

# Recent Developments in Post-Trial: Failure to Demand Speedy Post-Trial Processing Equals Waiver of *Collazo* Relief for “Unreasonable” Post-Trial Delay

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“[P]ost-trial processing is not rocket science, and careful proof reading of materials presented to the convening authority, rather than inattention to detail, would save time and effort for all concerned.”<sup>1</sup>

## Introduction

Unlike the 2001-2002 term of the Court of Appeals for the Armed Services (CAAF), which decided *United States v. Emminizer*<sup>2</sup> and *United States v. Tardif*,<sup>3</sup> the former addressing the proper processing of adjudged and automatic forfeitures and the latter differentiating between a service court’s authority under Article 59, Uniform Code of Military Justice (UCMJ), and Article 66, UCMJ, to grant sentence relief for post-trial processing delay, this past term is best described as a relatively slow period in post-trial evolution. Both the service courts and the CAAF, however, continued to remain active in the post-trial arena, due in large part to inattention to detail by those responsible for post-trial processing. The most significant activity appears to be the Army court’s decision to ratchet back its philosophy of granting *Collazo*<sup>4</sup> relief for dilatory post-trial processing, placing responsibility on the defense to demand speedy post-trial processing.

This article outlines the recent developments in post-trial activity, developments discussed under the following headings: the staff judge advocate’s (SJA) recommendation, required contents and errors therein; service of the SJA’s recommendation; new matter and the addendum to the SJA’s recommendation; post-trial punishment; post-trial delay; the proper convening authority (CA); disqualification of the CA; post-trial assistance of counsel; and appellate court authority.

## The SJA’s Recommendation, Required Contents and Errors Therein—Rule for Courts-Martial (RCM) 1106(d)(3) and 1106(f)(6)<sup>5</sup>

Before taking action in a general court-martial (GCM) or a special court-martial (SPCM) in which the adjudged sentence includes a bad conduct discharge or confinement for one year, the CA’s SJA is required to provide the CA with a written post-trial recommendation.<sup>6</sup> The SJA’s recommendation (SJAR) must include the following:

- (A) The findings and sentence adjudged by the court-martial;
- (B) A recommendation for clemency by the sentencing authority, made in conjunction with the announced sentence;
- (C) A summary of the accused’s service record, to include length and character of service, awards and decorations received, and any records of nonjudicial punishment and previous convictions;
- (D) A statement of the nature and duration of any pretrial restraint;
- (E) If there is a pretrial agreement, a statement of any action the CA is obligated to take under the agreement or a statement of the reasons why the CA is not obligated to take specific action under the agreement; and
- (F) A specific recommendation as to the action to be taken by the CA on the sentence.<sup>7</sup>

In *United States v. Wellington*,<sup>8</sup> the SJAR stated, in part: “Prior Art. 15s: Field Grade Article 15 for underage drinking, assault consummated by a battery, and drunk and disorderly at

1. *United States v. Suksdorf*, 59 M.J. 544, 548 (C.G. Ct. Crim. App. 2003).

2. 56 M.J. 441 (2002).

3. 57 M.J. 219 (2002).

4. *United States v. Collazo*, 53 M.J. 721 (Army Ct. Crim. App. 2000).

5. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1106(d)(3) and 1106(f)(6) (2002) [hereinafter MCM].

6. *Id.* R.C.M. 1106(a).

7. *Id.* R.C.M. 1106(d)(3)(A)-(F).

Travis Air Force Base. Punishment imposed on 24 Jul 98. Field Grade Article 15 for failure to obey lawful order. Punishment imposed on 14 Dec 98.”<sup>9</sup> The SJAR also stated that the appellant was not subject to any pretrial restraint.<sup>10</sup> Both assertions were wrong; the appellant never received nonjudicial punishment and was restricted prior to trial, restriction the appellant argued at trial was tantamount to confinement.<sup>11</sup> Neither the appellant nor his defense counsel, after being served the SJAR,<sup>12</sup> mentioned the errors in their clemency submissions.<sup>13</sup> Their submissions did, however, renew the argument made at trial that the appellant’s restriction was tantamount to confinement warranting sentence credit.<sup>14</sup> Despite the defense’s allegation of an entitlement to *Mason*<sup>15</sup> credit, the SJA’s addendum to the SJAR was silent regarding the appellant’s restriction and failed to correct the errors in the SJAR.<sup>16</sup>

In reviewing whether the appellant was prejudiced by the defective SJAR, the CAAF looked to the waiver provision of RCM 1106(f)(6):<sup>17</sup> “Where, as in this case, the SJAR is served

on the defense counsel and accused in accordance with R.C.M. 1106(f)(1), and the defense fails to comment on any matter in the recommendation, R.C.M. 1106(f)(6) provides that any error is waived unless it rises to the level of plain error.”<sup>18</sup> Applying a plain error analysis, the court found that the errors were both “clear” and “obvious” and that the error prejudiced the appellant. The court noted that despite a service record lacking in any disciplinary action, the SJAR “portrayed [the appellant] as a mediocre soldier who had twice received punishment from a field grade officer.”<sup>19</sup> The CAAF also found that the “[a]ppellant’s ‘best hope for sentence relief’ was dashed by the inaccurate portrayal of his service record.”<sup>20</sup> Finding plain error in the defective SJAR, the court affirmed the lower court’s decision as to findings but set aside the sentence, remanding the case for a new SJAR and action.<sup>21</sup>

The next case involving a defective SJAR is *United States v. Scalo*,<sup>22</sup> a case in which the Army Court of Criminal Appeals (ACCA), applying waiver, found that the defect in the SJAR

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8. 58 M.J. 420 (2003). The appellant was convicted at a GCM of indecent assault, attempted rape, and attempted forcible sodomy and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for six years, and a dishonorable discharge. *Id.* at 421.

9. *Id.* at 424.

10. *Id.*

11. *Id.*

12. See MCM, *supra* note 5, R.C.M. 1106(f)(1). Rule for Courts-Martial 1106(f)(1) states:

*Service of recommendation on defense counsel and accused.* Before forwarding the recommendation and the record of trial to the convening authority for action under R.C.M. 1107, the staff judge advocate or legal officer shall cause a copy of the recommendation to be served on counsel for the accused. A separate copy will be served on the accused. If it is impracticable to serve the recommendation on the accused for reasons including but not limited to the transfer of the accused to a distant place, the unauthorized absence of the accused, or military exigency, or if the accused so requests on the record at the court-martial or in writing, the accused’s copy shall be attached to the record explaining why the accused was not personally served.

*Id.*

13. *Wellington*, 58 M.J. at 424.

14. *Id.*

15. *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985).

16. *Wellington*, 58 M.J. at 424; see MCM, *supra* note 5, R.C.M. 1106(d)(4) (stating that when an allegation of error is made in the accused’s clemency submissions, the SJAR or addendum thereto must note the error and whether corrective action is required; the SJAR or addendum need not provide an analysis of the error or rationale for the recommendation).

17. See MCM, *supra* note 5, R.C.M. 1106(f)(6). Rule for Courts-Martial 1106(f)(6) states: “*Waiver.* Failure of counsel for the accused to comment on any matter in the recommendation or matters attached to the recommendation in a timely manner shall waive later claim of error with regard to such matter in the absence of plain error.” *Id.*

18. *Wellington*, 58 M.J. at 427.

19. *Id.*

20. *Id.* (quoting *United States v. Jones*, 36 M.J. 438, 439 (C.M.A. 1993)).

21. *Id.* at 427 (stating that in setting aside the sentence, the court noted it would not speculate as to what the convening authority would do had he been properly advised in the case).

22. 59 M.J. 646 (Army Ct. Crim. App. 2003).

was waived because of the defense's failure to comment on the error during post-trial processing of the case.

In *Scalo*,<sup>23</sup> the appellant's case was submitted "on its merits."<sup>24</sup> A footnote in the appellant's submission alleged that the SJAR was defective because it failed to properly advise the CA regarding pretrial restraint;<sup>25</sup> the appellant was restricted to Fort Stewart, Georgia for forty-four days before trial.<sup>26</sup>

In finding waiver, the Army court differentiated between two situations: first, cases in which error is alleged at either the trial level or appellate level; and second, cases in which no error is alleged and the case is submitted on its merit. In the first situation, the court will apply the plain error analysis enunciated in *United States v. Wheelus*<sup>27</sup> to determine if relief is warranted for a defective SJAR.<sup>28</sup> The appellant will have to demonstrate the following: error occurred regarding the preparation of the SJAR, either through a misstatement in or omission from the SJAR; the error was prejudicial; and what the appellant would do to resolve the error.<sup>29</sup> If the appellant meets these three requirements, he need only make a "colorable showing of possible prejudice" to require a court of criminal appeals to either provide "meaningful relief" or return the case for a new review

and action."<sup>30</sup> In the second situation in which the SJAR is defective and error is not alleged at either the trial or appellate level, the court will apply a less appellant friendly plain error analysis<sup>31</sup> found in *United States v. Powell*.<sup>32</sup> The court will examine the record to determine the following: was there error; was the error plain and obvious; and does the error materially prejudice a substantial right of the appellant.<sup>33</sup> Applying *Powell's* "material prejudice" standard as opposed to *Wheelus's* "colorable showing of possible prejudice," the court found no material prejudice to a substantial right of the appellant and therefore, no plain error.<sup>34</sup> Absent plain error, any issue regarding the defective SJAR in the appellant's case was deemed waived.<sup>35</sup>

*Wellington* and *Scalo* are reminders to military justice practitioners that defects in the SJAR that are not noted prior to action will be reviewed under a plain error, waiver analysis. *Scalo* emphasizes the "raise or waive" point. Failure by Army trial defense or appellate defense counsel to raise defects in the SJAR will be scrutinized under the more rigid *Powell* analysis for plain error; a mere "colorable showing of possible prejudice"<sup>36</sup> will not result in a new SJAR and action. As a result, government counsel must understand RCM 1106(d)(3) and

23. *Id.* (stating an *en banc* decision with two judges concurring in the result, two judges dissenting, and one judge taking no part in the decision). The appellant was convicted at a GCM of four specifications of wrongful use of marijuana, three specifications of wrongful possession of marijuana, and two specifications of forgery and sentenced to forfeiture of all pay and allowances, fourteen months confinement, and a bad conduct discharge. *Id.* at 647.

24. *Id.* Cases submitted on the "merits" are sent to the appropriate service court without assignment of error by appellate counsel.

25. *Id.* Rule for Courts-Martial 1106(d)(3)(D) requires the post-trial recommendation to contain a "statement of the nature and duration of any pretrial restraint." MCM, *supra* note 5, R.C.M. 1106(d)(3)(D). Pretrial restraint is not limited to pretrial confinement.

The failure to correctly note the pretrial restraint in the SJAR is an all-too-common error. It is clear from many of the records we review that there is a fundamental misunderstanding by some SJAs and counsel that R.C.M. 1006(d)(3)(D) requires the SJA to include in his or her recommendation concise information as to the nature and duration of any pretrial restraint. Rule for Courts-Martial 1106(d)(3)(D) does not mandate reporting only restraint that awards an appellant pretrial confinement credit and/or restraint that might rise to the level of requirement confinement credit analysis. Rather, the rule requires inclusion of all "moral or physical restraint on a person's liberty" imposed before and during disposition of charges.

*Scalo*, 59 M.J. at 648 n.4.

26. *Id.* at 647.

27. 49 M.J. 283 (1998).

28. *Scalo*, 59 M.J. at 650.

29. *Id.*

30. *Id.* (quoting *Wheelus*, 49 M.J. at 289).

31. *Id.* at 648-50. "Appellant and his detailed counsel at trial and on appeal, however, have elected not to object or claim error, and thus allege prejudice, as a result of the SJAR's misstatement of the pretrial restraint. Thus, the *Wheelus* analysis does not apply to the case at bar." *Id.* at 650.

32. 49 M.J. 460 (1998).

33. *Scalo*, 59 M.J. at 648-49.

34. *Id.* at 649-50.

35. *Id.*

36. *See United States v. Wheelus*, 49 M.J. 283 (1998).

comply with its requirements. Defense counsel must thoroughly read the SJAR and comment on any defects therein or risk waiving any allegation of error.

