IN SEARCH OF CALM AFTER *WALTERS*: NAVIGATING "DIVERS" THROUGH A SEA OF AMBIGUITY

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The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

BY MAJOR SARAH J. RYKOWSKI
JUDGE ADVOCATE GENERAL'S CORPS
UNITED STATES ARMY

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MAJOR SARAH J. RYKOWSKI*

* Judge Advocate, United States Army. Presently assigned as Student, 63d Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. J.D., 2002, University of Michigan; B.A., 2002, Saint Mary's College (Notre Dame). Previous assignments include Brigade Judge Advocate, 31st Air Defense Artillery Brigade, Fort Sill, Oklahoma, 2013-2014; Chief, Client Legal Services, Eighth Army, Yongsan, South Korea, 2012-2013; Trial Defense Counsel, 3rd Infantry Division and Fort Stewart, Georgia, 2010-2012; Appellate Counsel, Government Appellate Division, U.S. Army Legal Services Agency, Arlington, Virginia, 2008-2010; Trial Counsel and Foreign Claims Attorney, 4th Brigade Combat Team, 25th Infantry Division (Airborne), 2007; Trial Counsel, Fort Wainwright, Alaska, 2005-2007. Member of the bars of Michigan, Army Court of Criminal Appeals, Court of Appeals for the Armed Forces, and Supreme Court of the United States. This thesis was submitted in partial completion of the Master of Laws requirements of the 63rd Judge Advocate Officer Graduate Course.

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> *Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.*[1]

I. Introduction

Today, Private (PVT) James D. Wilson stands convicted of falsely stating he did not rape his stepdaughter, RC,[2] but not of the rape itself, although he confessed to doing so, and she described the rape in graphic detail on the witness stand.[3] A magnitude of errors, from the beginning of the investigation to the completion of the appellate process, created this anomaly. First, the investigating agent failed to clarify the where, when, what, why, and how of PVT Wilson's admission of penetration during the investigation.[4] Second, the trial counsel chose to charge PVT Wilson with rape on divers occasions.[5] Third, the trial counsel failed to ask the agent to clarify these details at trial.[6] Fourth, the military judge excepted "divers occasions" from the specification and attempted but failed to sufficiently specify the occasion on which she had convicted PVT Wilson.[7] Each of these issues will be discussed in more detail in the applicable sections of this thesis.

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[1] United States v. Tateo, 377 U.S. 463, 466 (1964).

[2] The name of PVT Wilson's victim is redacted to preserve her privacy.

[3] Record of Trial at 67-70, United States v. SSG James D. Wilson, No. 20061187 (3rd Infantry Division and Fort Stewart, Fort Stewart, Georgia, 13 Feb. 2007)[Hereinafter *Wilson* Record], attached as Appendix 1 to this thesis; *Wilson* Record Prosecution Exhibit (PE) 2, attached as Appendix 2 to this thesis.

[4] *See* PE 2, *supra* note 2; *see also infra* Sections I.C.6 and III.B.1 of this thesis.

[5] *See Wilson* Record, *supra* note 2, at Charge Sheet; *see also infra* Sections I.C.6 and III.B.2 of this thesis.

[6] *See Wilson* Record, *supra* note 2, at 45-60; *see also infra* Sections I.C.6 and III.C.1 of this thesis.

[7] *See Wilson* Record, *supra* note 2, at 91-2; *see also infra* Sections I.C.6 and III.C.2 of this thesis.

The anomaly of PVT Wilson's situation is either a travesty of justice or a well-deserved windfall, depending on one's perspective.[8] If civilian authorities had prosecuted PVT Wilson, he would not have received the windfall of a "fatally"[9] ambiguous verdict.[10] If he had been a civilian, the government would have been able to retry PVT Wilson and he might stand convicted of the offense today.[11] A review of the history of ambiguous verdicts, including application of "divers occasions"[12] to charges, and analysis of solutions available throughout the investigatory, trial, and appellate process, and comparison to state and federal legal practice demonstrates the need for and possibility of change, to eliminate fatal ambiguity in military criminal law cases.

II. The Birth of "Fatal" Ambiguity in Military Courts-Martial

A. Divers Occasions and Ambiguity

The phrase "'[d]ivers occasions' means two or more occasions."[13] It originates from the Latin word *diversus* and was adopted into American jurisprudence, like many other legal terms, from Middle English and Anglo-French, beginning in the 13th century.[14]

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[8] The author of this thesis was appellate counsel for the Government when appellant appealed his conviction to the Army Court of Criminal Appeals and the Court of Appeals for the Armed Forces. The undersigned co-authored the government's briefs before both courts, and argued on behalf of the government in this case.

[9] Hereinafter in this thesis, "fatally" will not be surrounded by quotation marks. However, one position presented in this thesis is that the phrase "fatally" ambiguous verdicts is merely the legal construction of the military appellate courts.

[10] Reply Br. on Behalf of Appellant at 8, United States v. Wilson, No. 20061187, slip op. (A. Ct. Crim. App. Aug. 27, 2008)(conceding "this remedy may be a windfall to appellant"), *reversed*, 67 M.J. 423 (C.A.A.F. 2009)(No. 09–0010)[hereinafter "Reply Br. (*Wilson*)].

[11] *See infra* Section III.D.5 of this thesis.

[12] Hereinafter in this thesis, "divers occasions" will be referred to without enclosure in quotation marks, unless part of a quotation; while the phrase "on divers occasions" will be referred to with enclosure in quotation marks, for simplicity.

[13] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK para. 7-25 (10 Sept. 2014)(hereinafter DA PAM. 27-9)(placement of quotation marks around divers occasions in original).

[14] RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 574 (2d ed. 1997)[hereinafter WEBSTER'S].

"Ambiguity" means "doubtfulness or uncertainty of meaning or intention," as well as "an unclear indefinite, or equivocal word, expression [or] meaning."[15] Further, "ambiguous" is defined as "open to or having several possible meanings or interpretations; equivocal."[16] Legally, the Supreme Court has discussed ambiguity in terms of this definition, as something which causes multiple interpretations, or raises questions as to interpretation.[17] This definition comes into play later in this thesis.[18]

B. History of Divers Occasions in Military Courts-Martial

A brief historical review showing the evolution of the use of divers occasions in military courts-martial sheds light on the significance of the Court of Appeals for the Armed Forces (CAAF)'s decision in *United States v. Walters*.[19] The earliest mention of charging multiple occasions of misconduct within a single specification in recorded, available military law cases is a 1942 case, *United States v. Stryker*,[20] where the accused moved "to strike a specification alleging that" he committed an offense "on sundry occasions."[21] In the 1942 case, the Board of Review upheld the law officer's denial, holding "'the accused was sufficiently informed of the offense and was fully able to, and did in fact, address his defense to the offense intended to be charged.'"[22] However, the first reported appellate case using

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[15] WEBSTER'S, *supra* note 14, at 64.

[16] *Id.*

[17] Apprendi v. New Jersey, 530 U.S. 466, 475 (2000).

[18] *See infra* Section III of this thesis.

[19] *United States v. Walters*, 58 M.J. 391 (C.A.A.F), *reconsideration denied*, 59 M.J. 164 (C.A.A.F. 2003).

[20] United States v. Stryker, CM 219135, 12 BR 225 (A.B.R. 1942)(on file with the author).

[21] United States v. Sparks, 15 C.M.R. 584, 589 (C.G.B.R. 1954)(citing *Stryker*, 12 BR at 225).

[22] *Sparks*, 15 C.M.R. at 589 (citing *Stryker*, 12 BR at 225).

the phrase "divers" in a charging situation was *United States v. Gomes*, a Coast Guard case.[23] In that case, the appellant, Lieutenant Commander Joseph Gomes, was charged with receiving "divers envelopes containing money" from certain individuals, in exchange for not inspecting their vessels.[24] The appeal did not concern the actual use of the phrase divers.[25]

Early on in the history of the Uniform Code of Military Justice (UCMJ), the military boards of review addressed the issue of vagueness in charges, and evidence supporting those charges, when the government charged divers occasions. For example, in *United States v. Jones*,[26] the Air Force Board of Review (AFBR) upheld an airman's convictions for indecent acts under Article 134, UCMJ, at divers times and in divers locations as a single course of conduct, and thus neither multiplicious nor overly vague.[27] Because the AFBR determined the specification alleged a course of conduct rather than a specific offense, the AFBR amended the specification from alleging a violation of Article 125, UCMJ to one alleging a violation of Article 134, UCMJ.[28] Counsel charging a single occasion but presenting multiple instances in a short amount of time should study this case as well as *United States v. Brown*[29] and *United States v. Rodriguez*[30] for guidance concerning proper charging and presentation of evidence.

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[23] United States v. Gomes, 6 C.M.R. 479 (C.G.B.R. 1952).

[24] *Id.* at 482.

[25] *Id.* at 481.

[26] United States v. Jones, 15 C.M.R. 664 (A.F.B.R. 1954).

[27] *Id.* at 670.

[28] *Id.* at 669-70, 673.

[29] United States v. Brown, 65 M.J. 356 (C.A.A.F. 2007).

[30] United States v. Rodriguez, 66 M.J. 201 (C.A.A.F. 2008).

On the other hand, in *United States v. Schoolcraft*,[31] the AFBR found the evidence factually and legally insufficient to support convictions for sodomy and lewd behavior where the government *did not allege* divers occasions because the evidence failed to adequately specify the location (one of two possibilities) or the time of the offenses.[32] The AFBR set aside the convictions and dismissed the charges, but held its action "in no way precludes the accused from being brought to trial for such other offenses as may be indicated by the evidence."[33] The AFBR did not order a retrial, citing Article 63(b), UCMJ.[34] These two cases demonstrate the importance of the government's decision whether or not to charge divers occasions, and the limitations on military rehearings due to Article 63, UCMJ.

Two cases from the 1980s demonstrate the difference between the fact finder's removal of divers occasions from a specification, and the appellate court's similar action when the fact-finder does not remove divers occasions but the appellate court finds only one occasion is proven. In *United States v. Rust*,[35] counsel initially charged divers occasions, indicated at trial that they intended to amend the specification by removing the phrase, but failed to do so, and the military judge convicted the accused as charged, on divers occasions.[36] The appellate court "modif[ied] the finding of guilty . . . to delete the words

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[31] United States v. Schoolcraft, 16 C.M.R. 790 (A.F.B.R. 1954).

[32] *Schoolcraft*, 16 C.M.R. at 795 (A.F.B.R. 1954)(holding "it is impossible to tell from this record of trial of just *what* offenses the court found the accused guilty.")(emphasis in original).

[33] *Id.*

[34] *Id.* (citing Article 63(a), UCMJ (1951)(requiring the convening authority who "disapproves the findings and sentence and does not order a rehearing [to] dismiss the charges").

[35] United States v. Rust, No. 26028, 1987 CMR Lexis 630 (A.F.C.M.R. Aug. 21, 1987), *review denied*, 25 M.J. 391 (C.M.A. 1987).

[36] *Rust*, 1987 CMR Lexis 630 at *2.

'on divers occasions.'"[37] The Air Force Court of Military Review (AFCMR) did the same in *United States v. Lessard,*[38] with appellate government counsel's agreement, and the Court of Military Appeals (CMA) affirmed the AFCMR's corrective action.[39] As discussed in Section III.B.2.c of this thesis, the CAAF continues to approve this practice.

The CMA's denial of review in *United States v. Devenny*[40] approved the service appellate court's remedy for an ambiguous verdict: review of the record of trial, only to about-face in *United States v. Seider*[41] sixteen years later.[42] In *Devenney*, although the trial court failed to specify the occasion of drug use of which it convicted the accused the AFCMR found:

> it is clear to us that the 'one occasion' of drug abuse by the appellant as found by the court, was that which occurred on 28 June 1987, as confirmed by the positive urinalysis of 30 June. There is convincing evidence in the record to support the conclusion that was the court's intention.[43]

Similarly, the CMA also denied appellant's petition for review and affirmed the AFCMR's decision in *United States v. Cornelius,*[44] where the military judge found the accused guilty of only one occasion, but failed to specify which one, and where counsel for either side failed to

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[37] *Id*.

[38] United States v. Lessard, No. 26309, 1988 CMR Lexis 103 (A.F.C.M.R. Feb. 10, 1988), *affirmed*, 26 M.J. 281 (C.M.A. 1988).

[39] *Lessard*, 1988 CMR Lexis 103 at *2.

[40] United States v. Devenney, No. 26603, 1988 CMR Lexis 377 (A.F.C.M.R. May 27, 1988), *review denied*, 27 M.J. 461 (C.M.A. 1988).

[41] United States v. Seider, 60 M.J. 36 (C.A.A.F. 2004), *reconsideration denied*, 60 M.J. 289 (C.A.A.F. 2004).

[42] *See infra* Section II.C.3 of this thesis for a thorough discussion of *United States v. Seider*.

[43] *Devenney*, 1988 CMR Lexis 377 at *5 (A.F.C.M.R. May 27, 1988)(citing United States v. Cameron, 34 C.M.R. 913 (A.F.B.R. 1964); and *see generally*, United States v. Anderson, 10 M.J. 536 (A.C.M.R. 1980)).

[44] United States v. Cornelius, No. 27293, 1989 CMR Lexis 281 (A.F.C.M.R. Mar. 15, 1989), *review denied*, 28 M.J. 451 (C.M.A. 1989).

request clarification.[45] The AFCMR reviewed the record of trial and determined the occasion on which the military judge found the accused guilty.[46] The AFCMR employed the same analysis in *United States v. Crick,*[47] examining appellant's pretrial confession and the military judge's findings regarding the portions of appellant's pretrial confession corroborated by other evidence presented at trial, and found, that although appellant's confession did not match perfectly with the other evidence, the latter evidence "raise[s] an inference of truth of the essential facts admitted by the appellant" and affirmed his convictions.[48] The CMA affirmed the AFCMR's decision.[49] These cases demonstrated the widely held belief prior to *Walters* that the service appellate courts had the ability to determine which occasion a fact-finder found an accused guilty when the fact-finder failed to specify the occasion.

Also in 1989, the Army Court of Military Review (ACMR) confirmed the convening authority's ability to amend a specification through removal of divers occasions. [50] The ACMR affirmed a conviction for lewd and lascivious acts in *United States v. Johnson*, where the convening authority had previously amended the conviction, removing divers occasions and finding the accused guilty of only one occasion.[51]

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[45] *Cornelius*, 1989 CMR Lexis 281 at *3-4.

[46] *Id.*

[47] United States v. Crick, 1989 CMR Lexis 277 (A.F.C.M.R. Mar. 17, 1989), *review denied,* 29 M.J. 341 (C.M.A. 1989).

[48] *Crick*, 1989 CMR Lexis 277 at *2.

[49] *Crick*, 29 M.J. at 341.

[50] United States v. Johnson, 15 M.J. 518, 520 (A.C.M.R. 1989).

[51] *Id.*

Of all the service appellate courts, the AFCMR was the most active in the 1980s and 1990s concerning cases where divers occasions was removed, either by the trial court or at the appellate level. While these cases demonstrate that ambiguity is not a new problem in military courts-martial, they also show that for almost sixty years, the service appellate courts ascribed to the view that they could amend potentially ambiguous verdicts in certain cases, where the trial court failed to specify the one remaining occasion after removing the phrase divers occasions, through review of the trial record, and the CMA approved this practice. Amendments based on the record of trial, in those cases, avoided the possibility that a mere misstatement of findings invalidated a conviction.[52] The Double Jeopardy Clause of the Constitution of the United States (Double Jeopardy Clause) is not mentioned in any of these opinions. When the CAAF discarded this practice, in the *Walters*/*Seider* line of cases, discussed below,[53] the opinions fail to address the sixty years of prior adherence. This thesis will address the current viability of review of the trial record as a method of resuscitating a "fatal" ambiguity caused by removal of the phrase divers occasions, in particular considering the sixty years of prior practice overruled by *Walters* and *Seider*.[54]

C. The Birth of Fatal Ambiguity

1. Introduction

After taking very little action previous to *United States v. Walters*,[55] and affirming a number of cases, such as *Cornelius*,[56] the CAAF changed course dramatically, creating an

[52] United States v. Downs, 15 C.M.R. 8, 11 (C.M.A. 1954); *see infra* Section III.D.2 of this thesis.

[53] *See infra* Section II.C of this thesis.

[54] *See infra* Section III.D.2 of this thesis.

[55] *Walters*, 58 M.J. at 391.

[56] *Cornelius*, 1989 CMR Lexis 281.

appellate error government counsel risk today when charging misconduct on divers occasions. This section details the history and evolution of the "fatally" ambiguous verdict that results when divers occasions is removed from a specification. This history and evolution demonstrates the possibility that divers occasions is only 'mostly' dead,"[57] and provides the foundation for resolution of ambiguity at the appellate level short of dismissing the charge due to a violation of the Double Jeopardy Clause.

2. United States v. Walters[58]

After the Government presented evidence regarding, and asked the enlisted panel to determine the accused's guilt on one specification of divers occasions of wrongful use of ecstasy, in its findings the *Walters* panel excepted out[59] the "on divers occasions" language without substituting language clarifying which one occasion of multiple occasions they found appellant guilty of using drugs.[60] In *Walters*, the CAAF held

> the Court of Criminal Appeals [CCA] is required to weigh the evidence and be themselves convinced beyond a reasonable doubt of the Appellant's guilt of engaging in wrongful use on the same 'one occasion' that served as the basis for the members' guilty finding. Without knowing which incident that Appellant had been found guilty of and which incidents he was found not guilty of, that task is impossible.[61]

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[57] THE PRINCESS BRIDE (Act III Communications/Buttercup Films Ltd./The Princess Bride Ltd 1987)(Miracle Max tells Inigo Montoya and Fezzik that Westley is only "mostly dead").

[58] *Walters*, 58 M.J. at 396.

[59] MANUAL FOR COURTS-MARTIAL, UNITED STATES, RULE FOR COURTS-MARTIAL 918 (2012)[hereinafter MCM](permitting military judges and panel members to make findings by exceptions and substitutions, or, in other words, remove language from or add language to a specification unless the exceptions and substitutions "substantially change the nature of the offense or . . . increase the seriousness of the offense or the maximum punishment for it." The ability to make minor changes, such as changing the amount of money allegedly stolen in a larceny specification, or finding an accused guilty of possession of a lesser number of images of child pornography promotes justice and efficiency.).

[60] *Walters*, 58 M.J at 391-2, 395.

[61] *Id.* at 396; *see also* UCMJ, art. 66.

This is a function of the CCA's mandate for 'factual sufficiency review' in every appellate case.[62] The Court also held

> "any rehearing on those instances [of which appellant had been found not guilty] is clearly barred by double jeopardy principles," and "the inability to identify and segregate those instances of alleged use of which Appellant was acquitted from the "one occasion" that served as the basis for the guilty finding effectively prevents any rehearing."[63]

The Court's decision prompted a vigorous dissent by then-Chief Judge Susan Crawford, chiefly concerning the doctrine of waiver and Double Jeopardy, both of which are discussed later in this thesis.[64] In that section, this thesis dissects the Court's verdict and demonstrates methods to work around it.[65]

3. United States v. Seider[66]

A year later, the CAAF decided *Seider*. In *Seider*, the panel convicted the appellant of a single occasion of illegal drug use after excepting the divers occasions language from the specification but failing to clarify which occasion to which they referred.[67] The AFCCA affirmed Airman First Class Seider's conviction, finding themselves able to perform a sufficient factual sufficiency review based on the evidence presented at trial.[68] The CAAF, however, determined the AFCCA erred because it could not determine which evidence the panel weighed more heavily, therefore was unable to determine of which occasion the panel

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[62] UCMJ, art. 66.

[63] *Walters*, 58 M.J. at 397; *See infra* Section III.D.5.c of this thesis.

[64] *Id.* at 397 (Crawford, J., dissenting); *See infra* Section III.D.5 of this thesis.

[65] *See infra* Section III.D.5 of this thesis.

[66] *Seider*, 60 M.J. at 36.

[67] *Id.* at 36-7.

[68] *Id*. at 38.

convicted appellant, unable to perform factual sufficiency review, and had no choice but to overturn the conviction.[69] Chief Judge Crawford again dissented, distinguishing the facts in *Seider* from those in *Walters*: "the conduct upon which Appellant's guilty finding was based is clear: the one occasion of cocaine use described in detail by all three witnesses."[70] In addition, Chief Judge Crawford noted that, unlike the service appellate court in Walters, the service appellate court in *Seider* was able to and did determine which occasion the panel had found the appellant guilty, the occasion

> overwhelmingly supported by the evidence, a conclusion so obvious to all parties at the trial that the verdict produced no comment, question, or objection from any party to the proceedings. In short, the level of certainty as to the findings in this case far exceeds the certainty in *Walters*.[71]

Chief Judge Crawford again argued appellant waived his right to appeal by failing to object to "what he now alleges were ambiguous findings."[72]

4. United States v. Augspurger[73]

In *Augspurger*, a panel of enlisted members found Airman Augspurger guilty of wrongful use of marijuana,[74] excepted the words "on divers occasions" from the specification, but again failed to specify the use of which they found him guilty.[75] The Government presented evidence of three uses, one proven via both a positive urinalysis and a

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[69] *Id.*

[70] *Id.* at 39 (Crawford, J., dissenting).

[71] *Id.* at 40.

[72] *Id.* at 40-1.

[73] United States v. Augspurger, 61 M.J. 189 (C.A.A.F. 2005).

[74] *Id.* at 189-90 (noting appellant was convicted of additional offenses not relevant to this thesis).

[75] *Id.* (citing *Walters*, 58 M.J. at 397).

post-urinalysis admission of guilt to an investigator, and two others via witness testimony.[76] The AFCCA "satisfied itself beyond a reasonable doubt that the members convicted Augspurger of the [positive urinalysis] use, and modified the findings in an effort to resolve the ambiguity."[77] The CAAF reversed the AFCCA's decision, pointing to the lack of "indication by the members as to the factual basis for their findings of guilty and not guilty."[78] The CAAF also rejected the government's request for a proceeding in revision to correct the verdict, holding "once the findings of a court-martial have been announced, any finding that amounts to a finding of not guilty is not subject to reconsideration or a post-trial session such as a proceeding in revision."[79]

5. United States v. Scheurer[80]

In *Scheurer*, the military judge found Scheurer guilty of wrongful use of controlled substances, but excepted the words divers occasions from two specifications, and, as in *Seider*, failed to specify the single use of which they found him guilty in one of the two specifications.[81] As the CAAF held in *Scheurer*, when a fact-finder "strikes out" the language on divers occasions from a specification, "the accused has been found guilty of misconduct on a single occasion and not guilty of the remaining occasions."[82] The CAAF affirmed appellant's conviction as to one of the two remaining specifications, because the

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[76] *Id.* at 190.

[77] *Id*. at 191.

[78] *Id.* at 192.

[79] *Id.* at 192 (citing MCM, *supra* note 59, R.C.Ms. 924(a) and 1102(c)(1)(2002)).

[80] United States v. Scheurer, 62 M.J. 100 (C.A.A.F. 2005).

[81] *Scheurer*, 62 M.J. at 110-1 (additionally the CAAF declared a third specification from which the military judge excepted divers occasions to be legally insufficient, but not ambiguous); *see also Seider*, 60 M.J. at 36-7.

[82] *Id.* at 111 (citing *Augspurger*, 61 M.J. at 190; *Walters*, 58 M.J. at 391).

military judge excepted one of two locations from that specification in addition to the divers occasions language, leaving only one possible use under that specification, and overturned the other, wrongful use of ecstasy, as fatally ambiguous because two possible uses remained.[83] This thesis discusses *Scheurer* in more detail in Section III.

6. United States v. Wilson[84]

Wilson remains factually and legally distinguishable from *Walters* and *Seider*.[85] Then-SSG Wilson elected trial by a military judge, sitting alone, whereas *Walters* and *Seider* were tried by panel members.[86] SSG Wilson pled guilty to one specification of false official statement, sodomy with a child under the age of 12, indecent acts at Fort Bliss, Texas (but not divers occasions as charged), and indecent acts in Colorado Springs, Colorado, on divers occasions, violations of Articles 107, 125, and 134, UCMJ.[87] The Government elected to go forward only on Charge II, which included two specifications of rape on divers occasions, one at Fort Bliss, Texas, and the other in Colorado Springs, Colorado, in violation of Article 120, UCMJ.[88] SSG Wilson admitted he falsely stated he did not have sexual contact with his daughter.[89] The military judge accepted SSG Wilson's plea, which was absent a pretrial agreement, and the trial counsel proceeded with the Government's case.[90] The military judge found appellant guilty of one occasion of rape, excepting out divers occasions, and sentenced

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[83] *Id.* at 110-112.

[84] United States v. Wilson, 67 M.J. 423 (C.A.A.F. 2009).

[85] *Walters*, 58 M.J. at 396; *Seider*, 60 M.J. at 36; *Wilson*, 67 M.J. at 424.

[86] *Wilson* Record, *supra* note 2, at 13; *Walters*, 58 M.J. at 392; *Seider*, 60 M.J. at 36.

[87] *Wilson* Record, *supra* note 2, at 20 and *Wilson* Charge Sheet.

[88] *Id*.

[89] *Wilson* Record, *supra* note 2, at 36.

[90] *Id*. at 39, 43.

him to confinement for fourteen years, reduction to E-1, and a dishonorable discharge.[91] On 13 February 2007, the military judge convened an RCM 1102 session based upon defense motion to dismiss Charges III and IV for passing the statute of limitations and granted a mistrial as to his original sentence.[92] The military judge sentenced SSG Wilson to confinement for eleven years, reduction to Private E-1, and a dishonorable discharge.[93]

The record of trial "convey[ed the military judge's] manifest intention" as a whole, through her interaction with the parties to the trial, that she intended to find appellant guilty of raping RC in the bedroom of her parents' house in Colorado, Springs, Colorado.[94] In *Wilson*, the Army Court of Criminal Appeals (ACCA) specifically held "the findings unquestionably disclose the single occasion on which the conviction is based," and therefore the ACCA "conduct[ed] a factual sufficiency review and affirm[ed] the findings because [they] could confidently, and without any doubt, determine which occasion the appellant was convicted of and for which occasion he was acquitted."[95] The CAAF disagreed, holding that "both incidents occurred within the remaining language of the specification after removal of the phrase 'on diverse occasions' the Court of Criminal Appeals was not in a position as a matter of law to determine which of the two alleged incidents served as the grounds for

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[91] *Id.*

[92] *Id.* at 128, 131.

[93] *Id.* at 145.

[94] *Id.* at 69-70, 79, 87-9, 91; United States v. Dilday, 47 C.M.R. 172, 173 (A.C.M.R. 1973) (stating although a "verdict must be certain and convey a definite meaning free from any ambiguity," findings need not be wholly free from defects, but must "convey the manifest intention of the [fact-finder] when viewed as a whole.").

[95] United States v. Wilson, No. 20061187, slip op. at 2 (A. Ct. Crim. App. Aug. 27, 2008)(citing *Scheurer*, 62 M.J. at 110-12).

[a]ppellant's conviction without explicit guidance on the record from the military judge."[96] This case is discussed further throughout the remainder of this thesis.

7. United States v. Trew[97]

A military judge, sitting alone, found Machinist's Mate First Class Daniel Trew, whom the Government charged with indecent acts on a child under the age of 16 on divers occasions, guilty of a lesser-included offense of assault on a child under the age of 16.[98] When the trial counsel requested clarification of the military judge's finding, the military judge stated "it it is on the one occasion."[99] The Navy-Marine Court of Criminal Appeals (NMCCA) determined the military judge used short-hand to refer to an incident on 26 September 2006 and affirmed appellant's conviction.[100] The CAAF found the military judge's attempted clarification resulted in fatal ambiguity and reversed the NMCCA's decision.[101] The case is discussed in more detail later, *infra* Part III of this thesis.

8. United States v. Saxman[102]

In *Saxman*, the NMCCA overturned appellant's conviction for possession of child pornography for two reasons. First, after the panel members excepted the words "22" from the specification, substituted the word "4," and found appellant guilty of possessing four images of child pornography, they failed to specify which 4 of the 22 video files they found

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[96] *Wilson*, 67 M.J. at 429.

[97] United States v. Trew, 68 M.J. 364 (C.A.A.F. 2010).

[98] *Id.* at 365.

[99] *Id.* at 366.

[100] *Id.* at 367.

[101] *Id.* at 368-9.

[102] United States v. Saxman, 69 M.J. 540 (N.-M. Ct. Crim. App. 2010).

appellant guilty of possessing.[103] Second, for failure to state an offense after the government charged the appellant with possession of the video files rather than the hard drive containing the video files despite using a statute that required charging possession of electronic media containing pornographic images.[104] Key nuances in this case are analyzed later in this thesis.

9. Pending cases

a. United States v. Oakley[105]

On 10 December 2014, the NMCCA heard oral argument in *Oakley* on the following issue: "Did the military judge's findings of not guilty to the words 'on divers occasions' in the first trial create an ambiguous verdict and a double jeopardy violation that precludes this court's review of specifications 1 and 2 under Article 66, UCMJ?"[106] The NMCCA has not yet issued an opinion in the case.

b. United States v. Piolunek[107]

The CAAF heard oral argument in *Piolunek* on October 8, 2014 and a decision is pending. According to the AFCCA, 3 of the 22 images of alleged child pornography the government charged appellant with and the members found appellant guilty of possessing did not meet the definition of child pornography.[108] Nonetheless, the AFCCA determined that

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[103] *Saxman*, 69 M.J. at 540, 542-3.

[104] *Id.* at 543.

[105] United States v. Oakley, No. 201200299, 2013 CCA Lexis 245 (N.-M. Ct. Crim. App. Mar. 26, 2013).

[106] Zachary D. Spilman, *This Week in Military Justice; December 7, 2014*, NATIONAL INSTITUTE OF MILITARY JUSTICE-CAAFLOG (December 7, 2014) http://www.caaflog.com/2014/12/07/this-week-in-military-justice-december-7-2014/.

[107] United States v. Piolunek, 72 M.J. 830 (A. F. Ct. Crim. App. Oct. 2013), *review granted*, 73 M.J. 281 (C.A.A.F. 2014).

[108] *Id.* at 836-837.

the error was harmless, and affirmed appellant's possession of the remaining 19 images.[109] Analysis of potential ambiguities arising from the government's decision to charge possession of constitutionally protected material are found later in this brief.

c. United States v. Doshier[110]

While *Oakley*, *Barberi*, and *Piolunek* seemed to signal a major shift to appellate errors caused by ambiguity concerning convictions based on Constitutionally-protected material, unfortunately, the facts in *Doshier* indicate fatal ambiguity caused by removal of divers occasions language from specifications is alive and well.[111] In *Doshier,* the a panel convicted the appellant of one specification of attempted sodomy of a child, five specifications of rape of a child under the age of 12, one specification of aggravated sexual contact with a child, one specification of indecent liberty with a child, four specifications of sodomy with a child, and one specification of possession of over 400 images of child pornography.[112] The panel excepted out divers occasions from two of the specifications of rape, one for each of the two child victims, creating fatal ambiguity because the children testified about multiple rapes during the specific time periods and locations charged.[113] In addition to the ambiguity caused by divers occasions, not all 600 images the panel reviewed prior to convicting appellant of possession of child pornography were, in fact, images of child pornography.[114] Some were, for example, pictures of a door and someone's head.[115]

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[109] *Id.* at 837-839.

[110] United States v. Doshier, No. 20120691, slip op. at 1 (A. Ct. Crim. App. Feb. 24, 2015).

[111] *Doshier* at 1-4.

[112] *Id.* at 3-4.

[113] *Id*.

[114] *Id.* at 4-7.

Applying the three-part test articulated by the AFCCA in *Piolunek*, "(1) the quantitative strength of the evidence; (2) the qualitative nature of the evidence; and (3) the circumstances surrounding the offense as they relate to the elements of the offense charged," the ACCA distinguished *Doshier* from the facts in *Barberi* and affirmed appellant's conviction.[116]

This line of cases demonstrates that ambiguity in findings has been an issue since the enactment of the UCMJ, and continues to plague the military justice system. No one service, trial counsel, or judge is to blame. It is a systemic, Department of Defense (DoD)-wide issue. While the issue of ambiguity has mutated somewhat, in the *Barberi* line of cases, to one of ambiguity with respect to Constitutionally-protected material, *Doshier* indicates divers occasions is still another cause of the fatality of findings. Lack of precision and attention to detail are the root cause of nearly all of the overturned cases, from *Walters* to *Doshier*. Part III of this thesis will suggest and apply solutions to resolve ambiguity, from the start of an investigation all the way through completion of the appellate process.

III. Solutions

A. Introduction

Investigations, charging decisions, opening statements, evidence presentation, and closing arguments demonstrate ambiguity lurks at every stage of the military justice process. This section will identify and analyze the effectiveness of solutions at each stage of the process, using *Wilson*,[117] *Trew*,[118] and *Saxman*[119] as examples. If ambiguity survives to the

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[115] *Id.* at 5.

[116] *Id.* at 5-6, 10 (citing *Piolunek*, 72 M.J. at 838).

[117] *Wilson*, 67 M.J. at 423.

[118] *Trew*, 68 M.J. at 364.

[119] *Saxman*, 69 M.J. at 540.

post-trial and appellate stages of courts-martial, trial counsel also have additional options, such as RCM 1102 proceedings in revision, Article 39(a), UCMJ, sessions, *United States v. DuBay*[120] hearings, extraordinary writs, and new trials. Finally, Congress and the President can immunize the military justice system against ambiguity via amendments to the UCMJ and Rules for Court-Martial.

B. Pretrial

1. Investigations

In *Wilson*, Criminal Investigation Command (CID) Special Agent (SA) Heintzelman, the investigating agent, elicited a partial confession from then-Staff Sergeant (SSG) Wilson – a confession that ultimately opened the door to a fatal ambiguity later in the case.[121] In the statement, then-SSG Wilson admitted to penetrating his stepdaughter's labia, but the agent failed to gather additional information following that admission, such as when, where, or how this took place.[122] If he had done so, the military judge would have known the location and time of the crime, the critical detail that would have resolved the "fatal" ambiguity in SSG Wilson's case. Because the agent failed to ask that critical question, and SSG Wilson failed to spontaneously supply it, no one, except perhaps now-PVT Wilson and his stepdaughter, know the truth. And therein lies the ambiguity. The ACCA analyzed SSG Wilson's statement and determined the penetration appellant referred to was the occasion in the bedroom.[123] However the CAAF, reading the same sworn statement, determined the

[120] United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967).

[121] *Wilson*, 67 M.J. at 426-7; *Wilson* Record, *supra* note 3, at PE 2.

[122] *Wilson* Record, *supra* note 3, at PE 2.

[123] *Wilson*, No. 20061187, slip op. at 1-2.

penetration to which SSG Wilson referred happened in the bathroom and was therefore a second occasion, apart from the rape RC described in her parents' bedroom.[124]

Clarity in the investigative process is key. Investigators should pay close attention to the facts of each case, working with trial counsel to identify offenses and the critical elements, and ensure that all of this information goes into each sworn statement. Trial counsel should review sworn statements early in the process to determine if any potential ambiguity exists and take steps to clarify it. If trial counsel identify a potential ambiguity,[125] such as multiple occasions with similar facts, or a situation where the facts are not clear in the initial interview, like the statement in *Wilson*, they or an investigator can take additional statements or gather evidence to clarify it. The bottom line is that an investigator's role in a case does not end when the trial counsel renders an opine. Investigators receive hours of training prior to becoming an investigator, and numerous hours of training throughout their careers.[126] Each investigator would benefit from a course concerning clarity in identifying offenses, nailing down facts, and preventing ambiguity, using the leading cases discussed in this thesis, perhaps taught by the Special Victim Prosecutor or Chief of Military Justice assigned to the specific installation as a refresher, using examples from cases where ambiguity resulted in findings being overturned on appeal. An investigator forewarned of the

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[124] *Wilson*, 67 M.J. at 426-7.

[125] *See supra* Section I.A of this thesis.

[126] Email from Lieutenant Colonel Paulette Burton, Staff Judge Advocate, Criminal Investigation Command (CID) to Major Sarah Rykowski, Student, 63d Graduate Course (20 March 2015 13:45:00 EST) (on file with author); *Special Agent Training,* U.S. CRIMINAL INVESTIGATION COMMAND, http://www.cid.army.mil/agent training.html (last visited 15 Mar. 2015) (referencing sixteen weeks of training at the Special Agent Course, and offerings of advanced courses in Abuse Prevention and Investigative Techniques, Crisis/Hostage Negotiations, Protective Services Training, Advanced Crime Scene Techniques, and Special Victim Unit Investigator Course." The site also discusses sustainment, or refresher training, offered at the unit level, "to maintain individual proficiency and learn new methods of focusing . . . investigative resources." Finally, the site references opportunities for further study and training at the Federal Bureau of Investigation (FBI) Academy and other institutions, as well as study in forensic science).

dire consequences of a lack of clarity will ask better, more detailed questions, obtain better, more detailed statements, and know his role continues through to trial.

