensive Federal Litigation/ JAGS–ADA–86–6 (377 pgs).
AD B100756	Reports of Survey and Line of Duty Determination/JAGS–ADA–86–5 (110 pgs).
AD B100675	Practical Exercises in Administrative and Civil Law and Management (146 pgs).

Labor Law

AD B087845 Law of Federal Employment/ JAGS-ADA-84-11 (339 pgs).

AD B087846 Law of Federal Labor-Management Relations/JAGS-ADA-84-12 (321 pgs).

Developments, Doctrine & Literature

AD B086999 Operational Law Handbook/ JAGS-DD-84-1 (55 pgs).

AD B088204 Uniform System of Military Citation/ JAGS-DD-84-2 (38 pgs.)

Criminal Law

AD B100238 Criminal Law: Evidence I/ JAGS-ADC-86-2 (228 pgs).

AD B100239 Criminal Law: Evidence II/ JAGS-ADC-86-3 (144 pgs).

AD B100240 Criminal Law: Evidence III (Fourth Amendment)/JAGS-ADC-86-4 (211 pgs).

AD B100241 Criminal Law: Evidence IV (Fifth and Sixth Amendments)/JAGS-ADC-86-5 (313 pgs).

AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS-ADC-85-3 (216 pgs).

AD B095870 Criminal Law: Jurisdiction, Vol. I/ JAGS-ADC-85-1 (130 pgs).

AD B095871 Criminal Law: Jurisdiction, Vol. II/ JAGS-ADC-85-2 (186 pgs).

AD B095872 Criminal Law: Trial Procedure, Vol. I, Participation in Courts-Martial/ JAGS-ADC-85-4 (114 pgs).

AD B095873 Criminal Law: Trial Procedure, Vol. II, Pretrial Procedure/JAGS-ADC-85-5 (292 pgs).

AD B095874 Criminal Law: Trial Procedure, Vol. III, Trial Procedure/JAGS-ADC-85-6 (206 pgs).

AD B095875 Criminal Law: Trial Procedure, Vol. IV, Post Trial Procedure, Professional Responsibility/JAGS-ADC-85-7 (170 pgs).

AD B100212 Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (approx. 75 pgs).

Those ordering publications are reminded that they are for government use only.

3. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
#2 UPDATE	Evaluations		22 Apr 86
#16 UPDATE	Reserve Components Personnel		1 May 86
DA PAM 700-15	Logistics Support of U.N. Peacekeeping Forces		1 May 86

4. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

Aaron, *Unfair Labor Practices and the Right to Strike in the Public Sector: Has the National Labor Relations Act Been a Good Model?*, 38 Stan. L. Rev. 1097 (1986).

Administrative Law Symposium, 72 Va. L. Rev. 215 (1986).

Allen, *Controlling the Growth of Punitive Damages in Products Liability Cases*, 51 J. Air L. & Com. 567 (1986).

Barnard, *Proof of Hospital-Performed Blood Alcohol Tests in Evidence*, 9 Am. J. Trial Advoc. 43 (1985).

Bar-Yaacov, *Some Aspects of Prisoner-of-War Status According to the Geneva Protocol I of 1977*, 20 Israel L. Rev. 243 (1985).

Behr, *Tax Planning in Divorce: Both Spouses Benefit from the Tax Reform Act of 1984*, 21 Willamette L. Rev. 767 (1985).

Call, *Polygraph Regulations: A Trend Toward Tougher Standards*, 11 Employee Rel. L.J. 585 (1986).

Cohen, *Toward an Economic Theory of the Measurement of Damages in a Wrongful Death Action*, 34 Emory L.J. 295 (1985).

Davis, *Why Attempts Deserve Less Punishment than Complete Crimes*, 5 Law & Phil. 1 (1986).

DeVisscher, *Legal Aspects Concerning the Installation of the First Nuclear Missiles on Belgian Soil*, 20 Israel L. Rev. 137 (1985).

Dinstein, *International Criminal Law*, 20 Israel L. Rev. 206 (1985).

Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law*, 1985 Duke L.J. 849.

Elliston, *Ethics, Professionalism and the Practice of Law*, 16 Loy, U.L.J. 529 (1985).

The Ethics of Expert Testimony, 10 Law & Hum. Behav. 1 (1986).

