

# Annual Review of Developments in Instructions: 1996

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## Introduction

This article is a review of courts-martial instruction law for calendar year 1996. This review discusses the September 1996 publication of the *Military Judges' Benchbook*<sup>1</sup> and developments in case law that affected courts-martial instructions. In seeking justice, counsel need to realize that they, as well as military judges, are responsible for ensuring that instructions provided to panel members are correct.

## New Military Judges' Benchbook

From a practical standpoint, one of the most important developments in instructions during 1996 was the republication of the *Military Judges' Benchbook*. This revamped document updates its predecessor which had become somewhat unwieldy.<sup>2</sup> In addition to including relevant case law, the new *Benchbook* incorporated the 1996 amendments to the Uniform Code of Military Justice (UCMJ).<sup>3</sup>

Trial practitioners must review this new *Benchbook* in detail—for it is counsels' thoughtful consideration and careful inclusion of applicable instructions into the themes of their cases, to include voir dire, opening statements, questioning of witnesses, and closing arguments, that win or lose cases.<sup>4</sup>

As a companion to the 1996 *Benchbook*, the Army Trial Judiciary developed an easy to use computer version. All *Benchbook* files were converted to Microsoft Word (MS Word) with a special template—providing instant access to the entire *Benchbook* from within MS Word. The Computer Benchbook runs from a comprehensive menu allowing users to navigate through all *Benchbook* instructions, trial scripts, and appendices. Using the Computer Benchbook, military judges, counsel, and clerks can take *Benchbook* material and instantly create MS Word files. This not only assists military judges in assembling, tailoring, and delivering instructions, but it also permits counsel to tailor the instructions that they wish military judges to give, to copy and insert form specifications in charge sheets, to create customized trial scripts, or for any other use that requires the manipulation of *Benchbook* materials.<sup>5</sup> Wanting to keep the

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1. DEP'T OF ARMY, PAMPHLET 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (30 Sept. 1996) [hereinafter BENCHBOOK].

2. The previous edition of the pamphlet, DEP'T OF ARMY, PAMPHLET 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (1 May 1982) had three changes and fifteen published U.S. Army Trial Judiciary Benchbook Update Memoranda.

3. Pub. L. No. 104-106, 110 Stat. 186 (1996); see BENCHBOOK, *supra* note 1, para. 3-19-5 (describing Fleeing Apprehension). Prior to the 1996 amendments, fleeing apprehension was not a violation of Article 95 of the UCMJ. See also BENCHBOOK, *supra* note 1, Chapter 2, Trial Procedures and Instruction, at 66-67 (describing effect of Article 58(b)).

4. For example, in a court-martial for larceny in which the accused is found in the knowing, conscious, and unexplained possession of recently stolen property, the members may be instructed concerning a permissible inference. The *Benchbook* Instruction 3-46-1, Larceny, Note 4, provides:

You are advised that if the facts establish that the property was wrongfully taken . . . from the possession of . . . [the owner] . . . and that shortly thereafter it was discovered in the knowing, conscious, and unexplained possession of the accused, you may infer that the accused took . . . the property. The drawing of this inference is not required.

The term "shortly thereafter" is a relative term and has no fixed meaning. Whether property may be considered as discovered shortly thereafter if it has been taken depends upon the nature of the property and all the facts and circumstances shown by the evidence in the case.

This instruction is replete with issues that could be developed within a consistent, logical theme.

*Benchbook* current while providing trial practitioners an accessible location for review and discussion of *Benchbook* issues, the Army Trial Judiciary created the Benchbook Forum within the JAGC Bulletin Board. Counsel should access this forum periodically to review developments.