### Service of the SJA's Recommendation—RCM 1106(f)<sup>37</sup>

The post-trial process requires service of the SJAR on both the accused and counsel, who then have ten days to submit written matters, commonly referred to as “clemency matters,” for the CA’s consideration before action.<sup>38</sup>

In *United States v. Lowe*,<sup>39</sup> the CAAF addressed the right to submit clemency matters prior to action by the CA. After trial, but prior to action, the appellant suffered a gunshot wound to his right arm which, according to his medical records, “[would] need very aggressive therapy to restore his motion.”<sup>40</sup> The long-term prognosis for the appellant’s recovery “[was] uncertain.”<sup>41</sup> This information, however, was not included in the

SJAR because the CA took action on the case before the appellant’s defense counsel was served with the SJAR.<sup>42</sup>

On appeal,<sup>43</sup> the appellant asked the CAAF for a new review and action in his case.<sup>44</sup> The government argued that the appellant waived any objection he had to the government’s failure to serve his counsel with the SJAR because he had over four and one-half months to advise the CA about his injury.<sup>45</sup> Additionally, the appellant could have asked the CA to recall and modify his earlier action based on post-action submissions by the appellant.<sup>46</sup> Finding both arguments to be without merit, the CAAF found error in the CA’s action prior to service of the SJAR on the appellant’s defense counsel as required by RCM 1106(f)(1). In reaching this decision, the court relied on the plain meaning of both RCM 1106(f)(1) and Article 60, UCMJ, which establish the requirement for service of the SJAR prior to action.

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37. MCM, *supra* note 5, R.C.M. 1106(f).

38. *See id.* R.C.M. 1105, 1106. Rule for Courts-Martial 1105(c)(1) states:

*General and special courts-martial.* After a general or SPCM, the accused may submit matters under this rule within the later of 10 days after a copy of the authenticated record of trial or, if applicable, the recommendation of the staff judge advocate or legal officer, or an addendum to the recommendation containing new matter is served on the accused. If, within the 10-day period, the accused shows that additional time is required for the accused to submit such matters, the convening authority or that authority’s staff judge advocate may, for good cause, extend the 10-day period for not more than 20 additional days; however, only the convening authority may deny a request for such an extension.

*Id.* Rule for Courts-Martial 1106(f)(1) states:

*Service of recommendation on defense counsel and accused.* Before forwarding the recommendation and the record of trial to the convening authority for action under R.C.M. 1107, the staff judge advocate or legal officer shall cause a copy of the recommendation to be served on counsel for the accused. A separate copy will be served on the accused. If it is impracticable to serve the recommendation on the accused for reasons including but not limited to the transfer of the accused to a distant place, the unauthorized absence of the accused, or military exigency, or if the accused so requests on the record at the court-martial or in writing, the accused’s copy shall be attached to the record explaining why the accused was not personally served.

*Id.* *See also* 10 U.S.C. § 860 (2000) (stating that prior to acting in a case requiring an SJAR (e.g., GCM or SPCM with an adjudged bad conduct discharge or confinement of one year), the SJAR will be served on the appellant who then has ten days to submit matters; the ten days can be extended by twenty additional days). *Id.*

39. 58 M.J. 261 (2003). The appellant was convicted at a SPCM of unauthorized absence and missing movement and sentenced to forfeiture of \$650 pay per month for three months, ninety days confinement, and a bad conduct discharge. *Id.*

40. *Id.* at 262.

41. *Id.*

42. *Id.*; *see also* MCM, *supra* note 5, R.C.M. 1106(f).

43. After the case was docketed with the Navy-Marine Corps Court of Criminal Appeals (NMCCA), but before any assignment of error, the appellant’s defense counsel sought relief for the government’s failure to serve the SJAR as required by RCM 1106(f). The defense counsel’s motion was denied, the case was submitted for review without assignment of errors, and the NMCCA affirmed the findings and sentence in an unpublished opinion. *United States v. Lowe*, NMCM No. 200000956 (N-M. Ct. Crim. App. Aug. 30, 2001), *aff’d* by 58 M.J. 261, 262 (2003).

44. *Lowe*, 58 M.J. at 262.

45. *Id.* Although the opinion indicates the government argued the appellant had over four and one-half months to submit matters, the facts indicate that the appellant was shot on 21 January 2000 and the CA’s action was dated 16 May 2000, giving the appellant less than four post-injury months to advise the CA about the nature of his injuries and his prognosis for recovery. *Id.* at 262-63.

46. *Id.* at 262; *see also* MCM, *supra* note 5, R.C.M. 1107(f)(2) (authorizing recall and modification of post-trial action before forwarding of the case for appellate review under Article 66, UCMJ).

The opportunity to be heard before or after the convening authority considers his action on the case is simply not qualitatively the same as being heard at the time a convening authority takes action, anymore than the right to seek reconsideration of an appellate opinion is qualitatively the same as being heard on the initial appeal. "The essence of post-trial practice is basic fair play -- notice and an opportunity to respond." [Citation omitted].<sup>47</sup>

The CAAF next looked to whether the appellant established some "colorable showing of possible prejudice" warranting relief in his case.<sup>48</sup> The court found prejudice in the denial of the appellant's opportunity to advise the CA of his gunshot wound and his future prognosis. Finally, the court provided common sense guidance to military practitioners:

Where there is a failure to comply with R.C.M. 1106(f), a more expeditious course would be to recall and modify the action rather than resort to three years of appellate litigation. The former would appear to be more in keeping with principles of judicial economy and military economy of force.<sup>49</sup>

As the *Lowe* court indicated, the issue is not whether an appellate court would have granted clemency; rather, "whether [the] Appellant had a fair opportunity to be heard on clemency before a convening authority, vested with discretion, acting in his case."<sup>50</sup>

### **New Matter and the Addendum to the SJAR—RCM 1106(f)(7)<sup>51</sup>**

Once the SJA completes the SJAR and serves the accused and counsel, the government waits for the defense's clemency submissions.<sup>52</sup> Although not required,<sup>53</sup> most legal offices, after receiving the defense's submissions, will prepare an "addendum" to the SJAR.<sup>54</sup> If the addendum contains new matter, the government must serve the addendum on the accused and counsel for comment prior to action. Although undefined in the text of RCM 1106(f)(7), the discussion thereto defines new matter as: "[1] discussion of the effect of new decisions on issues in the case, [2] matter from outside the record of trial, and [3] issues not previously discussed."<sup>55</sup> These broad definitional categories of new matter, however, are often of little value to the practitioner in deciding whether the contents of an addendum constitute new matter. This issue was addressed by the Air Force court in *United States v. Gilbreath*.<sup>56</sup>

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47. *Lowe*, 58 M.J. at 263.

48. *Id.* (citing *United States v. Chatman*, 46 M.J. 321 (1997); *United States v. Howard*, 47 M.J. 104 (1997)).

49. *Id.* at 264.

50. *Id.* at 263-64.

51. MCM, *supra* note 5, R.C.M. 1106(f)(7). Rule for Court-Martial 1106(f)(7) states:

*New matter in addendum to recommendation.* The staff judge advocate or legal officer may supplement the recommendation after the accused and counsel for the accused have been served with the recommendation and given an opportunity to comment. When new matter is introduced after the accused and counsel have examined the recommendation, however, the accused and counsel for the accused must be served with the new matter and given 10 days from the service of the addendum in which to submit comments. Substitute service of the accused's copy of the addendum upon counsel for the accused is permitted in accordance with the procedures outlined in subparagraph (f)(1) of this rule.

*Id.* The Discussion to RCM 1106(f)(7) states, in part: "'New matter' includes discussion of the effect of new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed." MCM, *supra* note 5, R.C.M. 1106(f)(1) Discussion. Rule for Courts-Martial 1106(f)(1) allows for substitute service upon the accused's counsel if it is impracticable to serve the recommendation or addendum upon the accused. If substitute service is used, however, the record of trial will contain a statement explaining why the accused was not served. *See id.*

52. *See id.* R.C.M. 1105(b), 1106(f)(4). Rule for Courts-Martial 1105 addresses matters to be submitted by the appellant (e.g., accused) and RCM 1106 addresses matters submitted by the appellant's (e.g., accused's) counsel. Collectively, RCM 1105 and 1106 submissions from the defense (e.g., accused and counsel) are commonly referred to as the defense's clemency submissions.

53. *See id.* R.C.M. 1106(f)(7). An addendum is only required in those cases in which the defense alleges legal error in the proceedings, requiring comment by the staff judge advocate or legal officer. *See id.* R.C.M. 1106(d)(4).

54. *See id.* R.C.M. 1106(f)(7). An addendum is an excellent tool for memorializing those matters submitted by the defense, in their RCM 1105 and 1106 submissions, that the convening authority considered before action.

55. *See id.* R.C.M. 1106(f)(7). "'New matter' does not ordinarily include any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the recommendation." *Id.* Discussion.

56. 58 M.J. 661 (A.F. Ct. Crim. App. 2003).

In *Gilbreath*, a case before the Air Force court for a second time, the SJA prepared the required SJAR and properly served the appellant's defense counsel.<sup>57</sup> The appellant was not served because the SJA's office was unable to locate her.<sup>58</sup> The defense counsel, unable to locate her client, prepared a request for clemency and submitted it along with the appellant's original clemency request.<sup>59</sup> After receiving the defense's clemency submissions, the SJA prepared an addendum to the SJAR and submitted it to the CA without serving it on either the appellant's counsel or appellant. The addendum stated, in part:

The defense counsel received a copy of the second SJA's recommendation on 7 Oct 02. In her 17 Oct 02 request, defense counsel, among other things, states that AB Gilbreath deserves clemency because she was a 19 year old girl at the time the offense took place, she had no prior disciplinary record, and she pled guilty and took responsibility for her actions without a pretrial agreement. *We attempted to serve AB Gilbreath a copy of the new SJA's Recommendation, but could not locate her.* In AB Gilbreath's original clemency request letter, however, she states, among other things, that she would like to have her BCD upgraded to a general discharge so that she can get a decent job and pay for college.<sup>60</sup>

After considering the SJAR, the addendum, and the defense's clemency matters, the CA approved the adjudged findings and sentence.<sup>61</sup>

On appeal, the Air Force court noted that the government failed to comply with RCM 1106(f)(1) because it failed to serve the appellant with the SJAR and failed to provide a statement of impracticability in the record of trial supporting substitute service on the appellant's counsel.<sup>62</sup> The court next noted that "the SJA's statement that they attempted to serve a copy of the SJAR on the appellant but couldn't locate her was new matter because it was information from outside the record of trial and it injected an issue not previously discussed."<sup>63</sup> The appellant and counsel, therefore, were entitled to service of the addendum along with a ten-day period to respond. Finding error, the court tested the error for prejudice by applying *United States v. Chatman*,<sup>64</sup> whereby an appellant must "demonstrate prejudice by stating what, if anything, would have been submitted to 'deny, counter, or explain' the new matter."<sup>65</sup>

In *Gilbreath*, neither the appellant nor her appellate defense counsel alleged what "would have been submitted to 'deny, counter, or explain' the new matter."<sup>66</sup> The court, however, focused on the possible adverse effect of the new matter on the CA's decision to grant clemency, noting that the inability to locate the appellant could be perceived by the CA as evidence of the appellant's disobedience of orders because she failed to provide a valid leave address while on appellate leave.<sup>67</sup> Additionally, the CA could view the new matter as an indication of how little the appellant cared about her case because she failed to provide a proper mailing address for issues associated with her case.<sup>68</sup> In light of the potential adverse impact of the new matter, the court found prejudice and ordered a new SJAR and action in the case.<sup>69</sup>

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57. *Id.* The appellant was convicted at a GCM of wrongful use of cocaine and sentenced to reduction to E-1 and a bad conduct discharge. *Id.* On the first appeal to the AFCCA, the service court affirmed the findings and sentence and the CAAF certified two issues for review. The first was whether it was error for the staff judge advocate not to serve the defense with an addendum that recommended the convening authority approve the adjudged jury sentence, when, in fact, the appellant was tried by a military judge alone. Finding prejudicial error in the failure to serve an addendum containing new matter, the CAAF set aside the CA's action and remanded the case for a new recommendation and action. *See United States v. Gilbreath*, 57 M.J. 57 (2002).

58. *Gilbreath*, 58 M.J. at 662.

59. *Id.* at 661, 662.