Finn, *Collaboration Between the Judiciary and Victim-Witness Assistance Programs*, Ct. Rev., Spring 1986, at 6.

Franconi, *Peacetime Use of Force, Military Activities, and the New Law of the Sea*, 18 Cornell Int'l L.J. 203 (1985).

Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763 (1986).

Goldberg, *The Status of Apartheid Under International Law*, 13 Hastings Const. L.Q. 1 (1985).

Graham, *Evidence and Trial Advocacy Workshop: Law Witness Opinion Testimony; Opinion on Ultimate Issue by Lay or Expert Witness*, 22 Crim. L. Bull. 144 (1986).

Greig & Althoff, *The Constitutionality of Roadblocks*, Ct. Rev., Spring 1986, at 20.

Hamlin, *Effective Direct Examination*, Litigation, Winter 1986, at 15.

Hatfield, *Defense of the United States in Aviation Litigation Under the Federal Tort Claims Act*, 29 Trial Law. Guide 425 (1986).

Hoff, *Federal Court Remedies in Interstate Child Custody and Parental Kidnapping Cases*, 19 Fam. L.Q. 443 (1986).

Howard, *Husband-Wife Homicide: An Essay From a Family Law Perspective*, 49 Law & Contemp. Probs. 63 (1986).

Hughes & Hsiao, *Pretesting All Phases of a Jury Trial With the Aid of a Microcomputer,* 9 Am. J. Trial Advoc. 53 (1985).

Jacobs & Kiker, *Accident Compensation for Airline Passengers: An Economic Analysis of Liability Rules Under the Warsaw Convention,* 51 J. Air L. & Com. 589 (1986).

Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement,* 70 Minn. L. Rev. 665 (1986).

Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?,* 23 J. Fam. L. 149 (1985–1986).

O'Connell, *Alternatives to the Tort System for Personal Injury,* 23 San Diego L. Rev. 17 (1986).

Pauley, *The Emerging "Victim Factor" in the Supreme Court's Criminal Jurisprudence: Should Victims' Interests Ever Prevent a Court from Overturning a Conviction and Ordering a Retrial?,* 61 Ind. L.J. 149 (1985–1986).

Pomerance, *The U.S. Involvement in Sinai: 1975 as a Legal-Political Turning Point, 20 Israel L. Rev. 299 (1985).*

Raskin, *The Polygraph in 1986: Scientific, Professional and Legal Issues Surrounding Application and Acceptance of Polygraph Evidence,* 1986 Utah L. Rev. 29.

Raubitschek, *Government Employee Inventions,* 33 Fed. B. News & J. 215 (1986).

Roberts, *Child Support,* 19 Clearinghouse Rev. 1310 (1986).

Rust, *Sexual Abuse: The Nightmare Is Real,* Student Law., April 1986, at 12.

Saltzburg, *Impeachment of Witnesses and the Federal Rules of Evidence,* 22 Crim L. Bull. 101 (1986).

Schachter, *In Defense of International Rules on the Use of Force,* 53 U. Chi. L. Rev. 113 (1986).

Schuman, *False Accusations of Physical and Sexual Abuse,* 14 Bull. Am. Acad. Psychiatry & L. 5 (1986).

Soiret, *The Freedom of Information Act: A Viable Alternative to the Federal Rules?* 29 Trial Law. Guide 484 (1986).

Spjut, *The Relevance of Culpability to the Punishment and Prevention of Crime,* 19 Akron L. Rev. 197 (1985).

The Strategic Defense Initiative, 10 Fletcher Forum 1 (1986).

Zedalis, *Foreign State Military Use of Another State's Continental Shelf and International Law of the Sea,* 16 Rut. L.J. 1 (1984).

Note, *Automated Teller Machine Robberies: Theories of Liability, 14 Fordham L. Rev. 171 (1985–86).*

Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?,* 95 Yale L. Rev. 788 (1986).

Note, *The Constitutional Rights of AIDS Carriers,* 99 Harv. L. Rev. 1274 (1986).

Note, *The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?,* 60 N.Y.U. Rev. 725 (1985).

Note, *The Prosecutor's Duty To Disclose to Defendants Pleading Guilty,* 99 Harv. L. Rev. 1004 (1986).

Comment, *The Discovery and Use of Computerized Information: An Examination of Current Approaches,* 13 Pepperdine L. Rev. 405 (1986).

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