2. Charging

a. Introduction

Charging divers occasions both shortens the charge sheet and decreases an accused's sentencing liability.[127] However, trial counsel should avoid charging divers occasions unless absolutely necessary. If trial counsel intend to charge and prove only two or three occasions, why not charge them separately and specifically? A review of the *Wilson* case demonstrates that, while the trial counsel drafted charges "on divers occasions," the victim in the case testified clearly that she was raped only once, in the bedroom of the family's house in Colorado Springs, Colorado.[128] Understanding that victims' and witnesses' testimony changes over time as memories fade and change,[129] it is difficult to understand why the trial counsel in the *Wilson* case chose to charge divers occasions, given the evidence's indication that only one rape, at most two, occurred.[130] Working closely with the investigators on any particular case will help trial counsel avoid overcharging a case, as in *Wilson*,[131] only to

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[127] Lieutenant John E. Hartsell and Major Bryan D. Watson, *The Decay of 'Divers' and the Future of Charging 'On Divers Occasions' in Light of United States v. Walters*, 61 A. F. L. Rev. 185, 186 (2008).

[128] *Wilson* Record, *supra* note 3, at 67-70.

[129] Claire L. Seltz, *Sixth Amendment – The Confrontation Clause, Witness Memory Loss and Hearsay Exceptions: What are the Defendant's Constitutional and Evidentiary Guarantees – Procedure or Substance*,79 J. CRIM. L. & CRIMINOLOGY 866, 884 (1998)(citing H.R. Rep. No. 355, 94th Cong., 1st Sess. 2, *reprinted in* 1975 U.S. Code Cong. & Admn News 1092, 1093 (quoting Kirby v. Illinois, 406 U.S. 682, 691 (1972)); Mary P. Koss, Aurelio Jose Figueredo, Iris Bell, Melinda Tharan, and Sharon Tromp. *Traumatic Memory Characteristics: A Cross-Validated Mediational Model of Response to Rape Among Employed Women*, 105 J. ABNORMAL PSYCHOLOGY 421, 428 (1996)(finding "rape memories, compared to other unpleasant memories, were less clear and vivid, were less likely to occur in a meaningful order, were less well-remembered, and were less thought and talked about.").

[130] *Wilson* Record, *supra* note 3, at 67-70; PE 2, *supra* note 3.

[131] *Wilson* Record, *supra* note 3, at 20 and Charge Sheet.

spend time before and during the trial dropping elements, specifications, and charges. Because of *Walters*, Lieutenant Colonel (LtCol) John Hartsell and Major (Maj) Bryan Watson recommend [in their article *The Decay of 'Divers" and the Future of Charging 'On Divers Occasions' in Light of United States v. Walters*,"] trial counsel drafting specifications "think like litigators and appellate counsel."[132] If upon analysis, charging divers occasions will only create both trial and appellate issues, rather than resolve them, trial counsel should think twice before employing this phrase. Military case law is replete with situations, like *Wilson*, where otherwise valid convictions were overturned because trial counsel chose to charge divers occasions without apparent consideration of and vigilance regarding the possible consequences.[133]

United States v. Campbell,[134] on the other hand, demonstrates a trial counsel wisely charging divers occasions, and a military judge, trial counsel, and defense counsel attuned to the issues concerning use of divers occasions, multiplicity, and unreasonable multiplication of charges. In *Campbell*, the accused was charged with three specifications of misconduct on divers occasions: first, falsely stating he had a physician's authority to withdraw medication from the Pyxis machine; second, larceny of the medications from the machine, and third and finally, wrongful possession of the Percocet and Vicodin he obtained from the machine.[135] The government presented evidence that the accused withdrew medication from the machine at least thirty-one times.[136] The defense counsel filed motions alleging unreasonable

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[132] Hartsell & Watson, *supra* note 127, at 193.

[133] *See, e.g*, *Walters*, 58 M.J. at 391; *Seider*, 60 M.J. at 36; *Augspurger*, 61 M.J. at 189; *Scheurer*, 62 M.J. at 100; *Wilson*, 67 M.J. at 423.

[134] United States v. Campbell, 71 M.J. 19 (C.A.A.F. 2012).

[135] *Campbell*, 71 M.J. at 21.

[136] *Id*. at 20, 25.

multiplication of charges and multiplicity concerning the possession and larceny charges, later argued the false statement specification was also multiplicious with the larceny specification, and also requested "'the offenses be found mulitiplicious for sentencing.'"[137] The military judge denied the motion for multiplicity, but granted the defense motion to merge the three specifications for sentencing.[138] As the CAAF found, "the military judge did not abuse his discretion by not dismissing or merging the charges for findings based on an unreasonable multiplication of charges. "Within a range of possible options, the prosecution chose a middle ground between charging the conduct as larceny alone on divers occasions, as three distinct criminal acts on divers occasions, or as thirty-one separate and distinct larcenies."[139]

In the alternative, trial counsel also have the option of drafting a "mega-spec," listing each occasion of misconduct that fits that specification.[140] For example, when charging possession of child pornography, trial counsel now charge each different media, such as a hard drive, separately, and list out each image found on that particular media, under the same specification. This creates a simple checklist, of sorts, that the trial counsel, defense counsel,

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[137] *Id*. at 21.

[138] *Id.* at 21-22.

[139] *Id.* at 25.

[140] Hartsell & Watson, *supra* note 127, at 193 (citing U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE (21 Dec. 2007) Figure 3.2)); *see also Rodriguez*, 66 M.J. at 207 (Erdmann, J., dissenting)(recommending trial counsel "be required to list all of the alleged occasions of wrongful use [of drugs] in the context of one specification, as is commonly done with bad checks under Article 132a, UCMJ. Under this method, the findings worksheet would include the alleged occasions of use and the military judge could then instruct the panel to indicate which of the occasions it has found the accused guilty of. This would ensure not only that the accused is fully informed of the specific instances he or she must defend against, it would also allow the CCA to be fully informed of those occasions where the accused has been found guilty and those occasions where the accused has been acquitted.").

and trier-of-fact can use to determine when an image is proven beyond a reasonable doubt to be child pornography, and, when it has not, it is easily crossed off on the charge sheet.[141]

Saxman is a perfect example of the issues that arise when trial counsel do not employ a list-type specification. In *Saxman*, the trial counsel charged appellant with possession of 22 video files of child pornography even after a trained forensic examiner at the Defense Computer Forensic Laboratory (DCFL) examined each of the video files and determined only four of them contained "known child images."[142] While an image may not be a "known child image" and yet meet the definition of child pornography, applying the factors in *United States v. Dost*,[143] trial counsel must closely examine each image or file and apply the factors, and consider not charging those images that do not or may not meet the definition. The CAAF adopted the *Dost* factors in *United States v. Roderick.*[144] The factors include,

> 1) whether the focal point of the visual depiction is of the child's genitalia or pubic area; 2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity; 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; 4) whether the child is fully or partially clothed, or nude; 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.[145]

The CAAF in *Roderick* "adopt[ed the] approach" recognized by "several federal circuits courts," that is, "combining a review of the *Dost* factors with an overall consideration of the

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[141] *See* Sample Charge Sheet, attached as Appendix 3 to this thesis.

[142] *Saxman*, 69 M.J. at 541.

[143] United States v. Dost, 636 F. Supp. 828, 832 (S.D. Ca. 1986), *affirmed*, 813 F.2d 1231 (9th Cir. 1987).

[144] United States v. Roderick, 62 M.J. 425, 429 (C.A.A.F. 2006)(citing *Dost*, 636 F. Supp. at 832).

[145] *Id.*

totality of the circumstances."[146] Applying *Roderick*, in *United States v. Andersen*,[147] the ACCA articulated the difference between child erotica and child pornography, stating "if the if the images do not involve the genitals or pubic area, however, one does not reach the question whether the image is 'lascivious,' regardless of whether that secondary determination is one of fact or law."[148]

Careful review of images and videos avoids creating another issue – as *Trew, United States v. Barberi*,[149] and *Piolunek* demonstrate, that a verdict possibly based on constitutionally protected material cannot stand. In *Saxman*, the panel found appellant guilty of possession of 4 of the video files, but failed to specify which of the 22 video files they found him guilty of.[150] In addition, the NMCCA found that the specification, even prior to the exception and substitution by the panel, failed to state an offense, because it did not charge possession of electronic media containing child pornography, in accordance with the statute under which it was charged.[151]

In addition, trial counsel need to be aware that "fatal" ambiguity has been found when a specification fails to omit time periods when the accused are clearly not able to commit crimes, typically because they are not co-located with their victims. In *United States v. Ransom*, although the military judge found the accused guilty of indecent acts on divers

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[146] *Roderick*, 62 M.J. at 429-30 (citing United States v. Amirault, 173 F.3d 28, 32 (1st. Cir. 1999); United States v. Campbell, 81 F. App'x 532, 536 (6th Cir. 2003); United States v. Knox, 32 F.3d 733, 747 (3d Cir. 1994)).

[147] United States v. Andersen, No. 20080669, 2010 Lexis CCA 328 (A. Ct. Crim. App. Sept. 10, 2010).

[148] *Id.* at *25.

[149] United States v. Barberi, 71 M.J. 127 (C.A.A.F. 2012).

[150] *Saxman*, 69 M.J. at 543.

[151] *Id.* at 544.

occasions, the military judge failed to except out the period of time the accused was stationed in Korea away from his victim, and thus could not have committed the charged offenses during that period of time.[152] In addition, the military judge also failed to except out the period of time outside the statute of limitations.[153] The ACCA overturned the accused's conviction for indecent acts on divers occasions because of insufficient evidence that the accused committed those offenses during the time within the statute of limitations and while he was co-located with the victim.[154] Although the error here resulted in a failure of proof rather than an ambiguous verdict, it illustrates the importance of the trial counsel's role in charging and proving offenses to avoid ambiguous verdicts. In *Ransom*, the ACCA placed the blame squarely on the trial counsel, who chose "to charge, and present evidence, that appellant committed criminal acts during time periods when appellant simply did not have access to [his victim.]"[155] As the ACCA stated in *Ransom*, the government must "do the hard work of establishing timelines of events based on all the information available," in addition to "making sensible charging decisions that do not allege an accused Soldier committed crimes against a family member during time periods a simple review of military records reveals the Soldier is stationed in a different country."[156]

b. United States v. Fosler – The Effect of a Shift to Notice Pleading

At the same time military appellate courts continue to find fatal ambiguity in cases employing divers occasions, those same courts have increasingly shifted to a "notice"

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[152] United States v. Ransom, No. 20060591, 2009 WL 6920848 at *6-7 (A. Ct. Crim. App. Aug. 10, 2009).

[153] *Id.* at *7.

[154] *Id.* at *7-8.

[155] *Id.* at *8.

[156] *Id*.

pleading philosophy. From the earliest days of American military jurisprudence, trial counsel drafting specifications alleging Article 134, UCMJ violations did not need to explicitly include the "terminal element," also known as either "prejudicial to good order and discipline," or "of a nature to bring discredit upon the armed forces."[157] These terms were "'deemed to be involved in every specific military crime,' and . . . therefore available as a lesser included offense (LIO) of the enumerated Articles of the Articles of War and later the UCMJ."[158] The Rules for Court-Martial (RCM), promulgated by the President of the United States, also did not require it, and still do not.[159] The CMA also previously approved the practice of implying, but not including, the terminal element.[160] In 1989, however, the Supreme Court decided *Schmuck v. United States* and shifted from the "inherent relationship" test and "adopted the elements approach," seeking "greater certainty," and focusing on "the right of the defendant to notice of the charge brought against him."[161] According to the Court, an accused could only be convicted of those lesser included offenses "'necessarily included in the offense charged.'"[162] As a result of *Schmuck*, the CAAF began to review and invalidate specifications failing to allege all required elements.[163] For

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[157] United States v. Fosler, 70 M.J. 225, 227 (C.A.A.F. 2011).

[158] *Id*.

[159] MCM, *supra* note 59, R.C.M. 307 (2005 and 2012)(*but see* R.C.M. 307, discussion (2012)(recommending charging the terminal language)).

[160] *Fosler*, 70 M.J. at 228 (citing United States v. Mayo, 12 M.J. 286, 293-4 (C.M.A. 1982); United States v. Marker, 3 C.M.R. 127, 134 (C.M.A. 1952)).

[161] Schmuck v. United States, 489 U.S. 705, 715, 718 (1989).

[162] *Id.* at 719 (internal citations omitted).

[163] *Fosler*, 70 M.J. at 228 (*see also* United States v. McMurrin, 70 M.J. 15, 17 (C.A.A.F. 2011); United States v. Girouard, 70 M.J. 5, 9 (C.A.A.F. 2011); United States v. Jones, 68 M.J. 465, 468 (C.A.A.F. 2010); United States v. Miller, 67 M.J. 385, 388-89 (C.A.A.F. 2009); United States v. Medina, 66 M.J. 21, 24-25 (C.A.A.F. 2008).

example, in *United States v. Fosler*, the CAAF invalidated a charge and specification that failed to explicitly plead the terminal element.[164] The CAAF also pointed out that the President had the opportunity to expressly promulgate a rule directing exclusion of the terminal element in specifications but did not do so.[165] The President's ability to promulgate rules is further explored later in this thesis.[166]

c. Current Practice

As result of this change in jurisprudence, and citing *United States v. Fosler*, the Discussion for RCM 307 (concerning specifications) now directs "expressly alleg[ing] every element of the charged offense."[167] The Discussion also defines a lesser included offense as "'necessarily included' in the offense charged only if the elements of the lesser offense are a subset of the elements of the greater offense alleged."[168] Numerous cases failing to allege the terminal element were reversed as a result of the *United States v. Jones-Fosler* line of cases.[169] Since *Jones*, CAAF and the service appellate courts continue to consistently apply the elements test.[170] With respect to divers occasions, the shift to notice pleading requires specificity as much as possible with respect to charging decisions. As a result of the shift,

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[164] *Fosler*, 70 M.J. at 233.

[165] *Id.* at 231.

[166] *See infra* Section III.E of this thesis.

[167] MCM, *supra* note 59, R.C.M. 307(c)(3), discussion (2012)(citing *Fosler*, 70 M.J. at 225).

[168] *Jones*, 68 M.J. at 468; R.C.M. 307(c)(3), discussion (2012).

[169] *See, e.g.* United States v. Gaskins, 72 M.J. 225 (C.A.A.F. 2012); United States v. Goings, 72 M.J. 202 (C.A.A.F. 2013); *C.A.A.F. Daily Journal*, COURT OF APPEALS FOR THE ARMED FORCES, http://www.armfor.uscourts.gov/newcaaf/journal/2011Jrnl/2011Nov.htm (November 2011), attached as Appendix 4 to this thesis.

[170] United States v. Elespuru, 73 M.J. 326, 328 (C.A.A.F. 2014).

fewer trial counsel will charge divers occasions, lessening the opportunity for ambiguous verdicts.

Several methods of charging avoid the so-called "*Walters* problem." First, the easiest way to avoid an ambiguous verdict is to avoid using divers occasions, and charge each offense separately.[171] Second, even if counsel charges only one occasion, they may present evidence of multiple occasions in order to prove one, as a "continuing course of conduct."[172] For example, in *United States v. Brown*, CAAF held the military judge properly "instruct[ed] the court members that they could convict [a]ppellant of the offense of indecent assault without agreeing on which of three possible factual scenarios constituted the offense."[173] The Government presented evidence of three occasions but as a single course of conduct.[174] "The members found [a]ppellant guilty of a single incident of indecent assault, a lesser included offense of the rape charge."[175] In *United States v. Fields*,[176] the government presented evidence of appellant's use of a fellow Soldier's Visa check card on four occasions, but only charged him with larceny on one occasion.[177] Calling these occasions separate "theories," the military judge instructed the panel that they could go down the list of

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[171] *See, e.g*, *Brown*, 65 M.J. at 358 (clarifying that *Walters* only applies in the "narrow circumstance[s] involving the conversion of a 'divers occasion' specification to a 'one occasion' specification through exceptions and substitutions.") (quoting *Walters*, 58 M.J. at 396).

[172] *See, e.g*, *Brown*, 65 M.J. at 358 (quoting *Walters*, 58 M.J. at 396); *see also* United States v. Fields, No. 201100455, 2012 CCA Lexis 129 at *4-11 (N.-M. Ct. Crim. App. Apr. 12, 2012), *review denied*, 2012 C.A.A.F. Lexis 939 (C.A.A.F. Aug. 10, 2012).

[173] *Brown*, 65 M.J. at 356.

[174] *Id.* at 358.

[175] *Id*.

[176] *Fields*, 2012 CCA Lexis at *1.

[177] *Id.* at *1-2.

occasions on the findings worksheet and vote on each one.[178] If they found appellant guilty with a 2/3 majority on the first occasion, they could cross the rest of the occasions out.[179] If they found him not guilty, they would cross that occasion out and move to the next occasion.[180] The panel found appellant guilty of the first occasion/theory and lined the rest of the "theories" out.[181] The NMCCA found that "a general guilty verdict would have attached equally to all four acts of theft submitted to the members and we could affirm the finding provided at least one of the four acts withstood our factual and legal sufficiency analysis."[182]

Finally, factfinders need not specify a theory of liability to justify a finding of guilty.[183] In *Brown,* CAAF cited *United States v. Vidal*[184] where the government presented evidence on multiple theories: that appellant was either a principal *or* an aider and abettor.[185] Because the panel in *Brown* convicted appellant of indecent acts, "the elements require acts done 'with the intent to gratify,' and not the specification of particular acts or methods of gratification."[186]

Further, when trial counsel charge divers occasions, "so long as the fact-finder rendered a general verdict of guilty to the 'on divers occasions' specification without

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[178] *Fields*, 2012 CCA Lexis at *6-8.

[179] *Id.* at *7.

[180] *Id*.

[181] *Id.* at*8.

[182] *Id.* at *13.

[183] *Rodriguez*, 66 M.J. at 205 (citing *Brown*, 65 M.J. at 359).

[184] United States v. Vidal, 23 M.J. 319, 325 (C.M.A. 1987).

[185] *Brown*, 65 M.J. at 359 (citing *Vidal*, 23 M.J. at 325-6).

[186] *Brown*, 65 M.J. at 360 (MCM, *supra* note 59, pt. IV, para. 63.b.(2)(2005 ed.).

exception, any one of the individual acts may be affirmed by the CCA as part of its Article 66, U.C.M.J., review."[187] When the "on divers occasions" language survives findings, the fact-finder "need only determine that the accused committed two acts that satisfied the elements of the crime as charged – without specifying the acts, or how many acts, upon which the conviction was based."[188] Therefore, although "it was impossible for the [court of criminal appeals] to know upon which alleged instances of marijuana use the members based the verdict of guilty 'on divers occasions,'" and "[there was] no way for [CAAF] or the CCA to determine which acts comprised the 'divers occasions' found by the members, and no way to determine whether the members found Appellant guilty of the single act alleged in the specification as amended by the CCA," because of "longstanding jurisprudence in the Supreme Court, [CAAF], and the common law regarding the presumption that controls general verdicts on appeal," "that when the factfinder returns a guilty verdict[, it] stands if the evidence is sufficient with respect to any one of the acts charged."[189]

As Judge Charles E. Erdmann's dissent points out, CAAF's holding in *Rodriguez* indicates it is possible for a CCA to except "on divers occasions" from a charge without knowing "whether the members had found [an appellant] guilty of wrongful use on that specific occasion."[190] In other words, the CCA has to know which offense the fact-finder found appellant guilty of if divers occasions was excepted, but does not, if the fact-finder found appellant guilty without excepting out divers occasions. In *Rodriguez*, the CAAF

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[187] *Rodriguez*, 66 M.J. at 203.

[188] *Rodriguez*, 66 M.J. at 203 (*c.f. Brown*, 65 M.J. at 359)(citing Griffin v. United States, 502 U.S. 46, 49-51 (1991); Schad v. Arizona, 501 U.S. 624, 631 (1991)(plurality opinion)).

[189] *Rodriguez*,66 M.J. at 203-204 (citing *Griffin*, 502 U.S. at 49-51); *Brown*, 65 M.J. at 359; Peake v. Oldham, 98 Eng. Rep. 1083, 1084 (K.B. 1775)(on file with the author)).

[190] *Rodriguez*, 66 M.J. at 205-6 (Erdmann, J., dissenting).

relies on the "common law rule regarding general verdicts," after rejecting it in *Walters*.[191] As Judge Erdmann pointed out, because "the [AFCCA] could not determine which occasions of marijuana use the members found Rodriguez guilty or not guilty of, the same ambiguity that existed in *Walters* exist[ed in *Rodriguez*]."[192]

Further, the CAAF's holding in *Barberi* is illustrative of a growing issue: the fatality of specifications charging possession of constitutionally-protected material. In *Barberi*, the government charged appellant with possession of six images of alleged child pornography.[193] On appeal, the CCA found that four of the six images did not meet the definition of child pornography, but affirmed the conviction based on the two images that did.[194] The CAAF reversed, holding "we cannot know which images formed the basis for the finding of guilt to the possession of child pornography charge.[195] As previously mentioned, a similar issue exists in *Piolunek*, although the government in that case charged *Piolunek* with possession of a greater number of images, a greater number of which allegedly met the definition of child pornography.[196]

Trial counsel should not have carte blanche concerning charges and specifications. Most military justice offices have the benefit of a chief of military justice, senior trial counsel, and, for applicable cases, a special victim prosecutor. Each of these individuals should look over the charge sheet for potential issues, including ambiguity, before the trial

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[191] *Id.* at 206.

[192] *Id*.

[193] *Barberi*, 71 M.J. at 128.

[194] *Id.* (citing United States v. Barberi, No 20080636, 2011 CCA Lexis 24, at *5 (A. Ct. Crim. App. Feb. 22, 2011)(per curiam)).

[195] *Barberi*, 71 M.J. at 128-9, 131.

[196] *See supra* Section II.9.b of this thesis.

counsel swears the commander to the charge sheet. These individuals typically have additional training and access to greater information and guidance than trial counsel, and should also have open lines of communication with the Trial Counsel Assistance Program, who, by virtue of their position and even greater access to information, should be ready and able to assist. In particular, the special victim prosecutor may have the ability to work with the alleged victim in a sexual assault or abuse case to determine greater details of each offense and eliminate the need for divers occasions in the specification in question.

C. Trial Practice

1. Evidence/Arguments

A trial counsel who has charged an offense "on divers occasions" must identify, present evidence on, and argue the commission of each of these divers occasions. Clarity is key. SA Heintzelman testified at then-SSG Wilson's trial, and the trial counsel in the *Wilson* court-martial had every opportunity to clarify the location of the rape and failed to do so.[197] A trial counsel who has developed a good working relationship with the local CID office and its agents, and been closely involved in investigations is better able to ask insightful questions of that agent to bring out important testimony at trial. The testimony of CID agents is useful for more than admitting the sworn statement of the accused – the agent can discuss the demeanor of the witnesses, including the accused, during the investigation and interviews, and other details that will bring the case to life, provide clarity, and resolve ambiguity.

If a trial counsel is prepared to ask a witness about multiple occasions of a particular type of offense, and that witness' testimony changes at the last minute, indicating that only

[197] *Wilson* Record, *supra* note 2 at 45-60.

one occasion occurred, the trial counsel must change his or her argument accordingly. The trial counsel must be specific, unlike the trial counsel in *Seider*, who argued evidence of use "'one more than one occasion,' 'on divers occasions,' 'on an additional occasion,' 'during both occasions,' 'on a second occasion,' and 'on two occasions.'"[198] That did not occur in the *Wilson* case. Even after RC testified she was raped only once, the trial counsel argued that occasion but also referenced SSG Wilson's admission of a single rape in his sworn statement, without clearly arguing that SSG Wilson's admission referred to RC's rape in the bedroom, or that one rape had occurred.[199] In *Trew*, the trial counsel argued for a conviction on at least two occasions.[200] In *Ransom*, the trial counsel "failed to establish the dates of [the appellant's alleged] crimes with specificity."[201]

Prior to trial, and even prior to findings, the trial counsel may request the convening authority dismiss charges or specifications, or portions thereof that, in the course of trial preparation, are unsupported by the evidence and facts.[202] The trial counsel who has interacted with his witnesses, handled the evidence, and discussed the case with investigators may have a better knowledge of the facts, but not the "big picture" that the SJA may be privy to. Differences of opinion between trial counsel and staff judge advocates concerning the value of the available evidence and possibility of conviction based on that evidence mean it is imperative that the chief of military justice step in and ensure the trial counsel is tracking

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198 *Seider*, 60 M.J. at 37.

199 *Wilson* Record, *supra* note 2, at 85-87, 90-1; PE 2 *supra* note 2.

200 *Trew*, 68 M.J. at 366.

201 *Ransom*, 2009 WL 6920848 at *8.

202 MCM, *supra* note 59, R.C.M.s. 401 and 604.

the big picture, and the SJA is properly briefed on the facts, so they can be of one mind concerning the charges and required proof.

However, a trial counsel who either lacks the support of the staff judge advocate and convening authority to dismiss specifications or charges prior to trial has other options. In trial, trial counsel must also be prepared to and may also request the military judge "line out" "on divers occasions" on a charge sheet in the event the evidence only demonstrates one possible offense.[203] In the alternative to requesting action by the military judge, trial counsel also may inform the military judge that the Government does not intend to go forward on certain specifications, charges, or portions thereof, as the trial counsel attempted to do in *Wilson.*[204] A conscientious chief of military justice, senior trial counsel, or special victim prosecutor, normally sitting section chair to the typically less-experienced trial counsel, should discuss this possibility with the staff judge advocate, and even the convening authority, prior to trial. Such preparation and attention to detail will ensure counsel for the government are prepared to request dismissal depending on the success of the presentation of evidence in the government's case.

Defense counsel, on the other hand, when faced with a failure of proof in the government's case in chief as to divers occasions, could move for dismissal of that language pursuant to RCM 917.[205] While the state of the case law concerning divers occasions may

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[203] *See* MCM, *supra* note 59, R.C.M.s 603(c) and 906(b)(4) (2012) (Eliminating the "divers occasions" portion from a specification reduces the seriousness of the offense, and qualifies as a minor change. "After arraignment, the military judge may, upon motion, permit minor changes in the charges and specifications at any time before findings are announced if no substantial right of the accused is prejudiced.").

[204] *Wilson* Record, *supra* note 3 at 20 and Charge Sheet.

[205] MCM, *supra* note 59, R.C.M. 917(e)(2012)(stating "[a] motion for a finding of not guilty may be granted to part of a specification and, if appropriate, the corresponding charge, as long as a lesser offense charged is alleged in the portion of the specification as to which the motion is not granted. In such cases, the military judge shall announce that a finding of not guilty has been granted as to specified language in the specification and, if appropriate, corresponding charge").

not energize defense counsel to make such a motion, a successful motion in this manner may still result in ambiguity, if the military judge does not *sua sponte* insert language in the specification to indicate the single occasion for which he is finding the accused guilty, in findings. Further, a defense counsel who does not make such a motion in light of the government's failure of proof may face an allegation for ineffective assistance of counsel on appeal if the fact-finder finds the accused guilty of this offense despite the government's failure of proof.

2. Findings

a. General

Any military judge handling a case involving charges "on divers occasions" should watch carefully for the appearance of ambiguity and know how to resolve it. Findings, even on rulings short of verdicts, should be complete and free of ambiguity. It is not enough, as the military judge in the *Wilson* case did, to amend the charge by removing divers occasions and ensure the remaining language still states an offense under the UCMJ.[206] The military judge must also ensure the remaining language identifies the factual predicate underlying the offense, such that the appellate courts can conduct both factual and legal review, pursuant to Articles 66 and 67, UCMJ, respectively.[207] If the remaining language does not, the military judge should add language to ensure the specification sufficiently describes the remaining occasion for the appellate court to conduct review.[208]

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[206] *Wilson* Record, *supra* note 2 at 91, 94.

[207] *Wilson*, 67 M.J. at 428.

[208] *Id.* (citing Walters, 58 M.J. at 396).

b. Fact-Finders: Panel v. Military Judge-Alone

The military judge serves as watchman in panel cases, ensuring to the best of his or her ability that a verdict escapes fatal ambiguity. In *Walters*, for example, the CAAF identified the "military judge's error in both his hypothetical instruction to the members regarding a finding by exceptions and substitutions and his failure to secure clarification of the ambiguity when he reviewed the findings worksheet prior to announcement."[209] The military judge can prevent ambiguity by giving special instructions prior to sending the panel back to deliberate on a case involving divers occasions.[210] These instructions might include that "any findings by exceptions and substitutions that remove 'divers occasions' language must clearly reflect the specific instance of conduct upon which their modified findings are based."[211] In fact, today's Military Judge's Benchbook [The Benchbook] includes such an instruction.[212] In *Augspurger*, failure to give such an instruction was the military judge's first mistake.[213] "When findings are ambiguous," generally in panel cases, "the military judge should seek clarification," but "[w]hen the announced finding are ambiguous because the fact finder has excepted out the words 'on divers occasions,' without further

[209] *Walters*, 58 M.J. at 396.

[210] *Walters*, 58 M.J. at 396-7; *see also Trew*, 68 M.J. at 367, 369 (citing *W*alters and reminding trial counsel and military judges to "take appropriate steps through instruction and pre-announcement review of findings to ensure that no ambiguity occurs").

[211] *Walters*, 58 M.J. at 396.

[212] DA PAM. 27-9, *supra* note 13, at para. 7-25 (directing military judges to instruct the panel as follows: "[Y]our findings must clearly reflect the specific instance(s) of conduct upon which your findings are based. That may be reflected on the Findings Worksheet by filling in (a) relevant date(s), or other facts clearly indicating which conduct served as the basis for your findings.")(attached as Appendix 5 to this thesis).

[213] *Augspurger*, 61 M.J. at 192.

substitutions, the military judge *must* seek clarification."[214] Failure to do so was the *Augspurger* military judge's second mistake.[215]

However, in giving instructions, in particular with specifications alleging essentially the same act but with slightly different elementary requirements, military judges should ensure they differentiate between the two. In *United States v. Stewart*,[216] the military judge used the same exact words to define "substantially incapacitated" and "substantially incapable," "creat[ing] the framework for a Double Jeopardy violation," permitting the panel to find appellant guilty of the same exact facts of which it had just acquitted him.[217] The military judge in *Saxman* further muddied the waters in that case by instructing the panel they could find him guilty of possession of "a lesser amount of child pornography" than the 22 that the government charged, and that, if so, they "must modify the specification to correctly reflect [their] findings," but "fail[ing] to further instruct the members that if they convicted the appellant by exceptions and substitutions, they needed to identify the specific videos which had formed the basis of their guilty finding."[218]

In the earliest days of courts-martial, panels received instruction from a law officer on the law during closed sessions, also known as deliberation.[219] The rule change that required the law officer's presence during closed sessions was meant to "eliminate illegal, irregular, confused, or ambiguous findings by the court prior to its announcement in open

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[214] United States v. Major, 2007 CCA Lexis 264 at *24 (A. F. Ct. Crim. App. June 8, 2007) *review denied*, 66 M.J. 191 (C.A.A.F. 2008)(emphasis in original)(citing *Walters*, 58 M.J. at 397).

[215] *Augspurger*, 61 M.J. at 192.

[216] United States v. Stewart, 71 M.J. 38 (C.A.A.F. 2012).

[217] *Id*. at 42.

[218] *Saxman*, 69 M.J. at 542.

[219] United States v. London, 15 C.M.R. 90, 97 (C.M.A. 1954).

court," and more closely match civilian trial procedures.[220] In fact, both civilian and military courts resolved these issues via proceedings in revision to ensure the final record, including findings, was correct.[221] Even if the jury was discharged, "it is permissible to recall the jury for the purpose of resubmission of the issue or amendment of the verdict," but only if the jury has not dispersed[.]"[222] Nor are special interrogatories available to "resolve the ambiguity in the general verdicts . . . such use would constitute a manifest invasion of the jury's exclusive deliberative function in arriving at a verdict."[223] Ultimately, "the finding rendered [must] be the true finding agreed upon and that there be but one determined."[224]

Today, in lieu of the presence of a law officer during deliberations, military jurisprudence permits a military judge to review the findings in open court prior to announcement, in greater synchronicity with civilian courts.[225] While findings worksheets are not required according to the RCM, the Manual for Courts-Martial (MCM) includes a sample,[226] as does The Benchbook,[227] and the now-CAAF encourages their use.[228] Each of

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[220] *Id.*

[221] *Downs*, 15 C.M.R. at 11.

[222] *Id.* (citing Summers v. United States, 11 F.2d 583, 586 (4th Cir. 1926), certiorari denied, 271 U.S. 681 (1926)).

[223] United States v. Barrett, 870 F.2d. 953, 955 (3d Cir. 1989).

[224] *Downs*, 15 C.M.R. at 12.

[225] MCM, *supra* note 59, R.C.M. 921(d) (2012)(using the word "may"); United States v. Brickey, 16 M.J. 258, 263 (C.M.A. 1983)(stating "replacement of the 'law officer' with 'military judge' tended to suggest that Congress meant for this judge to possess the post-trial powers customarily enjoyed by his civilian counterparts in the judiciary").

[226] MCM, *supra* note 59, APPENDIX 10.

[227] DA PAM. 27-9, *supra* note 13, Section IV, Appendix B at 1198-1207.

[228] United States v. Henderson, 11 M.J. 395 (C.M.A. 1981)(discussing sentencing worksheets); United States v. Barclay, 6 M.J. 785 (A.C.M.R. 1978), petition denied, 7 M.J. 71 (C.M.A. 1979)(discussing findings worksheets).

the services includes use of both findings and sentencing worksheets in sample trial scripts,[229] and the Rules of Practice before Army Courts-Martial also includes instructions concerning use of worksheets in trial.[230] Trial counsel, defense counsel, and the military judge usually review the draft findings worksheet during an Article 39(a) session prior to the military judge's issuance of findings instructions.[231]

If a panel returns a verdict that appears ambiguous, the military judge can again issue additional instructions and send the panel back to revise their findings, but not re-deliberate the verdict.[232] The military judge could also, prior to announcement and after review of the charge sheet, require the panel to draft a description of each occasion of which they found the accused guilty, as LtCol Hartsell and Maj Watson suggest.[233] If the military judge "is in doubt as to what offense the court intended to find, he should give it proper instructions, and advise the court to close and reconsider its findings, and to make a new finding that is not ambiguous."[234] The military judge should continue to repeat this clarification or revision process until the panel returns an unambiguous verdict, that is, a verdict that includes enough information to "put the accused and the reviewing courts on notice of what conduct served as the basis for the findings."[235] At the trial counsel's request, the military judge in *United*

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[229] DA PAM. 27-9, *supra* note 13, at 1198 & 1208; U.S. DEP'T OF NAVY, NAVY-MARINE TRIAL JUDICIARY, TRIAL GUIDE 2013 at 84, 97-8, 100-1, 105 (1 Feb. 2013); DEP'T OF AIR FORCE, AIR FORCE TRIAL JUDICIARY, AIR FORCE SCRIPT at 35, 50 (27 Jan. 2011); U.S. COAST GUARD, TRIAL SCRIPT at 12, 58, 87-8, 94 (10 Jan. 2013).

[230] UNITED STATES ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL, Rule 22 (1 Nov. 2013).

[231] DA PAM. 27-9, *supra* note 13, at Section IV, Appendix B at 1198-1208.

[232] MCM, *supra* note 59, R.C.M.S 922, 924 & 1102 (2012).

[233] Hartsell & Watson, *supra* note 127, at 193.

[234] *London*, 15 C.M.R. at 96.

[235] *Walters*, 58 M.J. at 396.

States v. Major "asked the president of the court to specify which occasions resulted in the finding of guilty in Specification 1," after the panel excepted out "on divers occasions."[236] The panel returned three minutes after their recess and "the president announced, 'Ma'am, we thought we had evidence for the occasion on the couch.'"[237] The AFCCA held "the military judge did not err," and that this clarification "renders it possible for this Court to conduct a factual sufficiency review in accordance with Article 66(c), UCMJ."[238] Similarly, in *United States v. Bitner*,[239] the military judge received the panel's verdict excepting divers occasions from the specification, then recessed for the evening.[240] In the morning, having noted the ambiguity, the military judge requested the panel retire and clarify, but not reconsider their verdict, and issued carefully worded instructions.[241] The panel returned in 41 minutes and clarified their verdict, identifying the one occasion of which they had found the accused guilty.[242] "[A]fter making their announcement, when the military judge directly asked them if they had followed his instructions, they each affirmatively assured the judge they had[.]"[243] In contrast, the military judge in *Augspurger* reviewed the findings worksheet but failed to request clarification of the verdict from the panel.[244]

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[236] *Major*, 2007 CCA Lexis 264 at *25-6.