60. *Id.* at 662.

61. *Id.*

62. *Id.* at 663; *see also* MCM, *supra* note 5, R.C.M. 1106(f)(1).

63. *Gilbreath*, 58 M.J. at 664.

64. 46 M.J. 321 (1997) (establishing the standard for relief in cases in which new matter is inserted in the addendum).

65. *Gilbreath*, 58 M.J. at 664 (quoting *United States v. Chatman*, 46 M.J. 321, 323 (1997)).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 665.

New matter is not prohibited and *Gilbreath*<sup>70</sup> does not stand for the proposition of avoiding new matter whenever possible. Rather, serve the accused and counsel with the addendum and wait ten days before acting on the case if new matter is inserted in the addendum or when in doubt about whether something constitutes new matter. If unable to serve the accused, comply with the substitute service provisions of RCM 1106(f)(1). All the government needed to do in *Gilbreath* was omit the “unable to locate” language from the addendum and provide a statement in the record of trial, dated after the action, explaining why the appellant was not personally served. Alternatively, the government could have inserted a statement of impracticability in the SJAR, affording the appellant’s defense counsel the opportunity to comment on the statement prior to action. Instead, the government inserted its statement of impracticability in the addendum, resulting in a finding of prejudice to the appellant because the government highlighted for the CA that they could not find the appellant to serve her with the post-trial documents in her case.<sup>71</sup>

### Post-Trial Punishment

Another recent development in post-trial processing occurred in *United States v. Brennan*,<sup>72</sup> a case involving an allegation of post-trial punishment and the standard by which such an allegation is reviewed. *Brennan* also highlights for military justice managers, SJAs, and convening authorities the value of specifying, in cases in which clemency is granted, the specific reason or reasons for granting clemency.

During post-trial processing of the appellant’s case, the appellant’s counsel requested clemency based on seven separate grounds, one of which was abusive post-trial confinement.<sup>73</sup> The appellant alleged that while confined at the United States Army Confinement Facility, Europe, (USACFE), she was subjected to cruel and unusual punishment, to wit: repeated sexual harassment and sexual assaults by an E-6 cadre member, in violation of the Eighth Amendment and Article 55, UCMJ.<sup>74</sup>

In evaluating the appellant’s Eighth Amendment claim, the CAAF noted that the test for post-trial cruel and unusual punishment has both an objective component, “whether there is a sufficiently serious act or omission that has produced a denial of necessities,” and a subjective component, “whether the state of mind of the prison official demonstrates deliberate indifference to inmate health or safety.”<sup>75</sup> Additionally, “to sustain an Eighth Amendment violation, there must be a showing that the misconduct by prison officials produced injury accompanied by physical or psychological pain.”<sup>76</sup> The government did not dispute the appellant’s factual assertions; rather, the government argued that the appellant failed to establish any harm, a prerequisite to a finding of an Eighth Amendment violation.<sup>77</sup> The CAAF disagreed, finding that under the facts of the appellant’s case, it was clear that the appellant suffered harm at the hands of the cadre member.<sup>78</sup> Finally, the government argued that relief was not warranted in the appellant’s case because the CA granted clemency, approving only nine months confinement instead of twelve months under the pretrial agreement.<sup>79</sup> The court disagreed because the reason the CA granted clemency

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70. *Id.* at 661.

71. Stated another way, had the government inserted the addendum language in question, to wit: “*We attempted to serve AB Gilbreath a copy of the new SJA’s Recommendation, but could not locate her.*” in a statement of impracticability inserted in the record of trial after action, in compliance with RCM 1106(f)(1), as opposed to placing it in the addendum, there would be no “new matter” in the post-trial process and the case would not have been remanded for a third SJAR and action.

72. 58 M.J. 351 (2003). The appellant was convicted at a GCM of three specifications of use, possession, and distribution of marijuana and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for fifteen months, and a bad conduct discharge. The pretrial agreement in the case limited the period of confinement to twelve months. *Id.* at 352.

73. *Id.* at 355.

74. *Id.* at 352-53; *see* U.S. CONST. amend VIII; UCMJ art. 55 (2002).

75. *Brennan*, 58 M.J. at 353.

76. *Id.* at 354.

77. *Id.*

78. *Id.*

The present case, however, involves more than occasional unwelcome advances and incidental contact. Virtually every day over a two-month period, the Guard Commander abused his position as a prison official to mistreat Appellant, a prisoner subject to his command and control. At one point, using graphic language, he brutally threatened her with anal sodomy. On another occasion, he isolated her in a locked room, trapped her in a corner, and physically assaulted her. This case involves a Guard Commander whose raw exercise of power over a prisoner transformed her lawful period of confinement into a different form of punishment by imposing repeated physical and verbal abuse over a two-month period. Under these circumstances, expert testimony is not needed to demonstrate that the harm inflicted upon Appellant was sufficiently injurious to establish that she was subjected to punishment in violation of Article 55 by the Guard Commander.

*Id.*

was unclear. Since the appellant's counsel raised seven separate bases for relief in the clemency submissions and because the SJAR and addendum were silent regarding the allegation of cruel and unusual punishment, the court was unable to determine whether the CA's three-month reduction in confinement was based on this allegation of error.<sup>80</sup> The court, therefore, affirmed the lower court's decision as to findings, set aside the decision as to sentence, and remanded the case to the service court with the option of either granting relief at their level or remanding the case back to the CA for remedial action.<sup>81</sup>

*Brennan* defines the standard by which appellate courts will review allegations of cruel and unusual punishment. Post-trial punishment and any resulting harm must be thoroughly established in defense submissions. Punishment, without harm, does not require relief. The client should submit an affidavit detailing the punishment and, if possible, corroborating statements from third parties should accompany the defense's submissions.

79. *Id.* at 355. The government argued that the issue of cruel and unusual punishment was "adequately addressed because the convening authority reduced [the appellant's] confinement from [12 months to nine months]." *Id.*

80. *Id.* "Under these circumstances, it would be inappropriate to conclude that the convening authority took corrective action to remedy Appellant's mistreatment in post-trial confinement." *Id.*

81. *Id.*

Because the case in its present posture involves correction of a legal error rather than the provision of clemency, corrective action may be taken by the Court of Criminal Appeals. The Court of Criminal Appeals has discretion either to take corrective action with respect to the Article 55 violation, or remand the case for such action by a convening authority.

*Id.*

82. See, e.g., U.S. DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (30 Sept. 1996).

83. Before taking action, the convening authority must consider the result of trial, the recommendation of the staff judge advocate or legal officer, if applicable, and any matters submitted by the accused under RCM 1105 or 1106. The record of trial should be presented to the convening authority for his or her consideration, but is not required to be considered. See MCM, *supra* note 5, R.C.M. 1107(b)(3). The convening authority, in a document other than the formal action, should memorialize what he or she considered and why clemency, if any, was granted. Some jurisdictions have the convening authority sign a decision memorandum as well as the action. The action document should be a simple, one page document entitled ACTION with the formal action mirroring the action format contained in Appendix 16 of the MCM. See *id.* app. 16. For example, in *Brennan* the staff judge advocate and convening authority could have connected the relief granted to the allegation raised in the following manner:

Option 1:

Staff Judge Advocate's Addendum—The Defense alleges illegal post-trial punishment in violation of Article 55, UCMJ and the 8<sup>th</sup> Amendment. I disagree with the allegation therefore no corrective action is required. However, to moot any possible issue surrounding the accused's treatment while confined at Mannheim, I recommend you reduce her period of confinement by three months.

Convening Authority's Decision—After having considered the defense's submissions, the post-trial recommendation dated [insert date], the report of result of trial, and the record of trial, the recommendation of the staff judge advocate is approved. Only so much of the sentence as provides for reduction to E-1, forfeiture of all pay and allowances, confinement for nine months, and a bad conduct discharge is approved. Were it not for the allegation of illegal post-trial punishment, I would have approved twelve months confinement in the accused's case.

Option 2:

Staff Judge Advocate's Addendum—The Defense alleges illegal post-trial punishment in violation of Article 55, UCMJ and the 8<sup>th</sup> Amendment. I agree with the allegation and corrective action is required. I recommend that you reduce her period of confinement by three months.

Convening Authority's Decision—After having considered the defense's submissions, the post-trial recommendation dated [insert date], the report of result of trial, and the record of trial, the recommendation of the staff judge advocate is approved. Only so much of the sentence as provides for reduction to E-1, forfeiture of all pay and allowances, confinement for nine months, and a bad conduct discharge is approved. Were it not for the illegal post-trial punishment, I would have approved twelve months confinement in the accused's case.

84. 57 M.J. 219 (2002).

sions. If an investigation was conducted, the investigating officer's report should also be included with the defense's submissions.<sup>82</sup> If relief is granted for post-trial punishment, or for any other basis raised in the defense's submissions, the CA should document his decision, connecting the relief to the allegation(s) raised by the defense.<sup>83</sup>

## Post-Trial Delay

*United States v. Tardif*<sup>84</sup> clarified the service courts' authority under Article 66(c), UCMJ, to grant relief for dilatory post-trial processing.<sup>85</sup> Post-*Tardif* decisions highlight the different approaches taken by the respective services in handling post-trial delay. The Navy-Marine Corps<sup>86</sup> and the Air Force<sup>87</sup> service courts continue to require prejudice before granting relief. The Army<sup>88</sup> and Coast Guard<sup>89</sup> service courts apply a more liberal standard, granting sentence relief absent any showing of

prejudice. Despite the liberal approach taken by two of the four service courts, the Army court has, in recent opinions, indicated it would hold the appellant and his trial defense counsel to a higher standard in evaluating claims of dilatory post-trial processing.<sup>90</sup>

In *United States v. Khamsouk*,<sup>91</sup> the appellant argued that his discharge should be disapproved because of the unreasonable twenty-month delay in the post-trial processing of his case.<sup>92</sup> The Navy-Marine Court of Criminal Appeals (NMCCA) disagreed, finding that there was a “reasonable, although not entirely satisfactory explanation for the delay in the CA’s [convening authority’s] action.”<sup>93</sup> Over half of the twenty-month delay was attributed to the military judge who took thirteen months to authenticate the record of trial.<sup>94</sup> The court also

addressed the lack of effort on the defense’s part to demand speedy post-trial processing until after receiving the SJAR, noting that the defense counsel could have sought a post-trial 39(a) session to demand speedy post-trial processing since the military judge still controlled the case.<sup>95</sup> Considering all the facts and circumstances, the NMCCA found that the post-trial processing was not unreasonable and denied the appellant’s request for relief.<sup>96</sup>

In *Wallace*,<sup>97</sup> the second of the NMCCA post-trial delay cases, the appellant alleged he was entitled to relief because it took the government 290 days to act in his guilty plea case.<sup>98</sup> The appellant, however, failed to cite any prejudice resulting from the delay. Again, the NMCCA declined to exercise its broad Article 66(c), UCMJ, power to grant relief, noting that

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85. *Id.* (holding that the service courts have authority under Article 66(c), UCMJ, to grant sentence relief for unreasonable post-trial delay absent any prejudice to an appellant resulting from the delay).

86. *See, e.g.*, *United States v. Dezotell*, 58 M.J. 517 (N-M. Ct. Crim. App. 2003) (stating that relief denied absent prejudice in a case in which government took nearly fourteen months to process the appellant’s case through action); *United States v. Khamsouk*, 58 M.J. 560 (N-M. Ct. Crim. App. 2003); *United States v. Wallace*, 58 M.J. 759 (N-M. Ct. Crim. App. 2003).

87. *See, e.g.*, *United States v. Bigelow*, 55 M.J. 531 (A.F. Ct. Crim. App. 2001), *aff’d*, 57 M.J. 64 (2002) (discussing the absence of prejudice to the appellant from the post-trial delay). As of the date of this article, there were no published post-*Tardif* Air Force opinions addressing post-trial delay. Several unpublished opinions existed. *See, e.g.*, *United States v. Josey*, 2004 CCA LEXIS 80, ACM 33745 (A.F. Ct. Crim. App., Mar. 23, 2004) (unpublished); *United States v. Wolfer*, 2003 CCA LEXIS 154, ACM 35380 (A.F. Ct. Crim. App. 2003 June 6, 2003) (unpublished); *United States v. Zinn*, 2003 CCA LEXIS 35, ACM 34434 (A.F. Ct. Crim. App. 2003, Jan. 22, 2003) (unpublished).