### Instructions on Offenses

#### *Homicide: Distinguishing Premeditation and Intent to Kill*

The Uniform Code of Military Justice (UCMJ) expressly prohibits seven forms of homicide,<sup>6</sup> including those murders committed by an accused with a premeditated design to kill<sup>7</sup> as well as those committed with an intent to kill or inflict great bodily harm upon a person.<sup>8</sup> These two offenses differ only in the mental state required for each,<sup>9</sup> a distinction that has been called “too vague and obscure for any jury to understand.”<sup>10</sup> The Court of Appeals for the Armed Forces (CAAF) nevertheless held in *United States v. Loving*<sup>11</sup> “that there is a meaningful distinction between premeditated and unpremeditated murder sufficient to pass constitutional muster.”<sup>12</sup> The court reasoned that the offenses are distinct because premeditated murder requires proof of the element of a premeditated design to kill, an element not required for other forms of murder, and further observed that premeditation and its associated terms were “commonly employed . . . and are readily understandable by court members.”<sup>13</sup>

In the aftermath of *Loving*, attention has shifted from litigating the constitutional significance of the distinction between

the two offenses to the task of describing this distinction to the trier of fact.<sup>14</sup> The pattern instruction contained in the *Military Judges’ Benchbook*<sup>15</sup> already provides, in relevant part:

The term “premeditated design to kill” means the formation of a specific intent to kill and the consideration of the act intended to bring about death. The “premeditated design to kill” does not have to exist for any measurable or particular length of time. The only requirement is that it must precede the killing.<sup>16</sup>

In *United States v. Eby*,<sup>17</sup> the defense requested that the military judge give this additional instruction:

Having a premeditated design to kill requires that one with a cool mind did, in fact, reflect before killing. It has been suggested that, in order to find premeditation, you must find that AT1 Eby asked himself the question, “Shall I kill her?” The intent to kill aspect of the crime is found in the answer, “Yes, I shall.” The deliberation part of the crime requires a thought like, “Wait, what about the consequences? Well, I’ll do it anyway.” Intent to kill alone is insufficient to sustain a conviction for premeditated murder.<sup>18</sup>

5. The Computer Benchbook is available for download from the JAGC Bulletin Board. Copies of the Computer Benchbook were also sent to Chief Trial Judges of all Services. Non-Army personnel should contact their Chief Trial Judges as some of the Services may make Service-specific changes. Those who have either no access or unreliable access to the JAGC Bulletin Board may send two, blank and formatted 3.5" diskettes to: Clerk of Court, 3d Judicial Circuit, Fort Hood, Texas 76544. Include a pre-addressed return envelope.

6. See UCMJ arts. 118-19 (1988); cf. MANUAL FOR COURTS-MARTIAL, United States, pt. IV, para. 85 (1995 ed.) [hereinafter MCM] (describing negligent homicide as an offense arising under UCMJ art. 134).

7. UCMJ art. 118(1) (1988).

8. *Id.* art. 118(2).

9. Compare MCM, *supra* note 6, pt. IV, para. 43.b.(1) with para. 43.b.(2).

10. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., 2 SUBSTANTIVE CRIMINAL LAW § 7.7(a), at 240-41 (1986) (citing BENJAMIN CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS 99-100 (1931)) [hereinafter LAFAVE & SCOTT]; cf. *United States v. Loving*, 41 M.J. 213, 279 (1994) (considering whether requiring premeditation genuinely narrows the class of persons eligible for the death penalty), *aff’d on other grounds*, 116 S. Ct. 1737 (1996).

11. 41 M.J. 213 (1994), *aff’d on other grounds*, 116 S. Ct. 1737 (1996).

12. *Id.* at 279-80. But see *infra* notes 27-29 and accompanying text.

13. *Id.* at 280 (citations omitted).

14. See, e.g., *United States v. Levell*, 43 M.J. 847 (N.M.Ct.Crim.App. 1996) (considering the form of instructions to the trier of fact concerning premeditation).

15. BENCHBOOK, *supra* note 1.

16. *Id.* para. 3-43-1.d.

17. 44 M.J. 425 (1996).