[237] *Id.* at *26.

[238] *Id.* at *26-7.

[239] United States v. Bitner, ACM 36990, 2008 CCA Lexis 354 (A. F. Ct. Crim. App. Sept. 29, 2008), *review denied*, 68 M.J. 91 (C.A.A.F. 2009).

[240] *Bitner*, 2008 CCA Lexis 354 at *4-5.

[241] *Id.* at *4-7.

[242] *Id.* at *7.

[243] *Id.* at *11.

[244] *Augspurger*, 61 M.J. at 192.

In military judge-alone cases, the military judge must be ever more vigilant, and should be aware of his or her options in the event a verdict appears ambiguous, because there is no one to check the military judge's actions.[245] The military judge sitting alone should read his or her findings carefully prior to announcement, to ensure the facts underlying the finding are clear and unambiguous.

When a military judge sitting alone determines his or her verdict is ambiguous, the military judge must clarify the ambiguity "by making a 'clear statement on the record as to which alleged incident formed the basis of the conviction,'"[246] sometimes involving the addition of language to the specification.[247] The additional language should "refe[r] in the substituted language to a relevant date or other facts in evidence that will clearly put the accused and reviewing courts on notice of what conduct served as the basis for the findings."[248]

In both *Wilson* and *Trew*, the military judges unsuccessfully attempted to clarify their findings. In *Wilson*, the military judge asked the trial counsel, "you would agree that, at most, it would be guilty except the words 'on divers occasions'?" and the trial counsel answered in the affirmative.[249] In *Trew*, when asked by the trial counsel to clarify her

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[245] *Trew*, 68 M.J. at 369 (citing *Wilson*, 67 M.J. at 428).

[246] *Trew*, 68 M.J. at 369 (citing *Wilson*, 67 M.J. at 428).

[247] *Trew*, 68 M.J. at 367, 369 (reiterating that "the language must clearly reflect the specific instance of misconduct upon which their modified findings are based.")(quoting *Walters*, 58 M.J. at 396); *see also* MCM, *supra* note 59, R.C.M. 922(b), discussion (2012)(stating "if the findings announced are ambiguous, the military judge should seek clarification."); MCM, *supra* note 59, R.C.M. 992(d)(2012)(stating errors in announcement of findings "may be corrected by a new announcement in accordance with this rule [, but] must be discovered and the new announcement made before the final adjournment of the court-martial in the case."); *see also* MCM, *supra* note 59, R.C.M. 924 (2012).

[248] *Trew*, 68 M.J. at 369 (citing *Walters*, 58 M.J. at 396).

[249] *Wilson* Record, *supra* note 2, at 91.

finding, the military judge stated, "[i]t is on the one occasion."[250] Interestingly, the government argued on appeal in *Trew* that the military judge's "clarification" was in fact a nullity – that the military judge's exact words "Of the Specification under the Charge: Not Guilty, but Guilty of the lesser included offense of Article 128, assault consummated by a battery upon a child under 16 years, paragraph 54(b)(3)(c) in the [MCM]" could be read as a general verdict to a lesser-included offense.[251] The CAAF disagreed, finding the military judge's post-announcement statement was a "correction of the announcement of the findings as permitted by RCM 922."[252] In *Trew*, unfortunately, the military judge's attempt at clarification created an ambiguous verdict.[253]

Trial counsel have a duty to resolve any ambiguity created by either a panel or judge-alone verdict. "The defense counsel [in *Augpurger*] asked the military judge to have the members clarify their findings [and] the military judge declined to do so[.]"[254] Trial counsel in *Wilson* could have and should have requested the military judge add the phrase "in the bedroom" to the specification, or state that she found then-SSG Wilson guilty of the rape in the bedroom, as part of her findings, but failed to do so. While the trial counsel in *Trew* attempted to do so, he/she did not persist when the military judge attempted to clarify his/her verdict but failed to specifically identify the incident upon which her finding was based.[255] Trial counsel should be aware that they can request clarification, prior to the court closing, to

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[250] *Trew*, 68 M.J. at 366 (internal citations omitted).

[251] *Id.*

[252] *Id.* at 368.

[253] *Id*.

[254] *Augspurger*, 61 M.J. at 190.

[255] *Trew*, 68 M.J. at 366.

correct ambiguous findings.[256] The trial counsel in *Augspurger* objected to the military judge giving the panel sentencing instructions conditional on which offense they found him guilty.[257]

Currently, the Army provides new military judges with three weeks of training prior to beginning their assignments as military judges.[258] The new military judges are typically senior majors or junior lieutenant colonels, and very often have prior experience in military justice, at either the trial or appellate level. While at least one hour of this training concerns ambiguous findings and covers some of the seminal cases touched on in this thesis, the Army Court's recent ruling in *Doshier* indicates that ambiguous verdicts are still happening despite potentially heightened judicial attention to the issue, although the judge in that case was not a recent attendee of the new judge's training.[259] Judges should understand fully that the only tool in their arsenal remaining to amend an ambiguous verdict in a military judge-alone case after close of trial, but prior to authentication of the record, is an RCM 1102 proceeding in revision.[260]

3. Post-Trial: Prior to Authentication of the Record of Trial

a. RCM 1102 Proceedings in Revision

The military judge may direct a proceeding in revision "to correct an apparent error, omission, or improper or inconsistent action by the court-martial, which can be rectified by

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[256] MCM, *supra* note 59, R.C.M.s. 922, 924 & 1102 (2012).

[257] *Augspurger*, 61 M.J. at 190.

[258] Major Jeremy Stephens, Final 58th Military Judge Course Block Schedule (Mar. 16, 2015)(unpublished PowerPoint presentation)(on file with author).

[259] Major Jeremy Stephens, 57th MJ Motions & Findings (Mar. 16, 2015)(unpublished PowerPoint presentation)(on file with author); *Doshier*, No. 20120691 at 1.

[260] MCM, *supra* note 59, R.C.M. 1102(b) (2012).

reopening the proceedings without material prejudice to the accused."[261] Normally a military judge cannot admit additional evidence during such a proceeding.[262] Ambiguous or apparently illegal action by the court-martial is a proper matter for a proceeding in revision.[263] Proceedings in revision must not "[R]econsider[] . . . a finding of not guilty of any specification, or a ruling which amounts to a finding of not guilty," "unless the record shows a finding of guilty under a specification laid under that charge which sufficiently alleges a violation of some article of the code."[264] However, the panel could "reconsider[]" a "legally impossible" finding of guilt, if they did so prior to official announcement of the findings in open court.[265]

Since the early days of the UCMJ, the military judge has had the opportunity and authority to individually correct, or order a jury to retire and correct an "unintelligible[,] legally absurd, or defective" verdict, "before the verdict is recorded," or announced.[266] The authority to do so stems from Article 60(e), UCMJ and RCM 1102,[267] and the CMA, now CAAF, "strong[ly] endorse[d] . . . the practice and authority of military judges to order a

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[261] MCM, *supra* note 59, R.C.M. 1102(b) (2012); United States v. Staruska, 4 M.J. 639, 641 (A.F.C.M.R. 1977)(holding R.C.M. 1102 proceedings in revision are intended for "correction of the record to reflect unintended omissions, to clarify ambiguities, and to correct improper or illegal sentence announcements, the alterations of which do not materially prejudice the substantial rights of the accused.")(citing United States v. Roman, 46 C.M.R. 78, 81 (C.M.A. 1972)).

[262] MCM, *supra* note 59, R.C.M. 1102(b) discussion (2012).

[263] *Id*.

[264] MCM, *supra* note 59, R.C.M. 1102(c) (2012).

[265] *London*, 15 C.M.R. at 95.

[266] *Id*.

[267] United States v. Dawson, 65 M.J. 848, 851 (A. F. Ct. Crim. App. 2007)(citing UCMJ, art. 60(e), and MCM, *supra* note 59, R.C.M. 1102).

post-trial Article 39(a) session or a proceeding in revision."[268] According to the CMA, judges had "broad authority" "to permit post-trial Article 39(a), UCMJ sessions and revision hearings to include the taking of evidence 'as to matters which concern the integrity of the proceedings.'"[269] As the CMA remarked in *United States v. Brickey*,[270] if the appellate courts, convening authorities, and supervisory authorities have directed *DuBay* hearings in the past to resolve post-trial issues, for the purpose of appellate review, prior to authentication of the record proceedings in revision should also be appropriate when conducted on the military judge's own motion.[271] While the military judge may order a post-trial Article 39(a), UCMJ session for the purpose of gathering additional evidence, he may not call an RCM 1102 proceeding in revision to do the same.[272] Trial and defense counsel may also request the military judge order an RCM 1102 session.[273] "Post-trial sessions 'provide a means for promptly eliminating an ambiguity or omission in the record, or disposing of a claim of error, before necessary witnesses dispersed, memories faded, and witnesses became unavailable.'"[274] Post-trial sessions pursuant to Article 39(a), UCMJ and RCM 1102 meet "the interest of justice, [wherein] corrective action should take place as

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[268] *Dawson*, 65 M.J. at 851(citing *Brickey*, 16 M.J. at 263).

[269] *Dawson*, 65 M.J. at 851 (citing *Brickey*, 16 M.J. at 264).

[270] *Brickey*, 16 M.J. at 258.

[271] *Id*.

[272] *Dawson*, 65 M.J. at 851; *see also* United States v. Scaff, 26 M.J. 985, 988 (A.C.M.R. 1988)(affirming where a military judge "conducted a post-trial session, and made the post-trial affidavit a part of the record, authenticated the record of trial and forwarded the record of trial to the convening authority for whatever action he deemed appropriate[,]" but "was without authority to reopen the case, admit the affidavit and make an adjudication on it which may have altered his original findings."), *review denied*, 30 M.J. 220 (C.A.A.F. 1990).

[273] *Dawson*, 65 M.J. at 850-1; United States v. Washington, 23 M.J. 679, 679-81 (A.C.M.R. 1986), *review denied*, 25 M.J. 197 (C.M.A. 1987).

[274] *Dawson*, 65 M.J. at 851 (citing *Brickey*, 16 M.J. at 263).

promptly as possible."[275] "Return of the record will ensure correction of defects at the earliest possible time, expedite the appeal process and conserve both time and resources."[276] Proceedings in revision are held in open court, on the record, with counsel for both the government and defense present.[277]

Proceedings in revision, rehearings, and Article 39(a), UCMJ post trial sessions are not barred because the original military judge is unavailable. In *United States v. Kosek*, where the military judge who made findings that the CAAF found incomplete and ambiguous was unavailable upon rehearing, the AFCCA found substitution of a different judge appropriate to clarify the original judge's rulings and continue the proceeding.[278] According to the AFCCA, "substitution of a military judge after assembly is not a jurisdictional defect, and any claim of error is forfeited by failure to object at trial."[279] The CAAF affirmed the AFCCA's decision.[280]

The CAAF also found no error in *United States v. Kulathungam*[281] where the military judge conducted a proceeding in revision to correct his failure to announce findings after finding appellant guilty pursuant to his pleas.[282] While the defense counsel knew of the error

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[275] *Dawson*, 65 M.J. at 851 (citing *Brickey*, 16 M.J. at 264).

[276] United States v. Williamson, 4 M.J. 708, 710 (N.M.C.R. 1977), *review denied*, 5 M.J. 219 (C.M.A. 1978).

[277] MCM, *supra* note 59, R.C.M. 1102(e)(2012)(R.C.M. 505 governs changes of members, military judges, and counsel, while R.C.M. 805 requires the presence of the military judge and counsel, during any proceeding, including proceedings pursuant to R.C.M. 1102).

[278] United States v. Kosek, 44 M.J. 579, 579-82 (A. F. Ct. Crim. App. 1996)(also noting that appellant failed to object to the substitution of military judges when his trial resumed, and in fact "specifically requested trial b[the substitute judge] alone," and thus waived the issue), *affirmed*, 48 M.J. 315 (C.A.A.F. 1997).

[279] *Id.* at 582 (citing *United States v. Hawkins*, 24 M.J. 257, 259 (C.M.A. 1987)).

[280] United States v. Kosek, 48 M.J. 315 (C.A.A.F. 1997).

[281] United States v. Kulathungam, 54 M.J. 386 (C.A.A.F. 2001).

[282] *Id.* at 386-8.

and "tactically" chose to remain silent, the trial counsel and the court reporter inappropriately agreed, without notifying either the military judge or defense counsel, to insert the missing findings language into the record, to cover up the error.[283] Upon discovery of this action, the military judge ordered and conducted the proceeding.[284] According to the [CMA], in the future, "trial counsel should seek advice from the military judge or a more experienced attorney to avoid the "train wreck" that occurred in this case."[285]

In *United States v. Barrett*,[286] after close of trial but prior to authentication, the military judge ordered a proceeding in revision after members excepted out the phrase divers occasions and convicted appellant of a single occasion, but failed to specify which one.[287] At that proceeding, the military judge advised the members only "to address whether they had" chosen a specific incident of which appellant was guilty, and to avoid further deliberations.[288] "[I]f they had determined a specific instance in their original deliberations, they were to inform the court which of the alleged distributions was the basis for their original findings."[289] While AFCCA found the military judge's actions proper, because the government conceded the issue prior to argument before CAAF, CAAF remanded the case to the AFCCA for reassessment or rehearing on sentence in lieu of weighing in on the propriety

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[283] *Id.*

[284] *Id.* at 387.

[285] *Id.* at 388.

[286] United States v. Barrett, No. 35790, 2006 CCA Lexis 39 (A. F. Ct. Crim. App. Feb. 28, 2006), *set aside, affirmed in part, reversed in part*, No. 06-0571, 64 M.J. 307 (C.A.A.F. Nov. 3, 2006), *on remand*, 2007 CCA Lexis 298 (A. F. Ct. Crim. App. Mar. 21, 2007).

[287] *Barrett*, 2006 CCA Lexis 39 at *2-3.

[288] *Id.* at *4.

[289] *Id*.

of the military judge's actions themselves.[290] However, the AFCCA pointed out that CAAF used "should" rather than "shall" in *Walters,*[291] in terms of clarification of errors in findings after announcement, and so held that Walters does not forbid clarification of errors to findings after announcement.[292]

The military judge may order such a proceeding any time prior to authentication of the record of trial, and need not wait for an order from the appellate court to do so.[293] In *United States v. Dawson,*[294] after the military judge "failed to advise the appellant of the distinguishing element of aggravated assault,"[295] he "accepted [Dawson's] plea of guilty to . . . aggravated assault."[296] "Six weeks later, prior to authentication of the record, the military judge recognized his error and called a post-trial session under Article 39(a), UCMJ to cure the defective *Care*[297] inquiry."[298] On appeal, the AFCCA subsequently "affirm[ed] the authority of military judges to remedy a flawed *Care* inquiry in a post-trial Article 39(a) session."[299] Prior to the post-trial hearing, the military judge informed the parties he was conducting the hearing "pursuant to RCM 1102 and at the request of the government[,] . . . to

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[290] 2006 CCA Lexis at *4, *but see* 64 M.J. at *1-2.

[291] *Walters*, 58 M.J. at 396, n. 5; *See* 10 USC (U.S.C.) §101 (2005); MCM, *supra* note 59, R.C.M. 103 (Discussion)(2005 and 2012)(Stating for purposes of the MCM, "'shall' is used in an imperative sense," whereas "'may' is used in a permissive sense.").

[292] *Barrett*, 2006 CCA Lexis 39 at 4.

[293] UCMJ, art. 60 (2012); MCM, *supra* note 59, R.C.M. 1102(d) and analysis (2012).

[294] *Dawson*, 65 M.J. at 848.

[295] *Id.* at 849, n. 1 (citing United States v. Care, 40 C.M.R. 247 (C.M.A. 1969)).

[296] *Dawson*, 65 M.J. at 849.

[297] *Care*, 40 C.M.R. at 247.

[298] *Dawson*, 65 M.J. at 849.

[299] *Id*.

correct any omission in [the military judge's] discussion with the accused on the elements of the Specification of Charge II. [The military judge] determined that this matter does not involve a substantive error which would preclude such a hearing."[300] The accused failed to object to the hearing both at the hearing itself and after, in post-hearing clemency filings to the convening authority.[301] In *Dawson*, the AFCCA held the accused and defense counsel's failure to object to the post-trial session as waived, absent material prejudice, and found none existed in this case, because the accused pled "guilty to the very charge to which he initially pled guilty, for which he obtained the benefit of a plea bargain, and for which he never raised any matter inconsistent with his guilt."[302] The "sum effect" of the post trial session was the provident entry of "appellant's guilty plea."[303] In *United States v. Boie,*[304] after trial, but before authentication of the record of trial, the military judge noticed he had failed to properly state his findings of guilt by exceptions and substitutions pursuant to the accused's pleas.[305] The CAAF upheld the military judge's decision to convene an RCM 1102 proceeding in revision "to rectify a mistake that had been made during the announcement of findings and to reflect the judge's intent to find the appellant guilty of the offense as modified. Such action is not prohibited by [RCM] 1102(c)(1)."[306] In *United States v. Washington,* at defense counsel's request, the military judge conducted a post-trial hearing,

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[300] *Dawson*, 65 M.J. at 850-1.

[301] *Id.* at 851.

[302] *Id* at 854.

[303] *Id.* at 854.

[304] United States v. Boie, 70 M.J. 585 (C.A.A.F. 2011), *review denied*, 2011 CAAF Lexis 998 (C.A.A.F. Nov. 15, 2011).

[305] *Boie*, 70 M.J. at 593.

[306] *Id*.

receiving appellant's change of plea and adjusting appellant's sentence accordingly, and the convening authority subsequently approved appellant's new plea and the adjudged lesser sentence.[307] The ACMR upheld the actions of both the military judge and the convening authority, denying appellant's claim that a rehearing was the proper method by which to change appellant's plea and sentence.[308]

In *Wilson*, the military judge held a post-trial Article 39(a), UCMJ session, dismissing sodomy and indecent acts charges against Private Wilson, after determining the statute of limitations had passed, and resentencing Private Wilson to reduction to pay grade E-1, confinement for 11 years, and a dishonorable discharge, in lieu of his original sentence which included confinement for 14 years.[309]

The convening authority may also order a proceeding in revision.[310] "When, as an incident of the review of a record of trial pursuant to Articles 65(b), 66, and 67, or examination of the record of trial pursuant to Article 69, any incomplete, ambiguous, void, or inaccurate action of the convening authority is noted, this action will be modified [by the convening authority] in accordance with the advice or instructions of higher reviewing authority or the Judge Advocate General."[311] While the National Defense Authorization Act of 2013 modified convening authorities' ability to dismiss findings of guilty concerning certain offenses, these changes do not curtail convening authorities' ability to convene proceedings in revision pursuant to RCM 1102 to clarify ambiguous findings, because the

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[307] *Washington*, 23 M.J. at 679-81.

[308] *Id*. at 680.

[309] *Wilson* Record, *supra* note 2, at 127-8, 145.

[310] UCMJ art. 60 (2012); United States v. Steck, 10 M.J. 412, 414 (C.M.A. 1981).

[311] United States v. Luedtke, 19 M.J. 548, 556 (N.-M. C. M.R. 1984).

end result of such a proceeding will not change the outcome of the court-martial. For example, if the convening authority had ordered a proceeding in revision in *United States v. Wilson*, prior to commencement of appellate review to clarify which occasion the military judge had found appellant guilty, appellant would have entered the hearing with a finding of guilt as to one occasion in the specification alleging rape. Appellant would have departed the hearing with that finding intact. Thus the convening authority would not violate Congress' new restriction on disapproval of findings in sexual assault cases.

b. Extraordinary Writs

In the rare case in today's courtroom where a military judge refuses to clarify an ambiguous verdict, the careful trial counsel can request a recess to explore the possibility of filing an extraordinary writ pursuant to the All Writs Act[312] requesting relief from the appellate courts, who have jurisdiction over the court-martial in question. The recess and writ may serve multiple purposes. First, requesting a recess for the purpose of exploring a writ may awaken an inattentive military judge to the presence of ambiguity and the need to clarify findings. Second, a recess, and ultimately potentially an abatement of the proceedings prevents the court-martial from closing and thus forestalling remedies such as clarification on the record, or proceedings in revision. One writ possibly applicable to a situation where a military judge has refused to clarify findings is a writ of mandamus or prohibition. In *United States v. Gross*,[313] the government filed a writ of mandamus requesting ACCA "order the military judge 'to reverse his ruling that the defense of Mistake of Fact as to age applies to

[312] 28 U.S.C. § 1651.

[313] United States v. Gross, 73 M.J. 864 (A. Ct. Crim. App. 2014).

Charge II and its specification."[314] "To prevail on a request for a writ, the petitioner must show that: '(1) there is no other adequate means to attain relief;[315] (2) the right to issuance of the writ is clear and undisputable; and (3) the issuance of the writ is appropriate under the circumstances.'"[316] Because the ACCA found that the effect of the military judge's ruling was a likely finding of not guilty, from which the government would not be able to appeal, the ACCA granted the government's request for the writ.[317] As the ACCA stated in *Gross*, "a writ of prohibition is to 'prevent usurpation of judicial power' and to confine courts to the proper exercise of their power and authority."[318] In *Hasan v. Gross,*[319] the appellant filed requests for "a writ of prohibition, "barring enforcement of the military judge's order that [a]ppellant's beard be forcibly shaved[,]"and "a writ of mandamus ordering the removal of the military judge," with the CAAF.[320] The CAAF granted both, vacating the military judge's order and removing him from the trial.[321] The Supreme Court suggested similar actions, such as "mandatory continuances" and "expedited interlocutory appeals" in *Evans v. Michigan*,[322] "to prevent misguided acquittals."[323]

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[314] *Gross*, 73 M.J. at 866.

[315] *See* United States v. Denedo, 556 U.S. 904, 911 (2009)(requiring that one who seeks a writ must first exhaust all other remedies).

[316] *Gross*, 73 M.J. at 867 (citing Hasan v. Gross, 71 M.J. 416, 418 (C.A.A.F. 2012)(citing Cheney v. United States Dist. Court for D.C., 542 U.S. 367, 380-1 (2004))).

[317] *Gross*, 73 M.J. at 867.

[318] *Gross*, 73 M.J. at 867 (citing The Florida Bar, 329 So.2d. 301, 302 (Fla. 1974)) *see also* La Buys v. Howes, 352 U.S. 249, 257 (1957)(pointing out that the All Writs Act is meant to protect against, among other things, "judicial usurpation of power.")(citing Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383 (1953)).

[319] *Hasan*, 71 M.J. at 416.

[320] *Id.* at 416-7.

[321] *Id.* at 416-7.

[322] Evans v. Michigan, 133 S. Ct. 1069, 1081 (2013).

The issue trial counsel face when employing this remedy in an attempt to clarify an ambiguous verdict is that the military judge is not required to stay the proceedings during the pendency of the writ and can proceed with the trial, including dismissing panel members, rendering any clarification of ambiguity impossible.[324] Once the military judge closes the court, with respect to issues with findings, the Government may lose the ability to file a writ, particularly if the issue which the Government wishes to appeal involves an apparent acquittal.[325] The "issuance of writs" by the appellate courts "'is largely discretionary,'" adding to the inadequacy of this method to correct ambiguous findings prior to adjournment of the court.[326] Major Jeremy Stephens recently published an informative article in the Army Lawyer concerning extraordinary writs which counsel seeking to employ this remedy will find useful.[327]

D. Post-Authentication Appellate Remedies

1. Introduction

Reviving a fatally ambiguous verdict post-authentication of the record of trial is extremely difficult, given CAAF's holding in *Walters*. This section will detail the options available to the government once the trial court has closed, including analysis of the trial record, RCM 1102, new trials, and Constitutional and Presidential Amendments, and analyze the probability of success for each. Appellate remedies, such as a new trial, may be the way

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[323] *Id*.

[324] United States v. Allen, 31 M.J. 572, 599 (N.M.C.M.R. 1990).

[325] *Gross*, 73 M.J. at 867.

[326] *Id.* at 868 (citing United States v. Higdon, 638 F.3d 233, 245 (3d. Cir. 2011)(quoting Hahnemann University Hospital v. Edgar, 74 F.3d 456, 461 (3d. Cir. 1996))).

[327] Major Jeremy Stephens, *Explaining the Extraordinary: Understanding the Writs Process*, ARMY LAW, Feb. 2015, at 33.

of the future, using a well-crafted comparison of military jurisprudence with federal and state courts' solutions to concerns regarding Double Jeopardy and acquittals. While it is the position of this author that the language of RCM 1102 and the UCMJ permit proceedings in revision to correct ambiguous verdicts without improperly reconsidering findings, amending the language of the UCMJ and RCM with a view toward greater resemblance to civilian remedies for ambiguous verdicts, may be a clearer solution that CAAF would not disregard.

2. Analysis of trial record

According to the CAAF in *United States v. Leak*, "Congress intended a [CCA] to act as fact-finder in an appellate-review capacity and not in the first instance as a trial court."[328] "This . . . fact-finding power . . . is expressly couched in terms of a trial court's findings of guilty and its prior consideration of the evidence."[329] However, in *Turner v. United States*,[330] the Supreme Court "set forth as the prevailing rule: 'When a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged.'"[331]

The appellate courts have differentiated between erroneously announced verdicts and those which are "formally and correctly announced."[332] Where a "not guilty" verdict has been "formally and correctly announced" "in open court", the court cannot "reconsider its

[328] United States v. Leak, 61 M.J. 234, 244 (C.A.A.F. 2005)(citing United States v. Ginn, 47 M.J. 236, 242 (C.A.A.F. 1997)).

[329] *Ginn*, 47 M.J. at 242.

[330] Turner v. United States, 396 U.S. 398 (1970).

[331] *Griffin*, 502 U.S. at 56-7 (citing *Turner*, 396 U.S. at 420).

[332] United States v. Hitchcock, 6 M.J. 188, 189 (C.M.A. 1979)(citing United States v. Boswell, 23 C.M.R. 369, 373 (C.M.A. 1957)).

finding and return a finding of guilty."[333] In the military, as long as the finding is announced "in court, in the presence and hearing of the accused," it is formally and correctly announced.[334] Errors, informalities, or inaccuracies in the announcement of findings, or verdicts are, for the most part, not fatal, as long as the fact finder's intention "is evident from the record."[335] The question is where the error in the announcement lies, on the spectrum between "material prejudice [to a substantial right of the accused],"[336] and a "slip of the tongue."[337] Regarding the latter, for example, in *United States v. Downs*,[338] the CMA refused "to enunciate a doctrine which permits an error in expression to mean immunity for a person who has judicially admitted his guilt," finding that "neither Congress nor the Framers of the [MCM] intended that a procedure should be so rigid and inflexible as to prevent a court-martial from correcting what might be likened to a slip of the tongue."[339] In *Downs*, appellant admitted guilt to the lesser included offense of AWOL to a desertion charge (Charge III) and the panel found him guilty of that offense, but the board president mistakenly referred to Charge II as Charge III, prompting the military judge to reinstruct the board and send them back to redraft their findings.[340] The findings were redrafted correctly

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[333] *Id*.

[334] *Hitchcock*, 6 M.J. at 190.

[335] United States v. Perkins, 56 M.J. 825, 827 (A. Ct. Crim. App. 2001)(citing United States v. Johnson, 22 M.J. 945, 946 (A.C.M.R. 1986)(citing United States v. McCready, 17 C.M.R. 449 (A.B.R. 1954))); United States v. Boone, 24 M.J. 680 (A. C. M. R. 1987).

[336] *Perkins*, 56 M.J. at 827 (citing *Dilday*, 47 C.M.R. at 173).

[337] *Downs*, 15 C.M.R. at 11.

[338] *Id.* at 8.

[339] *Id.* at 11.

[340] *Id.* at 10-2.

referring to Charge II,[341] and the CMA held "after a careful search of the entire record," that such action did not constitute reconsideration of the findings."[342]

The announcement, however, must "'enable the court intelligently to base judgment thereon and . . . form the basis for a bar to subsequent prosecution for the same offense.'"[343] "The [CCA] is required to weigh the evidence and be themselves convinced beyond a reasonable doubt of appellant's guilt . . . on the same 'one occasion' that served as a basis for the [fact-finder's] guilty finding."[344] The CCA does not have the authority, even during its factual and legal sufficiency analysis, to "weig[h the] evidence and conclud[e] that evidence of one [occasion] is quantitatively or qualitatively inferior."[345] *Seider*, per the CAAF, is one case where a service appellate court independently and wrongly weighed the evidence and determined appellant was convicted of the offense for which the evidence was stronger.[346] The bottom line is that if the military judge "fail[s to clarify ambiguous findings] the appellate courts cannot rectify that error."[347]

In *United States v. McCready*, the Army Board of Review (ABR) found "the obvious intention of the [trial] court . . . [was] apparent from both a simple interpretation of the

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[341] *Id.* at 10 (reading "of specification of charge II, guilty; except the words, 'and with intent to remain away permanently,' and 'in desertion,' of the excepted words, not guilty, of the charge, not guilty, but guilty of Article 86, unauthorized absence.'").

[342] *Id.* at 12.

[343] *Perkins*, 56 M.J. at 827 (citing *Dilday*, 47 C.M.R. at 173).

[344] *Walters*, 58 M.J. at 396; *and see Brown*, 65 M.J. at 356-60 (holding where appellant is charged with two acts of rape over a "short period of time" (3-4 hours) as a continuing course of conduct, but not divers occasions, panel's finding of guilty of a single occasion "of indecent assault, a lesser included offense of the rape charge[,]" without specifying the factual basis for the conviction, is not ambiguous, especially where the elements of indecent assault "require acts done 'with the intent to gratify,' and not the specification of particular acts or methods of gratification.").

[345] *Seider*, 60 M.J. at 38 n. 1.

[346] *Id.* at 38.

[347] *Augspurger*, 61 M.J. at 193.

language used and the fact that there was no objection or inquiry made as to the meaning of the verdict by anyone associated with the trial."[348] *McCready's* holding followed the principle enunciated in *O'Connell v. United States*,[349] where the parties' failure to object to the form or wording of the verdict reflected an understanding of, lack of confusion, and agreement with the findings as given, and led the Supreme Court to find no ambiguity in those findings.[350]

The ACMR reviewed the record of trial in *United States v. Johnson*, where the government charged the appellant with both adultery and indecent acts, but the military judge instructed the panel they could not find him guilty of both.[351] The panel failed to announce findings on the adultery charge, but lined the charge out on the findings worksheet.[352] The ACMR held the findings were incomplete, but "the 'lining out' of the portion of the finding worksheet relating to the adultery specification [was] tantamount to a finding of not guilty[.]"[353] The ACMR dismissed the adultery charge, holding the panel's intent to acquit appellant of adultery was clear from the record.[354]

The military judge in *United States v. Perkins* found the appellant guilty of Specification 3 of Charge III, instead of Specification 3 of Charge II.[355] After review,

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[348] *McCready*, 17 C.M.R. at 451 (concerning exception of the words "$375.35" for $50.00 or more," without a finding of not guilty to the excepted words and guilty of the substituted words).

[349] 253 U.S. 142 (1920).

[350] *McCready*, 17 C.M.R. at 148.

[351] *Johnson*, 22 M.J. at 945-6.

[352] *Id*.

[353] *Id.* at 946.

[354] *Id*.

[355] *Perkins*, 56 M.J. at 826.

however, the ACCA found that the military judge's "clear intent," understood "by all the parties at trial, was to find the appellant guilty of Specification 3 of Charge II and Charge II," and that her announcement, "under the circumstances of this case, is sufficient to intelligently discern the basis for the findings and is adequate to bar a subsequent prosecution for the same offense," and as a result, found "no error materially prejudicial to a substantial right of the appellant."[356]

In *United States v. Dunn*,[357] relying on the victim's testimony, the Government's sole evidence on the offense of sodomy of a child on divers occasions, which fell short of penetration, the military judge found appellant not guilty of sodomy of a child, but guilty of the lesser included offense to sodomy, indecent acts with a child on divers occasions.[358] The Court held that contrary to appellant's assertion, the judge's findings did not implicate *Walters* because the divers occasions language remained, so there was no possibility appellant was found not guilty of any offense.[359] Although the NMCCA preferred "the military judge to specifically enumerate the acts that constitute a lesser included offense," there was no requirement to do so, and "the findings convey the 'manifest intention' of the military judge when viewed as a whole."[360]

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[356] *Id.* at 827, 828 n. 4 (noting also that the military judge correctly announced she "found appellant guilty of the Specification of Charge III and Charge III immediately after she incorrectly mentioned Charge III in announcing findings to Charge II," lending credence to the Court's finding that the military judge merely misspoke regarding findings to Charge II).

[357] United States v. Dunn, Docket No. 200201707, 2006 CCA Lexis 143 (N. –M. Ct. Crim. App. June 30, 2006) affirmed, 64 M.J. 357 (C.A.A.F. Dec. 7, 2006).

[358] *Id.* at *7-9.

[359] *Id.* at *5-7.

[360] *Id.* at 9-10 (citing *Dilday*, 47 C.M.R. at 173).

In *Wilson*, the ACCA held it could conduct a factual sufficiency review because "the findings unquestionably disclose the single occasion on which the conviction is based," and affirmed the findings and sentence.[361] The ACCA based its findings on RC's testimony, and the fact that "the parties accordingly shaped their arguments to address the only assertion of rape described by the victim."[362] Indeed, the trial counsel referred to a single instance of rape, the "bedroom" rape, throughout his opening statement.[363] This is in contrast to the trial counsels in *Seider*, who asserted "that the Government would prove two cases," and presented evidence of more than one occasion of wrongful use of cocaine,[364] and *Augspurger*, where "the Government presented evidence of three separate" occasions of marijuana use.[365] In *Scheurer*, the government presented evidence of appellant's use of LSD and ecstasy on divers occasions, at two different locations for each type of drug.[366] Because the government presented evidence of appellant's use of ecstasy on more than one occasion at or near Tokyo, Japan, and the military judge failed to specify which of these occasions was the one occasion of which he found appellant guilty, the CAAF overturned Scheurer's conviction.[367] For the other specification, wrongful use of LSD, the government charged wrongful use at two locations, the military judge excepted one location from the specification

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[361] *Wilson*, No. 20061187 at 1-2; *Walters*, 58 M.J. at 396; *see also* UCMJ art. 66.

[362] *Wilson*, No. 20061187 at 1-2 (noting that the "victim unequivocally testified she was raped on only one occasion, and the parties accordingly shaped their oral arguments to address the only assertion of rape described by the victim. Thus, we find no ambiguity in the finding at issue.").

[363] *Wilson* Record, *supra* note 2, at 43-5.

[364] *Seider*, 60 M.J. at 37.

[365] *Augspurger*, 61 M.J. at 190.

[366] *Scheurer*, 62 M.J. at 110-112.

[367] *Id.* at 111.

but kept the other.[368] Because the facts disclosed the basis for the "one occasion," the CAAF held the AFCCA could properly review this offense, and affirmed appellant's conviction.[369]

Appellate courts should, however, look at the *lack* of confusion among the parties as one factor in the analysis of a record of trial with potentially ambiguous finding. In *Augspurger*, after findings "each party held a different view of the basis of the findings," including the military judge, who gave a conditional instruction to the panel.[370] As a result of this confusion, the CAAF held that it fell into the *Walters* line of cases, because of the "inability to determine the basis for the findings . . . reflected in this record."[371] More recently, in *Trew*, where it was "clear that the military judge, counsel, and the appellant all understood, and at various times, used essentially the same shorthand reference ultimately adopted by the military judge," the NMCCA found "the military judge's announcement of the findings, while irregular, clearly referred to the single incident on 26 September 2008."[372] The CAAF disagreed, however, and overturned appellant's conviction.

On the other hand, in *United States v. Baird*,[373] where the NMCCA noted appellant's utter lack of objection during and after trial, and "[t]he record reflects that no one was misled by the announced findings[,]" the Navy Court therefore stated "the appellant was not prejudiced by the claimed ambiguity in the announced findings."[374] Similarly, in *Wilson*, the

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[368] *Id.* at 111-2.

[369] *Id.* at 111-2.

[370] *Augspurger*, 61 M.J. at 192.

[371] *Id*.