88. *See, e.g.*, *United States v. Harms*, 58 M.J. 515 (Army Ct. Crim. App. 2003); *United States v. Chisholm*, 58 M.J. 733 (Army Ct. Crim. App. 2003).

89. *See, e.g.*, *United States v. Tardif*, 58 M.J. 714 (C.G. Ct. Crim. App. 2003).

90. *See United States v. Bodkins*, 59 M.J. 634 (Army Ct. Crim. App. 2004); *see also United States v. Garman*, 59 M.J. 677 (Army Ct. Crim. App. 2004).

91. 58 M.J. 560 (N-M. Ct. Crim. App. 2003). The appellant was convicted at a GCM of fraudulent enlistment, forgery, five specifications of larceny, and sixteen specifications of unauthorized use of another’s credit card and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for five years, a bad conduct discharge, and a \$2,500 fine. *Id.* at 561.

92. *Id.*

93. *Id.* at 562.

94. *Id.* In addressing the thirteen-month delay, the court noted:

While this delay is not attributable to the appellant, it is nonetheless clear that responsibility for authentication lies solely with the independent military judge and not with the trial counsel, staff judge advocate, or CA. In our previous decision, we did not find it necessary to hold that the Government was not responsible for delay by the military judge. *Khamsouk*, 54 M.J. at 748 n.6. Nonetheless, the fact that the military judge held the record for about thirteen months [out of twenty months] does serve as a reasonable explanation for why the CA could not act in a more timely fashion.

*Id.* *But see United States v. Garman*, 59 M.J. 677 (Army Ct. Crim. App. 2004) (refusing to treat the time it took the military judge to authenticate the record as a separate category of time in evaluating post-trial processing delay; military judge’s time treated as government time).

95. *Khamsouk*, 58 M.J. at 562 (citing *United States v. Tardif*, 57 M.J. 219, 225 (2002)).

96. *Id.*

97. *United States v. Wallace*, 58 M.J. 759 (N-M. Ct. Crim. App. 2003). The CAAF granted review of this case to address the post-trial delay issue. On 30 August 2002, it remanded the record for reconsideration. The appellant was convicted at a GCM of unpremeditated murder, kidnapping and obstruction of justice and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for life without the possibility of parole, and a dishonorable discharge. *Id.* at 761. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged and suspended all confinement in excess of thirty years for the period of confinement plus twelve months. *Id.*

98. *Id.* at 774. The appellant requested that the service court reduce the period of suspension from twelve years to five years. *Id.*

“relief pursuant to Article 66(c), UCMJ [for post-trial delay] should only be granted under the most extraordinary of circumstances.”<sup>99</sup> Of significance to trial practitioners was the court’s focus on the appellant’s silence during the post-trial processing of his case:

[N]either Appellant nor trial defense counsel raised the issue of delay with the military judge or the SJA [staff judge advocate] or the CA [convening authority] during the entire post-trial processing period. Appellant raises it for the first time on appeal. . . . Appellant’s lengthy silence is strong evidence that he suffered no harm and that this is not an appropriate case for this Court to exercise its Article 66(c), UCMJ authority.<sup>100</sup>

In *United States v. Tardif*,<sup>101</sup> the government took one-year to process the appellant’s record from sentencing to dispatch to the appellate court. On appeal, the Coast Guard court noted:

Although appellant did not suffer individualized prejudice, we feel relief may be granted to an appellant when post-trial delay is unreasonable and unexplained. In many cases, unexplained post-trial delay reduces an appellant’s opportunity to obtain clemency from a convening authority or to receive meaningful relief if errors are found on

appeal. It may also create a perception of unfairness within the military justice system.<sup>102</sup>

Finding unreasonable and unexplained delay, the court reduced the appellant’s confinement from twenty-four months to nineteen months.<sup>103</sup> The court was unwilling, however, to mitigate the appellant’s dishonorable discharge to a bad-conduct discharge as he requested.<sup>104</sup>

The next two cases in the area of post-trial delay are *United States v. Bodkins*<sup>105</sup> and *United States v. Garman*,<sup>106</sup> both Army court opinions highlighting the defense counsel’s role in the pursuit of timely post-trial processing.

In *Bodkins*, a case submitted on the merits, the court noted the following regarding the post-trial processing of the appellant’s case: the seventy-four-page record of trial was authenticated 165 days after trial; the SJAR was signed on day 173; the CA acted on the case on day 412; and the appellate court received the record of trial 475 days after sentencing.<sup>107</sup> Despite acknowledging its authority under Article 66(c), UCMJ, to grant sentence relief absent a showing of “actual or specific prejudice”<sup>108</sup> and a finding of “unreasonably slow”<sup>109</sup> post-trial processing, the court declined to grant sentence relief holding that the trial defense counsel and appellate counsel, respectively, waived the issue by failing to demand speedy post-trial processing or relief on appeal.<sup>110</sup> In denying the appellant relief, the court provided simple guidance to trial and

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99. *Id.* at 775.

100. *Id.*

101. 58 M.J. 714 (C.G. Ct. Crim. App. 2003). The CAAF granted review of this case to address the post-trial delay issue. On 30 August 2002, it remanded the record for reconsideration. The appellant was convicted of absence without leave and two specifications of assault on a child under the age of sixteen and sentenced to reduction to E-1, forfeiture of all pay and allowances, three years confinement and a dishonorable discharge; the CA only approved two years of confinement. *Id.*

102. *Id.* at 715.

103. *Id.*

104. *Id.*

105. 59 M.J. 634 (Army Ct. Crim. App. 2003). The appellant was convicted at a SPCM of two specifications of AWOL and sentenced to reduction to E-1, forfeiture of \$695 pay per month for two months, confinement for two months, and a bad conduct discharge. *Id.*

106. 59 M.J. 677 (Army Ct. Crim. App. 2003). The appellant was convicted at a SPCM of wrongful use of methamphetamine and two specifications of wrongful distribution of methamphetamine and sentenced to reduction to E-1, “forfeiture of two-thirds monthly pay,” confinement for two months, and a bad conduct discharge. *Id.* at 677-78. The forfeitures in the appellant’s case were stated as follows: “forfeiture of ‘two-thirds monthly pay, which appears to be \$737 per month a[t] the grade of E1, during [appellant’s] term of confinement.’” *Id.* Because the announced forfeitures failed to comply with RCM 1003(b)(2) requiring partial forfeitures to be stated in whole dollar amounts per month, the adjudged forfeitures were deemed to be ambiguous and treated as forfeiture of \$737 pay for one month. *Id.* at 683; see also MCM, *supra* note 5, R.C.M. 1003(b)(2).

107. *Bodkins*, 59 M.J. at 635.

108. *Id.* at 636; see also UCMJ art. 66(c) (2002).

109. *Bodkins*, 59 M.J. at 636. The court specifically focused on the unreasonable delay between trial and initial action and the unreasonable delay between action and dispatch of the record of trial to the ACCA. *Id.*

110. *Id.* at 637.

appellate defense counsel: demand speedy post-trial processing at the trial level and raise the issue on appeal or risk waiver.<sup>111</sup>

In *Garman*, the appellant alleged he was entitled to relief because of “unreasonable delay in the post-trial processing of his case.”<sup>112</sup> In evaluating the post-trial processing of the appellant’s case, the court noted that action approving the adjudged sentence occurred 329 days after sentencing.<sup>113</sup> Of the 329 days, eighty-one days were attributable to the defense. More importantly, the first time the defense commented on the post-trial delay was in its RCM 1105 and 1106 submissions, submitted on day 324.<sup>114</sup>

In denying the appellant’s claim for post-trial relief, the court, applying a totality of the circumstances approach, focused on five reasons: (1) trial defense counsel’s “dilatatory” objection to the post-trial processing on day 324, “well after” appellant’s release from confinement; (2) after defense counsel objected, the CA acted on the case within five days; (3) the unexplained time attributable to the government did not exceed 248 days;<sup>115</sup> (4) the only error in the post-trial processing was the post-trial delay itself; and (5) the appellant did not allege or suffer any “real harm or legal prejudice due to the slow post-trial processing of his case.”<sup>116</sup>

The *Garman* court reminded counsel that when applying a totality of circumstances approach, the court will look to two

distinct periods: the time between the close of trial and action and the time from action to dispatch of the record to the appellate authority.<sup>117</sup> In evaluating whether there was a lack of diligence in the processing of a case, the court will continue to examine such factors as: the size of the record of trial, the number of post-trial errors in the case, the number and length of post-trial defense delays, the “post-trial absence or mental illness of the [appellant],” the military justice section’s workload and real-world operational requirements on the Office of the SJA.<sup>118</sup>

Finally, the court concluded its opinion by providing guidance similar to that provided in *Bodkins*; defense counsel should demand speedy post-trial processing in a timely manner or risk waiver of the issues or a finding of no relief warranted. Commenting on post-trial delay for the first time at action will not go unnoticed. The *Garman* court held, “[i]t was appellant’s complete lack of effort to seek expeditious processing for 324 days that was the most critical factor in our resolution of this issue.”<sup>119</sup>

The final post-trial delay case is the CAAF’s decision in *United States v. Chisholm*.<sup>120</sup>

Last term, the Army Court of Criminal Appeals decided *Chisholm*,<sup>121</sup> a post-trial delay case in which the appellant complained of “dilatatory post-trial processing.”<sup>122</sup> The court agreed finding that a “sixteen-month delay from trial to action [in a

111. *Id.*

In the absence of evidence to the contrary, and assuming the competency of trial and appellate defense counsel [footnote omitted], we find that appellant and his counsel were aware of the issue of dilatatory post-trial processing. We have published ten opinions of the court and thirty-two memorandum opinions [footnote omitted] discussing this issue. Further, this topic has been emphasized at periodic conferences and training seminars at The Judge Advocate General’s Legal Center and School. Accordingly, we conclude that trial and appellate counsel effectively waived any right to claim a reduction in appellant’s sentence resulting from dilatatory post-trial processing by failing to make a timely objection.

*Id.*

112. *United States v. Garman*, 59 M.J. 677, 678 (Army Ct. Crim. App. 2003).

113. *Id.*

114. *Id.*

115. *Id.* Unlike the Navy-Marine court, the Army court refused to segregate the military judge’s time into its own, non-government category for post-trial processing.

The Government urges us to deduct the military judge’s processing time, fifty days, from the overall post-trial processing time in appellant’s case. That is, they urge us to deduct the time period from the date the ROT [record of trial] was mailed to the military judge to the date the military judge signed the authentication page. We disagree with this purely mathematical approach. The period of time for preparation of the ROT is attributable to the government when dilatatory post-trial processing.

Compare *id.* at 679, with *United States v. Khamsouk*, 58 M.J. 560, 562 (N-M. Ct. Crim. App. 2003).

116. *Garman*, 59 M.J. at 678.

117. *Id.* at 681.

118. *Id.* at 682 (quoting *United States v. Bauerbach*, 55 M.J. 501, 507 (Army Ct. Crim. App. 2001)).

119. *Id.*

120. 59 M.J. 151 (2003).

case with an 849-page record of trial] was unexplained and excessive.”<sup>123</sup> In addressing the issue of delay, the service court “emphasize[d] the responsibilities of the military judge in the timely preparation and authentication of the record of trial.”<sup>124</sup> After discussing the military judge’s oversight responsibilities regarding preparation of the record of trial,<sup>125</sup> the court suggested several “remedial actions” available to a military judge to ensure timely preparation of the record of trial:

The exact nature of the remedial action is within the sound judgment and broad discretion of the military judge, but could include, among other things: (1) directing a date certain for completion of the record with confinement credit or other progressive sentence relief for each day the record completion is late; (2) ordering the accused’s release from confinement until the record of trial is completed and authenticated; or (3) if all else fails, and the accused has been prejudiced by the delay, setting aside the findings and the sentence with or without prejudice as to a rehearing.<sup>126</sup>

Thereafter, The Army Judge Advocate General certified two issues for review by the CAAF:

I. Whether the United States Army Court of Criminal Appeals’ opinion in *United States v.*

*Chisholm*, Army No. 9900240 (Army Ct. Crim. App. January 24, 2003) improperly vested military trial judges with power to issue interlocutory orders and authority to adjudicate and remedy post-trial processing delay claims?