[372] United States v. Trew, 67 M.J. 606, 606 (N.-M. Ct. Crim. App. 2008), *reversed*, 67 M.J. 364 (C.A.A.F. 2010).

[373] United States v. Baird, 2006 CCA Lexis 171 (N.-M.C.C.A. 2006)

[374] *Baird*, 2006 CCA Lexis 171 at *34-5.

parties echoed a similar lack of confusion, with defense counsel even arguing on sentencing that PVT Wilson "understands the types of actions that he has committed and the offenses that he has committed," and PVT Wilson himself admitting, "I did a terrible thing,"[375] not things. But, again, the CAAF reversed ACCA in *Wilson*.

Walters stands for the proposition that an ambiguous verdict cannot be cured by review of the record of trial. On the other hand, the CAAF's holdings in *Augspurger* and *Scheurer* appear to create an exception to this prohibition, if only one occasion remains as a possible basis for the fact-finder's deletion of "on divers occasions" from a specification. The *Walters* Court based its holding regarding the impermissibility of appellate review of not-guilty findings on *United States v. Smith*.[376] However, the CMA based its holding in *Smith* on *United States v. Dean*,[377] which discussed an appellate court's inability to increase a conviction or sentence, as adjudged by a fact-finder and approved by a convening authority.[378] Nowhere in any of the *Walters* line of cases discussed herein is there any discussion of increasing a finding of guilt, or reversing it. Rather, it is a question of clarification, which the CAAF continues to conflate.

3. RCM 1102 Proceedings in Revision After Authentication

In lieu of a proceeding in revision, RCM 1102 "expressly authorizes post trial Article 39(a), UCMJ sessions to address matters not subject to proceedings in revision which may affect the legality of findings of guilty or the sentence."[379] In fact, "even if some or all of the

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[375] *Wilson* Record, *supra* note 2, at 125, 137-8.

[376] United States v. Smith, 39 M.J. 448, 451 (1994).

[377] United States v. Dean, 23 C.M.R. 185 (C.M.A. 1957).

[378] *Id*. at 188-9.

sentence has been executed," the "reviewing authority," defined as "the supervisory authority, or the Judge Advocate General" may direct a trial session to "make the record show the true proceedings."[380] RCM 1102 also permits an appellate court to order a proceeding in revision to correct an ambiguous verdict.[381] As the Government argued in its Petition for Reconsideration in *Wilson* to the CAAF, CAAF mischaracterized the Government's request for a proceeding in revision pursuant to RCM 1102 as a request for a rehearing.[382] "A proceeding in revision is a continuation of the original trial; it is not a second trial or rehearing."[383]

In both *Wilson* and *Trew*, the government requested that CAAF order a post-trial RCM 1102 hearing to correct the alleged fatal ambiguity in each case. In *Wilson*, the government did so after oral argument was heard, in a petition for reconsideration.[384] The Government requested CAAF return PVT Wilson's case to the convening authority to order a proceeding in revision, asking the military judge two questions: 1) to advise the court whether she had found an instance of rape; and 2) what it was.[385] The Government requested CAAF advise the military judge that she could not reconsider her findings, or review any of the evidence, following the example in *Kulathungam*, with "no impact on the pleas or

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[379] MCM, *supra* note 59, R.C.M. 1102, Analysis (2012)(citing MCM, *supra* note 59, R.C.M. 1102 and United States v. Mead, 16 M.J. 270 (C.M.A. 1983)).

[380] MCM, *supra* note 59, R.C.M. 1102(d) (2012).

[381] MCM, *supra* note 59, R.C.M. 1102(d) including discussion and analysis (revealing no change from 2008 ed. of MCM).

[382] Petition for Reconsideration at 4, 14, United States v. Wilson, 67 M.J. 423 (C.A.A.F. 2009)(No. 09–0010)[hereinafter Pet. for Recon. (*Wilson*)].

[383] *Steck*, 10 M.J. at 414.

[384] Pet. for Recon (*Wilson*) at 14.

[385] *Id.* at 14.

sentence."[386] The result, as the Government pointed out, would be that SSG Wilson would remain convicted of one occasion of rape, and the military judge would not reconsider her findings.[387] Because the same judge would act during the proceeding in revision, she would not subject SSG Wilson to a second prosecution for his crimes, including any of which she may have acquitted him.[388] At the time of the Government's Petition in PVT Wilson's case, the military judge who presided over his trial remained on active duty, subject to the CAAF's order and ruling.[389] In *Trew*, the government requested the hearing in its original brief and at oral argument.[390] In both cases, the CAAF denied the government's request.[391]

The CAAF's denial of the government's request goes against the plain language of the Rule and rules of statutory construction. "It is a general rule of statutory construction that 'if the statute is clear and unambiguous, a court may not look beyond it but must give effect to its plain meaning.'"[392] While the words in question flow from an executive order, and not

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[386] Pet. for Recon. (*Wilson*) at 14 (citing *Kulathungam*, 54 M.J. at 388).

[387] Pet. for Recon. (*Wilson*) at 4, 14.

[388] MCM, *supra* note 59, R.C.M. 1102(c) (2012)(specifically forbidding reconsideration of a finding of not guilty); *see also, generally*, United States v. Feld, 27 M.J. 537, 538-9 (A.F.C.M.R. 1988), petition denied, 28 M.J. 235 (C.M.A. 1989)(detailing that convening authority ordered proceeding in revision to allow questions regarding sentence ambiguity to be explored before he approved the sentence where the same panel re-announced the correct sentence during proceeding in revision).

[389] PERSONNEL, PLANS & TRAINING OFFICE, JUDGE ADVOCATE GENERAL'S CORPS PERSONNEL AND ACTIVITY DIRECTORY 19 (2009-2010)(demonstrating the military judge's assignment at the time as military judge for the 25th Infantry Division in Hawaii).

[390] *Trew*, 68 M.J. at 369.

[391] *C.A.A.F. Daily Journal*, COURT OF APPEALS FOR THE ARMED FORCES, http://www.armfor.uscourts.gov/newcaaf/journal/2009/2009Jul.htm (July 2009), attached as Appendix 4 to this thesis; *Trew*, 68 M.J. at 369.

[392] United States v. Clark, 62 M.J. 195, 198 (C.A.A.F. 2005); *see also* United States v. McGowan, 41 M.J. 406, 413 (C.A.A.F. 1995)(citing Tibbs v. United States, 507 A.2d 141, 143-4 (D.C. App. 1986))(stating "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms.")(citing Caminetti v. United States, 242 U.S. 470, 485 (1917))); *see also* United States v. Custis, 65 M.J. 366, 370 (C.A.A.F. 2007)(citing Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000)).

a statute, the same analysis applies to the RCM.[393] A version of RCM 1102 has been in effect since 1949.[394] The language of the 2012 version of the Rule, including the Rule itself, and its Discussion and Analysis, clearly indicate the President intended proceedings in revision to remain available at the appellate level to clarify ambiguities.[395] "Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."[396]

According to the Supreme Court, "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction . . . [or] ratified it with positive legislation."[397] As the Government argued in *Wilson*,

> given the clarification in the 2008 version of RCM 1102 that such a procedure is appropriate post-action, and indication that appellate courts were included in the 1994 Amendment as potential authori[ties] to order such proceedings,[398] it would be unwise to read into the previous versions 'in such a fashion as to create internal inconsistencies for the purpose of nullifying the rules as drafted by the President,'[399] particularly in light of the history and case law surrounding the use of this procedure.[400]

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[393] *Clark*, 62 M.J. at 198; *see also Custis*, 65 M.J. at 370 (reminding "it is a well established rule that the principles of statutory construction are used in construing the [MCM] in general and the [MRE] in particular.")(citing United States v. James, 63 M.J. 217, 221 (C.A.A.F. 2006); United States v. Lucas, 1 C.M.R. 19, 22 (C.M.A. 1951))).

[394] United States v. Timmerman, 28 M.J. 531, 534 (A.F.C.M.R. 1989), rev. denied, 28 M.J. 356 (C.M.A. 1989)(citing MCM, *supra* note 59, para. 87b (1949) and UCMJ art. 60(e)(1949)).

[395] MCM, *supra* note 59, R.C.M. 1102, including discussion and analysis (2012).

[396] Loving. v. United States, 517 U.S 748, 770 (1996)(citing Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118, n. 13 (1980)(quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-1 (1969)))(internal quotations omitted).

[397] *Red Lion Broadcasting*, 395 U.S. at 381-2.

[398] *See* MCM, *supra* note 59, R.C.M. 1102(d) analysis (2012)(containing the same language as MCM, R.C.M. 1102(d) analysis (2008))(cited by Pet. for Recon. (*Wilson*) at 7).

[399] United States v. Hunter, 65 M.J. 399, 402 (C.A.A.F. 2007)(citing *Loving*, 517 U.S. at 773 ("stating the 'President, acting in his constitutional office of Commander in Chief, had undoubted competency to prescribe'

The Government also cited Supreme Court Justice Clarence Thomas in its Petition, who noted in *Loving v. United States* that "there is abundant authority for according Congress and the President deference in the regulation of military affairs[.]"[401] In turn, Congress traditionally has granted the President "quite broad" "delegation of powers" "in the field of military justice," including the authority to repair defects such as the one in RCM 1102.[402]

While CAAF acknowledges the Discussion for each RCM "reflects applicable judicial precedent," the Court does not consider the language in the Discussion "binding."[403] Where the language of a statute is plain, "'the sole function of the courts is to enforce it according to its terms.'"[404] Courts may rely on the principles of common law, "'when application of such principles by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or this manual.'"[405]

The CAAF noted in *United States v. Czechin*[406] that the military justice system contained "hierarchical sources of rights . . . including the Constitution, federal statutes, Executive Orders, Department of Defense Directives, service directives, and federal common

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R.C.M. provisions.")); *see also Hunter*, 65 M.J. at 402 (citing Litecky v. United States, 510 U.S. 540, 552 (1994)(rejecting a statutory interpretation that would have required a statute to "contradict itself".))(cited by Pet. for Recon. (*Wilson*) at 7).

[400] Pet. for Recon. (*Wilson*) at 7 (citing *Timmerman*, 28 M.J. at 534-5; MCM, *supra* note 59, R.C.M. 1102 including discussion and analysis (2012)).

[401] Pet. for Recon. (*Wilson*) at 7 (citing *Loving*, 517 U.S. at 777-8 (J. Thomas, concurring)).

[402] United States v. Matthews, 16 M.J. 354, 380-1 (C.M.A. 1983)(citing UCMJ art. 36 (1969)).

[403] United States v. Moran, 65 M.J. 178, 187, n. 7 (C.A.A.F. 2007)(citing United States v. Carter, 61 M.J. 30, 33 (C.A.A.F. 2005)).

[404] United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241(1989)(quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)).

[405] United States v. Smith, 30 M.J. 1022, 1025-6 (A.F.C.M.R. 1990), affirmed on other grounds, 33 M.J. 114 (C.M.A. 1991).

[406] United States v. Czeschin, 56 M.J. 346 (C.A.A.F. 2002), *affirmed*, 56 M.J. 346 (C.A.A.F. 2002).

law"[407] and the "normal rules of statutory construction provide that the highest source of authority will be paramount, unless a lower source creates rules that are constitutional and provide greater rights for the individual."[408] In this particular case while RCM 1102 is not a federal statute, it has the authority of a federal statute, but the CAAF continues to ignore it.

The AFCCA outlined the origins, history, and purpose of RCM 1102 in detail in *United States v. Timmerman*.[409] When the President initially promulgated RCM 1102, "no part of a court-martial sentence which included a punitive discharge or confinement of one year or more could be ordered executed until the case was until the case was in essence final in law, that is, after completion of appellate review."[410] The Military Justice Act of 1983, however, permitted "[a] convening authority . . . [to] order execution of all types of punishment when taking initial action except for punitive discharges or a sentence extending to death" with no corresponding amendment to RCM 1102 permitting post-partial execution of the sentence proceedings in revision.[411] The *Timmerman* court found the same conflict between the language of the Rule, the Discussion, and Analysis, in both the 1985 and 2005 versions of RCM 1102, and begged Congress or the President for clarification, stating "there is no rational basis for an appellate court not to have the same power as a military judge or convening authority as far as proceedings in revision are concerned."[412] Citing *Timmerman*,

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[407] *Czeschin*, 56 M.J. at 348 (citing United States v. Lopez, 35 M.J. 35, 39 (C.M.A. 1992)).

[408] *Czeschin*, 56 M.J. at 348 (citing *Lopez*, 35 M.J. at 39).

[409] *Timmerman*, 28 M.J. at 534.

[410] *Id.* (internal citations omitted).

[411] *Id.* (internal citations omitted).

[412] *Id.* at 534-537 (indicating the Air Force Court correctly applied the version of the rule in effect at the time of the case, interpreted the rule as applied to post-trial Article 39(a), UCMJ sessions only, and resolved the ambiguity based on a review of the record.).

in *United States v. Dunham*, the AFCCA reluctantly held a proceeding in revision was not appropriate to clarify a military judge's ambiguous findings.[413]

In *United States v. Dawson*,[414] the AFCCA determined that where appellant pled guilty, then challenged an R.C.M. 1102 session held to correct a defective *Care*[415] inquiry, and its resulting finding that appellant was guilty "to the very charge to which he initially pled guilty, for which he obtained the benefit of a plea agreement, and for which he never raised any matter inconsistent with his guilt," appellant suffered no material prejudice as a result of the hearing or its finding.[416] As the CMA stated in *United States v. Barnes*, the principle purpose of Article 62(b), UCMJ, the mechanism by which Barnes' proceeding in revision was conducted, is simply to ensure "that an accused will not be twice put in jeopardy for the same offense" and clarification of counsel rights does not violate that prohibition.[417] In *Barnes*, in fact, the CMA found nothing wrong with the military judge questioning appellant concerning his understanding of his rights to counsel [collecting evidence] in a proceeding in revision, holding that the prohibition concerning collecting evidence in proceedings in revision only applies to the merits portion of the trial.[418] It is hard to imagine that the clarification that the government asked for in *Wilson*, "of which occasion did she convict then-SSG Wilson?" would have resulted in any prejudice to appellant, other than the loss of CAAF's "windfall," because the military judge's clarification would not have

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[413] United States v. Dunham, 2005 CCA Lexis 28 at *7 (A.F.Ct. Crim. App. Jan. 24, 2005), affirmed, 64 M.J. 362 (C.A.A.F. 2006)(citing *Timmerman*, 28 M.J. at 533; MCM, *supra* note 59, R.C.M. 1102)

[414] *Dawson*, 65 M.J. at 848.

[415] *Care*, 40 C.M.R. at 247.

[416] *Dawson*, 65 M.J. at 854-5.

[417] United States v. Barnes, 44 C.M.R. 223, 170 (C.M.A. 1972).

[418] *Id.* at 170-1.

increased SSG Wilson's guilt, much less his sentence. The difference between the two cases is that the *Dawson* hearing concerned a guilty plea, and was conducted prior to appellate review.

The trial counsel in *Timmerman* requested clarification as to the unannounced findings, the military judge agreed, and inexplicably, the trial counsel stated, "they were guilty. Thank you, your Honor."[419] Although "the record [indicated] all parties believed the court's findings included findings of guilty on all three specifications under Charge III," the maximum possible punishment included findings of guilt to the three specifications, defense counsel failed to object, and focused his clemency matters, after trial, arguing insufficient evidence for these three specifications.[420] The AFCCA determined that although "the right to announcement of all findings in open court is a substantial right of the accused," and omission of this right "is presumptively prejudicial," "'the presumption may yield to *compelling* evidence in the record that no harm actually resulted.'"[421] After examining the record,[422] "to determine the intent of the trial court with respect to announcement of the findings," the AFCCA determined the panel's intent was to find appellant guilty of all three specifications, and that appellant was not harmed by their erroneous announcement.[423] Pending such an amendment, in 2005 the AFCCA stated "in our view there is no rational

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[419] Timmerman, 28 M.J. at 533.

[420] *Id.*

[421] *Id.* at 536.

[422] *Id.* at 536-7 (citing the "overwhelming evidence" of appellant's guilt to these offenses, the military judge's proper instructions, the President's announcement of guilt to the charge, which would not happen if he had been found not guilty of all of the specifications, the trial counsel's inquiry, to which no one protested or objected, the sentencing proceeding which treated appellant as guilty to all three specifications, the findings worksheet, which had "not guilty" marked out under these specifications, appellant's post-trial submission, which "demonstrated [he and his defense counsel's] understanding that he was found guilty of all three specification[.]").

[423] *Id*. at 536.

basis for an appellate court not to have the same power as a military judge or convening authority as far as proceedings in revision are concerned," because prior to completion of the appellate process, no court-martial results are "final" in law.[424]

The President duly amended the Rule in 2007, permitting proceedings in revision during the appellate process.[425] However, despite the requirement of the courts to accord a MCM provision its "full weight" where that "provision does not lie outside the scope of the authority of the President, offend against the Uniform Code, conflict with another well-recognized principle of military law, or clash with other Manual provisions,"[426] the CAAF has refused to permit RCM 1102 proceedings in revision to clarify ambiguities at the appellate level since the President's amendment.[427]

While "military judges are presumed to know the law and follow it, absent clear evidence to the contrary," [428] proceedings in revision are also subject to appellate review. The convening authority, service appellate courts, and CAAF may review the record of trial, as the CAAF did in *Kulathungam*, and the AFCCA did in *Barrett*, to ensure the military judge who conducted the proceeding properly followed applicable rules and any guidance given by these listed authorities, as well as to ensure the appellant's rights are protected and in no way prejudiced by the proceedings.[429]

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[424] *Dunham*, 2005 CCA Lexis 28 at *6.

[425] MCM, *supra* note 59, R.C.M. 1102(d), Analysis (2012).

[426] *Timmerman*, 28 M.J. at 535.

[427] *Trew*, 68 M.J. at 369.

[428] United States v. Mason, 45 M.J. 483, 484 (C.A.A.F. 1997)(citing United States v. Prevatte, 40 M.J. 396, 398 (C.M.A. 1994)(citing United States v. Vangelisti, 30 M.J. 234 (C.M.A. 1990))).

[429] *Barrett*, 2006 CCA Lexis 39 at *4-5; *see also Downs*, 15 M.J. at 12 (holding post-announcement proceedings proper absent "reconsideration of the findings.").

In 2010, the CAAF reiterated, "when we cannot know, nor could the CCA know, what the military judge found [a]ppellant guilty and not guilty of, or indeed whether he found [a]ppellant not guilty of anything at all. The CCA therefore cannot conduct its review under Article 66(c), UCMJ . . . under these circumstances a proceeding in revision[] is not permitted, and dismissal of the Charge and its Specification with prejudice is required."[430] The CAAF's continued adherence to the hard line it drew in *Walters*, does not square with Supreme Court jurisprudence. In *United States v. Wilson*, the Supreme Court held that "[A] defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact."[431] On the first point, the Supreme Court stated

> where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended. In various situations where appellate review would not subject the defendant to a second trial, this Court has held that an order favoring the defendant could constitutionally be appealed by the Government.[432]

The Supreme Court has also held reinstatement of a conviction on appeal does not violate the Double Jeopardy Clause,[433] and an appellate order for dismissal does not bar further government appeals.[434] "Where there is no threat of successive prosecutions if the government's appeal is successful, the double jeopardy clause does not prohibit appellate

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[430] United States v. Ross, 68 M.J. 415, 418 (C.A.A.F, 2010)(citing *Trew*, 68 M.J. at 366).

[431] United States v. Wilson, 420 U.S. 332, 345 (1974).

[432] *Wilson*, 420 U.S. at 344; *see also* Illinois v. Cervantes, 991 N.E.2d. 521, 535 (2013)(finding where a factfinder finds an accused guilty, but his conviction is overturned by an appellate court, a higher court may reinstate it without violating Double Jeopardy, as long as the new proceeding does not involve "'further proceedings devoted to resolving the factual elements of the offense.'")(citing People v. Mink, 565 N.E.2d 975, 176 (Ill. 1990)).

[433] *Wilson*, 420 U.S. at 344-5.

[434] *Id.*

review of a judgment of acquittal."[435] "Since the 1907 Criminal Appeals Act, for example, the Government has been permitted without serious constitutional challenge to appeal from orders arresting judgment after a verdict has been entered against the defendant."[436]

In civilian courts, "reformation of improper verdicts" is permissible. In *Collins v. Youngblood*,[437] the Supreme Court held that a "Texas statute allowing reformation of improper verdicts does not punish as a crime any act previously committed, which was innocent when done, nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with [a] crime of any defense available according to law at the time when the act was committed. Its application to respondent therefore is not prohibited by the Ex Post Facto Clause of Art. I, §10."[438]

Where a judge finds an accused not guilty of a greater offense, but at the urging of the prosecutor, does subsequently find him guilty of a lesser offense, because the judge does not reconsider his initial finding of not guilty on the greater offense, there is no Double Jeopardy violation.[439] "When the military judge sits as the trier of fact, we presume the military judge knows the law and applies it correctly."[440] Applying this same logic to the government's requests in *Wilson* and *Trew*,[441] the military judge as fact-finder should be capable of clarifying his or her verdict using an RCM 1102 session, without impermissibly

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[435] People v. Mink, 141 Ill. 2d 163, 176 (Ill. 1990)(citing *Wilson*, 420 U.S. at 332).

[436] *Wilson*, 420 U.S. at 344 (*see e.g*. United States v. Bramblett, 348 U.S. 503 (1955); United States v. Green, 350 U.S. 415 (1956)).

[437] Collins v. Youngblood, 497 U.S. 37 (1990).

[438] *Collins*, 497 U.S. at 52.

[439] *Cervantes*, 991 N.E.2d at 537 (citing People v. Johnson, 710 N.E.2d 161, 163 (Ill. App. 1999)).

[440] United States v. Phillips, 70 M.J. 161, 166 (C.A.A.F. 2011)(citing United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000).

[441] Pet. for Recon. (*Wilson*) at 14; *Trew*, 68 M.J. at 369.

reconsidering his finding of not guilty. Further, applying this law to proceedings in revision to clarify an ambiguous verdict in a judge alone case would involve the judge answering simple questions, would not in any way subject the appellant in question to "a second trial before a second trier of fact," because RCM 1102 sessions are continuations of the original trial, and would also not violate the criteria the Supreme Court laid out in *Collins*. These holdings therefore give credence to the government's ability, through an RCM 1102 proceeding in revision, clarify an ambiguous verdict, when created by a military judge alone.

4. DuBay Hearings

The appellate courts may also remand cases containing potentially ambiguous verdicts pursuant to *Dubay*.[442] While not based on statutory grounds, this type of post-trial hearing results from a remand to a convening authority for a new trial.[443] The purpose of this "trial" is to conduct a hearing, taking testimony and collecting evidence concerning "the respective contentions of the parties on the question," based on which the military judge will "enter findings of fact and conclusions of law" on the question.[444] If a *Dubay* hearing was conducted to resolve a question of ambiguity, following the model laid out for this type of hearing in *Dubay*, the military judge presiding over the hearing would have the authority to set aside the findings and sentence if ambiguous, or if not, to return the record to the convening authority, to review and take action, and thus to the Judge Advocate General for action by the appellate courts.[445] However, given the existence of proceedings in revision,

[442] *Dubay*, 37 C.M.R. at 413.

[443] *Id.* at 413.

[444] *Id*.

[445] *Id*.

which are more specifically constructed to resolve ambiguity, they remain the proper venue for clarification of ambiguous findings post trial.

5. New Trial: The Ultimate Life Preserver

a. Introduction

While RCM 1102 proceedings in revision provide an opportunity for military judges to clarify their verdicts in cases where they sit as fact-finder, in panel cases resulting in ambiguous verdicts, the RCM may bar recalling panel members to similarly clarify their verdict, as previously discussed in this thesis.[446] The only options, therefore, would be, either to set aside the ambiguous verdict and dismiss it with prejudice, as CAAF did and does, or conduct a second trial, the method permitted by the Supreme Court and employed in the federal court system with certain limitations.[447]

In 1951, Congress created a "statutory basis for rehearings in all the services."[448] A rehearing includes a new trial "in full on all the charges and specifications."[449] Initially only convening authorities could order new trials, but today, the Judge Advocate Generals for each service,[450] the service courts of appeal, and the CAAF may authorize rehearings.[451] In 2005, in *Leak*, the CAAF affirmed that "neither Article 67(c) nor double jeopardy

[446] *See supra* Section III.C.2.b of this thesis.

[447] Green v. United States, 355 U.S. 184, 193 (1957)(holding government may retry one who is acquitted of a greater offense, but convicted of a lesser, after a successful appeal of his conviction, but not of the offense of which he was originally acquitted); United States v. Natelli, 527 F.2d 311 (2nd Cir. 1975); *Barrett*, 870 F.2d. at 955; United States v. Dale, 178 F.3d 429 (6th Cir. 1999); United States v. Pace, 981 F.2d. 1123 (10th Cir. 1992).

[448] Major Jerry W. Peace, *Post Trial Proceedings*, ARMY LAW, Oct. 1985, at 20 (citing Hugh Clausen, *Rehearings Today in Military Law*, 12 MIL. L. REV. 145 (1961)).

[449] Peace, *supra* note 448, at 20 (citing Clausen, *supra* note 448, at 145).

[450] Peace, *supra* note 448, at 20 (citing House Armed Svc. Comm., Military Justice Act of 1983, H. Rep. No. 549, 98th Cong., 1st Sess. 19, reprinted in 1983 U.S. Code Cong. & Ad. News 2177, 2185).

[451] UCMJ arts. 66 and 67 (2012).

considerations preclude this Court from reviewing the question of law raised by the Government by certification where the members at trial have returned a verdict of guilty."[452]

The issue here is that in *Walters* the CAAF held retrial of an ambiguous finding was "clearly barred" due to the Double Jeopardy Clause.[453] However, CAAF failed to cite support for this premise. Two questions must be resolved if retrial is to be a viable method to resuscitate a fatally ambiguous verdict. First, whether or not a fatally ambiguous verdict implicates Double Jeopardy protections, as the CAAF held in *Walters*, and, if so, whether an appellant who raises the issue for the first time on appeal has waived his right to Double Jeopardy. This section will answer these two questions through a review of Supreme Court jurisprudence concerning the Double Jeopardy Clause, examination and comparison of civilian criminal cases with military courts-martial, demonstrating that retrials are available in civilian cases to rectify verdicts determined ambiguous on appeal, and should be available to clarify ambiguous verdicts in military courts-martial in panel cases.

b. Double Jeopardy Concerns

Historically in the United States, if a conviction has been set aside, retrials are permitted.[454] In *Ex Parte Fortune*, the Court of Criminal Appeals of Texas (Texas CCA) cited this "venerable principle of double jeopardy," holding that "the successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support

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[452] *Leak*, 61 M.J. at 245.

[453] *Walters*, 58 M.J. at 397.

[454] Ball v. United States, 163 U.S. 662, 672 (1896)(holding "[i]t is quite clear that a defendant who procures a judgment against him upon an indictment to be set aside may be tried anew upon the same indictment, or upon a new indictment, for the same offense of which he had been convicted.")(citing Hopt v. Utah, 104 U.S. 634 (1881).

the verdict, poses no bar to further prosecution on the same charge."[455] In *Ex Parte Fortune*, the government retried the defendant after his "conviction [for sexual assault] was reversed on discretionary appeal."[456] The defendant filed a *habeas* petition alleging violation of his rights under the Double Jeopardy Clause.[457] Retrial, as the Texas CCA held in that case, did not violate the defendant's Double Jeopardy protections "because the 'original conviction, has, at the defendant's behest, been wholly nullified and the slate wiped clean.'"[458] This principle dates back to English law where "an acquittal upon an indictment so defective that if it had been objected to at the trial, or by motion in arrest of judgment, or by writ of error, it would not have supported any conviction or sentence, has generally been considered as insufficient to support a plea of former acquittal."[459] The Texas CCA therefore denied appellant's application.[460]

But, also applying English law, in *United States v. Ball* the Supreme Court encountered what might appear to be a contradiction, that acquittals "before a court having no jurisdiction" are "absolutely void" and do not bar a later trial before a court of proper

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[455] Ex Parte Fortune, 797 S.W.2d 929, 932 (Tex. Crim. App. 1990)(citing Burks v. United States, 437 U.S. 1 (1978); United States v. Scott, 437 U.S. 82 (rehearing denied, 439 U.S. 883 (1978)); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 462 (1947) (holding "where a state obtains a new trial after conviction because of errors, while an accused may be placed on trial a second time, it is not the sort of hardship forbidden by the Fourteenth Amendment.").

[456] *Ex Parte Fortune*, 797 S.W.2d. at 933; Fortune v. State, 699 S.W.2d. 706, 706-8 (Tex. App. 1985)("the [a]ppellant was charged with burglary of a habitation ["without the effective consent of Marvin Beard, the owner"] with the intent to commit the felony offense of sexual assault and, by a separate account, the [a]ppellant was charged with aggravated sexual assault against one S.B[.]" The Court of Appeals of Texas for the Ninth District reversed appellant's conviction for sexual assault because it had been improperly charged with burglary when it should have been charged separately).

[457] *Ex Parte Fortune*, 797 S.W.2d. at 930.

[458] *Ex Parte Fortune*, 797 S.W.2d. at 936 (citing North Carolina v. Pearce, 395 U.S. 711, 721(1969)).

[459] *Ball*, 163 U.S. at 666.

[460] *Ex Parte Fortune,* 797 S.W.2d at 936.

jurisdiction,[461] but that "a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense."[462] States continue to apply Supreme Court law that "an acquittal based on 'an egregious erroneous foundation' [is] nevertheless an acquittal for double jeopardy purposes."[463] As the CMA found in *United States v. Hitchcock*, "[h]owever mistaken or wrong it may be, an acquittal cannot be withdrawn or disapproved."[464]

The Supreme Court itself illustrates the difficulty and confusion surrounding this area of jurisprudence. As the Supreme Court pointed out in *Ball*, permitting a second indictment after an acquittal based on a faulty indictment, "is very like permitting a party to take advantage of his own wrong. If this practice be tolerated, when are trials of the accused to end?"[465] But, as the Texas CCA pondered later, citing *Tateo*, on the other hand

> a second trial may well provide a defendant with a better prepared opportunity to argue the case or afford advantages in jury or witness selection. While a retrial may subject a defendant to additional expense and anxiety it does allow a defendant two chances for acquittal and maintains society's valid concern for insuring that the guilty are punished.[466]

The principle question is: what is justice in these cases? To paraphrase words largely attributed to William Blackstone, is it better "that ten guilty persons escape than that one innocent suffer[?]"[467] Or, in this case, that an individual convicted of one offense not be re-

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[461] *Ball*, 163 U.S. at 669.

[462] *Ball*, 163 U.S. at 671 (citing United States v. Sanges, 144 U.S. 310 (1892); Commonwealth v. Tuck, 37 Mass. 356 (Mass. 1838)).

[463] *Cervantes*, 991 N.E.2d. at 533 (citing Fong Foo v. United States, 369 U.S. 141, 143 (1962)).

[464] *Hitchcock*, 6 M.J. at 188 (citing *Fong Foo*, 369 U.S. at 143).

[465] *Ball*, 163 U.S. at 668.

[466] *Ex Parte Fortune*, 797 S.W.2d. at 933 (citing *Tateo*, 377 U.S. at 466).

[467] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Clarendon Press, Oxford, 1765-1969).

prosecuted because he has been found not guilty of other offenses? What is the true "balance" between "liberty and order[?]"[468] And what if there is a third category, for individuals who admitted their guilt and thus are not innocent?

The purpose for prohibiting successive trials pursuant to the Double Jeopardy Clause is to prevent the prosecution from "tak[ing] advantage of his own wrong," [469] a second chance to "supply evidence which it failed to muster in the first proceeding."[470] The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal[,] . . . against a second prosecution for the same offense after conviction[, a]nd it protects against multiple punishments for the same offense."[471] The idea "'is that the State with all its resources and power should not be able to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity[.]'"[472]

While permitting a prosecutor a second opportunity to present evidence and attempt a conviction where none was originally found would violate the Double Jeopardy Clause, the Government may retry an accused where an initial guilty finding is overturned on appeal.[473] In *Tateo*, the Supreme Court determined that the Double Jeopardy Clause did not bar retrial after the appellate court overturned appellant's convictions for burglary and other offenses,

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[468] *Sattazahn*, 537 U.S. at 116 (citing Medina v. California, 505 U.S. 437 (1992)).

[469] *Ball*, 163 U.S. at 668.

[470] United States v. DiFrancesco, 449 U.S. 117, 128 (1980).

[471] *Pearce*, 395 U.S. at 717 (overruled on other grounds by Alabama v. Smith, 490 U.S. 794 (1989)(cited by *Leak*, 61 M.J. at 242).

[472] Grady v. Corbin, 495 U.S. 508, 518 (1990)(citing *Green*, 355 U.S. at 187).

[473] *Cervantes*, 991 N.E.2d at 534 (citing *Wilson*, 420 U.S. at 352-3).

due to trial error, including the judge's inflexibility on sentencing.[474] As the Supreme Court stated, "[c]ourts are empowered to grant new trials under 28 U.S.C. §2255, and it would be incongruous to compel greater relief for one who proceeds collaterally than for one whose rights are vindicated on direct review."[475] Where a conviction is overturned

> because of a coerced confession improperly admitted, a deficiency in the indictment, or an improper instruction, it is presumed that the accused did not have his case fairly put to the jury. A defendant is no less wronged by a jury finding of guilt after an unfair trial than by a failure to get a jury verdict at all; the distinction between the two kinds of wrongs affords no sensible basis for differentiation with regard to retrial.[476]

The Supreme Court specifically pointed out that "it would be strange were Tateo to benefit because of his delay in challenging the judge's conduct."[477] "The bottom line is whether the question of criminal culpability was resolved."[478]

In *Burks v. United States*,[479] the Supreme Court differentiated between guilty verdicts overturned on appeal due to insufficient evidence, where retrial is barred, and those overturned due to trial error, where retrial is permitted.[480] The *Burks* Court relied on *Ball*

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[474] *Tateo,* 377 U.S. at 464-6.

[475] *Id*. at 466.

[476] *Id*. at 466-7.

[477] *Id*. at 468.

[478] *Cervantes,* 991 N.E.2d at 534 (citing Burks v. United States, 437 U.S. 1, 11 n. 6 (1978)(*see also Tateo*, 377 U.S. at 467 (assuming in case reversed due to trial error "that the accused did not have his case fairly put to the jury.").

[479] 437 U.S. at 1.

[480] *Burks*, 437 U.S. at 15 (holding "reversal for trial error as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the acused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished."); *see also* 437 U.S. at 18 (holding "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient[;] the only 'just' remedy available for that court is the direction of a judgment of acquittal.").

and *Tateo*, overruling the majority of other holdings that permitted retrial even after appellate findings of insufficient proof at trial.[481] The unanimous opinion in *Burks* also contains an excellent historical analysis of Double Jeopardy clause case law, including an English case, *Queen v. Drury*,[482] where retrial was permitted after an improper sentence was overturned on appeal, as the court held:

> A man who has been tried, convicted, and attainted on an insufficient indictment, or on a record erroneous in any other part, is in so much jeopardy literally that punishment may be lawfully inflicted on him, unless the attainder be reversed in a Court of Error; and yet when that is done, he may certainly be indicted again for the same offense, and the rule would be held to apply, that he had never been in jeopardy under the former indictment.[483]

United States v. Outpost Dev. Co[484] further clarified that convictions based on grounds that include one which might be unconstitutional, cannot stand, while convictions based on facts, some of which may be insufficient, can.[485]

The federal circuit courts permit retrial when a verdict is ambiguous, even when the jury may have found the accused not guilty of one of the offenses. In *United States v. Natelli*, Anthony Natelli and Joseph Scansaroli appealed their convictions in the Southern District of New York.[486] The panel tried and convicted both men "on a single count of wil[l]fully making and causing to be false and misleading material statements in a proxy statement. The single count specified two false statements: the 'footnote' and the 'nine-

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[481] *Burks*, 437 U.S. at 14.

[482] 175 Eng. Rep. 516 (Q. B. 1849)(cited by *Burks*, 437 U.S. at 14, n. 8).

[483] 175 Eng. Rep. at 520.

[484] United States v. Outpost Dev. Co, 552 F.2d 868 (9th Cir. 1977).

[485] *Outpost Dev. Co*, 552 F.2d at 869.

[486] *Natelli*, 527 F.2d at 314.

months earnings statement.'"[487] On appeal, the Second Circuit Court of Appeals (Second Circuit) "found that Scansaroli was not culpable on the earnings statement specification . . . [and] reverse[d] his conviction and remand[ed] for trial on the footnote specification alone."[488] The Second Circuit remanded the footnote specification for a new trial even though it did not know on which of the two statements the jury had based its guilty verdict, and therefore the panel may have found Scansaroli not guilty of the footnote specification.[489] The Third Circuit Court of Appeals (Third Circuit) also remanded a case for a new trial where it was unclear whether the jury found the accused guilty of the greater offense or its lesser included offense, but knew it had not found the accused guilty of both.[490] "While the jury was deliberating the district court called the jury back, and at the defendant's behest and over the government's objection, gave a 'lesser-included offense' instruction . . . instruct[ing] the jury that 'the charge in count one, conspiracy to commit felonies or misdemeanors, necessarily includes the lesser offense of conspiracy to commit misdemeanors.'"[491] The Third Circuit based its decision on a rule applicable to all federal courts.[492] The Sixth Circuit Court of Appeals (Sixth Circuit) applied a similar remedy in *United States v. Dale*.[493] In

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[487] *Id.* at 327.

[488] *Id.* at 325.

[489] *Id.* (finding "[t]he verdict becomes ambiguous, for the jury could have reflected the specification which the appellate court holds sufficiently proved, and have convicted only on the specification held to be insufficiently proved. In that event, there seems to be no alternative to remand for a new trial.").

[490] *Barrett*, 870 F.2d. at 955.

[491] *Id.* at 954.

[492] EDWARD J. DEVITT AND CHARLES B. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS §18.05 at 584 (3d ed., West Pub. Co. 1977)(1965) (stating "when [a] jury is instructed on a lesser-included offense and it returns a general verdict of guilty, the verdict is fatally ambiguous and the case will be remanded for a new trial.")(citing Glenn v. United States, 420 F.2d 1323 (D.C. Cir. 1969)).

[493] *Dale*, 178 F.3d. at 434.

United States v. Pace, the Tenth Circuit Court of Appeals (Tenth Circuit) found ambiguity where the jury's general verdict did not indicate whether it convicted the accused of conspiracy concerning methamphetamine or amphetamine.[494] The Tenth Circuit required the government to either affirm and sentence the accused to the lesser of the two or retry the accused.[495] Retrial in response to ambiguity discovered on appeal, even with the risk of re-prosecuting someone for an offense of which they have been found not guilty, is thus a remedy in the federal courts. The difference may lay in alternate applications of the word "ambiguous." Returning to the definition,[496] the difference appears to be that the federal courts interpret verdicts where there may or may not have been findings of guilty or not guilty as equivocal – so unclear as to be neither one nor the other, while the military courts give deference to the concept of non-re-prosecution of not-guilty findings.

While the military and civilian legal systems in the United States are very different, concerning, for example, composition of panels/juries,[497] tenure of military judges,[498] and requirements for panel/jury verdicts and sentences,[499] as well as the appellate process,[500] the systems are sufficiently similar, particularly in the area of Double Jeopardy, that the difference in appellate findings is stark.

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[494] *Pace*, 981 F.2d. at 1129.

[495] *Id.* at 1130.

[496] *See supra* Section I.A. of this thesis.

[497] UCMJ, arts. 25, 29; *Thompson v. Utah,* 170 U.S. 343, 349 (1898)(holding Constitution referred to juries "of twelve persons, neither more nor less.").

[498] UCMJ, art. 26; U.S. CONST. art. II, § 2.

[499] UCMJ, arts. 51-2; U.S. CONST. art. III.

[500] UCMJ, arts. 60-67; *The Appeals Process*, UNITED STATES COURTS, http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/TheAppealsProcess.aspx (last visited 15 March 2015).

Both military and civilian courts have declared a military judge's reversal of findings from not guilty to guilty in the same trial a violation of the Double Jeopardy Clause of the Constitution. In *United States v. Hitchcock*, the military judge granted the defense counsel's motion pursuant to RCM 917 concerning the offense of resisting apprehension, and then continued the trial concerning a separate charge of escape.[501] He reconsidered his finding of not guilty to resisting apprehension and changed his ruling.[502] When the trial continued the panel found the accused guilty of resisting apprehension and found the accused guilty of both resisting apprehension and escape.[503] The CMA found the military judge's action violated Double Jeopardy protections, requiring the accused "to defend himself again against a charge as to which he had been acquitted."[504] The Illinois appellate courts considered a similar error in *Cervantes v. United States*, and found the judge's reversal from not guilty to guilty violated of the accused's right to protection under the Double Jeopardy Clause, because in doing so the judge has "necessarily reweighed the facts in going from finding insufficient evidence to finding sufficient evidence."[505]

Cervantes also demonstrates that civilian courts run in formation with military courts concerning inadvertent erroneous announcement of findings. In *Cervantes*, the Illinois appellate court outlined the difference between an unequivocal finding of not guilty, and an erroneous announcement, as in *People v. Burnette*, where the judge pronounced the accused not guilty in his findings, listed out the reasons he was guilty, and, at the request of counsel,

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[501] *Hitchcock*, 6 M.J. at 188-9.

[502] *Id.* at 189.

[503] *Id*.

[504] *Id*. at 190.

[505] *Cervantes*, 991 N.E.2d at 536, n. 2.

clarified his finding, stating he meant to say "Guilty."[506] In *United States v. Boone*, the military judge initially found the accused guilty of lesser offenses, wrongful appropriation and unlawful entry.[507] However, the military judge erroneously stated on the record in his findings pursuant to his pleas that he found the accused not guilty of the greater offenses to which he had pled not guilty, specifically, larceny and housebreaking.[508] After stating his findings, the military judge permitted the government to present evidence on greater offenses, a typical procedure in today's military jurisprudence.[509] The ACMR determined the military judge's initial comments constituted an erroneous statement of his findings, and were not intended as an acquittal.[510] In civilian courts, as in military courts, therefore, an erroneous announcement, immediately corrected, does not violate the Double Jeopardy Clause, where reconsideration would.

In *United States v. McMurrin*,[511] a case concerning the government's ability to retry the accused on a lesser-included, but uncharged offense of which he had been earlier found guilty, the NMCCA applied *Burks* and held that the government was barred from reprosecuting the accused on the greater, charged offense of which he had been found not guilty, but could reprosecute the accused for the lesser-included offense.[512] The *McMurrin* Court cited Article 44(c), UCMJ which "provides that '[n]o proceeding in which an accused

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[506] *Id.* at 532 (citing People v. Burnette, 758 N.E.2d 391, 404 (Ill. App. 2001)(holding a misstatement corrected "virtually in the same breath" did not implicate Double Jeopardy concerns).

[507] *Boone*, 24 M.J. at 680.

[508] *Id.* at 680-1.

[509] *Id.* at 681.

[510] *Id.* at 681-2.

[511] United States v. McMurrin, 72 M.J. 697 (N. M. Ct. Crim. App. 2013), *review denied*, 2014 CAAF LEXIS 228 (C.A.A.F. February 28, 2014), *certiorari denied*, 135 S. Ct. 382 (2014).

[512] *McMurrin*, 72 M.J. at 704.

has been found guilty by court-martial upon any charge or specification is a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed.'"[513] On the other hand, as in *Barrett*, where the panel fails to clearly find an accused guilty of the greater, charged offense, or the lesser, un-charged offense on which the military judge instructed them, ambiguity permits a new trial on both the greater and the lesser.[514]

The bottom line is that retrial after a conviction is overturned as ambiguous not only does not violate the Double Jeopardy Clause, it is permissible. Retrial also serves an important societal function: the pursuit of justice. As Chief Judge Crawford stated,

> The allegation of committing an offense 'on divers occasions' exists not only under the facts of this case and Walters, but also in the context of sexual abuse,[515] carnal knowledge,[516] leaving a daughter unattended,[517] sexual harassment,[518] conduct unbecoming an officer and a gentleman,[519] and numerous drug offenses.[520] Given the myriad of factual scenarios which might generate a charge of committing an offense on 'divers occasions,' this Court should address the issue presented through a fact-specific inquiry with a fact-specific holding, interpreting Walters through the lens of its unique facts. Instead, the majority applies Walters in a sweeping fashion, with the inevitable consequence of an immeasurable impact on military justice.[521]

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[513] UCMJ, art. 44(c) (cited by *McMurrin*, 72 M.J. at 704).

[514] *Barrett*, 870 F.2d. at 955.

[515] United States v. Welling, 58 M.J. 420 (C.A.A.F. 2003).

[516] United States v. McCollum, 58 M.J. 323 (C.A.A.F. 2003).

[517] United States v. Vaughan, 58 M.J. 29 (C.A.A.F. 2003).

[518] United States v. Brown, 55 M.J. 375 (C.A.A.F. 2001).

[519] United States v. Rogers, 54 M.J. 244 (C.A.A.F. 2000).

[520] United States v. Campbell, 57 M.J. 134 (C.A.A.F. 2002); United States v. Downing, 56 M.J. 419 (C.A.A.F. 2002); United States v. Grant, 56 M.J. 410 (C.A.A.F. 2002).

[521] *Seider*, 60 M.J. at 38-39 (Crawford, J., dissenting).

In this "sweeping" decision, the *Walters* Court created an unnecessary massive disparity between military and civilian courts. The Double Jeopardy Clause is implicated in military courts because the ambiguous finding implies a partial finding of not guilty; but the Double Jeopardy Clause is not implicated in federal civilian courts even though the same possibility exists. Whether the federal circuit courts of appeal or CAAF are correctly applying the guarantees of the Double Jeopardy Clause, the point is that they apply it differently, and that calls into question why a person who puts on a uniform and serves his or her country deserves greater protections under the Double Jeopardy Clause than one who does not.

c. Waiver

Second, the government must resolve the question of waiver. The CAAF reversed the service court's decision in *Walters* to avoid violating the appellant's rights under the Double Jeopardy Clause.[522] However, as Chief Judge Crawford argued in her dissent, a review of historical application of the Double Jeopardy Clause to similar appeals, including those in civilian courts, demonstrates that an appellant who first raises this issue on appeal waives his right to Double Jeopardy.[523] Chief Judge Crawford stated "[a]ppellant waived his right to a double jeopardy claim by appealing his conviction, and cannot now avoid a rehearing on double jeopardy grounds."[524]

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[522] *Walters*, 58 M.J. at 397.

[523] *Walters*, 58 M.J. at 397 (Crawford, J., dissenting)(citing *Wilson*, 420 U.S. at 334 n. 11; *Green*, 350 U.S. at 189).

[524] *Walters*, 58 M.J. at 397(Crawford, J., dissenting)(citing Sattazahn v. Pennsylvania, 537 U.S. 101 (2003)(holding double jeopardy does not bar death sentence on retrial for murder, where an appellate court set aside the conviction, and appellant had previously been sentenced to life imprisonment)).

While the focus of this thesis thus far has been on the role of the government and the military judge in preventing and repairing ambiguous verdicts, In *Walters*, Chief Judge Crawford placed the blame for the ambiguous verdict squarely on the defense counsel, pointing out that "the waiver doctrine aims 'to prevent defense counsel from remaining silent, making no objection, and then raising the issue on appeal for the first time, long after any possibility of curing the problem has vanished," putting the "parties and the public" "to the expense of retrial."[525] Should an accused "benefit because of his delay in challenging the [factfinder's] conduct?" as the Supreme Court asked in *Tateo.*[526] Although the verdict in *Sattazahn v. Pennsylvania* was not set aside because appellant had been found not guilty, as the previous section concerning Double Jeopardy[527] demonstrates, retrial even in federal cases for offenses of which the appellants may have been found not guilty is permissible.[528] As grounds for such an appeal, it is unique, as most other grounds must be raised at trial or risk waiver.[529] "It is important 'to encourage all trial participants to seek a fair and accurate trial the first time around.'"[530] A trial defense counsel may still raise an allegation of trial error on appeal for the first time if it rises to the level of plain error.[531] Plain errors are

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[525] *Walters*, 58 M.J. at 398 (Crawford, J., dissenting)(citing United States v. Causey, 37 M.J. 308, 311 (C.M.A. 1993) and United States v. Jones, 37 M.J. 321, 323 (C.M.A. 1993) (interestingly, in Jones, in lieu of remaining silent, the trial defense counsel affirmatively indicated the "change in procedures was 'satisfactory' adding credence to the appellate court's finding of no error")).

[526] *Tateo*, 377 U.S. at 468.

[527] *See supra* Section III.D.5.b of this thesis.

[528] *Sattazahn*, 537 U.S at 105 (detailing the Pennsylvania Superior Court's reversal of appellant's conviction for instructional error).

[529] *Causey*, 37 M.J. at 311 (finding, for example, objection to improper argument waived absent objection at trial).

[530] *Causey*, 37 M.J. at 311 (citing United States v. Frady, 456 U.S. 152, 163 (1982).

[531] *Causey*, 37 M.J. at 311; United States v. Heryford, 52 M.J. 265, 266 (C.A.A.F. 2000)(citing United States v. Britton, 47 M.J. 195 (C.A.A.F. 1997)).

"'those errors that "seriously affect the fairness, integrity, or public reputation of judicial proceedings,"'" resulting in a "miscarriage of justice."[532] Double jeopardy claims are waived if not raised in timely motions to dismiss if they do not rise to the level of plain error.[533]

The Supreme Court defined "waiver" as "an intentional relinquishment or abandonment of a known right or privilege."[534] Courts determine whether there has been a waiver through examination of the "particular facts and circumstances" in each case.[535] Normally, trial defense counsel's failure to object at trial "supports the inference . . . [that the issue, now raised on appeal was] deemed at the time to be of little consequence."[536] Interestingly, the 10th Circuit applied waiver in *Pace* to the accused's failure to object to the use of a general verdict which caused ambiguity, and reviewed the issue under the plain error doctrine, finding plain error.[537] If military appellate courts applied waiver and reviewed cases lacking a defense objection to an ambiguous verdict at trial for plain error they would likely find it. In refusing to apply the waiver doctrine, therefore, the military appellate courts may simply be shortening the analysis to get to error. However, while this ruling reveals that trial counsel and the military judge bear the primary responsibility as officers of the court to ensure the accuracy and clarity of findings and completeness of the record, the defense counsel still have a role in the process.

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[532] *Causey*, 37 M.J. at 311 (citing United States v. Fisher, 21 M.J. 327, 328-29 (C.M.A. 1986)(quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

[533] *Heryford*, 52 M.J. at 266.

[534] *Elespuru*, 73 M.J. at 328 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

[535] *Elespuru*, 73 M.J. at 328 (citing Zerbst, 304 U.S. at 464).

[536] *Causey*, 37 M.J. at 311 (citing United States v. Grandy, 11 M.J. 270, 275 (C.M.A. 1981)).

[537] *Pace*, 981 F.2d at 1127-1128.

Case law cited earlier in this thesis concerning the lack of confusion of the parties[538] highlights the role of the defense counsel. To be effective on sentencing, a defense counsel should know the facts and nature of the offense for which his or her client has been found guilty. When neither defense counsel nor the accused demonstrate confusion regarding the findings at trial, appellate counsel should not be able to turn around on appeal and claim ambiguity. While in the military system, it is possible that an appellate defense counsel who takes the case after trial may be confused the ability to create such ambiguity on appeal with no discussion of the waiver doctrine is troubling.

d. Retrial

Unlike the civilian system, the military places restrictions on retrials, concerning sentences in particular. Per the Supreme Court's holding in *Alabama v. Smith*,[539] an accused whose guilty plea is overturned on appeal, contests at a retrial, and receives a greater sentence receives no presumption of vindictiveness and must affirmatively prove it in order to overturn his new, harsher sentence.[540] As the Supreme Court stated,

> We made clear, however, that "'the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness.'" And in our other cases dealing with pretrial prosecutorial decisions to modify the charges against a defendant, we have continued to stress that a "mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule."[541]

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[538] *See supra* Section III.D.2 of this thesis.

[539] *Alabama v. Smith*, 490 U.S. at 794.

[540] *Id.* at 799-800 (modifying the Supreme Court's holding in *Pearce*, differentiating between sentences awarded at a guilty plea and those at a contested trial, stating that the 'evil the [*Pearce*] Court sought to prevent' was not the imposition of 'enlarged sentences after a new trial' but 'vindictiveness of a sentencing judge.'")(citing Texas v. McCullough, 475 U.S 134, 138 (1986)).

[541] *Alabama v. Smith*, 490 U.S. at 800, n. 3 (citing United States v. Goodwin, 457 U.S. 368, 384 (1982)).

In the military system, however, "no sentence in excess of or more severe than the original sentence may be approved, unless the sentence is based upon a finding of guilty of an offense not considered on the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory."[542] Certain circumstances, however, permit adjustments also found in federal civilian courts. For instance,

> if the sentence approved after the first court-martial was in accordance with a pretrial agreement and the accused at the rehearing changes his plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with the pretrial agreement, the approved sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first court-martial.[543]

While the cases referencing civilian retrials earlier in this thesis do not reference any limitations on the government's ability to present evidence, such as limiting the government to the exact case it presented initially, if concerns arise on retrial concerning successive prosecutions permitting the government to perfect its case, the government could be made to seal its case file, as in preparation for a *Kastigar*[544] motion, and if the defense raises a similar motion, demonstrate it intends to present the exact same case as in the first trial. Further, the findings on retrial in a divers occasions case could be limited to one occasion, as opposed to divers, to ensure no violation of *Smith* or *Dean*, and the sentence would also be limited to none greater than that originally adjudged, pursuant to Article 63, UCMJ.

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[542] UCMJ, art. 63.

[543] *Id*.

[544] Kastigar v. United States, 406 U.S. 441, 460 (1972)(restricting the government's presentation of evidence to that which is "'not tainted by establishing that they had an independent, legitimate source for the disputed evidence," other than the immunized testimony of the accused, after forcing the accused to testify (citing Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 n. 18 (1964)).

e. Conclusion

The disparity shown here between military and federal civilian appellate courts' handling of ambiguous findings raises serious questions of equality before the law. While the CAAF and service appellate courts, and indeed federal civilian courts frequently reference the fact that the former are Article I courts, while the latter are Article III courts when discussing the differences between the two, neither the Double Jeopardy Clause nor the waiver doctrine should apply in such a disparate fashion. Either they apply to all Americans or they do not. CAAF adds to the confusion with conflicting decisions in *Heryford* and *Walters*: the former applies waiver to Double Jeopardy claims, the latter does not.[545] The government has never petitioned for a writ of certiorari to the Supreme Court regarding this issue, although it may do so when the CAAF and service appellate courts grant relief to an appellant.[546] Further, although the federal courts have the ability to review military courtsmartial,[547] the government has never appealed to that quarter on this issue. Resolution of the disparity between the civilian and military courts in the courtroom, therefore, is unlikely. In the alternative, discussed in the next section of this thesis, is the possibility of a Congressional or Presidential amendment correcting this disparity, in either the federal civilian or military courts.

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[545] *Heryford*, 52 M.J. at 266; *Walters*, 58 M.J. at 397.

[546] 28 U.S.C. §1259 (2014).

[547] LRM v. Kastenberg, 72 M.J. 362, 367 (C.A.A.F. 2013)(citing *Denedo*, 556 U.S. at 911); *see also Denedo*, 556 U.S. at 920, n. 1.

E. Amendments: Presidential and Congressional Cardiopulmonary Resuscitation

Pursuant to the United States Constitution, Congress "has the power to make rules for the Government and Regulation of the land and naval forces."[548] Congress used this authority to promulgate the UCMJ, "establishing procedural and substantive rules for the prosecution of criminal offenses in the armed forces."[549] Congress also has the ability to amend the UCMJ.[550] This section will discuss possible amendments, the language of such amendments, and the effects of any amendment regarding ambiguous verdicts.

Congress is the branch of federal government "most capable of responsive and deliberative lawmaking."[551] The Supreme Court "give[s] Congress the highest deference in ordering military affairs[.]"[552] As CAAF stated in *Leak,* CAAF is a "Court of limited jurisdiction," an Article I court, "a court of special jurisdiction created by Congress that cannot be given the plenary powers of Article III courts."[553] As such, its authority "'is not only circumscribed by the Constitution, but limited as well by the powers given to it by Congress.'"[554] Without Congressional authority, CAAF is powerless.[555]

Congress could amend Article 63, UCMJ, to permit retrials when verdicts are so ambiguous as to be void, to more closely match the procedures and treatment of ambiguous

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[548] U.S. CONST. art. I, § 8, cl. 14.

[549] Schmidt v. Boone, 59 M.J. 841, 854 (A. F. Ct. Crim. App. 2004).

[550] United States v. Swift, 53 M.J. 439, 448 (C.A.A.F. 2000).

[551] *Loving*, 517 U.S. at 757-8.

[552] *Loving*, 517 U.S. at 768.

[553] *Leak*, 61 M.J. at 249 (Gierke, J., dissenting) (citing In re United Mo. Bank of Kansas City, N.A., 901 F.2d 1449, 1451-52 (8th Cir. 1990)(internal citations omitted)).

[554] *Leak*, 61 M.J. at 249)(Gierke, J., dissenting)(citing In re United Mo. Bank, 901 F.2d at 1452 (internal citations omitted)).

[555] *Leak*, 61 M.J. at 249 (Gierke, J., dissenting).

verdicts in federal court. In this way, Congress could ensure equal application of the Double Jeopardy Clause in both military and civilian federal courts. Or, in the alternative, Congress could promulgate an amendment ensuring that non-Soldier defendants receive the same Double Jeopardy protections in federal court as Soldier-accused in military courts-martial.

Congress "may delegate no more than the authority to make policies and rules that implement its statutes."[556] Congress delegated authority to the President permitting him to prescribe rules for trial procedures for courts-martial in Article 36, UCMJ.[557] Specifically, he may prescribe

> 'pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under [the UCMJ] triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry,' by regulation, 'which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.'[558]

Pursuant to this authority, the President produced both the RCM, which "govern the procedures and punishments in all courts-martial and, whenever expressly provided, preliminary, supplementary, and appellate procedures and activities," as well as the Military Rules of Evidence (MRE).[559] The President therefore has the ability to amend both the RCM and MRE, and has done so in the time since the UCMJ was enacted.[560] As Commander-in-Chief, the president must "take responsible and continuing action to superintend the military,

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[556] *Loving*, 517 U.S. at 771 (citing Field v. Clark, 143 U.S. 649, 693-4 (1892)).

[557] UCMJ art. 36 (1995); *Loving*, 517 U.S. at 758 (holding this delegation, the power to execute a law, according to that law, is not the same as promulgating the law itself).

[558] Pet. for Recon. (*Wilson*) at 5- 6.

[559] MCM, *supra* note 59, R.C.M. 101 (2012 ed.); Schmidt, 59 M.J. at 854.

[560] *Czeschin*, 56 M.J. at 349 (citing MCM, *supra* note 59, R.C.M. analysis at A21-3 (2002)).

including the courts-martial."[561] Neither "rules derived from" "military tribunals", nor "[d]evelopments in the civilian sector [affecting] the underlying rationale for a rule . . . affect the validity of the rule[,] except . . . [as] required . . . [by] statutory or constitutional law."[562] These developments "have an independent source of authority and are not dependent upon continuing support from the judiciary" "once incorporated into the Executive Order."[563] However, the Supreme Court indicated it "owed [respect] to the President as Commander in Chief" and gave him "wide discretion and authority."[564]

As a rule of trial procedure, the President has authority to change RCM 1102, a rule of trial procedure.[565] When the President does change RCM 1102, like any other procedural rule, those procedural changes can affect cases prosecuted prior to the change, as long as the appellant in question had notice of the crime itself and its penalties.[566] As CAAF pointed out in *United States v. Matthews*, both Congress and the President can remedy defects such as that in *Matthews*: sentencing procedures in capital courts-martial.[567] The President's authority flows from "the exercise of his responsibilities as commander-in-chief, pursuant to Article II, Section 2, and of powers expressly delegated to him by Congress."[568]

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[561] *Loving*, 517 U.S. at 772.

[562] *Czeschin*, 56 M.J. at 349 (citing MCM, *supra* note 59, R.C.M. analysis, A21-3 (2002)).

[563] *Czeschin*, 56 M.J. at 349 (citing MCM, *supra* note 59, R.C.M. analysis, A21-3 (2002)).

[564] *Loving*, 517 U.S. at 768.

[565] *Czeschin*, 56 M.J. at 349 (citing MCM, *supra* note 59, R.C.M. analysis at A21-3 (2002)).

[566] *Matthews*, 16 M.J. at 381(citing Dobbert v. Florida, 432 U.S. 282 (1977)).

[567] *Matthews*, 16 M.J. at 380 (citing UCMJ art. 36 (1969)).

[568] *Matthews*, 16 M.J. at 380 (citing UCMJ art. 36 (1969)).

By Directive, the DoD instituted an annual review of the MCM, which contains, among other documents, the UMCJ, RCM, and MRE.[569] The Directive established the Joint Service Committee (JSC), which is responsible for both the annual review and proposition of amendments to the MCM.[570] Among other factors the JSC must consider when reviewing the MCM is that it "applies, to the extent practicable, the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which are not contrary to or inconsistent with the UCMJ."[571] [A]ny JSC voting member may propose . . . an amendment" to the JSC Working Group for study, and, "if [the amendment is] approved by a majority of the voting members of the JSC, [it] becomes a part of the annual review."[572] Any member of the public may also submit proposals for amendments to JSC.[573] The JSC forwards the annual review to the General Counsel for DoD and may be directed to forward it to the Code Committee to consider pursuant to Article 46, UCMJ.[574] The Code Committee, made up of the judges sitting on CAAF; the Judge Advocates General of the Army, Navy, and Air Force; the Chief Counsel of the Coast Guard, and the Staff Judge Advocate to the Commandant of the Marine Corps, and two members of the public appointed by the Secretary of Defense, will conduct an annual survey and submit

[569] DEP'T OF DEF. DIR. 5500.17, THE ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE (3 May 2003)(certified current 31 October 2006)[hereinafter DoDD 5500.17].

[570] DoDD 5500.17, *supra* note 569.

[571] *Id.* Encl. 2 at 6.

[572] *Id*.

[573] *Id.* Encl. 2 at 7.

[574] *Id*.

the report of their survey to the Committees on Armed Forces of the Senate and House of Representatives, among others, including any amendments to the UCMJ.[575]

The President could amend RCM 1102 to explicitly permit proceedings in revision where a military judge or panel's finding is not clear, but the issue is not raised until appeal. The President has done so previously when the courts indicated they were powerless to correct an issue due to a defect in a statute or rule. For example, in 1983 the CMA reversed a death sentence due to "the failure of either the UCMJ or the RCM to require that court-martial members 'specifically identify the aggravating factors upon which they have relied in choosing to impose the death penalty.'"[576] In doing so, they "ruled that either Congress or the President could remedy the defect and that the new procedures could be applied retroactively."[577] The President corrected the defect the following year via Executive Order, "promulgating RCM 1004."[578] The President, therefore, has the power to change the RCM to more explicitly permit RCM 1102 sessions post-trial.

Recently, there have been calls to change the military trial system, including "elimination of the service Courts of Criminal Appeals," and "changing the [CAAF] from a discretionary appellate court sitting en banc to a court comprised of panels of three judges, operating in a manner similar to the U.S. circuit courts of appeals," and "removing restrictions from appeals to the Supreme Court."[579] Just as Congress created the military trial system, Congress has the ability to amend it. However, any amendment is still subject to the

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[575] UCMJ, art. 146.

[576] *Loving*, 517 U.S. at 754 (citing *Matthews*, 16 M.J. at 379).

[577] *Loving*, 517 U.S. at 754 (citing *Matthews*, 16 M.J. at 380-2).

[578] *Loving*, 517 U.S. at 754.

[579] Colonel (Ret.) James A. Young, *Court-Martial Procedure: A Proposal*, 41 THE REPORTER, no. 2, 2014, at 20, 23.

military and federal appellate system. For example, Congress recently amended both the RCM and MRE concerning sexual assault cases.[580] Previously, Congress amended Article 120, UCMJ, and the military appellate courts ruled that certain portions of the amendment were unconstitutional.[581] Therefore, any amendment should be carefully drafted and worded, using the processes outlined above, to ensure justice for accused as well as maintenance of good order and discipline. Amendments are no quick fix, but may be a viable option to narrow the gap between federal and military courts concerning ambiguity.

V. Conclusion

Walters remains the status quo in military appellate jurisprudence, and cases like *Wilson* and *Doshier* will continue to appear, as the convictions they contain give way to ambiguity on appeal. As this thesis demonstrates, trial counsel must begin at the beginning and own the process. They need to work early and often with investigators, ensuring the investigators are gathering all the necessary facts for the trial counsel to carefully, precisely draft specifications and charges. As trial counsel navigate the murky, dangerous waters of ambiguity, they must remember the procedures, methods, and personnel available to assist them. If they have a long list of occasions or images, a laundry list-style specification may be more appropriate than divers occasions, or charging each occasion as its own specification. They can charge one occasion and present multiple theories. In this decision-making process, the Chief of Military Justice and, if applicable, Special Victim Prosecutor should make themselves available and assist in whatever way they are needed. Staff Judge Advocates, who are typically senior lieutenant colonels and colonels, have seen some of their cases drown in the sea of ambiguity and accordingly have insight to bring to the charging

[580] United States v. Prather, 69 M.J. 338, 340-1 (C.A.A.F. 2011).

[581] United States v. Medina, 69 M.J. 462, 464 (C.A.A.F. 2011)(citing *Prather*, 69 M.J. at 343-4).

decision. Careful drafting and rehearsal of openings, closings and the order and manner of direct and cross examinations will identify potential icebergs threatening to capsize a successful prosecution, including potential ambiguities or failures of proof. Trial counsel should familiarize themselves with methods to amend the charges before and during trial, as this thesis details. Defense counsel should identify issues with vague or poorly drafted specifications, and consider whether or not to request a bill of particulars. In the event any of the reforms discussed in this thesis come to fruition, with potentially different remedies for ambiguity depending on the type of fact-finder, the defense counsel should discuss options and possibilities with any clients during the forum selection deliberative process.

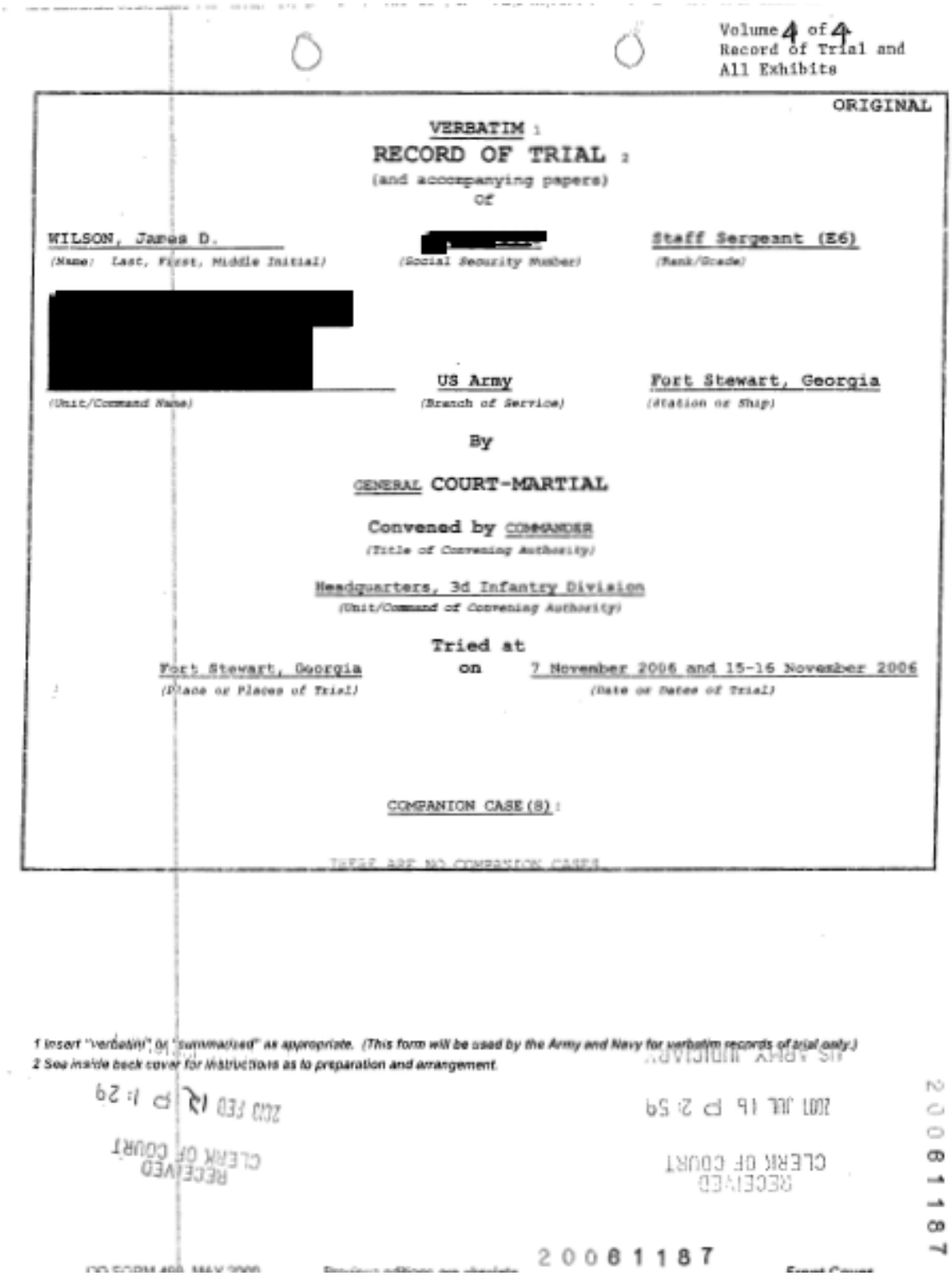
At trial, the military judge and trial counsel must be ever vigilant for ambiguity. Sloppy presentation of facts and evidence and poorly drafted instructions for findings are frequent cause of fatal ambiguity. Even after the trial, the trial counsel and the military judge should carefully review the record, including the language used during findings, and determine whether a post-trial RCM 1102 session is necessary to clarify a verdict.

In military appellate practice, the only option on appeal to remedy an ambiguous finding is to dismiss it. No options remains on appeal save for invalidating convictions for ambiguous fatalities. But remedies should and could be available. Review of the record of trial served to right many cases tilting toward ambiguity in sixty years of American military jurisprudence prior to *Walters.* As this thesis demonstrated, when fatalities occur, according to the language of RCM 1102, proceedings in revision remain available even on appeal to resolve ambiguity without inappropriately reconsidering findings, for judge-alone trials. If we trust judges to follow the law in all other cases, why not here? Admittedly, if an ambiguity occurs at trial, it may be the result of judicial error, but judges are human beings too. Clarifying a verdict should not result in a Double Jeopardy violation.

More controversially, the ultimate life preserver, a new trial, should be available on appeal in panel cases. If a new trial due to ambiguity in findings does not result in a violation of the Double Jeopardy Clause in civilian courts, why is it not available in military courts-martial? And, if waiver applies and CAAF merely skipped the analysis and found error, what effect does waiver have on military courts-martial resulting in ambiguous findings? Appellate counsel should take note of these possible remedies in cases involving potentially ambiguous verdicts.

Ultimately, Congress, the Commander-in-Chief, and military officials involved in the rule and policy-making process should examine this issue and determine if amendments to the UCMJ or RCM would permit the government to bring military appellate practice in line with civilian federal courts and resuscitate otherwise fatally-ambiguous verdicts without violating the accused's constitutional rights. With justice and fairness as their watchword, to say nothing of good order and discipline, these leaders can determine if change is necessary to ease navigation through and calm the sea of ambiguity left in the wake of the good ship *Walters.*

Appendix A. Excerpt: United States v. Wilson Record of Trial



Volume 4 of 4
Record of Trial and
All Exhibits

ORIGINAL

VERBATIM [1]

RECORD OF TRIAL [2]

(and accompanying papers)
of

WILSON, James D. | [redacted] | Staff Sergeant (E6)
(Name: Last, First, Middle Initial) | (Social Security Number) | (Rank/Grade)

[redacted]
(Unit/Command Name) | US Army (Branch of Service) | Fort Stewart, Georgia (Station or Ship)

By

GENERAL COURT-MARTIAL

Convened by COMMANDER
(Title of Convening Authority)

Headquarters, 3d Infantry Division
(Unit/Command of Convening Authority)

Tried at
Fort Stewart, Georgia (Place or Places of Trial) on 7 November 2006 and 15-16 November 2006 (Date or Dates of Trial)

COMPANION CASE(S):

THERE ARE NO COMPANION CASES

1 Insert "verbatim" or "summarized" as appropriate. (This form will be used by the Army and Navy for verbatim records of trial only.)
2 See inside back cover for instructions as to preparation and arrangement.