II. Whether the United States Army Court of Criminal Appeals’ decision concerning the role of the military judge in adjudicating and remedying post-trial processing delay claims constitutes an advisory opinion?<sup>127</sup>

In a Per Curiam decision, the CAAF first addressed Issue II, holding that the lower court’s decision was not an impermissible advisory opinion, which was a proper holding since there was a valid issue before the Army court: whether the appellant’s case warranted sentence relief under Article 66(c), UCMJ, for dilatory post-trial processing.<sup>128</sup> The CAAF, however, found the first certified issue premature for review.<sup>129</sup> Despite finding that Issue I was not ripe for review, the court perhaps tipped its hand when it noted that “[t]he parties in a subsequent case are free to argue that specific aspects of an opinion . . . should be treated as non-binding dicta.”<sup>130</sup>

Trial counsel faced with a *Chisholm*-like remedial measure<sup>131</sup> affecting a lawfully adjudged finding or sentence should first argue that the service court’s *Chisholm*<sup>132</sup> decision, as it relates to the authority of the military judge, is nothing more

121. 58 M.J. 733 (Army Ct. Crim. App. 2003). The appellant was convicted at a GCM of conspiracy to commit rape, conspiracy to obstruct justice, false official statement, and rape and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for four years, and a bad conduct discharge.

122. *Id.* at 734.

123. *Id.* at 739.

124. *Id.* at 734.

125. See UCMJ art. 38(a) (2002); MCM, *supra* note 5, R.C.M. 1103(b)(1)(A).

126. *Chisholm*, 58 M.J. at 738.

127. *United States v. Chisholm*, 59 M.J. 151, 152 (2003); see also UCMJ art. 67(a)(2).

128. *Chisholm*, 59 M.J. at 152. In the second paragraph of the service court opinion, after stating what the appellant was convicted of, the Army court addressed the post-trial delay.

In his only assignment of error, appellant asserts that he is entitled to relief under *United States v. Collazo*, 53 M.J. 721 (Army Ct. Crim. App. 2000), for dilatory post-trial processing. We agree. We also write to emphasize the responsibilities of the military judge in timely preparation and authentication of the record of trial.

*Chisholm*, 58 M.J. at 734. Everything after “we agree,” however, is advisory in nature and dicta.

129. *Chisholm*, 59 M.J. at 153 (stating that neither party to the litigation challenged any action by the presiding military judge nor did any party had any “personal stake in the outcome” of any decision rendered by the court on the limits of a military judge’s post-trial authority).

130. *Id.* at 152 (quoting *United States v. Campbell*, 52 M.J. 386, 387 (2000)).

131. Examples of remedial measures include the following: dismissal of a charge or specification; reduction in sentence; or a court order releasing a lawfully confined post-trial prisoner from confinement.

132. See *Chisholm*, 59 M.J. at 151.

than non-binding dicta. If the military judge disagrees, the trial counsel should ask the military judge to stay his or her order so that the government can appeal the order. Disobeying and ignoring the order are not options.<sup>133</sup>

Demands for post-trial relief based on “dilatatory post-trial processing” are here to stay. The Navy-Marine Corps and Air Force continue to examine allegations of undue delay for prejudice and, absent prejudice, continue to deny relief. The Army and Coast Guard courts grant relief without any showing of prejudice; however, it now appears the Army will examine the actions of the appellant and his counsel in deciding whether to grant relief, action consistent with the Navy-Marine court.<sup>134</sup> Defense counsel should demand speedy post-trial processing as soon as a reasonable amount of time has elapsed for the preparation of the record of trial. A good court reporter can estimate the size of a record of trial in any given case based on the number of tapes used. Defense counsel should ask the reporter to estimate the size of the record, apply a thirty to forty pages per duty day standard for transcription and calculate the number of duty days it should take the government to transcribe the case. Once a tentative delivery date is established, defense counsel should demand speedy post-trial processing after that date, advising the government on how the defense arrived at its delivery date. A more proactive approach is to demand speedy post-trial processing in a documented format shortly after trial even if the tentative delivery date is several months away. Renew the demand periodically after the delivery date passes. Government counsel, especially chiefs of military justice, should document the post-trial processing of old cases, the reasons for delay, and consider attaching an affidavit to the SJAR documenting why the case took so long to process.

### The Proper Convening Authority—RCM 1107<sup>135</sup>

Rule for Courts-Martial 1107(a) provides clear guidance on who can take action in a case: the CA who referred the case or,

133. See *United States v. Castillo*, 59 M.J. 600, 603 (N-M. Ct. Crim. App. 2003).

134. See, e.g., *United States v. Wallace*, 58 M.J. 759 (N-M. Ct. Crim. App. 2003).

135. MCM, *supra* note 5, R.C.M. 1107.

136. See *id.* Rule for Courts-Martial 1107(a) states:

*Who may take action.* The convening authority shall take action on the sentence and, in the discretion of the convening authority, the findings, unless it is impracticable. If it is impracticable for the convening authority to act, the convening authority shall, in accordance with such regulations as the Secretary concerned may prescribe, forward the case to an officer exercising general court-martial jurisdiction who may take action under this rule.

*Id.* See also UCMJ art. 64 (2002).

137. 59 M.J. 540 (Army Ct. Crim. App. 2003).

138. *Id.*

139. *Id.* at 541.

140. *Id.* at 540. The appellant was sentenced to reduction to E-1, confinement for ten months and eight days, and a bad conduct discharge. *Id.*

in cases of impracticability, another officer exercising GCM jurisdiction.<sup>136</sup> Notwithstanding this clear guidance, the Army court had the opportunity to address this issue in *United States v. Newlove*.<sup>137</sup>

In *Newlove*, the appellant, a 10th Mountain Division (Light) (the Division) Soldier, was scheduled to deploy with his brigade to Kosovo.<sup>138</sup> In an effort to avoid the movement, the appellant solicited two other Soldiers to assault him. At the hospital, the Soldiers who assaulted the appellant told civilian law enforcement officials that the appellant was “robbed and beaten by unknown assailants.”<sup>139</sup> Eventually the appellant was charged and convicted of attempting to miss movement, simple disorder and neglect, and solicitation.<sup>140</sup> At the time the charges were referred, the Division was deployed, resulting in the creation of 10th Mountain Division (Light) (Rear) (the Division Rear). The Division Rear commander referred the appellant’s case to a GCM. The Division re-deployed to Fort Drum, however, before the Division Rear commander took action on the case. Upon re-deployment, the Division commander “resumed command of Fort Drum, NY, and the 10th Mountain Division (Light Infantry)” and “adopt[ed] all responsibilities for all courts-martial cases previously referred.”<sup>141</sup> Unfortunately, the commander of the Division Rear never transferred the appellant’s case from the Division Rear to the Division in accordance with RCM 1107.<sup>142</sup> Absent a proper transfer, the commander who refers a case, or a successor commander, “must” act on the case.<sup>143</sup> Since the appellant’s case failed to contain any documentation either transferring his case from the Division Rear commander to the Division commander, or documenting the Division commander as a “successor in command,” the action was set aside and the case remanded for action by someone “shown to be properly authorized to act on the record.”<sup>144</sup>

*Newlove*<sup>145</sup> stands for a relatively simple proposition: the CA who convenes a court-martial must act on the court-martial unless it is impracticable to do so. If action by the original CA

is impracticable, the government must comply with the transfer requirements of RCM 1107 and Article 60, UCMJ.<sup>146</sup>

### Disqualification of the CA

The last section addressed situations in which units deploy, rear commands are established, and a CA other than the one who convened the court takes action in the case. This section addresses situations involving proper convening authorities who, through their actions, may be disqualified from taking action in a case. The two cases that will be discussed are: *United States v. Gudmundson*<sup>147</sup> and *United States v. Davis*.<sup>148</sup>

In *Gudmundson*, the appellant argued that the CA, Brigadier General (BG) Fletcher, was disqualified from acting on his case

because he testified in the appellant's case on a controverted matter.<sup>149</sup> Specifically, the CA testified as a government witness in response to a defense motion to suppress the results of the urinalysis that formed the basis of the appellant's wrongful use charge.<sup>150</sup> The defense's suppression motion alleged that "Operation Nighthawk," an inspection authorized by BG Fletcher, was merely a subterfuge for an illegal search.<sup>151</sup> After hearing from the CA and considering four uncontroverted stipulations of expected testimony from members of the command, the military judge denied the motion.<sup>152</sup> The post-trial submissions by the appellant were silent regarding the inspection and the military judge's ruling on the motion.<sup>153</sup> Similarly, the submissions were silent regarding disqualification of the convening authority to act post-trial.<sup>154</sup> Instead, the submissions reminded the CA that he previously testified in the appellant's court-martial.<sup>155</sup>

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141. *Id.* at 541. A chronology of the pre- and post-trial processing of the appellant's case follows:

1. 12 April 2002—BG T.R.G., Commander, 10th Mtn (L)(R) refers the appellant's case to a GCM;
2. 29 May 2002—Appellant's trial held;
3. 29 July 2002—The staff judge advocate (SJA), 10th Mtn (L)(R) [MAJ J.H.R.II] prepares the Rule for Courts-Martial (R.C.M.) 1106 recommendation (SJAR) for BG T.R.G.;
4. 9 August 2002—MG F.L.H. resumes command of Fort Drum, NY, and 10th Mountain Division (Light Infantry) and assumes responsibility for all previously referred courts-martial cases;
5. 13 September 2002—The SJA, 10th Mtn (L) [LTC C.N.P.] prepared an addendum to the previously prepared SJAR in the appellant's case, an addendum prepared for the Commander, 10th Mtn (L), MG F.L.H.; and
6. 13 September 2002—The Commander, 10th Mtn (L), MG F.L.H. acted on the appellant's case.

*Id.*

142. *Id.* at 542. Rule for Courts-Martial 1107, *Army Regulation 27-10*, and Article 60, UCMJ, envision situations when it might be impracticable for one convening authority to act in a case, requiring transfer of the case to another GCM convening authority; however, if transfer occurs, the "memorandum, or other document, forwarding the case will contain a statement of the reasons why the convening authority who referred the case is unable to act on the record. A copy of the forwarding document will be included in the ROT [record of trial]." *Id.* See also MCM, *supra* note 5, R.C.M. 1107; U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE para. 5-32 (6 Sept. 2002) [hereinafter AR 27-10]; UCMJ art. 60 (2002).

143. *Newlove*, 59 M.J. at 542.

144. *Id.* at 543. Since there are no orders or other documents in the record reflecting that the Rear Commander, who referred appellant's case to court-martial, subsequently transferred post-trial jurisdiction for the appellant's case to the Division Commander, the purported action by the Division Commander is void. *Id.* at 542. See also *id.* n.8.

145. 59 M.J. 540 (Army Ct. Crim. App. 2003). see also *United States v. Brown*, 57 M.J. 623 (N-M. Ct. Crim. App. 2002).

146. See MCM, *supra* note 5, R.C.M. 1107; UCMJ art. 60 (2002); AR 27-10, *supra* note 142, para. 5-32.

147. 57 M.J. 493 (2002). The appellant was convicted at a SPCM of wrongful use of lysergic acid diethylamide and sentenced to reduction to E-1, confinement for three months, and a bad conduct discharge, a sentence approved by the convening authority (CA), BG Fletcher. *Id.* at 493-94.

148. 58 M.J. 100 (2003).

149. *Gudmundson*, 57 M.J. at 495.

150. *Id.* at 494.

151. *Id.*

152. *Id.* at 494-95.

153. *Id.* at 495.