RECEIVED CLERK OF COURT 2007 FEB 12 P 1:29

RECEIVED CLERK OF COURT 2007 JUL 19 P 2:59

20061187

20061187

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. SSN	3. GRADE OR RANK	4. PAY GRADE
WILSON, James D.	[redacted]	SSG	E6

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
[redacted] Fort Stewart, Georgia 31314	a. INITIAL DATE	b. TERM
	[redacted]	[redacted]

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$2,770.50	None	$2,770.50	N/A	N/A

II. CHARGES AND SPECIFICATIONS

10. CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 107

SPECIFICATION: In that Staff Sergeant (E-6) James D. Wilson, U.S. Army, did, at or near Fort Stewart, Georgia, on or about 22 May 2006, with intent to deceive, sign an official statement, to wit: DA Form 2823, dated 22 May 2006, stating that the said Accused did not have sexual contact with R[redacted] which statement was totally false, and was then known by the said Accused to be so false.

~~CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 120~~

~~SPECIFICATION 1: In that Staff Sergeant (E-6) James D. Wilson, U.S. Army, did, at or near Fort Bliss,~~ Texas, on divers occasions between on or about 1 January 1995 and on or about 31 October 1995, rape R[redacted] ~~a person under the age of 12.~~ ML 14 Sep 09

~~SPECIFICATION 2: In that Staff Sergeant (E-6) James D. Wilson, U.S. Army, did, at or near Colorado~~ Springs, Colorado, on divers occasions between on or about 15 February 1996 and on or about 1 March ~~1998,~~ rape R[redacted] ~~a person under the age of 12.~~ ML 14 Sep 09

~~CHARGE III: VIOLATION OF THE UCMJ, ARTICLE 125~~ ML 14 Sep 09

~~SPECIFICATION 1: In that Staff Sergeant (E-6) James D. Wilson, U.S. Army, did, at or near Fort Bliss,~~ Texas, between on or about 1 January 1995 ~~and on or about 31 October~~ 1995, commit sodomy with R[redacted] ~~a child under the age of 12.~~ ML 14 Sep 09

(SEE CONTINUATION SHEET)

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	[redacted]	[redacted]

d. SIGNATURE OF ACCUSER	e. DATE (YYYYMMDD)
[signature]	20060825

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 25th day of August, 2006, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice and that he either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his knowledge and belief.

[redacted]
Typed Name of Officer

[redacted]
Organization of Officer

CPT
Grade

Trial Counsel
Official Capacity to Administer Oath
(See R.C.M. 307(b) – must be a commissioned officer)

[redacted]
Signature

CONTINUATION SHEET, DD FORM 458, PERTAINING TO SSG WILSON, James D.,
Fox Company, 3d Brigade Support Battalion, 1st Brigade Combat Team, 3d infantry Division,
Fort Stewart, Georgia 31314

Item 10, cont'd:

~~SPECIFICATION 2: In that Staff Sergeant (E-6) James D. Wilson, U.S. Army, did, at or near Colorado~~ Springs, Colorado, on divers occasions ~~between on or about~~ 15 February 1996 and 1 March 1998, ~~commit sodomy with R[redacted] C[redacted], a child under the age of 12.~~ MW 19 Sep 09

~~CHARGE IV: VIOLATION OF THE UCMJ, ARTICLE 134~~ MW 19 Sep 09

~~SPECIFICATION 1: In that Staff Sergeant (E-6) James D. Wilson, U.S. Army, did, at or near Fort~~ Bliss, Texas, on divers occasions between on or about 1 January 1995 ~~and on~~ or about 31 October 1995, commit indecent acts upon the body of R[redacted] C[redacted], a female under 16 years of age, not the wife of the said Accused, ~~by fondling her~~ and placing his penis upon her private parts, with intent to arouse and ~~gratify the sexual desires of the said Accused.~~ MW 19Sep09

~~SPECIFICATION 2: In that Staff Sergeant (E-6) James D. Wilson, U.S. Army, did, at or near Colorado~~ Springs, Colorado, on divers occasions between on or about 15 February 1996 and 1 March 1998, commit indecent acts upon the body of R[redacted] C[redacted], a female under 16 years of age, not the wife of the said Accused, ~~by fondling her~~ and placing his penis upon her private parts, with intent to arouse and ~~gratify the sexual desires of the said Accused.~~ MW 19 Sep 09

MJ: You can be tried by all officers, you can be tried by officers and one-third enlisted, or you could be tried by judge alone. Do you understand those choices?

ACC: Yes, ma'am.

MJ: Did you discuss those choices with your defense counsel?

ACC: Yes, ma'am. I have.

MJ: And how do you want to be tried?

ACC: Judge alone, ma'am.

MJ: Okay. Do you understand that by going judge alone, you give up your right to be tried by members?

ACC: Yes, ma'am.

MJ: Are you ready to enter a plea?

DC: If we could wait until tomorrow, I think that would be easier, ma'am.

MJ: Okay. You don't have any other motions to make then?

DC: No further motions, ma'am.

MJ: All right. Nine o'clock tomorrow morning?

TC: Yes, ma'am. The government is prepared to move forward with the trial.

DC: Yes, ma'am. The defense has the judge alone request if you would like to ----

MJ: All right. Great. Please mark that as the next appellate exhibit.

DC: The defense is prepared to plead.

MJ: Okay. Sergeant Wilson, I need you to stand up.

[The accused did as directed.].

MJ: So you don't have any other motions?

DC: No further motions, ma'am.

MJ: Go ahead and enter a plea.

DC: Ma'am, the defense pleads as follows:

To Charge I and its Specification:	**Guilty.**
To Charge II and its Specifications:	**Not Guilty.**
To Charge III and its Specifications:	**Guilty.**
To Charge IV, Specification 1:	**Guilty, except to the words "on divers occasions".**
To the excepted words:	**Not Guilty.**
To the [sic] Specification as amended:	**Guilty.**
To Charge IV, Specification 2:	**Guilty.**
To the [sic] Charge:	**Guilty.**

MJ: To Charge IV: Guilty?

DC: Correct, ma'am.

MJ: Thank you. You may be seated.

[The accused and his defense counsel did as directed.].

MJ: Government, are you going forward on the charges and excepted language?

TC: We are not going forward on the excepted language, ma'am. We are going forward on Charge II, Specification 2.

MJ: Okay. So Specification 2 of Charge II only?

TC: Yes, ma'am.

MJ: Did you know that that statement was not true at the time you made it?

ACC: Yes, ma'am.

MJ: And did you intend to deceive anyone when you made that statement?

ACC: Yes, ma'am.

MJ: Who did you intend to deceive?

ACC: I guess just about anybody that read it, ma'am.

MJ: Okay. And did you want them to believe that you had not had any sexual contact with your stepdaughter?

ACC: At the time, yes, ma'am.

MJ: And you agree that the DA Form 2823 -- so how did it work? You answered his questions and then he typed up the form?

ACC: He asked quite a few questions, and he typed it all up. He had me review it, initial next to every item that he typed up on there, and then sign and date it.

MJ: And did you understand that that was an official statement?

ACC: Yes. I did, ma'am.

MJ: And do you agree that -- why was Special Agent Mitchell interviewing you?

ACC: Because the Department of Family and Child Services on Fort Stewart had reported the case to CID.

MJ: Is it part of his duties to interview people who are accused of such allegations?

However, I advise you that you may request to withdraw your guilty plea at any time before the sentence is announced and, if you have a good reason for your request, I will grant it.

Okay. So my understanding is the only offense you're going forward on is Specification 2 of Charge II; is that correct?

TC: That is correct, Your Honor.

MJ: Okay. Does either side want to present an opening statement?

TC: Your Honor, if the government may take a brief recess to make sure that -- to consult with witnesses.

MJ: Court's in recess.

[The court-martial recessed at 0947, 16 November 2006.]

[The court-martial was called to order at 1010, 16 November 2006.]

MJ: Court is called to order. All parties present when the court recessed are again present. Government, are you ready ?

ATC: Yes, Your Honor.

May it please the court, what does a teddy bear represent to a little girl? Your Honor, I would like you to meet Honey Bear [holding up a teddy bear]. This is R[redacted] C[redacted]'s teddy bear. She has had this bear for a long time, since she was a little girl. And this bear represents to her, her innocence, her childhood, and her safety. Whenever she was scared, she wanted to have this teddy bear with her.

One night -- she can't tell you exactly when because she doesn't remember the details perfectly, but she was between 5 and 7

years old -- she asked for her teddy bear. She was scared because the accused, her stepfather, was raping her. The accused placed her on his bed, helped to remove her clothes, knelt behind her, and raped her.

R[redacted] is going to tell you about other incidents when her teddy bear wasn't enough to save her, when she wanted her teddy bear. There were times when she, her mother, and the accused were living together in Colorado Springs when her stepfather offered her bribes to perform other sexual acts on him -- cookies, candy, toys -- things that are normally associated with the exuberance of childhood -- were offered up in exchange for sexual acts.

Now, R[redacted]s statements are going to be a little bit foggy. She was between 5 and 7 years old when most of these acts occurred, and most of them occurred nearly 10 years ago. So her recollection is going to be in bits and pieces, but you're also going to hear about these acts from the mouth of the accused, through these statements that he gave to CID agent here at Fort Stewart. Your Honor, I ask you to pay attention to those statements because they clarify the critical details of R[redacted]'s recollection of those events.

Your Honor, the statements in this case -- the facts speak for themselves, but when you are listening to these facts, I would like you to remember one thing -- that R[redacted] didn't want these things to happen to her. She was just a little girl who wanted what every little girl wants. She wanted safety. She wanted her innocence.

She wanted her teddy bear, but the accused would not give these things to her. The accused said, "No. Wait a minute. Wait until I'm done. It will only take a minute."

Thank you, Your Honor.

MJ: Defense, do you have an opening statement?

DC: We'll defer at this time. The defense probably won't have one.

MJ: Okay. Call your first witness.

SPECIAL AGENT JAMES HEINTZMAN, U.S. Army, was called as a witness for the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the assistant trial counsel:

Q. State your name for the record, please?

A. Chief Warrant Officer Three James P. Heintzman.

Q. How long have you been a CID agent?

A. Since December of 1995.

Q. And what is your duty title?

A. Special Agent.

Q. What are some of the duties you perform as a Special Agent?

A. I investigate felony crimes in which the government has an interest.

Q. How did you become involved in this case?

A. I was asked to interview Staff Sergeant Wilson.

Q. Did you, in fact, interview Staff Sergeant Wilson?

A. Yes, I did.

Q. Do you remember the date that you interviewed him?

A. I believe it was 7 June.

Q. Okay. On 7 June, how was it that you came to interview the accused?

A. The case agent requested I speak with Staff Sergeant Wilson to clarify issues within the investigation.

Q. Okay. So did you ask Staff Sergeant Wilson to come to you for questioning?

A. The case agent asked him if he would speak with me, yes.

Q. And how did the accused respond?

A. That he would.

Q. He came to your office?

A. Yes, he did.

Q. Did he come to your office voluntarily?

A. Yes, he did.

Q. Did you conduct an interview in your office?

A. Yes, I did.

Q. And during this interview, did the accused appear impaired at all?

A. No, sir.

Q. Did you threaten the accused in any way?

A. No, sir.

Q. Was the accused handcuffed during the interview?

A. No, sir.
Q. And did he resist?
A. No, sir.
Q. Did you identify yourself to the accused as a CID agent?
A. I believe I introduced myself as Mr. Heintzman.
Q. Okay. But did he understand that you were a law enforcement agency investigating ----
A. Yes, sir.
Q. ---- a sexual assault allegation?
A. Yes, sir.
Q. And prior to taking his statement, did you read Staff Sergeant Wilson his rights on a DA form 3881?
A. Yes, sir. I did.
Q. And what did you do to ensure that the accused understood the rights on a DA form 3881?
A. I read each line to him individually and before proceeding to the next one, I received an affirmative verbal response from him. Then, at the end, I had him read out loud the waiver. I asked him if he understood that, and he said yes. I asked him if that statement was true, and he said yes. Then he signed the waiver.
Q. Okay. Did he have any questions at all regarding the rights?
A. No, sir.

Q. And did he understand the charges that were presented against him while you were interviewing him?

A. Yes, sir.

MJ: Okay. I'm not sure how this witness would know what the accused understood. You can ask him other questions about whether the accused asked any questions or exhibited any uncertainty, but I don't think this witness or any witness can testify as to what someone else understood?

ATC: Understood, Your Honor.

Did the accused say anything to you to indicate that he didn't understand his rights?

A. I do not recall anything like that, sir.

Q. Did Staff Sergeant Wilson waive his rights?

A. Yes, sir.

Q. Did he sign the waiver form, the DA Form 3881?

A. Yes, sir.

Q. Special Agent Heintzman, I am now handing you what has been pre-marked as Government [sic] Exhibit 1 for identification, which is the DA Form 3881, rights waiver.

The waiver that is marked as Government [sic] Exhibit Number 1 for identification ----

MJ: That's Prosecution Exhibit 1, right?

ATC: Yes, Your Honor.

The waiver that is marked as Prosecution Exhibit 1 for identification, is that the same waiver that you and Staff Sergeant Wilson signed prior to taking his statement?

A. Yes, sir.

Q. Did you witness Staff Sergeant Wilson signing the waiver in Section B?

A. Yes, sir.

Q. And does your signature also appear in Section B?

A. Yes. It does, sir.

ATC: Your Honor, the government now moves to introduce the DA Form 3881 pre-marked as Prosecution Exhibit 1 into evidence as Prosecution Exhibit 1.

DC: No objections.

MJ: Prosecution Exhibit 1 is admitted.

Q. Now, during your interview with Staff Sergeant Wilson, did you take notes?

A. No, sir.

Q. You did not take notes?

A. No, sir.

Q. Did you produce any kind of written statement based upon your interview?

A. Yes, sir.

Q. Can you describe to me how that process occurred?

A. We filled out a DA Form 2823, sworn statement. It involves a narrative portion and a question-answer portion?

ATC: Your Honor, I am now handing the witness the statement that is pre-marked as Prosecution Exhibit 2 for identification.

Do you recognize this document?

A. Yes, sir.

Q. Can you tell me what this document is?

A. It's a DA Form 2823-E, sworn statement, that I took with Staff Sergeant James Wilson.

Q. How do you recognize that as the specific document that you took?

A. My signature on the back, Sergeant Wilson's signature, and I recall taking the statement, sir.

Q. Okay. By the signature, are you referring to the signature on the affidavit on Page 3?

A. Yes, sir.

Q. And is that your signature on Page 3 in the affidavit?

A. Yes. It is, sir.

Q. And does the accused's signature also appear?

A. Yes, sir.

Q. Was this document prepared contemporaneously with the interview?

A. Yes, sir.

Q. And except for it being a photocopy, does the document look the same as it did when you and the accused prepared it?

A. That's correct, sir.

ATC: Your Honor, the government now moves to introduce the statement pre-marked as Prosecution Exhibit 2 for identification into evidence as Prosecution Exhibit 2.

DC: No objections from the defense.

MJ: Prosecution Exhibit 2 is admitted.

Q. I'd just like to ask you a couple of questions now about the taking of the statement itself. Who actually typed up the statement?

A. I typed it, sir.

Q. And who wrote the handwritten initials at the beginning and end of each typed page?

A. That would be Staff Sergeant Wilson.

ATC: Your Honor, may I hand the exhibit back to the witness so that he can refer to it?

[Pause.]

Q. I am handing you Exhibit 2. Okay. The handwritten initials that are at the beginning and end of each typed page, are those Staff Sergeant Wilson's initials?

A. Yes, sir.

Q. And did he mark those initials after reviewing each page of the statement?

A. That's correct, sir.

Q. Can you explain to us how that process occurred?

A. Once the statement is completed, I hand him the statement and tell him to read through the statement and let me know if there is anything he wished to clarify, change, take out, add to the statement. I allow him time to read the statement. I ask him if there is anything he would like to change, take out, or add. If there are no changes to be made, I have him initial the date, put the time in, and initial that and make the initials at the top and bottom of each page. Once all of that is completed, I have him read the affidavit out loud and ask him if he has any questions about that. Does he understand that statement; is that a true statement? Once I receive affirmative responses to those questions, I swear him to the statement.

Q. And the typed lines that appear in the question-and-answer portion, are those Staff Sergeant Wilson's words or are those your words?

A. The questions are mine and the answers are his, sir.

Q. Are those exact quotes or did you paraphrase?

A. Exact quotes.

Q. Okay. And you said that Staff Sergeant Wilson was afforded an opportunity to look at the statement and make any corrections or comments?

A. Yes, sir.

Q. And did he have any questions or comments to make?
A. No, sir.
Q. Did Staff Sergeant Wilson say anything that made you think the statement he was giving was not voluntary?
A. No, sir.
Q. Did he do anything that made you think the statement was not voluntary?
A. No, sir.
Q. Just a couple of questions now from the statement itself. During this interview on 7 June, did you ask the accused if he touched his daughter, R[redacted] in a sexual way?
A. Yes, sir.
Q. And what was his response?
A. That he had, yes.
Q. Did you ask Sergeant Wilson if he penetrated his daughter's vagina with his penis?
A. Yes, sir.
Q. And what was his response?
A. He stated he was unsure.
Q. Did you clarify what he thought to be penetration of the vagina?
A. Yes, sir.
Q. Did you ask him if he knew what the vaginal canal was?
A. Yes, sir.

Q. And what was his response?

A. He said he knew what that was.

Q. Okay. Did you ask him if he knew what the external labia was?

A. Yes, sir.

Q. And how did he respond?

A. He said he understood what that was.

Q. Did you ask him if he penetrated the vaginal canal?

A. Yes, sir.

Q. And what did he say?

A. Again, I believe he replied he was not sure.

Q. Okay. Did you ask him if he penetrated R[redacted]s external labia?

A. Yes, sir.

Q. What was his response to that question?

A. He said yes.

Q. At anytime, did he tell you whether or not R[redacted] cried out in pain while he was rubbing his genitals on her genitals?

A. Yes, sir.

Q. And what did he respond to that?

A. He replied that she stated, "Ouch, that hurts," and that occurred while he was rubbing his genitalia against hers.

ATC: Your Honor, at this time, the government would request a brief recess in place to allow you to read the statement.

MJ: Yes.

[The court-martial recessed at 1022, 16 November 2006.]

[The court-martial was called to order at 1023, 16 November 2006.].

MJ: Court is called to order. All parties present when the court recessed are again present.

I have read Prosecution Exhibit 2. You can continue.

ATC: Your Honor, the government has no further questions.

MJ: Defense?

CROSS-EXAMINATION

Questions by the defense counsel:

Q. Agent Heintzman, this statement -- it contains the full conversation between you and Staff Sergeant Wilson relative to his admissions about this incident?

A. Correct, sir.

Q. And you made sure to include all of the pertinent details with his statement?

A. Yes, sir.

Q. In fact, when we were discussing this particular incident regarding possible penetration, Staff Sergeant Wilson indicated he wasn't looking down at that particular point?

A. That's correct.

Q. And he, in fact, indicates that it was a possibility but he wasn't sure?

A. That's correct.

Q. And Staff Sergeant Wilson was very forthright and forthcoming during this particular interview about admitting to some pretty serious actions?

A. Correct.

DC: I have nothing further. Thank you.

WIT: Yes, sir.

MJ: Redirect?

ATC: A couple of questions, Your Honor.

REDIRECT EXAMINATION

Questions by the assistant trial counsel:

Q. Agent Heintzman, just to be clear, did the accused have any questions at all when you were asking him what the vaginal canal was? Did he have any questions about what that meant or was he -- did he have any questions about what that meant?

A. He said he was sure when I asked him specifically about genitalia and the canal and external labia. He knew what that was.

Q. And what was his response when you asked him if he penetrated R[redacted]s external labia with his penis?

A. He said yes.

ATC: Thank you. Nothing further, Your Honor.

EXAMINATION BY THE COURT-MARTIAL

Questions by the military judge:

Q. When you were talking about oral sex, there's a question on here, "Did you perform oral sex on R[redacted]?" And the answer is yes.

"How many times did you perform oral sex on R[redacted]" "Twice." "What do you understand oral sex to be?" "Using the mouth to stimulate the genital area whether a man or woman." A few questions later you say, "During oral sex, did you place your tongue into R[redacted] vagina?" And the answer is no. Did you ever clarify what kind of oral sex they had?

A. No, ma'am.

Q. Okay. Because there are several varieties of oral sex, correct?

A. Yes, ma'am.

Q. And he basically denied placing his tongue in her vagina, correct?

A. That's correct, ma'am.

Q. But it's never clarified what kind of oral sex they had, was it? I mean, I don't see it in the statement?

A. No, ma'am.

MJ: Okay. Trial Counsel, please hand this statement to the witness.

[The trial counsel did as directed.]

MJ: And turn to the third page. Read over that third page again.

WIT: From the top, ma'am?

MJ: Yes, just to yourself.

WIT: Okay.

[Pause.]

WIT: All right, ma'am.

Q. Would you agree that it seems inconsistent with regard to whether or not he penetrated her external labia?

[Pause.].

Q. In one sentence near the top, it appears he is saying, "I'm not sure."

A. Correct, ma'am.

Q. And then a few questions later, you ask him again and he says yes?

A. Correct, ma'am.

Q. Can you clarify that? I mean, do you know how that came about?

A. When we discussed sexual intercourse as far as a man's penis entering a woman's vagina, he denied sexual intercourse with her.

Q. Okay?

A. But there was [sic] multiple incidents of him rubbing his penis against her vagina, and the question was did his penis make any kind of penetration inside her vagina but without having actual sexual intercourse by his penis entering her vaginal canal.

Q. And he initially indicated, "I'm not sure," and then he indicated yes, he did penetrate the labia?

A. That is correct, ma'am.

MJ: Okay. Retrieve the exhibit. I don't have any other questions for this witness. Does either side?

[The trial counsel retrieved the exhibit from the witness.]

DC: The defense just has one brief question.

MJ: Go ahead.

RECROSS-EXAMINATION

Questions by the defense counsel:

Q. Agent Heintzman, during this period of time, how long did this interview last?

A. From the time he entered my office until the time he left, it was approximately 4 hours, sir.

Q. And during this time, you were actually -- does that cover the time you were actually speaking with him?

A. Yes, sir.

Q. In his state -- well, not his state of mind. Did you observe that he had any emotions during that period of time?

A. Yes, sir.

Q. So, when he was discussing this with you, he was very emotional?

A. That's correct, sir.

Q. Can you describe, as you observed, his emotional state?

A. As I observed, sir, he had a burden that he had been living with for some time. He had come to a point where he wanted to release that burden, to talk about what happened.

Q. And was he crying?

A. He was emotional, yes.

DC: Nothing further.

MJ: Anything else?

ATC: No further questions.

MJ: Temporary or permanent?

ATC: Permanent, Your Honor?

DC: No objections.

[The witness was permanently excused, duly warned, and withdrew from the courtroom.]

TC: The government calls Ms. R[redacted] C[redacted]

R[redacted] C[redacted] civilian, was called as a witness for the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the trial counsel:

Q. You are R[redacted] C[redacted]

A. Yes, I am.

Q. Currently residing here at Fort Stewart, Georgia?

A. Yes.

Q. How old are you, R[redacted]

A. I am 16.

Q. When were you born?

A. I was born June 29th, 1990.

Q. Where do you go to school?

A. I go to Bradwell Institute.

Q. Where's that?

A. It's out in Hinesville. If you leave through the front gate, it's just right there.

Q. What grade are you in?

A. I'm a junior.

Q. Rene, if you would, could you tell this court to the best of your memory, some of the places where you have lived?

A. Well, I lived in El Paso, Texas; in Colorado Springs, Killeen, Texas at Fort Hood; Fort Knox; and here.

Q. Fort Knox is in Kentucky?

A. Yeah. Fort Knox is in Kentucky.

Q. How old were you when you lived at Fort Bliss?

A. Between I think 4 or 5.

Q. So was that around the 1994-95 timeframe?

A. Yes, sir.

Q. How old were you when you lived near Fort Carson?

A. I think, like, 5 and 6 and 7. I'm not quite sure.

Q. Did you live on post at Fort Carson?

A. No. We lived in an apartment and we lived with my mom and ex-stepfather's friends, Scott and Caroline.

Q. Where was the apartment located?

A. It was up on the top of a big hill in Colorado Springs. It was out there. It was really nice.

Q. What is your relationship with the accused Sergeant Wilson?
A. He is my ex-stepfather.
Q. Do you know when he and your mother were married?
A. I don't know the exact date, but I think she was 21 or 22.
Q. Do you have a relationship with your biological father?
A. No. He left when I was, like, 3 or something and tried to contact me when I was 13. And that's it. I haven't heard from him since.
Q. Is Sergeant Wilson basically the only father you've ever known?
A. Yeah. I guess.
Q. R[redacted], I'm going to ask you some difficult questions about what happened between you and your stepfather. Is that okay?
A. Yes.
Q. If you need a break at any point, just let me know. If you don't understand the question, let me know and I'll be happy to try to rephrase it and try to ask it in a different way. Will you do that for me?
A. Yes, sir.
Q. Did your stepfather ever touch you in ways that you believe are inappropriate?
A. Yes, sir.
Q. Would you, please, describe what you mean by inappropriate?

A. In my book inappropriate is anywhere where he invades my privacy, my private areas -- yeah.

Q. I know this may be difficult, but by "private areas," do you mean your vagina?

A. Yes, sir.

Q. And your breasts?

A. Yes, sir.

Q. How did he touch you?

A. He would touch me and he would masturbate, or he would make me perform oral sex on him, or he would perform oral sex on me while I performed oral sex on him. He had to tell me what to do, but -- I mean, I was young. I didn't know what it was, so he had to tell me what to do.

Q. Now, when he would touch you with -- you said he touched you with his hands?

A. Yes, sir.

Q. Where would he touch you exactly?

A. He would touch my vagina and he would, like, try to grab my breasts that weren't there but -- you know, he would touch me.

Q. Did that happen at Fort Bliss?

A. It happened once at Fort Bliss, but it happened primarily -- I think it was in Colorado Springs.

Q. And how old were you again when you were living in Colorado Springs?

A. Five.
Q. Did he ever touch you with anything else other than his fingers?
A. Yes, sir.
Q. Could you, please, describe that?
A. Actually, when we were in Colorado Springs, he actually raped me. He did.
Q. Okay. We'll get to that in a little bit?
A. Okay.
Q. But other than his hands and fingers, did he ever touch you with any other body part?
A. His mouth.
Q. Okay. Did he ever touch you with his penis?
A. Yes, sir.
Q. Where would he touch you with his penis?
A. My vagina.
Q. Now, you stated earlier that you would perform oral sex on your stepfather?
A. Yes, sir.
Q. How did that come about? Did he do anything in order to entice you to perform oral sex?
A. No, sir [laughing] -- I'm sorry. That was just ----
Q. I understand. I know this is somewhat difficult and embarrassing to talk about?

A. Yes, sir.

Q. How did it come about that you actually performed oral sex on him? Did he approach you? And what would happen at that point?

A. He would tell me what to do. Sometimes he would bring me into the bathroom and he would turn on the bathroom faucet -- the bathtub so, like, the water was always running and it was really loud. And he would tell me what to do.

Q. What would he tell you?

A. He would tell me to put his penis in my mouth and move my head up and down.

Q. Did he ever ejaculate in your mouth?

A. Yes.

Q. How do you remember that?

A. I remember that because I got really disgusted, and I told him that he peed in my mouth. And I spit and rinsed my mouth out in the sink, and I was just so disgusted and upset.

Q. Did he ever ejaculate on you?

A. I think maybe once because I had to use a washcloth -- I think it was a pink washcloth and it smelled, like, really, really bad because it was an old washcloth. It was just one we had in the bathroom.

Q. Would he ever offer you anything in order to get you to perform a sexual act on him?

A. A couple times actually, yes. He offered my Halloween candy. I bought a Texas-sized jawbreaker. It's just a really big clump of sugar. It's actually really good though. He crunched it up with a hammer and he offered that. We had Oreos. He offered Oreos.

Q. Did he ever show you any type of pornographic images?

A. Yes, sir. He showed me the picture, and he asked me if I wanted to do that. And I, like, looked away. But he had me look at it and he said [sic] if I wanted to do what the people in the pictures were doing. I'm, like, -- I remember being disgusted about it because it was, like, these people were showing off their private parts and those are supposed to stay covered up.

Q. When he was offering you the candy and the Oreos, was this at Fort Bliss?

A. I remember it at Fort Carson -- in Colorado Springs.

Q. So most of these incidents when he was performing oral sex on you or you were performing oral sex on him -- most of those incidents occurred in Colorado Springs?

A. Yes. And they are all the ones that I remember best. I have a pretty vivid memory.

Q. Did your stepfather ever do anything else to you that you consider inappropriate?

A. Yes, sir.

Q. What else did he do?

A. Well, like I said earlier, he did take me into my mother's bedroom and he did penetrate me when I was, like -- I don't remember -- 5 or 6.

Q. Was that in Colorado Springs?

A. Yes, sir.

Q. Now, you said he took you into the bedroom and penetrated you. And, again, I know that this may be difficult and embarrassing but I'm going to need you to talk about some of the details?

A. Of course.

Q. Could you, please, explain to the judge and this court exactly what happened when your stepfather took you into his bedroom?

A. Okay. Well, I remember -- I remember going into the bedroom and I remember being bent over in the doggy-style position, which is when I was bent over on my knees and I was sitting on my legs and I had my hands in front of me like this [demonstrating]. And he came up behind me, and he started talking. I don't quite remember what he said, but I remember something hurt -- it hurt a lot. And I said "Ow, that hurts. Stop. Please stop. Ow, that hurts." And I said, "I want my teddy bear. I want my Honey Blue." And I, to this day, still have that teddy bear. It might be around here somewhere.

Q. Is this your teddy bear [handing the witness a teddy bear]?

A. Yes, sir. That is my teddy bear.

MJ: Has that been marked?

TC: It has not, Your Honor.

MJ: Well, if you're going to hand it to the witness and she's going to use it in some manner, it needs to be marked?

TC: I don't think she's going to use it, Your Honor. I was just going to hand it to her. But we can -- I just wanted her ----

MJ: It's a smallish gray teddy bear with a purple dress.

WIT: Yes.

MJ: Would you agree with that?

WIT: Yes, ma'am.

MJ: Okay.

Q. Is this the teddy bear you asked for when you were in your stepfather's bedroom?

A. Yes, sir.

Q. Did he allow you to have your teddy bear?

A. No, sir. I said I wanted my teddy bear, and he said that I could do without my teddy bear.

Q. You stated it hurt?

A. It hurt.

Q. Where did it hurt?

A. My lower private areas.

Q. Was it your vagina that was hurting?

A. Yes, sir.

Q. Did he say anything to you when he penetrated you that day?

A. After, like, every incident he told me that it was to be our secret. It was a Daddy/[redacted] thing and mommy wasn't supposed to know. No one was supposed to know.

Q. Ne-ne is your nickname?

A. Ne-ne is my nickname among many others.

Q. Did you understand exactly what was happening at that point?

A. I didn't know what was happening. I knew that it was what he told me to do and that I didn't like it at all.

Q. How many times did this happen that you can remember?

A. Seven that I can remember clearly.

Q. How many times?

A. Seven.

Q. Not just -- I mean the actual penetration, not just ----

A. Oh, once.

Q. Say again, please?

A. Once.

Q. All of the other times you are referring to, that was the oral sex?

A. Yes, sir.

Q. And touching and rubbing his penis on you?

A. Yes, sir.

Q. Now, how old were you again when you were living in Colorado Springs?

A. In Colorado Springs, I was 5 and 6 and maybe 7.

TC: One moment, Your Honor.

[Pause.].

Q. You say that there was just the one time that you remember that you were penetrated by your stepfather?

A. Yes, sir.

Q. When he would rub his penis up against you, do you ever recall if he penetrated you a little bit?

A. I don't recall. I'm pretty sure it would have hurt as much as it hurt that one time.

Q. When he was rubbing his penis up against your vagina, was he rubbing hard?

A. I don't know. I just remember -- I remember it happening. I remember not liking it, but I remember him telling me what to do. I remember him telling me not to say anything or not to talk or just be quiet, stuff like that. Yeah.

Q. How did you feel after that one time in your parents' bedroom when your stepfather finished and said, "Don't tell anybody. This is a Daddy/[redacted] thing"? How did you feel?

A. I always felt strange afterwards, like dirty, like I needed to take a bath afterwards. I felt like crying but, you know, I didn't want to cry because, you know, I didn't want to come home and mommy be crying because -- I didn't want to say anything.

TC: The government has no further questions at this time, Your Honor.

MJ: Cross?

DC: Yes, ma'am.

CROSS-EXAMINATION

Questions by the defense counsel:

Q. Miss C[redacted], at the beginning of your testimony, Captain Pinkston asked you a number of questions about places where you lived. And you mentioned Fort Bliss/El Paso; Colorado Springs; Killeen, Texas; and Fort Knox. Are those in the right order?

A. Yes.

Q. And your earliest memories come from El Paso?

A. Yeah.

Q. You don't remember any places prior to El Paso?

A. Yeah.

Q. Okay. Now, just describing the one particular incident, you said that you were facing away from him and laying on your mother's bed?

A. No. I was sitting on the floor, beside my mother's door curled up on my knees.

Q. Okay. You were facing away from him though?

A. I had -- I was bent over like this [demonstrating] and my head was faced towards the wall and sometimes it was down, looking at my hands.

MJ: Let the record reflect the witness assumed a sort of modified fetal position with her arms bent in front of her and her head -- her back crunched over in a -- sort of like a reverse-C position with her head turned to the right.

Do both sides agree with that description?

TC: Yes, Your Honor.

DC: Yes, Your Honor.

Q. And you said it kind of hurt in your private area?

A. Yes, sir.

Q. None of the other times you remember that it hurt?

A. No.

Q. Now, this occurred in Colorado Springs?

A. Yes, sir.

Q. And you said you were between ages 5 and 7. Do you recall how old you were this particular time?

A. No, sir. I remember which house we lived in though.

Q. After Colorado Springs, where did Staff Sergeant Wilson go?

A. After Colorado Springs -- when we were in Colorado Springs, he went to Korea and we went down to El Paso.

Q. And then, after he came back from Korea, he came back and rejoined you?

A. Yes.

Q. He never -- he never physically touched you again?

A. No. But he did attempt

Q. And he attempted by asking you what?

A. Yes. Actually, me and my little sisters, D[redacted] and C[redacted], wanted to play with the Play-Doh and he told us that -- he asked me -- he said, "Do you remember what we used to do in Colorado?" I said, "Yes." He said, "Well, do you want to do that again?" I said, "No." And he said, "But I will let you play with the Play-Doh." And I said, "No." He said, "Okay. Are you sure?" And I said, "Yes." And he said, "All right. Then go."

Q. And this was in El Paso?

A. Yes. This was on Whitey Ford.

Q. And this was immediately after his return from Korea?

A. I don't know if it was immediately after, but it was after he returned.

Q. And you first -- the fact that he is sitting here was based upon you bringing this to somebody's attention ----

A. Yes.

Q. ---- in April of this year?

A. Yes.

Q. And you hadn't said anything prior to this?

A. Actually, I said something while we were in Colorado Springs before he went to Korea.

Q. What happened then?

A. I told my mother -- I remember his stuff was everywhere. I think he was, like, packing and getting ready to move his stuff. And

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I told my mother what happened, and she just didn't believe me. And she started crying, and she was crying and crying and crying. Well, because she was crying, my sisters were crying. And then I remember him -- him, referring to Jim -- I remember him crying. And I remember him looking at me and he said, "Take it back. Tell her it's not true. Tell her it didn't happen. Take it back. Please take it back." He said, "Everybody is crying. Take it back."

Q. And you took it back?

A. I did take it back.

Q. And then you didn't say anything until April?

A. Yes.

Q. And that came about because you had a conversation with a friend?

A. Actually, what happened there was -- it was a fight between me and my mother. We had been getting into fights constantly. It was just another verbal fight. I mean, I swear sometimes we're more like sisters than mother and daughter. So we were arguing, and I told her, "Do you want to know why I hate you so much? Why don't you go ask" -- "Why don't you go ask your husband? I'm tired of covering up his dirty little secret -- why I hate you, why I hate him, and why I don't like to be home." And I stormed out of the house.

Well, at that time, [redacted] -- she is a friend of mine. I call her my cousin, but we're not really cousins. She was at the house, and we were going to the bus stop. And the first thing

I remember her saying right there is, "I'm going to kill him." She's got a short temper. I know she's there though. She's like, "You've got to tell somebody. You have to tell somebody." And I'm like, "No." And she's like "You've got to go tell somebody. You have to tell somebody, [redacted]. You have to tell somebody. I didn't tell somebody and it screwed me up. No. You've got to go tell somebody." So she ended up dragging me to the school counselor. I told the school counselor, Ms. Stewart, and she was the one who filed the report.

Q. And since then you've talked to investigators?

A. Yeah. I've talked to millions of people.

Q. And they've helped you recall the incidents?

A. Yes.

Q. And you're receiving some counseling right now?

A. Yes, I am. I'm receiving counseling for Mr. [redacted] -- I think his real name is [redacted] -- that's how you spell it and [redacted] and she's right there [pointing to the gallery].

Q. And you go through all of the descriptions of what happened?

A. Yeah. I do talk about what happened a lot?

DC: One moment.

[Pause.]

DC: I have nothing further. Thank you.

MJ: Redirect?

TC: Yes, Your Honor.

REDIRECT EXAMINATION

Questions by the trial counsel:

Q. How old were you when you first told your mom about the incident?

A. I don't know. He was about to go to Korea -- maybe 6.

Q. And, at that point, would you consider your relationship with your stepfather close?

A. Not really. I wouldn't really ever consider us close.

Q. Why did you tell your mom at that point? Was there any reason behind telling her?

A. I remember that I was -- I remember thinking that it was wrong and that I decided that it wasn't supposed to happen and that mommy needed to know because mommy was the one that I trusted most in my life then. So I decided to tell her.

Q. Let's get back to what happened in Colorado Springs in your stepfather's bedroom real quick. When you were lying on the bed in the position that you described earlier, did you ever look back at your stepfather?

A. I was on the floor beside the door, not on the bed.

Q. Okay. Where were his hands at that point? Do you remember? Did you see them at all?

A. I don't remember.

Q. Where were his hips and his genital area at that point in relation to you?

A. Placed right behind my backside.

Q. So it was on your rear end essentially?

A. Yes, sir.

TC: No more questions, Your Honor.

MJ: Anything else?

DC: Just one question.

RECROSS-EXAMINATION

Questions by the defense counsel:

Q. Since you've made these allegations, has your relationship with your mother improved?

A. We have always been really distant, and we have always had lots of problems. And, I guess, it may have improved a little bit but I'm still -- I will always be a little rocky about everything. I really don't trust much of anybody anymore.

DC: Thank you.

EXAMINATION BY THE COURT-MARTIAL

Questions by the military judge:

Q. Rene, did you just live in one place in Colorado Springs?

A. No, ma'am. We lived with [redacted] -- I don't remember their names. It was a few friends of my parents -- my stepfather and my mother. They had a little daughter named [redacted]. And also we lived in the apartment. And then when we moved back --

we went El Paso, Colorado Springs, El Paso, Colorado Springs. So when we moved back, we lived on Dale or something like that. It was a blue house with a bi-level backyard.

Q. Okay. When you lived with [redacted] and ----

A. [redacted].

Q. ---- [redacted] was that in a house or an apartment?

A. I think it was a house. They had a stairwell -- I'm pretty sure it was a house because I remember it all very well.

Q. Okay. But the sexual abuse only occurred the first time you were in Colorado Springs or did it occur both times?

[Pause.]

Q. Do you understand the question?

A. Yes, ma'am. I don't know.

Q. How old were you the second time you were in Colorado Springs? Do you remember what grade you were in?

A. I don't know, maybe 4th grade -- maybe.

Q. Do you remember what you were wearing on this occasion when the accused penetrated you?

A. No, ma'am.

Q. Okay. And you said that you were curled up on the floor by the door?

A. Uhm-hmm [indicating an affirmative response].

Q. And then, describe to me how -- you felt something hurt?

A. Yes.

Q. Did your stepfather stand you up or -- did you move?

A. I didn't move from the position I was in. I remember staying curled up pretty tightly. I remember crying because I could see the tears falling on my hands. I had little chubby hands.

Q. But you remember him penetrating you from behind rather than the front?

A. Yes.

Q. I understand that back then you probably didn't know what sexual intercourse was.

A. Yes, ma'am.

Q. But you know what it is now?

A. Yes, ma'am.

Q. And you believe he penetrated you with his penis?

A. Yes, ma'am.

MJ: Okay. Anything else for Rene?

REDIRECT EXAMINATION

Questions by the trial counsel:

Q. [redacted] real quick, this penetration, did that occur before your stepfather left for Korea?

A. Yes, sir.

TC: No further questions, Your Honor.

MJ: Okay. Temporary?

TC: Temporary, Your Honor.

MJ: Okay.

MJ: Court is called to order. All parties present when the court recessed are again present.

Do you have any evidence to present?

DC: No, ma'am. The defense rests.

MJ: Okay. Are you ready to argue?

TC: One moment, Your Honor.

[Pause.]

TC: May it please the court, Your Honor, R[redacted] C[redacted] took the stand today to talk about how she was penetrated by her stepfather. She was living in Colorado Springs. She was a young girl. All she wanted was that teddy bear at the time. At the opening of this case, you heard how the accused would bribe his stepdaughter to perform sexual acts on him. [redacted] said Oreos, Halloween candy. The one time she wanted her teddy bear because she was in pain. She was crying. She couldn't have it. Why? Because the accused was raping her, and he wanted to finish what he was doing before she could go get her teddy bear and have some sense of security. Samantha Wilson took the stand and she told you where they were living. She even has the lease for the time she was living in Colorado Springs.

R[redacted] C[redacted] had something taken from her. She had it taken from her numerous times. While he may have only raped her once, he did engage in other acts of -- the government counsel is not even sure how to describe what it is when a stepfather molests his stepdaughter. He would perform oral sex on her. He would tell her

how to perform oral sex on him. He would ejaculate in her mouth. He would ejaculate on her and, ultimately, penetrate her. She was in a fetal position -- semi-fetal position, curled up on the floor with her rear end in the air. He was on top of her and had sex with her. She was crying. It hurts. She was of tender years. She obviously didn't understand what was going on. She didn't know at the time exactly what had happened, but she knows now. And she's struggling with it as you can tell from some of her questions -- or responses to questions both from government counsel and defense counsel.

What type of person engages in the systematic perversion of his stepdaughter? That person is in the courtroom right now, and it's the accused. He raped his stepdaughter. She told you how he penetrated her, how she obviously couldn't consent because she was young, how it was done by force.

And, even if R[redacted] didn't know what had happened -- or what was happening to her at that time, let's take a look at the accused's sworn statement that he gave to CID. On the final page, he didn't want to admit outright that he had entered her vaginal canal. He said, "It could have happened. I remember her saying, "Ouch. Yes, that hurts." "I can say that it's a possibility" -- that he penetrated her vaginal canal. He doesn't waver like that when he was asked if his penis had ever entered in between R[redacted]s external labia. He says, "Yes." He rubbed his penis against her vagina and,

ultimately, inserted his penis into her vagina. He admits it. R[redacted] told you about it as well.

The government has met its burden, has proven that R[redacted] was raped by her stepfather. The government asks you to find the accused guilty of raping his stepfather while in Colorado Springs and her parents' bedroom.

Thank you, Your Honor.

MJ: Defense?

DC: There is no doubt that Staff Sergeant Wilson did something inappropriate with respect to his daughter. He admitted that.

Memory does not improve with age. We heard Miss C[redacted] who obviously knows as Staff Sergeant Wilson admitted -- that some pretty horrible things did happen to her. No one denies that. However, Miss C[redacted] did say in the beginning, "I have very vivid memories." But then later on, when describing this specific instance, she said, "Well, my memory is not all that clear." She doesn't remember certain details which might or might not be understandable -- clothing worn. She says that Staff Sergeant Wilson was speaking but doesn't remember exactly what was said.

Now, this is not a question of penetration into the vaginal canal. This is whether the penetration was merely sufficient to penetrate the external labia, the "however slight" aspect of the offense.

The statement by Staff Sergeant Wilson taken in the context of a soldier doing a CID interview who -- where he was essentially undergoing a cathartic moment, very emotional and being guided by an experienced CID agent -- he goes back and forth. He says, "I don't remember. I wasn't looking down there. It's possible." Then, at the prompting of the CID agent, he says, "Yes."

But, when we look at the facts and we look at the residual of that statement, we see the contradictions within this statement that weren't clarified, avenues that weren't pursued during this interview with CID. We don't know the circumstances, despite the testimony of Agent Heintzman, of what exactly was meant, what exactly was the understanding? We knew in here when he was describing the actual incident -- "I wasn't looking down there. I didn't know. It's a possibility." But we don't have confirmation.

Now, Miss C[redacted] she is obviously again testifying about what she knows and what she recalls. However, memory doesn't improve with age. A significant period of time has gone by and she was of a young age when these allegations occurred. There is admitted memory lapses by Miss C[redacted]. She does remember certain incidences, but the question is -- and when asked about this particular incident -- and probably rightly so for the difficulty of testifying about something of this particular nature, we didn't go into the nitty-gritty. We didn't and the government didn't produce diagrams. He didn't produce medical evidence. He didn't produce medical testimony about this.

We just heard a girl saying, "Well, it hurt and I'm sure he penetrated me to some degree." But she wasn't looking at him according to her own testimony. And the essential -- when we get down to the nitty-gritty, is that it was hurting somewhere in the vaginal area.

Now, although she understands at this point in time what intercourse is, her reflections back are colored by an understanding that's gained later on. We don't know. We know that there was something going on back there, but we don't know whether the "however slight" standard was met.

We do also know with Miss C[redacted] -- she's undergoing a lot of change right now since making these allegations after not having done anything. We heard her testify that she has talked to a lot -- a lot of different people who are counselors, investigators -- different individuals -- you're helping her recall the memory. We all know and it makes sense that sometimes -- that multiple times at -- a later date can help color or influence your recollection or memory of an event.

Because of these reasons, the defense does not believe that the reasonable doubt standard has been met with respect to this particular offense. No doubt Staff Sergeant Wilson has admitted to some acts but the question is on this specific incident, has the standard of reasonable doubt been met?

I would also ask the court to note that it is very clear that this only pertains to one incident, not on divers occasions as alleged in the charge. I would also ask the court to review and reflect on whether all of the elements have been met and whether potentially even -- under the circumstances and given the tender age of the individual that the lesser included offense of carnal knowledge, lacking in force might be appropriate.

Thank you.

MJ: Do you have any rebuttal?

TC: May it please the court, the defense wants you to say -- or believe that she doesn't remember much. Look at the consistencies between Rene's testimony on the stand today and the accused's statements. The accused essentially corroborates everything that Rene said in her statement -- or in her testimony here today. What do we know? Well, we do know that the accused rubbed his penis against her -- rubbed it against her vaginal area. He admitted rubbing it between her labia. There was no issue, whatsoever, whether he understood -- or at least according to the CID agent when they were talking about what labia meant that he responded to the CID agent, "I know what it means. I know what it is." "Did you ever rub it in between her labia?" "Yes." The inconsistency was around whether he ever entered her vaginal canal. He wavered a little bit -- "I don't know. It could've happened. It's a possibility." He didn't outright deny it. He didn't outright deny it because later he

admitted -- just a few sentences down -- "I rubbed my penis against her vagina and in between her labia." That, by itself, constitutes the penetration. That, by itself, constitutes rape under the UCMJ.

But what we have is more. We have R[redacted] talking about how she was penetrated, how it hurt. He rubbed her vagina several times with his penis and it never hurt before. It was only when he penetrated that she said, "Ouch. That hurts." There are consistencies between her testimony and even what the accused said.

And while it did happen a number of years ago, there are certain things you don't forget. You heard her talk about how she smells a washcloth and it brings back memories because she had to wipe herself off with a dirty washcloth. There are certain things that are triggering her memory. And it was talking to other people that ultimately got her to talk to professionals and launch this investigation into the acts of her stepfather.

The government has met its burden. The government asks the court to enter a finding of guilty for Specification 2 of Charge II.

MJ: You would agree that, at most, it would be guilty except the words "on divers occasions"?

TC: Yes, Your Honor. The government would agree to that.

MJ: Okay. Before I close to deliberate, I'm showing that Prosecution Exhibits 1 and 2 have been admitted. Do both sides agree?

TC: Yes, Your Honor.

MJ: Staff Sergeant James D. Wilson, this court finds you:

Of Charge I and its Specification:	Guilty.
Of Specification 1 of Charge II:	Not Guilty.
Of Specification 2 of Charge II:	Guilty, except the words "on divers occasions".
Of the excepted words:	Not Guilty.
Of Charge II:	Guilty.
Of Charge III and its Specifications:	Guilty.
Of Specification 1 of Charge IV:	Guilty, except the words "on divers occasions" and "placing his penis upon her private parts".
Of the excepted words:	Not Guilty.
Of Specification 2 of Charge IV:	Guilty.
Of Charge IV:	Guilty.

You may be seated.

[The accused and his defense counsel did as directed.]

MJ: Sergeant Wilson, we now enter the sentencing phase of the trial where you have the right to present matters in extenuation and mitigation, that is, matters about the offenses or yourself which you want me to consider in deciding your sentence.

In addition to the testimony of witnesses and the offering of documentary evidence, you may, yourself, testify under oath as to these matters or you may remain silent, in which case I will not draw any adverse inference from your silence.

On the other hand, if you desire, you may make an unsworn statement. Because this statement is unsworn, you cannot be cross-examined on it, however, the government may offer evidence to rebut any statement of fact contained in an unsworn statement. An

MJ: Accused and counsel, please rise.

[The accused and defense counsel did as directed.]

MJ: Staff Sergeant James D. Wilson, this court sentences you:

To be reduced to E1;
To be confined for 14 years; and
To be Dishonorably Discharged from the service.

You may be seated.

[The accused and defense counsel did as directed.]

MJ: Is there anything else to take up at this time?

TC: No, Your Honor.

DC: No, ma'am.

MJ: Court is adjourned.

[The court-martial adjourned at 1135, 16 November 2006.]

[END OF PAGE]

[The post-trial session was called to order at 1510, 13 February 2007.]

MJ: The court is called to order. This is a post-trial session ordered by myself pursuant to R.C.M. 1102(b)(2) to inquire into the legal sufficiencies of findings of guilty in this case due to the potential statute of limitations problem.

The record of trial has not yet been authenticated.

All parties present when we adjourned are again present with the exception of Captain Kevin Landtroop. Has Captain Landtroop been excused by the SJA?

TC: Yes, Your Honor. He has.

MJ: Okay. I believe it is on or about 8 December or within a few days after that I had notified counsel by e-mail that I thought we had a statute of limitations problem with regard to some of the charges in the accused's case, specifically, the sodomy and indecent acts.

I had discovered the issue while reading a back issue of the Army Lawyer some time during the time I was on leave. I was TDY for two weeks following that week and returned to Fort Stewart on 8 December.

After that e-mail, I subsequently set a deadline of 5 January for briefs on the issue and I received those briefs. Appellate Exhibit VII is the defense motion for appropriate relief and Appellate Exhibit VIII is the government's response.

[The trial counsel and defense counsel approached the bench and read AE IX.]

MJ: Why don't we take a recess in place while you all read that?

[The court-martial recessed in place at 1517, 13 February 2007.]

[The court-martial was called to order at 1518, 13 February 2007.]

MJ: Court is called to order. All parties present when the court recessed are again present.

Did you both read my ruling?

TC: Yes, Your Honor.

DC: Yes, ma'am.

MJ: Any questions about it?

TC: No, ma'am. No questions.

DC: No, ma'am.

MJ: Okay. And basically, Private Wilson, what I have done here is basically I am dismissing -- at this time I am dismissing Charges III and IV, which is the sodomy specifications and the indecent acts. I am dismissing those because they are barred by the statute of limitations.

That means that the findings of guilty as to Charge I, which was the false official statement and Charge II, Specification 2, which was rape on one occasion between February '96 and March '98, those findings still stand.

Do you understand that?

Appendix B. Prosecution Exhibit 2: Sworn Statement SSG Wilson

SWORN STATEMENT

LOCATION: Fort Stewart, GA
FILE NUMBER: [redacted]
DATE: 7 Jun 06 JDW
TIME: 1525 JDW
NAME: WILSON, James D.
SSAN: [redacted]
GRADE/RANK: SSG
ORGANIZATION OR ADDRESS: F Company, 3rd Forward Support Battalion, Fort Stewart, GA 31314

JDW I, James D. WILSON, want to make the following statement under oath:
I wish to make this statement of my own free will to clarify the previous statement I provided to Fort Stewart CID. While I was stationed at Fort Bliss, TX, I got married to [redacted] on 20 Aug 94. S[redacted] already had a daughter named R[redacted] C[redacted]. During the late summer of 1995, I took R[redacted] into my bedroom and asked her to perform oral sex on me. I had to tell her what to do. She did as I asked and it was done. There weren't any other incidents at Fort Bliss. The next incident occurred at Fort Carson, CO. Actually in Colorado Springs, I was stationed at Fort Carson. I asked her to go to my bedroom with me and we laid in my bed. I began to touch her and I basically rubbed on her while I masturbated myself until I was done. That would be one incident. The other incident was in the bathroom in our apartment. It was pretty much the same thing. I rubbed up against her and I rubbed my penis on her vagina. I got myself stimulated and masturbated until I ejaculated on her. The next incident was also there in the bathroom. I did the same thing. I asked her if I could rub on her and she said yes. I rubbed on her until I was stimulated and masturbated. That time I actually ejaculated in the toilet.
QUESTIONS ARE BY SA HEINTZMAN; ANSWERS ARE BY WILSON
Q: How old was R[redacted] when you had her engage in oral sex with you at Fort Bliss?
A: 5 years old.
Q: Did you have to tell R[redacted] what to do?
A: Yes.
Q: What did you tell [redacted] to do?
A: I told her to put her lips around my penis and just move it back and forth inside her mouth.
Q: Did R[redacted] say anything to you ?
A: No.
Q: Did you ejaculate when R[redacted] had your penis in her mouth?
A: No.
Q: Did you ejaculate as a result of R[redacted] placing her mouth on your penis?
A: No.
Q: How long did R[redacted] have your penis in her mouth?
A: Maybe about 30 seconds or so, it didn't last very long.
Q: Did you end up ejaculating?
A: Yes, through masturbation.
Q: Did you tell R[redacted] not to tell anyone what she had done?
A: Yes. JDW

INITIALS OF PERSON MAKING STATEMENT JDW PAGE 1 OF 3 PAGES

DA Form 2823-E

FOR OFFICIAL USE ONLY

Prosecution Exhibit 2 for ID

Sworn Statement of SSG WILSON, taken at Fort Stewart, GA 7 Jun 06, CONTINUED:

Q: Did your penis enter her vagina, which caused her to make that statement?
A: I do not know. She never stated that it did and honestly I don't know.
Q: Did the head of your penis enter her vagina, meaning her external labia, and you then stopped before entering her vaginal canal when she stated that it hurt?
A: That could have happened, I remember her saying ouch, yes, that hurts, then I stopped. I can say that is a possibility.
Q: Do you understand what external labia means?
A: Yes.
Q: Do you understand what vaginal canal means?
A: Yes
Q: Did your penis ever enter R[redacted]'s vaginal canal?
A: No.
Q: Did your penis ever enter in between R[redacted]'s external labia?
A: Yes.
Q: R[redacted] stated that you engaged in sexual intercourse with her, is this true?
A: No.
Q: Did you become sexually aroused as a result of the sexual contact between yourself and R[redacted]?
A: Yes.
Q: Are there any other incidents of sexual contact between you and R[redacted] that you have not told me about?
A: None that I can remember.
Q: Do you have anything to add to this statement?
A: No I don't///End of Statement/// JDW

AFFIDAVIT

I, James D. WILSON, have read or have had read to me this statement which begins on page 1 and ends on page 3. I fully understand the contents of the entire statement made by me. The statement is true. I have initialed all corrections and have initialed the bottom of each page containing the statement. I have made this statement freely without hope of benefit or reward, without threat of punishment, and without coercion, unlawful influence or unlawful inducement.

Witness #1:

_____

_____

_____

(Signature of Person Making Statement)

Subscribed and sworn before me, a person authorized by law to administer oaths, this Wednesday, 7 June, 2006, at Fort Stewart, GA 31314

Witness #2:

_____

_____

_____

(Signature of Person Administering Oath)

SA JAMES P. HEINTZMAN

(Typed name of Person Administering Oath)

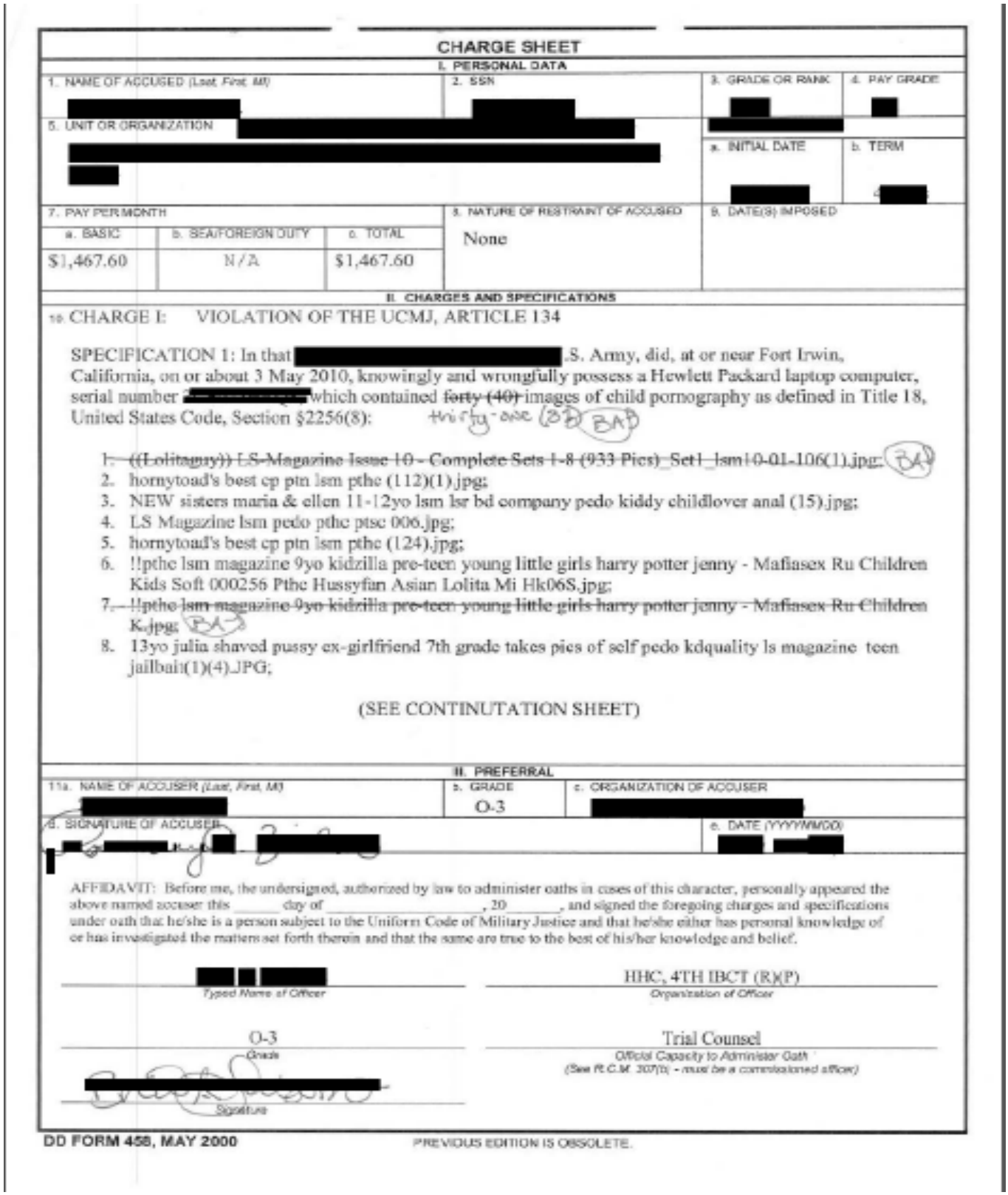
Article 136 UCMJ

INITIALS OF PERSON MAKING STATEMENT JDW

DA Form 2823-E

FOR OFFICIAL USE ONLY

Appendix C. Sample Charge Sheet



CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. SSN	3. GRADE OR RANK	4. PAY GRADE
[redacted]	[redacted]	[redacted]	[redacted]

5. UNIT OR ORGANIZATION	a. INITIAL DATE	b. TERM
[redacted]	[redacted]	[redacted]

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$1,467.60	N/A	$1,467.60	None	

II. CHARGES AND SPECIFICATIONS

10 CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 134

SPECIFICATION 1: In that [redacted], U.S. Army, did, at or near Fort Irwin, California, on or about 3 May 2010, knowingly and wrongfully possess a Hewlett Packard laptop computer, serial number [redacted] which contained ~~forty (40)~~ thirty-one (BD BAD) images of child pornography as defined in Title 18, United States Code, Section §2256(8):

1. ~~((Lolitagay)) LS-Magazine Issue 10 - Complete Sets 1-8 (933 Pics) Set1 lsm10-01-106(1).jpg;~~ (BAD)
2. hornytoad's best cp pth lsm pthc (112)(1).jpg;
3. NEW sisters maria & ellen 11-12yo lsm lsr bd company pedo kiddy childlover anal (15).jpg;
4. LS Magazine lsm pedo pthc ptsc 006.jpg;
5. hornytoad's best cp pth lsm pthc (124).jpg;
6. !!pthc lsm magazine 9yo kidzilla pre-teen young little girls harry potter jenny - Mafiasex Ru Children Kids Soft 000256 Pthc Hussyfan Asian Lolita Mi Hk06S.jpg;
7. ~~!!pthc lsm magazine 9yo kidzilla pre-teen young little girls harry potter jenny - Mafiasex Ru Children K.jpg;~~ (BAD)
8. 13yo julia shaved pussy ex-girlfriend 7th grade takes pics of self pedo kdquality ls magazine teen jailbait(1)(4).JPG;

(SEE CONTINUTATION SHEET)

II. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	O-3	[redacted]

d. SIGNATURE OF ACCUSER [redacted] e. DATE (YYYYMMDD) [redacted]

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this _____ day of _____, 20_____, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

[redacted]
Typed Name of Officer

HHC, 4TH IBCT (R)(P)
Organization of Officer

O-3
Grade

Trial Counsel
Official Capacity to Administer Oath
(See R.C.M. 307(b) - must be a commissioned officer)

[redacted]
Signature

DD FORM 458, MAY 2000 PREVIOUS EDITION IS OBSOLETE.

CONTINUATION SHEET, DD FORM 458, PERTAINING TO [redacted]

Item 10 (Cont'd):

9. ~~hornytoad's best cp ptn lsm pthc (131).jpg;~~
10. hornytoad's best cp ptn lsm pthc (110)(1).jpg;
11. ~~ls-magazine-lsm-pthc-als-nudism-ls-island-ism-020-059.jpg;~~
12. ls-magazine-lsm-pthc-als-nudism-ls-island-ism-018-078.jpg;
13. ls-magazine-lsm-pthc-als-nudism-ls-island-ism-018-027.jpg;
14. 10h-cindy-lsm-0002(1).jpg;
15. hornytoad's best cp ptn lsm pthc (20).jpg;
16. hornytoad's best cp ptn lsm pthc (113).jpg;
17. hornytoad's best cp ptn lsm pthc (139).jpg;
18. hornytoad's best cp ptn lsm pthc (249).jpg;
19. hornytoad's best cp ptn lsm pthc (107).jpg;
20. hornytoad's best cp ptn lsm pthc (109)(2).jpg;
21. hornytoad's best cp ptn lsm pthc (199).jpg;
22. hornytoad's best cp ptn lsm pthc (184).jpg;
23. hornytoad's best cp ptn lsm pthc (105).jpg;
24. hornytoad's best cp ptn lsm pthc (244).jpg;
25. ~~hornytoad's best cp ptn lsm pthc (246).jpg;~~
26. hornytoad's best cp ptn lsm pthc (321).jpg;
27. hornytoad's best cp ptn lsm pthc (322)(1).jpg;
28. ~~hornytoad's best cp ptn lsm pthc (309).jpg;~~
29. ~~hornytoad's best cp ptn lsm pthc (272).jpg;~~
30. hornytoad's best cp ptn lsm pthc (253)(1).jpg;
31. hornytoad's best cp ptn lsm pthc (276).jpg;
32. ~~ls-004 closeup Lolitas preteen young underaged hairless pussy pedo pthc ls-models bd-oompany.jpg;~~
33. hornytoad's best cp ptn lsm pthc (196).jpg;
34. hornytoad's best cp ptn lsm pthc (248)(1).jpg;
35. hornytoad's best cp ptn lsm pthc (219).jpg;
36. hornytoad's best cp ptn lsm pthc (126).jpg;
37. LS Models lsm pedo pthc ptsc 113.jpg;
38. hornytoad's best cp ptn lsm pthc (145).jpg
39. ~~Preview-T-1153703352-(Pthc)(Mast) 12yo Bobbie (girl) full mast to orgasm (original) VCD.mpg; and~~
40. (Pthc)(Mast) 12yo Bobbie (girl) full mast to orgasm (original) VCD.mpg;

which conduct was prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces.

(SEE CONTINUATION SHEET)

CONTINUATION SHEET, DD FORM 458, PERTAINING TO [redacted]

Item 10 (Cont'd):

SPECIFICATION 2: In that [redacted].S. Army, did, at or near Fort Stewart, Georgia, on or about 11 May 2010, knowingly and wrongfully possess a Dell laptop computer, serial number [redacted], which contained four (4) images of child pornography as defined in Title 18, United States Code, Section §2256(8):

1. (Pthc) Open f49-I (9Yo Girl Fucked With 11Yo Boy) (kleuterkutje) (pedo) (ptsc) (TVG) (babyshivid) (childlover) (r@ygold) (nablot) (st peter.mpg;
2. 8 and 10 year old brother and sister have pthc sex lolita ptch R@ygold hussyfan underage preteen .mpg;
3. (((Kingpass))) Cameraman shoots girl 10yo & cums on her PTHC -G- Another Cute Little Moscow Girl.mpg; and
4. ANNI 10 Hussyfan) (Pthc) Vicky 7yo and 10yo 69 Pedo Child Porno Lolita.mpg.

which conduct was prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces.

Appendix D. Excerpt: CAAF Daily Journal

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

DAILY JOURNAL

No. 09-219

Thursday, July 23, 2009

PETITIONS FOR GRANT OF REVIEW DENIED

No. 09-0177/AR. U.S. v. Victor E. SANGA. CCA 20060574.

No. 09-0300/AR. U.S. v. John F. GRIMES. CCA 20060361.

No. 09-0498/AR. U.S. v. Michael J. ANDERSEN. CCA 20071006.

PETITION FO RECONSIDERATION DENIED

No. 09-0010/AR. U.S. v. James D. WILSON. CCA 20061187.
Appellee's petition for reconsideration of this Court's decision, 67 M.J. 423 (C.A.A.F. 2009), denied.

PETITIONS FOR GRANT OF REVIEW FILED

No. 09-0753/AR. U.S. v. Christopher M. WALKER. CCA 20081105.

INTERLOCUTORY ORDERS

No. 09-0010/AR. U.S. v. James D. WILSON. CCA 20061187.
Appellee's motion for oral argument is denied.

MANDATES ISSUED

No. 08-0805/MC. U.S. v. Manasses A. PAIGE. CCA 200600587.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL

No. 12-059

Wednesday, November 30, 2011

APPEALS-SUMMARY DISPOSITIONS

No. 12-0012/AF. U.S. v. Natasha S. JUSTICE. CCA 37446. Review granted on the following issue:

WHETHER AN ARTICLE 134 CLAUSE 1 OR 2 SPECIFICATION THAT FAILS TO EXPRESSLY ALLEGE EITHER POTENTIAL TERMINAL ELEMENT STATES AN OFFENSE UNDER THE SUPREME COURT'S HOLDINGS IN UNITED STATES v. RESENDIZ-PONCE AND RUSSELL v. UNITED STATES, AND THIS COURT'S OPINION IN UNITED STATES v. FOSLER, 70 M.J. 225 (C.A.A.F. 2011).

The decision of the United States Air Force Court of Criminal Appeals is vacated. The record of trial is returned to the Judge Advocate General of the Air Force for remand to that court for consideration of the granted issue in light of United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011). [See also ORDERS GRANTING PETITION FOR REVIEW this date.]

BAKER, Chief Judge (dissenting):
I dissent for the reasons stated in my dissenting opinion in Fosler. United States v. Fosler, 70 M.J. 225, 240-47 (C.A.A.F. 2011).

No. 12-0044/AF. U.S. v. Varun K NAKULA. CCA 37658. Review granted on the following issue:

WHETHER THE SPECIFICATION FOR FRATERNIZATION FAILS TO STATE AN OFFENSE BECAUSE IT ALLEGES A VIOLATION OF ARTICLE 134 BUT FAILS TO ALLEGE ANY OF ARTICLE 134'S TERMINAL ELEMENTS.

The decision of the United States Air Force Court of Criminal Appeals is vacated. The record of trial is returned to the Judge Advocate General of the Air Force for remand to that court for consideration of the granted issue in light of United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011). [See also ORDERS GRANTING PETITION FOR REVIEW this date.]

BAKER, Chief Judge (dissenting):
I dissent for the reasons stated in my dissenting opinion in Fosler. United States v. Fosler, 70 M.J. 225, 240-47 (C.A.A.F. 2011).

ORDERS GRANTING PETITION FOR REVIEW

No. 12-0090/AF. U.S. v. Joseph A. HAYES. CCA 37588. Review granted on the following issue:

WHETHER THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO DISMISS FOR FAILURE TO STATE AN OFFENSE, WHERE THE SPECIFICATION OMITTED REFERENCE TO A REQUIRED ELEMENT UNDER STATE LAW FOR A FINDING OF GUILTY FOR WRONGFUL CONSUMPTION OF ALCOHOL WHILE UNDER AGE 21.

Briefs will be filed under Rule 25.

No. 12-0012/AF. U.S. v. Natasha S. JUSTICE. CCA 37446. [See also ORDERS GRANTING PETITION FOR REVIEW this date.]

No. 12-0044/AF. U.S. v. Varun K MAKULA. CCA 37658. [See also ORDERS GRANTING PETITION FOR REVIEW this date.]

PETITIONS FOR GRANT OF REVIEW DENIED

No. 12-0022/AR. U.S. v. Warren B. GILBERTSON. CCA 20080428.
No. 12-0024/MC. U.S. v. Steven E. MADUERI. CCA 201000573.
No. 12-0130/AR. U.S. v. Jason L. SMITH. CCA 20110165.

INTERLOCUTORY ORDERS

No. 12-0143/MC. U.S. v. Richard A. GARCIA-TOLSON. CCA 2010000610. Appellee's motion to extend time to file an answer to the supplement to the petition for grant of review granted to December 8, 2011.

No. 12-0173/NA. U.S. v. David A. STROUD. CCA 201100145. On consideration of the motion filed by Lieutenant Daniel Napier for leave to withdraw as appellate defense counsel, it appears that the Judge Advocate General has assigned another counsel to represent Appellant and the new attorney has assumed the representation of said Appellant. Accordingly, it is ordered that said motion is hereby granted.

No. 12-0182/AR. U.S. v. Nathaniel D. BOZMAN. CCA 20110077. Appellant's motion to extend time to file the supplement to the petition for grant of review granted to December 19, 2011.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL
No. 12-058
Tuesday, November 29, 2011

PETITIONS FOR GRANT OF REVIEW FILED

No. 12-0185/AR. U.S. v. Brandon L. MAULDIN. CCA 20100647.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL
No. 12-057
Monday, November 28, 2011

PETITIONS FOR GRANT OF REVIEW DENIED

Court of Criminal Appeals, it is ordered that said petition is granted on the following issue :

> WHETHER SPECIFICATION 2 OF CHARGE IV FAILS TO STATE AN OFFENSE AS IT DOES NOT ALLEGE, EXPRESSLY OR BY NECESSARY IMPLICATION, THE "TERMINAL ELEMENT" AS REQUIRED BY UNITED STATES v. FOSLER, 70 M.J. 225 (C.A.A.F. 2011).

The decision of the United States Army Court of Criminal Appeals is vacated. The record of trial is returned to the Judge Advocate General of the Army for remand to that court for consideration of the granted issue in light of United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011). [See also ORDERS GRANTING PETITION FOR REVIEW this date.]

> BAKER, Chief Judge (dissenting):
>
> I dissent for the reasons stated in my dissenting opinion in Fosler. United States v. Fosler, 70 M.J. 225, 240-47 (C.A.A.F. 2011).