154. *Id.* The appellant also failed to raise the disqualification issue at trial. *Id.*

155. *Id.*

In evaluating whether the CA was disqualified from acting in the appellant's case, the court distinguished between testimony by a CA indicating a "personal connection with the case" versus testimony of "an official or disinterested nature only."<sup>156</sup> The former is potentially disqualifying, whereas the latter is not.<sup>157</sup> In situations in which the CA may have a personal interest in the case, failure to raise a timely objection may result in waiver of the disqualification issue. The focal point for waiver in "personal connection" situations is whether the appellant was aware of the "ground for disqualification." If unaware, waiver does not apply; if aware, the converse is true. In the appellant's case, the court held the issue was waived.<sup>158</sup> Not only was the appellant aware of the potential disqualification issue, he highlighted it in his post-trial submissions when he reminded the CA about his earlier testimony and involvement in the appellant's court-martial.<sup>159</sup>

In *Davis*,<sup>160</sup> the appellant was convicted of wrongful use of cocaine and marijuana.<sup>161</sup> As part of his clemency petition, the defense counsel submitted a memorandum objecting to the CA acting in the case, arguing that, based on prior command briefings, the CA was unwilling to impartially listen to clemency petitions from airmen convicted of illegal drug use.<sup>162</sup> The defense memorandum stated, in part: "During the briefings, [the convening authority] also publicly commented that people caught using illegal drugs would be prosecuted to the fullest extent, and if they were convicted, they should not come crying to him about their situations or their families[?], or words to that effect."<sup>163</sup> The SJA failed to address the disqualification issue

in his addendum to the SJAR and the CA subsequently acted on the case.<sup>164</sup>

On appeal, the service court affirmed, in an unpublished opinion, finding that the CA's comments did not reflect an inelastic or inflexible attitude towards his post-trial duties.<sup>165</sup> The CAAF disagreed. In evaluating the CA's command briefing comments, the CAAF first noted that CA disqualification falls into two categories: (1) the CA is an accuser, has a personal interest in the outcome of the case, or has a personal bias toward the accused; (2) the CA exhibits or displays an inelastic attitude toward the performance of his or her post-trial duties or responsibilities.<sup>166</sup> The appellant's case involved category two.<sup>167</sup> The court noted that although CAs "need not appear indifferent to crime," they must maintain a "flexible mind" and a "balanced approach" when dealing with it.<sup>168</sup> The court found that the CA's comments reflect an inelastic or inflexible attitude toward his post-trial duties in drug cases.<sup>169</sup> The CAAF characterized Maj Gen [F's] comments as a "barrier to clemency appeals by convicted drug users" with the message being "Don't come [to him with requests for relief]."<sup>170</sup> The CAAF, finding that the CA lacked the "required impartiality with regard to his post-trial duties," disqualified him from acting in the appellant's case, reversed the lower court's decision, set aside the action, and remanded the case for a new review and action by a different CA.<sup>171</sup>

A defense counsel who cross-examines a CA should consider whether the CA is disqualified from taking action in the case, realizing that failure to seek disqualification prior to

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156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* "We hold that the issue was waived in this case. Appellant was aware of the convening authority's involvement, but he chose to not raise the disqualification issue at trial or in his post-trial submissions to the convening authority." *Id.*

160. 58 M.J. 100 (2003).

161. *Id.* at 101. The appellant was convicted at a SPCM of unauthorized absence, wrongful use of cocaine, and wrongful use of marijuana and sentenced to three months confinement and a bad conduct discharge. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 101-02; see MCM, *supra* note 5, R.C.M. 1106(d)(4) (requiring the staff judge advocate to comment on allegations of legal error raised in the defense's RCM 1105/6 submissions).

165. *United States v. Davis*, ACM S30020, 2002 CCA LEXIS 68 (A.F. Ct. Crim. App. Mar. 7, 2002) (unpublished).

[T]he convening authority's comments were made to general audiences on base, and his intent was to remind troops of the seriousness of drug use and its significant impact both on the military and his or her family. . . . We find no inelastic attitude by the convening authority in this case.

*Id.* at \*3.

166. *Davis*, 58 M.J. at 102.

167. *Id.* at 103.

action may result in waiver of the issue on appeal.<sup>172</sup> Furthermore, trial counsel, chiefs of military justice, and SJAs need to be aware of the information conveyed by convening authorities at command briefings and via command policy memoranda. Flexible, balanced briefings and memoranda are fine; briefings and memoranda that reflect an inelastic attitude towards post-trial duties are not.

### Post-Trial Assistance of Counsel

The next aspect of post-trial processing that will be discussed is an appellant's right to post-trial assistance of counsel. The two cases addressed in this section are *Diaz v. The Judge Advocate General of the Navy*<sup>173</sup> and *United States v. Brunson*,<sup>174</sup> highlighting the importance of ensuring that appellants receive timely post-trial appellate review of their cases.

In *Diaz*, the NMCCA received the petitioner's case on 25 February 2002 (451 days after trial).<sup>175</sup> The petitioner's first appellate defense counsel filed ten requests for enlargement of time to file his assignment of errors.<sup>176</sup> On December 3, 2002

(day 732), the petitioner filed a *pro se* petition for a Writ of Habeas Corpus with the NMCCA requesting release from confinement pending his appeal.<sup>177</sup> On 4 December 2003 (day 733) the NMCCA, while noting its concern with the post-trial and appellate delay in the petitioner's case, denied the petition.<sup>178</sup> The appellant thereafter filed a motion for reconsideration, which the NMCCA denied on 11 February 2003 (day 802).<sup>179</sup> The petitioner then filed a motion for appropriate relief with the CAAF, a motion treated by the CAAF as a petition for extraordinary relief.<sup>180</sup> On 16 June 2003 (day 927), the CAAF ordered the government to show cause why relief should not be granted in the petitioner's case.<sup>181</sup>

In response to the CAAF's order, the government asserted the following: the delay in the case was "neither excessive nor has it amounted to a prejudicial violation of Petitioner's due process right";<sup>182</sup> the "Petitioner has failed to show that this delay, 'in and of itself, is sufficient to characterize the delay as inordinate and excessive giving rise to a due process claim'",<sup>183</sup> and the petitioner "has not even served one-third of his nine year sentence."<sup>184</sup> Regarding the over two years of confinement already served by the appellant, the CAAF noted that

168. *Id.*

It is not disqualifying for a convening authority to express disdain for illegal drugs and their adverse effect upon good order and discipline in the command. A commanding officer or convening authority fulfilling his or her responsibility to maintain good order and discipline in a military organization need not appear indifferent to crime. Adopting a strong anti-crime position, manifesting an awareness of criminal issues within a command, and taking active steps to deter crime are consonant with the oath to support the Constitution; they do not per se disqualify a convening authority.

*Id.* The critical component of any policy letter, speech, communication, etc. is that it be "flexible" and "balanced" regarding options or ways of dealing with misconduct. *Id.*

169. *Id.* at 104.

170. *Id.*

171. *Id.*

172. Defense counsel need to know the convening authority and his or her views on clemency as well as his or her track record. If the convening authority never grants clemency, why not have him or her disqualified. Conversely, if the convening authority routinely grants clemency, having him or her disqualified may not be in the client's best interest. Bottom line—just because you can disqualify the convening authority does not mean you have to.

173. 59 M.J. 34 (2003). The petitioner was convicted at a GCM of multiple charges of rape and indecent assault of his twelve-year-old daughter and sentenced to reduction to E-1, forfeiture of all pay and allowances, nine years confinement, and a dishonorable discharge. *Id.* at 35.

174. 59 M.J. 41 (2003).

175. *Diaz*, 59 M.J. at 34.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

“[t]his fact would seem to underscore rather than excuse the failure to initiate a legal and factual review that could conceivably alter Petitioner’s conviction, sentence or both.”<sup>185</sup>

The government made several specific arguments in support of its contention that the delay in the petitioner’s case was not excessive:

[1] Due to the unique rights accorded servicemembers in our court-martial system, this Court should acknowledge that a detailed appellate counsel’s caseload can be an appropriate factor in deciding when the length of appellate delay becomes inordinate and excessive;

[2] This Court should not judge the length of time it takes a detailed military counsel to perfect an appeal in relation to the time it takes to perfect such an appeal when an appellant decides to hire his own private civilian counsel;

[3] This Court should not judge the length of time it takes a detailed military counsel to perfect an appeal in relation to civilian “public defenders” who are required to represent only indigent defendants, not all defendants, before the court;

[4] The military justice system requires the mandatory review of a vast number of court-martial cases regardless of whether the servicemember files a notice of appeal, and it is therefore reasonable and not a violation of due process when an appeal takes longer to perfect and decide in the military justice system than in the civilian justice system;

[5] This delay is not inordinate or excessive because of the size of the record of trial, the seriousness of the charges, the number of issues identified by Petitioner, and the “high volume of cases submitted to the lower Court.”<sup>186</sup>

In evaluating the petitioner’s claim and the government’s response, the court focused on the petitioner’s right to a full and fair review under Article 66, UCMJ,<sup>187</sup> which “embodies a concomitant right to have that review conducted in a timely fashion” and his “constitutional right to a timely review guaranteed him under the Due Process Clause.”<sup>188</sup>

After noting the petitioner’s Article 66, UCMJ, and Due Process rights to timely post-trial review, the court specifically addressed government’s arguments one through four, finding they all lacked merit. First, the court found that nothing in Article 66, UCMJ, or its legislative history, supports the position that the rights afforded service members should be used to lessen their post-trial right to timely review. As for counsel’s caseload, the court noted that heavy caseloads “are a result of management and administrative priorities and as such are subject to the administrative control of the Government.”<sup>189</sup> Second, the court noted that “the standards for representation of service members by military or civilian counsel in military appellate proceedings are identical.”<sup>190</sup> Third, the court noted that “[t]he duty of diligent representation owed by detailed military counsel to servicemembers is no less than the duty of public defenders to indigent civilians.”<sup>191</sup> Finally, regarding reason four above, the court found that rather than justifying post-trial delay, the differences between the military justice system and the civilian system, to include the unique fact finding authority of military appellate courts, compel even “greater diligence and timeliness than is found in the civilian system.”<sup>192</sup> As for the government’s argument that the appellant failed to establish prejudice from the delay, the court found this argument unpersuasive, characterizing it as “circular and disingenuous” since “the system that the Government controls has to date deprived [the] Petitioner of the timely assistance of counsel that would

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183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 36.

187. UCMJ art. 66 (2002).

188. *Diaz*, 59 M.J. at 37-38 (referring to the Due Process Clause of the United States Constitution).

189. *Id.* at 38.

190. *Id.* at 38-39.

191. *Id.* at 39.

192. *Id.*

enable him to perfect and refine the legal issues he has asserted.”<sup>193</sup>

The court held that the processing of petitioner’s case lacked the required vigilance, institutional or otherwise, necessary to preserve the petitioner’s post-trial rights. The court granted the petitioner’s motion, in part, by remanding the case to the NMCCA, the “court which is directly responsible for exercising ‘institutional vigilance’ over this [petitioner’s case] and all other cases pending Article 66 review within the Navy-Marine Corps Appellate Review Activity,” with direction that the NMCCA “expeditiously review the processing and status of Petitioner’s Article 66 appeal.”<sup>194</sup>

Along the same lines as *Diaz is United States v. Brunson*,<sup>195</sup> another post-trial processing case with inexcusable delay. In *Brunson*, the issue before the CAAF was appellate defense counsel’s “Motion to File Supplement to Petition for Grant of Review Out of Time.”<sup>196</sup> In deciding whether to grant the appellant’s motion, the court discussed the “serious pattern of delay in the appeal of decisions to [the CAAF] after review by the [NMCCA].”<sup>197</sup> The court discussed twenty-six cases in which petitions for grant of review were filed, but in which supplements thereto were not filed according to the court’s timelines. In all twenty-six cases, petitions were filed for grant of

review “out of time.”<sup>198</sup> The court then addressed an additional seventeen cases in which timely petitions had not been filed by appellate division personnel.<sup>199</sup> Only one of forty-three cases analyzed by the court, which involved a “medical emergency,” provided a basis for finding that relief [e.g., granting a motion to file out of time] was warranted by “‘extraordinary circumstances.’”<sup>200</sup>

Despite finding only one of forty-three cases contained an adequate factual basis for excusing the omissions by appellate defense counsel, the court concluded that:

Appellant Brunson and the remaining 42 appellants should not be penalized for the failure of attorneys and officials responsible for the provision of legal services under Article 70, UCMJ, 10 U.S.C. § 870 (2000) to ensure that appellate filings are made in a timely manner and to further ensure that motions for filings out of time contain adequate justification.<sup>201</sup>

In granting the appellant’s motion, the court reminded counsel of their responsibility “to aggressively represent [their clients] before military trial and appellate courts.”<sup>202</sup> Finally, the

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193. *Id.*

194. *Id.* The CAAF further directed the service court to issue “such orders as are necessary to ensure timely filing of an Assignment of Errors and Brief on behalf of Petitioner and the timely filing of an Answer to the Assignment of Errors on behalf of the Government.” *Id.*

195. 59 M.J. 41 (2003). The appellant was convicted at a SPCM of arson and sentenced to reduction to E-1, six months confinement, and a bad conduct discharge. *Id.*

196. *Id.* at 42. The relevant chronology of the post-trial processing of the appellant’s case follows:

1. 31 October 2002—The NMCCA decides the appellant’s case;
2. 9 January 2003—The NMCCA’s decision is mailed to the appellant;
3. 18 March 2003—Appellate defense counsel files a Petition for Grant of Review with the CAAF;
4. 18 March 2003—The CAAF orders the appellant to file a Supplement to the Petition for Grant of Review on or before 17 Apr 2003;
5. 17 April 2003—Appellate defense counsel files a Motion for Enlargement of Time to File Supplement to the Petition for Grant of Review;
6. 22 April 2003—The CAAF granted the appellant’s motion extending the deadline for filing to 19 May 2003;
7. 19 May 2003—Appellate defense counsel files a second Motion for Enlargement of Time to File Supplement to the Petition for Grant of Review;
8. 20 May 2003—The CAAF granted the second motion for enlargement with a new deadline of 5 June 2003;
9. 5 June 2003—The deadline for appellate filing lapsed without the filing of any supplement or request for enlargement; and
10. 20 June 2003—In response to an inquiry from the CAAF’s Clerk of Court, the appellate defense counsel files a Motion to File Supplement to Petition for Grant of Review Out of Time [issue before the CAAF on appeal].