No. 12-0124/NA. U.S. v. Kelvin J.C. RODEO. CCA 201000590. On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, we note that the convening authority approved the sentence, which included a dishonorable discharge, and then stated:

> In accordance with the Uniform Code of Military Justice, the Manual for Courts-Martial, applicable regulations, and this action, the sentence is ordered executed.

Under Article 71(c)(1), UCMJ, a punitive discharge cannot be ordered executed until, after the completion of direct appellate review, there is a final judgment as to the legality of the proceedings. Thus, to the extent that the convening authority's action purported to execute the dishonorable discharge, it was a nullity. To avoid any error in this regard, we again suggest that the model "Forms for Action" in Manual for Courts-Martial, United States app. 16 at A16-1 - A16-6 (2008 ed.) be revised. See United States v. Politte, 63 M.J. 24, 26 n.11 (C.A.A.F. 2006). Accordingly, it is ordered that said petition is granted, and the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed. [See also ORDERS GRANTING PETITION FOR REVIEW this date.]

ORDERS GRANTING PETITION FOR REVIEW

No. 11-0361/AR. U.S. v. Mark C. CHARTIER. CCA 20100312. [See also APPEALS-SUMMARY DISPOSITIONS this date.]

No. 12-0124/NA. U.S. v. Kelvin J.C. RODEO. CCA 201000590. [See also APPEALS-SUMMARY DISPOSITIONS this date.]

PETITIONS FOR GRANT OF REVIEW DENIED

No. 12-0102/AF. U.S. v. Joseph M. EMMONS. CCA 37738.
No. 12-0121/AR. U.S. v. Donald M. ARSENAULT. CCA 20100938.

PETITIONS FOR GRANT OF REVIEW FILED

No. 12-0169/AR. U.S. v. Thomas S. REYNA. CCA 20101051.

No. 12-0170/AR. U.S. v. Larry E. PARKS, Jr. CCA 20110176.
No. 12-0171/AR. U.S. v. Clayton J. DUNCAN. CCA 20090545.
No. 12-0172/NA. U.S. v. Jeremy L. RAUSCHER. CCA 201000684.
No. 12-0173/NA. U.S. v. David A. STROUD. CCA 201100145.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL
No. 12-054
Monday, November 21, 2011

PETITIONS FOR GRANT OF REVIEW FILED

No. 12-0165/MC. U.S. v. Stephen L. SCARINGELLO. CCA 201100192.
No. 12-0166/AR. U.S. v. Joshua R. STOVALL. CCA 20100876.
No. 12-0167/AR. U.S. v. Dantonio L. LYNCH. CCA 20110086.
No. 12-0168/AR. U.S. v. Cristian A. MARTINEZ. CCA 20100697.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL
No. 12-053
Friday, November 18, 2011

ORDERS GRANTING PETITION FOR REVIEW

No. 12-0008/AR. U.S. v. Alaa M. ALI. CCA 20080559. Review granted on the following issues:

I. WHETHER THE MILITARY JUDGE ERRED IN RULING THAT THE COURT HAD JURISDICTION TO TRY APPELLANT AND THEREBY VIOLATED THE DUE PROCESS CLAUSE OF THE FIFTH AND SIXTH AMENDMENTS BY REFUSING TO DISMISS THE CHARGES AND SPECIFICATIONS.

II. WHETHER THE COURT-MARTIAL HAD JURISDICTION OVER APPELLANT PURSUANT TO ARTICLE 2(a)(10), UNIFORM CODE OF MILITARY JUSTICE.

III. WHETHER AN ARTICLE 134 CLAUSE 1 OR 2 SPECIFICATION THAT FAILS TO EXPRESSLY ALLEGE EITHER POTENTIAL TERMINAL ELEMENT STATES AN OFFENSE UNDER THE SUPREME COURT'S HOLDINGS IN UNITED STATES v. RESENDIZ-PONCE AND RUSSELL v. UNITED STATES, AND THIS COURT'S OPINION IN UNITED STATES v. FOSLER, 70 M.J. 225 (C.A.A.F. 2011).

Briefs will be filed under Rule 25 on Issues I and II only.

PETITIONS FOR GRANT OF REVIEW FILED

No. 12-0158/AR. U.S. v. Christopher L. PARKER. CCA 20110209.
No. 12-0159/MC. U.S. v. Jaimie R. WALTON. CCA 2010000508.
No. 12-0160/MC. U.S. v. Marvin B. FLETCHER. CCA 201000421.
No. 12-0161/AR. U.S. v. Anthony S. ALMAGRO. CCA 20100872.
No. 12-0162/AR. U.S. v. Justin J. GORDON. CCA 20110164.
No. 12-0163/AR. U.S. v. Gary L. LAMBERT. CCA 20100378.
No. 12-0164/AR. U.S. v. Jason S. CHAMBERLAIN. CCA 20100775.

MISCELLANEOUS DOCKET - SUMMARY DISPOSITIONS

Misc. No. 12-8006/AR. Terrance A. NORMAN, Appellant v. United States, Appellee. CCA 20110521. Notice is hereby given that a pro se writ-appeal petition for review of the decision of the United States Army Court of Criminal Appeals on application for extraordinary relief was filed by mail under Rule 27(b) on October 25, 2011, and placed on the docket November 18, 2011. On consideration thereof, it is ordered that said writ-appeal is hereby denied.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL
No. 12-052
Thursday, November 17, 2011

PETITIONS FOR GRANT OF REVIEW FILED

No. 11-0243/AR. U.S. v. John A. MCCARY. CCA 20090601.*
No. 12-0151/AF. U.S. v. Andrew SILVA. CCA 37846.
No. 12-0152/AF. U.S. v. Benjamin C. MCKINNEY. CCA 37801.
No. 12-0153/AF. U.S. v. Matthew A. PINGEL. CCA 37783.
No. 12-0154/AF. U.S. v. Jeffrey S. MANLEY. CCA S31884.
No. 12-0155/AF. U.S. v. Joseph F. RICHARDSON. CCA S31743.
No. 12-0156/AR. U.S. v. Antonie HILLIARD. CCA 20091034.
No. 12-0157/AF. U.S. v. Jonathan D. MORRISON. CCA S31880.

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* Second petition filed in this case.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL
No. 12-051
Wednesday, November 16, 2011

PETITIONS FOR GRANT OF REVIEW DENIED

No. 12-0047/AR. U.S. v. Allan J. MARQUARDT. CCA 20100059.

PETITIONS FOR GRANT OF REVIEW FILED

No. 12-0150/AR. U.S. v. Joshua C. HOWARD. CCA 20110156.

INTERLOCUTORY ORDERS

No. 12-0009/MC. U.S. v. Brandon M. MAGNAN. CCA 201000414. No. 12-0096/NA. U.S. v. John CUMMINGS, Jr. CCA 201000623. On consideration of the motions filed by Lieutenant Michael Hanzel for leave to withdraw as appellate defense counsel, it appears that the Judge Advocate General has assigned other counsel to represent Appellants and the new attorneys have assumed the representation of said Appellants. Accordingly, it is ordered that said motions are hereby granted.

No. 12-6001/AF. U.S. v. Scott M. DEASE, Jr. CCA 2011-04. Appellant's motions to reply to answer and to reply to opposition to motion to stay out of time are hereby denied as moot.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL
No. 12-050
Tuesday, November 15, 2011

APPEALS-SUMMARY DISPOSITIONS

No. 11-0675/AR. U.S. v. Cassandra M. RILEY. CCA 20100084. Review granted on the following issues:

I. WHETHER IN LIGHT OF THIS COURT'S RECENT DECISION IN UNITED STATES v. FOSLER, THE SPECIFICATION OF THE CHARGE FAILED TO STATE AN OFFENSE UNDER ARTICLE 134.

II. WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HER TRIAL DEFENSE COUNSEL FAILED TO INFORM HER THAT SHE WOULD HAVE TO REGISTER AS A SEX OFFENDER AFTER PLEADING GUILTY.

III. WHETHER APPELLANT'S GUILTY PLEA WAS NOT KNOWING AND VOLUNTARY BECAUSE APPELLANT DID NOT KNOW THAT AFTER PLEADING GUILTY SHE WOULD HAVE TO REGISTER AS A SEX OFFENDER, AND THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE ACCEPTED APPELLANT'S UNKNOWING AND INVOLUNTARY PLEA WITHOUT ASKING THE TRIAL DEFENSE COUNSEL IF SHE HAD INFORMED APPELLANT OF THE APPLICABLE SEX OFFENDER REGISTER REQUIREMENTS.

The decision of the United States Army Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Army for remand to that court for further appellate inquiry and consideration of the granted issues. The Court of Criminal Appeals will obtain affidavits from the trial defense counsel that respond to Appellant's allegation of ineffective assistance of counsel. Under Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2006), the Court of Criminal Appeals shall review the ineffective assistance of counsel issue in light of the affidavits and any other relevant matters. See United States v. Ginn, 47 M.J. 238 (C.A.A.F. 1997). If the court determines that a fact-finding hearing is necessary, that court shall order a hearing pursuant to United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (1967). Once the necessary information is obtained, the court will complete its Article 66(c), UCMJ, review. Thereafter, Article 67, UCMJ, 10 U.S.C. § 867 (2006), shall apply. [See also ORDERS GRANTING PETITION FOR REVIEW this date.]

BAKER, Chief Judge (dissenting):

With respect to Issue I, I adhere to my dissent in Fosler, where I specifically addressed the issue of kidnapping. United States v. Fosler, 70 M.J. 225, 244-45 (C.A.A.F. 2011).

No. 12-0082/AF. U.S. v. Steven D. HARRIS, Jr. CCA S31822. Review granted on the following issue:

WHETHER AN ARTICLE 134 CLAUSE 1 OR 2 SPECIFICATION THAT FAILS TO EXPRESSLY ALLEGE EITHER POTENTIAL TERMINAL ELEMENT STATES AN OFFENSE UNDER THE SUPREME COURT'S HOLDINGS IN UNITED STATES v. RESENDIZ-PONCE AND RUSSELL v. UNITED STATES, AND THIS COURT'S OPINION IN UNITED STATES v. FOSLER, 70 M.J. 225 (C.A.A.F. 2011).

The decision of the United States Air Force Court of Criminal Appeals is vacated. The record of trial is returned to the Judge Advocate General of the Air Force for remand to that court for consideration of the granted issue in light of United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011). [See also ORDERS GRANTING PETITION FOR REVIEW this date.]

BAKER, Chief Judge (dissenting):

I dissent for the reasons stated in my dissenting opinion in United States v. Fosler, 70 M.J. 225, 240-47 (C.A.A.F. 2011).

ORDERS GRANTING PETITION FOR REVIEW

No. 11-0258/MC. U.S. v. Travis J. WESTBOVEN. CCA 201000132. Review granted on the following issue:

WHETHER, IN LIGHT OF UNITED STATES v. MCMURRIN, 70 M.J. 15 (C.A.A.F. 2011), AND UNITED STATES v. MORTON, 69 M.J. 12 (C.A.A.F. 2010), APPELLANT'S GUILTY PLEA TO AN OFFENSE NOT NECESSARILY INCLUDED IN THE CHARGED OFFENSE CAN BE AFFIRMED UNDER UNITED STATES v. WILKINS, 29 M.J. 421 (C.M.A. 1990).

Briefs will be filed under Rule 25.

No. 11-0675/AR. U.S. v. Cassandra M. RILEY. CCA 20100084. [See also APPEALS-SUMMARY DISPOSITIONS this date.]

No. 12-0082/AF. U.S. v. Steven D. HARRIS, Jr. CCA S31822. [See also APPEALS-SUMMARY DISPOSITIONS this date.]

PETITIONS FOR GRANT OF REVIEW DENIED

No. 11-0674/AF. U.S. v. Scott D. BOIE. CCA 37546.
No. 12-0069/MC. U.S. v. Matthew E. DAVIS. CCA 201100057.
No. 12-0093/AF. U.S. v. Aaron A. LOPEZ. CCA 37724.
No. 12-0094/AF. U.S. v. Michael A. TOWNE. CCA S31897.
No. 12-0095/AR. U.S. v. Jesse R. MORTON. CCA 20110056.
No. 12-0096/NA. U.S. v. John CUMMINGS, Jr. CCA 201000623.
No. 12-0097/AF. U.S. v. Deron D. HOLLOWAY. CCA 37760.
No. 12-0098/AF. U.S. v. Dustin M. CLARK. CCA 37871.
No. 12-0109/AF. U.S. v. Jessica A. WINKLER. CCA 37802.
No. 12-0110/AF. U.S. v. Anthony G. POLOZZOLO, Jr. CCA 31892.
No. 12-0111/AF. U.S. v. Joshua A. DOBBINS. CCA S31839.
No. 12-0112/AF. U.S. v. Nicholas J. SOBCZYK. CCA S31789.
No. 12-0115/AR. U.S. v. Matthew S. HUNTER. CCA 20100954.

PETITIONS FOR GRANT OF REVIEW FILED

No. 12-0149/AR. U.S. v. Christopher L. STADEL. CCA 20090820.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL
No. 12-049
Monday, November 14, 2011

ORDERS GRANTING PETITION FOR REVIEW

No. 12-6001/AF. U.S. v. Scott M. DEASE, Jr. CCA 2011-04. Review granted on the following issue:

> WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY FINDING APPELLANT HAD ABANDONED HIS URINEAND THUS HAD NO REASONABLE EXPECTATION OF PRIVACY WHERE APPELLANT CONSENTED TO THE SEIZURE OF HISURINE AND THEN REVOKED CONSENT PRIOR TO THE SEARCH OF APPELLANT'S URINE.

PETITIONS FOR GRANT OF REVIEW DENIED

No. 11-0646/AR. U.S. v. Hector B. LOPEZ. CCA 20080736.
No. 12-0037/AR. U.S. v. Roger D. JACOBSON. CCA 20100597.
No. 12-0038/AR. U.S. v. Danielle M. DANCE. CCA 20100543.
No. 12-0042/MC. U.S. v. Michael T. JENKINS. CCA 201000663.
No. 12-0059/AR. U.S. v. Aaron J.S. MORRIS. CCA 20090872.
No. 12-0085/MC. U.S. v. Michael D. FRANSON. CCA 2011100256.
No. 12-0086/AF. U.S. v. Addison T. MCFARLAND. CCA S31855.
No. 12-0087/AF. U.S. v. Tyler W. MEROLA. CCA 37701.
No. 12-0088/AR. U.S. v. Jessie GOMEZ, Jr. CCA 20100524.
No. 12-0089/AF. U.S. v. Chad R. SCHROEDER. CCA 37475.
No. 12-0091/AF. U.S. v. Christian A. HOLMLUND. CCA 37786.
No. 12-0092/AF. U.S. v. Brian J. HOWES. CCA S31809.

PETITIONS FOR GRANT OF REVIEW FILED

No. 12-0145/AF. U.S. v. Rebecca A. BURGESS. CCA S31908.
No. 12-0146/NA. U.S. v. Keith C. GARRETT. CCA 201100140.
No. 12-0147/MC. U.S. v. Phillip J. APODACA. CCA 201100008.
No. 12-0148/AR. U.S. v. James O. MORRIS. CCA 20081169.

INTERLOCUTORY ORDERS

No. 11-0675/AR. U.S. v. Cassandra M. RILEY. CCA 20100084. Appellant's motion to attach affidavit is denied.

No. 12-6001/AF. U.S. v. Scott M. DEASE, Jr. CCA 2011-04. Appellant's motion for a stay of proceedings is granted.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL
No. 12-048
Thursday, November 10, 2011

PETITIONS FOR GRANT OF REVIEW FILED

No. 12-0144/AR. U.S. v. Brian F. JONES. CCA 20110103.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL
No. 12-047
Wednesday, November 9, 2011

INTERLOCUTORY ORDERS

No. 11-5005/MC. U.S. v. Jeremy J. NASH. CCA 201000220. On consideration of the motion of the United States to attach page 857 of the record of trial, and following examination of the original record of trial which contains page 857, it is ordered that said motion is hereby denied.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL
No. 12-046
Tuesday, November 8, 2011

APPEALS - SUMMARY DISPOSITIONS

No. 12-0046/AR. U.S. v. Daniel A. SMELSER. CCA 20110114. Review granted on the following issue:

> WHETHER THE SPECIFICATION OF CHARGE II FAILS TO STATE AN OFFENSE AS IT DOES NOT ALLEGE EXPRESSLY OR BY NECESSARY IMPLICATION, THE "TERMINAL ELEMENT" AS REQUIRED BY UNITED STATES v. FOSLER, 70 M.J. 225 (C.A.A.F. 2011).

The decision of the United States Army Court of Criminal Appeals is vacated. The record of trial is returned to the Judge Advocate General of the Army for remand to that court for consideration of the granted issue in light of United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011). [See also ORDERS GRANTING PETITION FOR REVIEW this date.]

> BAKER, Chief Judge (dissenting):
>
> I adhere to my dissent in Fosler, where I specifically addressed the issue of kidnapping. United States v. Fosler, 70 M.J. 225, 244-45 (C.A.A.F. 2011).

No. 12-0057/AR. U.S. v. Roy E. BUSHROW III. CCA 20100911. Review granted on the following issue:

WHETHER CHARGE III FAILED TO STATE AN OFFENSE WHERE THE GOVERNMENT DID NOT ALLEGE APPELLANT'S CONDUCT WAS TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE OR OF A NATURE TO BRING DISCREDIT UPON THE ARMED FORCES.

The decision of the United States Army Court of Criminal Appeals is vacated. The record of trial is returned to the Judge Advocate General of the Army for remand to that court for consideration of the granted issue in light of United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011). [See also ORDERS GRANTING PETITION FOR REVIEW this date.]

BAKER, Chief Judge (dissenting):

I dissent for the reasons stated in my dissenting opinion in Fosler. United States v. Fosler, 70 M.J. 225, 240-47 (C.A.A.F. 2011).

ORDERS GRANTING PETITION FOR REVIEW

No. 11-0399/NA. U.S. v. Willie A. BRADLEY. CCA 200501089. Review granted on the following issues:

I. IN BRADLEY I, THIS COURT RULED THAT ITS APPLICATION OF WAIVER TO APPELLANT'S DISQUALIFICATION-OF-TRIAL-COUNSEL CLAIM DID NOT RENDER HIS PLEAS IMPROVIDENT WHERE THERE WAS: (1) NO INEFFECTIVE ASSISTANCE OF COUNSEL (IAC) CLAIM; AND (2) ONLY A POSSIBILITY THAT HE BELIEVED THE DISQUALIFICATION CLAIM WAS PRESERVED FOR APPEAL. ON REMAND, APPELLANT CLAIMED IAC AND PRESENTED EVIDENCE THAT HE DID BELIEVE HIS DISQUALIFICATION ISSUE WAS PRESERVED. DID NMCCA ERR IN HOLDING THAT IT WAS BOUND BY THIS COURT'S RULING THAT APPELLANT'S PLEAS WERE PROVIDENT?

II. APPELLANT'S CIVILIAN COUNSEL ERRONEOUSLY ADVISED HIM THAT HIS DENIED MOTION TO DISQUALIFY TRIAL COUNSEL FROM FURTHER PARTICIPATION IN THE CASE WAS PRESERVED FOR APPEAL DESPITE UNCONDITIONAL PLEAS. DID NMCCA ERR IN FINDING THAT CIVILIAN COUNSEL'S ERRONEOUS ADVICE WAS REASONABLE, AND THEREFORE NOT DEFICIENT?

III. ON REMAND, DID NMCCA VIOLATE THE LAW OF THE CASE DOCTRINE BY FINDING THAT EVEN IF THE TRIAL JUDGE ERRED BY NOT DISQUALIFYING TRIAL COUNSEL - WHICH THE BRADLEY I COURT FOUND HE HAD - APPELLANT WAS NOT PREJUDICED - WHICH THE BRADLEY I COURT FOUND HE WAS?

Briefs will be filed under Rule 25.

No. 12-0046/AR. U.S. v. Daniel A. SMELSER. CCA 20110114. [See also APPEALS - SUMMARY DISPOSITIONS this date.]

No. 12-0057/AR. U.S. v. Roe E. BURROW III. CCA 20100911. [See also APPEALS - SUMMARY DISPOSITIONS this date.]

PETITIONS FOR GRANT OF REVIEW DENIED

No. 12-0075/AF. U.S. v. Daniel H. HOOPES. CCA S31825.
No. 12-0076/AF. U.S. v. Ernest W. MOORE, II. CCA 37870.
No. 12-0077/AR. U.S. v. David A. HAGINS. CCA 20100373.
No. 12-0078/AF. U.S. v. William R. CHOPE. CCA S31769.
No. 12-0079/AF. U.S. v. Carlos A. LEE. CCA S31870.
No. 12-0080/AF. U.S. v. Bradley R. COOPER. CCA S31896.

No. 12-0081/AF. U.S. v. Joel D. MCNEARNEY. CCA 37778.
No. 12-0084/AF. U.S. v. Amber N. DEJESUS. CCA 831845.

INTERLOCUTORY ORDERS

No. 09-0079/AR. U.S. v. James T. MURPHY. CCA 19872873. Appellant's motion to exceed the page and word limits for the supplement to the petition for grant of review is denied. Appellant will file a supplement to the petition for grant of review that complies with Rule 21(b) on or before November 15, 2011. Appellant's pro se motion for relief is also denied.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL
No. 12-045
Monday, November 7, 2011

PETITIONS FOR GRANT OF REVIEW DENIED

No. 12-0068/AR. U.S. v. Zachary S. CHAVEZ. CCA 20100902.
No. 12-0074/AR. U.S. v. Kyle E. CHATTEN. CCA 20110001.

PETITIONS FOR GRANT OF REVIEW FILED

No. 12-0143/MC. U.S. v. Richard A. GARCIA-TOLSON. CCA 2010000610.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL
No. 12-044
Friday, November 04, 2011

PETITIONS FOR GRANT OF REVIEW FILED

No. 12-0142/NA. U.S. v. Osborn N. MIRANDA. CCA 201100084.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL
No. 12-043
Thursday, November 3, 2011

HEARINGS

No. 11-0396/MC. U.S. v. Joshua D. FRY. CCA 201000179.

PETITIONS FOR GRANT OF REVIEW DENIED

No. 11-0648/NA. U.S. v. Lloyd G. FISHER. CCA 201000287.
No. 11-0677/AR. U.S. v. David T. BISHOP. CCA 20090746.
No. 12-0045/NA. U.S. v. Eric R. SKINNER. CCA 201000555.
No. 12-0072/AF. U.S. v. Keith D. DYE, Jr. CCA 831887.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL
No. 12-042
Wednesday, November 2, 2011

HEARINGS

No. 11-5003/NA. U.S. v. Thomas J. Hayes. CCA 201000366.

PETITIONS FOR GRANT OF REVIEW DENIED

No. 12-0063/AR. U.S. v. Ricky J. HOLLOWAY, Jr. CCA 20110055.
No. 12-0065/AR. U.S. v. Edward R. JOHNSON. CCA 20100186.
No. 12-0067/AR. U.S. v. Edward NUNEZ. CCA 20100998.

PETITIONS FOR GRANT OF REVIEW FILED

No. 12-0138/AR. U.S. v. Erik W. HERMANSEN. CCA 20090628.
No. 12-0139/AF. U.S. v. Ryan D. HAIGH. CCA S31900.
No. 12-0140/AF. U.S. v. Jeremiah C. SLACK. CCA S31906.
No. 12-0141/AF. U.S. v. William L. HIGDON II. CCA S31869.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL
No. 12-041
Tuesday, November 1, 2011

PETITIONS FOR GRANT OF REVIEW FILED

No. 12-0136/AR. U.S. v. Colin M. JAMESON. CCA 20090908.
No. 12-0137/AR. U.S. v. Bryan D. SANTIZO. CCA 20100146.

INTERLOCUTORY ORDERS

No. 12-0015/AR. U.S. v. Marvin C. SIMPSON. CCA 20091039. Appellee's motion to extend time to file an answer to the supplement to the petition for grant of review granted to November 18, 2011.

No. 12-0134/AR. U.S. v. Jonathon L. TRUSS. CCA 20080988. Appellant's motion to extend time to file the supplement to the petition for grant of review granted to November 21, 2011.

Appendix E. Excerpt: Military Judge's Benchbook

Department of the Army
Pamphlet 27–9

Legal Services

Military Judges' Benchbook

Headquarters
Department of the Army
Washington, DC
10 September 2014

UNCLASSIFIED

7–25. DIVERS OR SPECIFIED OCCASIONS

NOTE 1: Divers occasions. When a specification alleges that the offense occurred on "divers occasions," the court members should be instructed substantially as follows:

"Divers occasions" means two or more occasions.

NOTE 2: When a specification alleges that the offense occurred on "divers occasions" or on a specified number of occasions and the members return a verdict substituting "one" for "divers" or reducing the number of occasions, IAW United States v. Walters, 58 MJ 391 (CAAF 2003), the court members should be instructed as follows:

Your verdict appears to be in the proper form, with the exception of (The) Specification(s) (____) of (The) (Additional) Charge(s) (____). Because you have substituted (one) (_____) for the language ("divers occasions, ") ("__ occasions, "), your findings must clearly reflect the specific instance(s) of conduct upon which your findings are based. That may be reflected on the Findings Worksheet by filling in (a) relevant date(s), or other facts clearly indicating which conduct served as the basis for your findings. Two thirds of the members, that is ____ members, must agree on the specific instance(s) of conduct upon which your findings are based. If two-thirds or ____ members do not agree on (at least one) (a) (the) specific instance(s) of conduct, then your finding as to (The) Specification(s) (____) of (The) (Additional) Charge(s) (____) [and (The) (Additional) Charge(s) (____)] must be changed to a finding of "Not Guilty."

NOTE 3: The military judge should ordinarily provide a supplemental Findings Worksheet to assist the court members in identifying the date(s) or specific instance(s) of conduct upon which the finding of guilty is based. Counsel for both sides should be consulted before the supplemental Findings Worksheet is provided to the court members.

NOTE 4: When the government has pled a course of conduct specification or a specification alleging conduct on "divers occasions," the military judge should carefully consider the strength of the evidence adduced. If a variance instruction is warranted or findings by exceptions and substitutions are likely, careful tailoring of the original Findings Worksheet may obviate the necessity to give the instruction in NOTE 2 above.

APPENDIX B

Appendix A
References

Section I
Required Publications

Manual for Courts–Martial, United States.

Section II
Related Publications

This section contains no entries.

Section III
Prescribed Forms

This section contains no entries.

Section IV
Referenced Forms

Except where otherwise indicated below, the following forms are available as follows: DA Forms are available on the APD Web site (http://www.apd.army.mil).

DA Form 2028
Recommended Changes to Publications Blank Forms

Appendix B
Findings Worksheets

1. Sample Findings Worksheets for each of the various situations which may arise are located at B-1 through B-4. An alternative Findings Worksheet is located at B-5.

2. The Findings Worksheet must be carefully reviewed by the military judge after the conclusion of the evidence in the case. It must be tailored for each case to ensure that the worksheet allows the court members to reach findings on all theories of the case which have been raised by the evidence. The worksheet should be made as simple as possible.

3. In cases in which the evidence requires that the court members reach findings by exceptions and/or substitutions, the military judge should attempt to have both sides agree on amendments to the specification in question. This will substantially reduce the problems involved with exceptions and substitutions. Use of the instruction on variance will also ensure that the panel members focus on the guilt or innocence factors, rather than the specific day or amount or nomenclature.

4. Counsel for both sides should consent to the Findings Worksheet on the record before it is given to the court members. This is especially important in cases involving lesser included offenses.

5. The military judge should keep a copy of the worksheet in order to review it with the President prior to the court closing.

6. When the court members return from deliberations, the military judge must review the Findings Worksheet to insure that the findings are lawful and in proper form. The military judge must have the President correct any mistake or omissions prior to announcement of the findings.

APPENDIX B

Appendix B-1
Findings Worksheet—No Lesser Included Offenses

Table B–1
Sample Findings Worksheet—No Lesser Included Offenses

United States v. SPC James D. Jones 123-45-6789 A Co 1/504 PIR 82d Airborne Division	FINDINGS WORKSHEET

NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.

Specialist James D. Jones, this court-martial finds you:

I. Full Acquittal or Full Conviction

Of (The) (all) Charge(s) and (its) (their) Specification(s):

(Not Guilty) (Guilty)

II. Mixed Findings

Of Charge I and its Specifications: (Not Guilty) (Guilty)
or
Of Specification 1 of Charge I: (Not Guilty) (Guilty)
Of Specification 2 of Charge I: (Not Guilty) (Guilty)
Of Charge I: Guilty

Of Charge II and its Specifications: (Not Guilty) (Guilty)
or
Of Specification 1 of Charge II: (Not Guilty) (Guilty)
Of Specification 2 of Charge II: (Not Guilty) (Guilty)
Of Charge II: Guilty

_____
(Signature of President)

Appendix B-2
Findings Worksheet—Lesser Included Offenses

Table B–2
Sample Findings Worksheet—Lesser Included Offenses

United States v. SPC James D. Jones 123-45-6789 A Co 1/504 PIR 82d Airborne Division	FINDINGS WORKSHEET

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial finds you:

I. Full Acquittal or Full Conviction

Of (The) (all) Charge(s) and (its) (their) Specification(s):

(Not Guilty) (Guilty)

II. Mixed Findings

Of Charge I and its Specifications: (Not Guilty) (Guilty)
or
Of Specification 1 of Charge I: (Not Guilty) (Guilty)
(Not Guilty of Burglary but Guilty of Housebreaking. As to Specification 1 of Charge I, Not Guilty of a Violation of Article 129, but Guilty of a Violation of Article 130.)
Of Specification 2 of Charge I: (Not Guilty) (Guilty)
Of Charge I: Guilty

Of Charge II and its Specifications: (Not Guilty) (Guilty)
or
Of Specification 1 of Charge II: (Not Guilty) (Guilty)
Of Specification 2 of Charge II: (Not Guilty) (Guilty)
(Not Guilty of Aggravated Assault, but Guilty of Assault Consummated by a Battery.)
Of Charge II: Guilty

_____
(Signature of President)

APPENDIX B

Appendix B-3
Findings Worksheet—Capital Cases

Table B–3
Sample Findings Worksheet—Capital Cases

United States v. SPC James D. Jones 123-45-6789 A Co 1/504 PIR 82d Airborne Division	FINDINGS WORKSHEET

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial finds you:

I. Full Acquittal

Of (The) (all) Charge(s) and (its) (their) Specification(s):
Not Guilty

II. Mixed Findings

Of the Specification of Charge I:
a. Not Guilty
b. By unanimous vote of all members, Guilty

_____
President

_____
COL James Member

_____
LTC Joyce Member

_____
CSM Brenda Member

_____
1SG Sally Member

_____
SFC Steven Member

c. Guilty
d. Not Guilty of premeditated murder, but Guilty of unpremeditated murder

Of Charge I: (Not Guilty) (Guilty)

Of Charge II and its Specification: (Not Guilty) (Guilty)

Of The Specification of the Additional Charge:

a. Not Guilty
b. By unanimous vote of all members, Guilty

_____
President

_____
COL James Member

_____
LTC Joyce Member

_____
CSM Brenda Member

_____
1SG Sally Member

_____
SFC Steven Member

c. Guilty
d. Not guilty of felony murder, but guilty of unpremeditated murder

Of The Additional Charge: (Not Guilty) (Guilty)

_____
(Signature of President)

APPENDIX B

Appendix B-4
Findings Worksheet—Exceptions and Substitutions

Table B–4
Sample Findings Worksheet— Exceptions and Substitutions

United States v. SPC James D. Jones 123-45-6789 A Co 1/504 PIR 82d Airborne Division	FINDINGS WORKSHEET

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial finds you:

I. Full Acquittal or Full Conviction

Of (The) (all) Charge(s) and (its) (their) Specification(s):

(Not Guilty) (Guilty)

II. Mixed Findings

Of Charge I and its Specifications: (Not Guilty) (Guilty)
or
Of Specification 1 of Charge I: (Not Guilty) (Guilty)
(Guilty, Except the [word(s)] [figure(s)] [word(s) and figure(s)]:

_____

_____

Of the excepted [word(s)] [figure(s)] [word(s) and figure(s)]:
Not Guilty)
Of Specification 2 of Charge I: (Not Guilty) (Guilty)
Of Charge I: Guilty

Of Charge II and its Specifications: (Not Guilty) (Guilty)
or
Of Specification 1 of Charge II: (Not Guilty) (Guilty)
(Guilty, Except the [word(s)] [figure(s)] [word(s) and figure(s)]:

_____

_____

Substituting therefor the [word(s)] [figure(s)] [word(s) and figure(s)]:

_____

_____

Of the excepted [word(s)] [figure(s)] [word(s) and figure(s)]:

Not Guilty
Of the substituted [word(s)] [figure(s)] [word(s) and figure(s)]:
Guilty)

Of Specification 2 of Charge II: (Not Guilty) (Guilty)
Of Charge II: Guilty

(Signature of President)

APPENDIX B

Appendix B-5
Alternative Findings Worksheet

Table B–5
Sample Findings Worksheet—Sample Alternative Findings Worksheet

United States v. SPC James D. Jones 123-45-6789 A Co 1/504 PIR 82d Airborne Division	FINDINGS WORKSHEET

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial finds you:

I. Full Acquittal or Full Conviction

Of (The) (all) Charge(s) and (its) (their) Specification(s):
[a] Not Guilty
[b] Guilty

II. Mixed Findings

Charge I (Breaking Restriction)

Of Charge I and its Specification:
[a] Not Guilty
[b] Guilty

Charge II (Burglary)

Of Specification 1 of Charge II:
[a] Not guilty
[b] Guilty
[c] Not Guilty, but Guilty of Housebreaking, in violation of Article 130
[d] Not Guilty, but Guilty of Housebreaking with intent to commit indecent assault therein, in violation of Article 130
[e] Guilty, except the [word(s)] [figure(s)] [word(s) and figure(s)]

_____
_____

(and substituting therefor the [word(s)] [figure(s)] [word(s) and figure(s)]

_____
_____

of the excepted [word(s)] [figure(s)] [word(s) and figure(s)], Not Guilty, of the substituted [word(s)][figure(s)] [word(s) and figure(s)], Guilty.

Of Specification 2 of Charge II:

[a] Not Guilty
[b] Guilty
[c] Not Guilty, but Guilty of Housebreaking in violation of Article 130
[d] Guilty, except the [word(s)] [figure(s)] [word(s) and figure(s)]

_____

_____

(and substituting therefor the [word(s)] [figure(s)] [word(s) and figure(s)]

_____

_____

of the excepted [word(s)] [figure(s)] [word(s) and figure(s)], Not Guilty, of the substituted [word(s)] [figure(s)] [word(s) and figure(s)], Guilty.

Of Charge II

[a] Not Guilty
[b] Guilty

Charge III (Larceny)

Of the specification of Charge III:

[a] Not Guilty, and of Charge III, Not Guilty
[b] Guilty, and of Charge III, Guilty
[c] Not Guilty, but Guilty of attempted larceny in violation of Article 80
[d] Not Guilty, but Guilty of wrongful appropriation, and of Charge III, Guilty.

_____
(Signature of President)

Appendix C
Sentence Worksheets

1. Sample Sentence Worksheets for the various types of courts-martial are located at C-1 through C-4.

2. The Sentence Worksheet must be carefully reviewed by the military judge before it is given to the court members. The samples should be modified to insure that the court is not given the opportunity to adjudge an unlawful sentence or one that is inappropriate. Examples include:

a. Fines. The fine heading and sentence element should be removed unless there is an unjust enrichment or some other colorable basis for imposing a fine. The trial counsel may announce that the government does not intend to argue for imposition of a fine, in which case the military judge may elect to delete that punishment from the worksheet. The contingent confinement language is rarely appropriate.

b. Mandatory Sentences. In cases in which there is a mandatory sentence for certain elements, that sentence element should be the only one placed on the Sentence Worksheet. For example, in a case in which the accused has been convicted of Article 118(1) or (4), the confinement element should read: To be confined for (life with eligibility for parole) (life without eligibility for parole). In such cases, the restriction and hard labor without confinement elements should be removed.

3. Counsel for both sides should consent to the Sentence Worksheet on the record prior to it being given to the court members. In a capital case, the court must ensure that the aggravating factors listed on the Sentence Worksheet are the same factors of which the accused was given notice.

4. When the court members return from deliberations, the military judge must review the Sentence Worksheet to ensure that the sentence is lawful and in proper form. The military judge must have the President correct any mistakes or omissions prior to announcement of the sentence.