*Id.* at 41-42.

197. *Id.* at 42.

198. *Id.*

199. *Id.* The reasons proffered for missing deadlines and untimely post-trial processing included, in part: a medical emergency involving the Deputy Division Director, “departure of an administrative office manager,” “temporary duty” of the Division director, “a ‘disconnect’ between active duty and reserve attorneys who review appellate cases,” the use of a new database to track cases which “‘reduced visibility’” over cases, “‘administrative oversight’” by a Branch Secretary, and simply “‘administrative oversight.’” *Id.*

200. *Id.* “All of the proffered bases for relief were within the administrative control of the attorneys and supervisory officials charged with the responsibility of providing legal services under Article 70.” *Id.* at 42-43.

201. *Id.* at 43.

court warned that, although it granted the appellate defense counsel's motion, its opinion should not be misread to condone late filings, noting that it "shall consider appropriate sanctions in the event of 'flagrant or repeated disregard of [its] Rules.'"<sup>203</sup>

Appellate defense counsel and their supervisors should take note of the court's guidance in *Diaz* and *Brunson*. An appellant has a right under the UCMJ and the United States Constitution to timely post-trial review of his case. This right is arguably greater in the military by virtue of the unique fact-finding authority found in the service courts of appeal. In the future, appellate defense counsel and their supervisors who fail to safeguard this important right run the risk of facing "appropriate sanctions" levied by a service court or the CAAF.

### Appellate Court Authority

The final area of discussion in the post-trial arena is appellate court authority. The cases addressed in this section are: *United States v. Perron*,<sup>204</sup> *United States v. Castillo*,<sup>205</sup> *United States v. Holt*,<sup>206</sup> *United States v. Rorie*,<sup>207</sup> and *United States v. Fagan*.<sup>208</sup>

In *Perron*, the issue before the CAAF was a service court's authority when confronted with a breach by the government of a material term of a pretrial agreement.<sup>209</sup> The appellant agreed to plead guilty and the CA agreed to "waive all automatic forfeitures and pay those to appellant's family during his confine-

ment."<sup>210</sup> Unfortunately, neither the trial counsel nor the military judge noticed that the appellant reached his ETS (expiration of term of service) date before trial, placing him in a no pay due status at trial.<sup>211</sup> As a result, there was no pay for the CA to waive and direct to appellant's family. On appeal, the Coast Guard Court of Criminal Appeals (CGCCA) set aside the CA's action due to a mutual misunderstanding regarding a material term of the pretrial agreement.<sup>212</sup> After remand, the CA only approved the reduction to E-3 and the bad-conduct discharge, resulting in a payment to appellant of \$3,184.90 for time spent in confinement.<sup>213</sup> This amount is equal to what his family would have received had the government complied with the forfeitures provision of the pretrial agreement.

On appeal to the CGCCA for a second time, the appellant argued that notwithstanding the CA's action on remand, he bargained for payment to his family members while confined, not after his release; therefore, the only appropriate remedy was either withdrawal from the plea or disapproval of the bad-conduct discharge.<sup>214</sup> The CGCCA disagreed, holding that the court could provide alternative relief to the appellant, even if the relief was contrary to appellant's wishes.<sup>215</sup> The CGCCA affirmed the findings of guilty and the bad-conduct discharge, restoring the appellant's pay grade to his pretrial grade of E-5. In so doing, the CGCCA found that "[t]his difference in pay [restored to the appellant] should exceed any reasonable interest calculation."<sup>216</sup>

202. *Id.*

203. *Id.* (citing *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987)).

204. 58 M.J. 78 (2003).

205. 59 M.J. 600 (N-M. Ct. Crim. App. 2003).

206. 58 M.J. 227 (2003).

207. 58 M.J. 399 (2003).

208. 59 M.J. 238 (2004).

209. *Perron*, 58 M.J. at 79. The appellant was convicted at a SPCM of one specification of wrongful possession of a controlled substance and two specifications of wrongful use and sentenced to reduction to E-3, confinement for ninety days, and a bad conduct discharge. At action, the convening authority approved the adjudged sentence but suspended all confinement in excess of sixty days. *Id.* at 79.

210. *Id.*

211. *Id.* at 80.

212. *Id.* The court remanded the case to the convening authority "to either set aside the findings of guilty and the sentence or determine whether some other form of alternative relief was appropriate." *Id.*

213. *Id.*

214. *Id.* at 80-81. The appellant argued his plea was involuntary because it was induced by a term in a pretrial agreement that the government could not comply with. *Id.* at 80.

215. *Id.* at 81.

216. *Id.*

The CAAF disagreed with the lower court, set aside the findings and sentence and authorized a rehearing. The CAAF held that “imposing alternative relief on an unwilling appellant to rectify a mutual misunderstanding of a material term of a pre-trial agreement violates the appellant’s Fifth Amendment right to due process.”<sup>217</sup>

An appellate court may determine that alternatives to specific performance or withdrawal of a plea could provide an appellant with the benefit of his or her bargain – and may remand the case to the convening authority to determine whether doing so is advisable – but it cannot impose such a remedy on an appellant in the absence of the appellant’s acceptance of that remedy.<sup>218</sup>

Faced with a situation in which the government cannot comply with a material term of a pretrial agreement, the appellant, not the appellate court, will ultimately control what happens in the case. The days of the appellate court fashioning an “appropriate remedy” are gone. As highlighted by the *Perron*<sup>219</sup> court, failure of the government to comply with a material term of a pretrial agreement calls into question the voluntariness of the plea itself.<sup>220</sup> Defense counsel representing clients faced with a *Perron*-like situation should demand specific relief in the post-trial processing of the case knowing that the government’s option is either compliance with the request or allowing the appellant to withdraw his plea. Chiefs of military justice and SJAs should seriously consider the relief suggested by the appellant or suggest alternative relief that both sides can accept. If the government and defense can not agree on alternative relief, have the CA direct a post-trial 39a session in which the military judge can ask the appellant whether he wants to withdraw from his plea.<sup>221</sup> While the defense counsel and SJA are deciding what to do, the trial counsel should be preparing his case as if the appellant will withdraw from the plea. Stated differently, if the trial counsel prepares for a contested court-mar-

tial and the accused and defense counsel see the government ready to try the case, the accused may be less inclined to withdraw from the plea agreement.

The next post-trial, appellate court authority case worth noting is *United States v. Castillo*. In *Castillo*, the appellant, in her first appeal before the NMCCA, alleged that her sentence was inappropriately severe.<sup>222</sup> The service court agreed, setting aside the CA’s action and remanding the case with the following direction: “The record will be returned to the Judge Advocate General for remand to the [CA], who may upon further consideration approve an adjudged sentence no greater than one including a discharge *suspended* under proper conditions.”<sup>223</sup>

Upon remand, the CA’s SJA prepared an SJAR that erroneously advised the CA that the appellate court recommended that the punitive discharge be set aside.<sup>224</sup> The SJAR further advised the CA to approve the sentence as adjudged, stating, in part: “In accordance with Navy-Marine Corps Court of Criminal Appeals (NMCCA) letter (sic) 200101326 of 31 July 02, NMCCA recommends you set aside the bad conduct discharge and upon further consideration approve an adjudged sentence no greater than one including a discharge suspended under proper conditions.”<sup>225</sup>

Upon receipt of the SJAR, the appellant’s trial defense counsel responded to the SJAR by indicating that the NMCCA’s decision was directive in nature as opposed to advisory as portrayed by the SJAR.<sup>226</sup> After considering the defense’s submission, the SJA prepared an addendum stating, “nothing presented by the defense justifies clemency in this case, therefore, my original recommendation remains unchanged.”<sup>227</sup> Following the SJA’s advice and notwithstanding the NMCCA’s remand decision, the CA approved the sentence as adjudged, including the bad conduct discharge.<sup>228</sup>

217. *Id.* at 86.

218. *Id.*

219. *Id.* at 78.

220. *Id.* at 86.

221. *See* MCM, *supra* note 5, R.C.M. 1102(a).

222. *United States v. Castillo*, 59 M.J. 600 (N-M. Ct. Crim. App. 2003). The appellant was convicted at a SPCM of unauthorized absence terminated by apprehension and sentenced to reduction to E-1, fifty-one days confinement, and a bad conduct discharge. *Id.* at 600-01.

223. *Id.* at 601 (quoting *United States v. Castillo*, NMCM No. 200101326, 2002 CCA LEXIS 165 (31 July 2001) (slip op. at 10) (unpublished)).

224. *Id.*

225. *Id.* at 602.

226. *Id.*

227. *Id.*

On appeal for a second time, the appellant alleged that the CA erred by disregarding the NMCCA's previous decision, arguing that the court should approve a sentence of no punishment. The court agreed, in part, finding clear and obvious error in the CA's action.<sup>229</sup> "While we concur that the CA [convening authority] erred as asserted by the appellant, approving a sentence of 'no punishment' would afford the appellant a windfall to which she is not entitled."<sup>230</sup> In exercising its sentence appropriateness authority under Article 66(c), UCMJ, the court approved only the reduction to E-1 and fifty-one days confinement and disapproved the bad conduct discharge.<sup>231</sup> As for the CA's decision to disregard the court's directive, the court noted that the advice he chose to follow was "misguided" and "clearly erroneous."<sup>232</sup> Finally, the court noted that its original decision was not a recommendation, providing obvious yet important guidance for military practitioners: "[p]arties practicing before trial and appellate courts have only three options when faced with [their] rulings [comply with the decision, request reconsideration, or appeal to the next higher authority to include certification of an issue by the Judge Advocate General]."<sup>233</sup>

*United States v. Holt*,<sup>234</sup> another appellate authority case, addresses the limitations on a service court in evaluating and considering evidence on appeal. On appeal, the appellant, tried for writing bad checks, alleged that the military judge erred by admitting prosecution exhibits (PEs) sixteen (victim's letter) and seventeen through thirty-four (copies of cancelled checks, debt collection documents, and a pawn ticket).<sup>235</sup> In affirming the findings and sentence,<sup>236</sup> the Air Force Court of Criminal Appeals (AFCCA) found that PE sixteen was admissible under Military Rule of Evidence (MRE) 807 as residual hearsay and

that PEs seventeen through thirty-four<sup>237</sup> were admissible under MRE 803, evidence of appellant's state of mind.<sup>238</sup>

Among the issues certified by the CAAF was whether the lower court erred by depriving the appellant of a proper Article 66(c), UCMJ, review limited to the record of trial when the lower court considered the questioned prosecution exhibits for the truth of the matters asserted notwithstanding that the military judge ruled otherwise and instructed the members that the evidence was not to be consider for the truth of the matters asserted.<sup>239</sup> In evaluating the lower court's decision, the CAAF noted that:

Article 66(c) limits the Courts of Criminal Appeals 'to a review of the facts, testimony, and evidence presented at trial, and precludes a Court of Criminal Appeals from considering 'extra-record' matters when making determinations of guilt, innocence, and sentence appropriateness' (citation omitted). Similarly, the Courts of Criminal Appeals are precluded from considering evidence excluded at trial in performing their appellate review function under Article 66(c).<sup>240</sup>

Resolving the issue in favor of the appellant, the CAAF set aside the lower court's decision and remanded the case for a proper review.<sup>241</sup> In so doing, the CAAF held that the lower court erred when it "altered the evidentiary quality of PEs 16-19, 21, 24, 26, 29, 30-32, and 34"<sup>242</sup> and that the AFCCA changed the evidentiary nature of the evidence in question by

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228. *Id.*

229. *Id.* at 603.

230. *Id.*

231. *Id.* at 604.

232. *Id.* at 603. Contrary to the staff judge advocate's written advice, the NMCCA neither recommended a set aside of the punitive discharge nor approval of any specific sentence; rather, the court afforded the CA the opportunity to approve a sentence he deemed appropriate provided it did not contain an unsuspended bad conduct discharge. *Id.*

233. *Id.*

234. 58 M.J. 227 (2003). The appellant was convicted at a GCM of fifty-eight specifications of dishonorable failure to maintain sufficient funds for the payment of checks and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for one year, and a bad conduct discharge. *Id.* at 228.

235. *Id.* at 228-29. In addition to Prosecution Exhibit 16, the appellant alleged that the MJ erred by admitting Prosecution Exhibits 17-19, 21, 24, 26, 29-32, and 34. *Id.* The allegation was that the MJ erred because: the Government had not laid a proper foundation for the evidence; the evidence was in inadmissible form; the defense had not sought a relaxation of the rules of evidence for sentencing purposes; and the evidence was inadmissible hearsay. *Id.*

236. ACM 34145, 2003 CCA LEXIS 190 (A.F. Ct. Crim. App. Apr. 15, 2002) (unpublished).

237. *Holt*, 58 M.J. at 233.

238. *Id.* at 231.

239. *Id.* at 228.

240. *Id.* at 232.

elevating them to evidence admitted for their truth, depriving the appellant of a “proper legal review.”<sup>243</sup>

*United States v. Rorie*, another CAAF decision, deals with abatement *ab initio* in situations when an appellant dies pending review by the CAAF.<sup>244</sup> In *Rorie*, the appellant’s conviction and sentence were affirmed in a memorandum decision by the Army Court of Criminal Appeals (ACCA) on 28 June 2002.<sup>245</sup> On 5 July 2002, the appellant and his appellate defense counsel were notified of the service court’s decision.<sup>246</sup> On 31 August 2002, three days before expiration of the sixty-day period to petition the CAAF for review, the appellant died from injuries sustained in an automobile accident.<sup>247</sup> As a result, the appellate defense counsel filed a Petition for Grant of Review and Motion to Abate the proceedings, in effect seeking to nullify or eliminate the appellant’s conviction on the grounds that he died prior to completion of appellate review in the case.<sup>248</sup>

In denying the motion, the CAAF distinguished between appeals as of right versus discretionary appeals, holding that an appeal under Article 67(a)(3), UCMJ, is a matter of discretion and not a matter of right.<sup>249</sup> As such, the court established a prospective policy of no longer granting abatement *ab initio* upon

death of an appellant pending Article 67(a)(3) appellate review, reversing a policy followed by the court since 1953.<sup>250</sup> Finding that abatement *ab initio* is a “matter of policy in Federal courts,” not mandated by the Constitution or statute and not part of the Rules of Practice and Procedures for the CAAF, the court did not feel constrained by its prior fifty-year policy (e.g., *stare decisis*) of routinely granting motions for abatement *ab initio*.<sup>251</sup>

The final post-trial appellate court authority case is *United States v. Fagan*, in which the CAAF makes crystal clear a service court’s authority under *United States v. Ginn*<sup>252</sup> to resolve factual issues raised for the first time on appeal via affidavit by an appellant and which cannot be resolved by review of the record of trial.<sup>253</sup>

On appeal, Private Fagan submitted an affidavit alleging cruel and unusual post-trial punishment while serving confinement for his second court-martial conviction at the USACFE.<sup>254</sup> In response, the government submitted several affidavits contesting the allegations and requesting the court find that “the record as a whole demonstrates the improbability of appellant’s assertions.”<sup>255</sup> Alternatively, the government requested that the court order a *DuBay*<sup>256</sup> hearing to inquire into the allegations.<sup>257</sup>

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241. *Id.* at 233.

242. *Id.*

243. *Id.*

244. 58 M.J. 399 (2003). The appellant was convicted at a GCM of three specifications of wrongful distribution of cocaine and sentenced to reduction to E-1 and two years confinement. *Id.* at 399-400.

245. *Id.* at 400.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 402-04.

250. *Id.* at 407.

251. *Id.* at 405-07. By reversing its policy, the court is now in line with the rule established by the Supreme Court in *Dove v. United States*, 423 U.S. 325 (1976). To the extent that *United States v. Kuskie*, 11 M.J. 253 (C.M.A. 1981) and *Berry v. The Judges of the United States Army Court of Military Review*, 37 M.J. 158 (C.M.A. 1983) are inconsistent with this decision, they were overruled.

252. 47 M.J. 236 (1997).

253. *United States v. Fagan*, 59 M.J. 238 (2004). The appellant was convicted at a GCM, his second court-martial in four months, of wrongful use of marijuana, three specifications of wrongful distribution of marijuana, three specifications of larceny, and three specifications of forgery and sentenced to forfeiture of all pay and allowances, confinement for thirty months, and a dishonorable discharge. *Fagan*, 58 M.J. at 534-35.

254. 58 M.J. 534 (Army Ct. Crim. App 2003). The allegation was that a specific cadre member, SGT D, inflicted physical and mental pain when he, in the guise of a pat down search, “intentionally assaulted him in the testicles during searches without legitimate penal purpose.” *Id.*

255. *Id.* at 535-36. In essence, the government argued that the case could be resolved by application of the fourth *Ginn* principle. *See infra* note 259.

256. *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967).

257. *Fagan*, 58 M.J. at 536. If unable to resolve the case applying the fourth *Ginn* principle, the government requested a *DuBay* hearing under *Ginn* principle six. *See infra* note 259.

Despite questioning the validity of the appellants' allegation,<sup>258</sup> the service court felt that its fact-finding authority was constrained by the CAAF's holding in *United States v. Ginn*,<sup>259</sup> wherein the CAAF established six principles for dealing with allegations of error raised for the first time on appeal in a post-trial affidavit:

First, if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in the appellant's favor, the claim may be rejected on that basis.

Second, if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis.

Third, if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the Court can proceed to decide the legal issues on the basis of those uncontroverted facts.

Fourth, if the affidavit is factually adequate on its face but the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts, the Court may discount those factual assertions and decide the legal issue.

Fifth, when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of

the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal.

Sixth, the Court of Criminal Appeals *is required to order a factfinding hearing only when the above-stated circumstances are not met. In such circumstances the court must remand the case to the trial level for a DuBay proceeding.*<sup>260</sup>

Rather than follow the CAAF's guidance and order a potentially expensive *DuBay*<sup>261</sup> hearing, as requested by the government, the court elected to exercise its "broad power to moot claims of prejudice' by granting appellant sentence relief," approving only forfeiture of all pay and allowances, confinement for nineteen months, and a dishonorable discharge.<sup>262</sup> Concerned by the "seriously and unfairly handicapped" position the government was placed in as a result of the CAAF's *Ginn* decision, the court took "the unusual step of recommending that The Judge Advocate General order this case be sent to the United States Court of Appeals for the Armed Forces for review under Article 67(a)(2)."<sup>263</sup>

The Judge Advocate General of the Army followed the service court's recommendation and certified three issues to the CAAF: (1) whether the Army court erred in concluding that *United States v. Ginn* provides the proper framework for analyzing the issues raised by the appellant's submission of a post-trial affidavit; (2) whether the Army court erred in concluding that it could not consider the government's rebuttal affidavits without ordering a *DuBay* hearing; and (3) whether the Army court erred in concluding it could grant sentence relief under

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258. *Id.* at 535.

259. 47 M.J. 236 (1997).

260. *Fagan*, 58 M.J. at 537 (quoting *Ginn*, 47 M.J. at 248). The Army court noted that applying the six *Ginn* principles to a situation in which the appellant raises an issue for the first time on appeal in a post-trial affidavit places the government at a significant disadvantage because of its inability to respond via affidavit. *Id.* at 538. The Army court noted:

The government is restricted to arguing to this court: (1) even if true, appellant's assertions do not warrant relief (first *Ginn* principle); (2) appellant's claim is speculative and should be rejected (second *Ginn* principle); or (3) the record as a whole compellingly demonstrates the improbability of appellant's asserted facts (fourth *Ginn* principle). However, the government may not submit affidavits containing conflicting rebuttal evidence that tends to prove one of these three points or contradict appellant's sworn assertion of fact unless the government is willing to hold an expensive and time consuming *DuBay* hearing to litigate the issue. Simply put, the Government must either withhold relevant affidavit evidence that might disprove an appellant's assertions and hope that the court rules against appellant, or submit the affidavits which may cause us to order a *DuBay* hearing.

*Id.*

261. 37 C.M.R. 411 (C.M.A. 1967).

262. *Fagan*, 58 M.J. at 538-39 (citing *United States v. Wheelus*, 49 M.J. 283, 288 (1998)) (reducing appellant's term of confinement by eleven months).

263. *Id.* at 538; *see also* UCMJ art. 67(a)(2) (2002).

*United States v. Wheelus* when it admitted the government's rebuttal affidavits.<sup>264</sup>

In evaluating the actions of the Army court and the certified issues, the CAAF found the Army court did not err with regard to the first two certified issues, determining that *Ginn* provides the proper framework for analyzing factual issues raised for the first time on appeal via a post-trial affidavit and a service court is precluded from considering government rebuttal affidavits without ordering a *DuBay* hearing.<sup>265</sup> With regard to the third certified issue, the court noted that the Army court erred when it exercised its Article 66(c), UCMJ, authority to "moot" any possible claims of prejudice.<sup>266</sup> In finding error, the court noted that the broad power referenced by the court in *Wheelus*<sup>267</sup> is to address "acknowledged legal error or [deficiencies] in the post-trial review process."<sup>268</sup> *Wheelus* does not empower a service court to grant relief without first ascertaining whether error occurred.<sup>269</sup> As a result, the CAAF remanded the case to The Judge Advocate General of the Army for a *DuBay* hearing on the appellant's claim of cruel and unusual punishment.<sup>270</sup>

All five cases touch upon the authority and limits on the service courts of criminal appeal and the CAAF in the post-trial

arena. Post-trial practitioners should review all five and keep them in mind while shepherding a case through the post-trial process.

## Conclusion

As noted at the outset, the past year has been a rather slow evolutionary period for post-trial. Having said that, however, some changes have been significant. For example, waiver has become a common term when addressing allegations of post-trial errors, errors ranging from defects in the required post-trial recommendations to action by a potentially disqualified CA. Perhaps more noticeable is the Army court's application of waiver in cases of unreasonable post-trial delay, holding the defense accountable for failing to demand speedy post-trial processing. One thing is certain—compliance with the 1100 series of the RCM coupled with timely post-trial processing should do away with many of the post-trial issues that the courts continue to deal with year-in and year-out. Stated differently, attention to detail goes a long way in the post-trial arena.

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264. *United States v. Fagan*, 59 M.J. 238, 239-40 (2004).

265. *Id.* at 244.

266. *Id.*

267. 49 M.J. 283 (1998).

268. *Fagan*, 59 M.J. at 244.

269. *Id.*

In terms of Fagan's claim, he may be entitled to relief if he did in fact suffer a violation of the rights guaranteed him by the Eight Amendment and Article 55. However "broad" it may be, the "power" referred to in *Wheelus* does not vest the Court of Criminal Appeals with authority to eliminate that determination and move directly to granting sentence relief to Fagan. Rather, a threshold determination of proper factual and legal basis must be established before any entitlement to relief might arise.

*Id.*

270. *Id.*