The military judge incorporated the substance of the first and last sentence of the requested instruction, but declined to adopt the remainder.<sup>19</sup> On appeal from his conviction for premeditated murder, Eby asserted that the military judge erred by refusing to give the relevant portion of the requested instruction;<sup>20</sup> the requested language had been cited with approval by the Court of Military Appeals (COMA) in *United States v. Hoskins*<sup>21</sup> and was taken from *Substantive Criminal Law*, a respected treatise by Professors Wayne LaFave and Austin Scott, Jr.<sup>22</sup>

The CAAF nevertheless concluded that the military judge did not abuse his discretion by refusing to give the requested instruction.<sup>23</sup> The unanimous opinion of the court emphasized “that no particular length of time is needed for premeditation, and no specific questions need be asked.”<sup>24</sup> To the extent that the requested instruction implies such requirements, it “runs the risk of confusing . . . [or] misleading the jury.”<sup>25</sup> As such, the military judge “correctly declined” to give the requested instruction.<sup>26</sup>

Decisions like those in *Loving* and *Eby* send an ambiguous message to the trial practitioner. On the one hand, the military appellate courts are vigorously asserting that “[t]here is critical distinction between a premeditated design to kill and an intent

to kill.”<sup>27</sup> However, these same courts have repeatedly held that a military judge does not err by refusing to depart from a pattern instruction that could be said to minimize the difference between the two offenses,<sup>28</sup> even when the requested instruction is an accurate statement of the law.<sup>29</sup> This apparent inconsistency could be confusing unless two lessons from *Eby* are kept in mind.

As a threshold matter, the court reinforces the point that parties to courts-martial are *not* entitled to a requested instruction unless it is a correct statement of the law, necessary to address a matter not substantially covered in the standard instruction, and critical in that a failure to give the requested instruction would deprive the accused of a defense or seriously impair its effective presentation.<sup>30</sup> Therefore, being correct is not enough; the requested instruction must add a new matter essential to the effective presentation of a defense. In any event, military judges always have “substantial discretionary power in deciding on the instructions to give,” and their decisions in this regard are reviewed only for an abuse of discretion.<sup>31</sup>

*Eby* also makes clear that what may be inappropriate as a requested instruction may, in some circumstances, be properly delivered as argument to the trier of fact.<sup>32</sup> For example, the court in *Eby* held that the military judge did not abuse his dis-

18. *Id.* at 427; *cf. Levell*, 43 M.J. at 849-50 (considering denial of request for instruction that “the government must prove to you beyond a reasonable doubt that the killing was committed by the accused ‘after reflection by a cool mind’”).

19. *Eby*, 44 M.J. at 427-28.

20. *See id.* at 426.

21. 36 M.J. 343 (C.M.A. 1993).

22. *Eby*, 44 M.J. at 428.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *United States v. Curtis*, 44 M.J. 106, 147 (1996); *United States v. Loving*, 41 M.J. 213, 279 (describing the distinction as “meaningful”), *aff’d on other grounds*, 116 S. Ct. 1737 (1996).

28. For example, the pattern instruction concerning premeditation in the *Benchbook* does provide that premeditation requires “the formation of a specific intent to kill and the consideration of the act intended to bring about death,” but then goes on to reduce the significance of this requirement by providing that “[t]he ‘premeditated design to kill’ does not have to exist for any measurable or particular length of time. The *only* requirement is that it must precede the killing.” *BENCHBOOK*, *supra* note 1, para. 3-43-1.d (emphasis added). No further explanation of premeditation, or the critical distinction between premeditated and unpremeditated murder, is provided.

29. *E.g.*, *United States v. Levell*, 43 M.J. 847, 851 (N.M.Ct.Crim.App. 1996) (holding military judge did not err in refusing to give “cool mind” instruction even though it “was not an incorrect statement of the law”).

30. *See Eby*, 44 M.J. at 428 (observing defense not entitled to requested instruction unless “correct, necessary, and critical”) (citing *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 2760 (1994)).

31. *Eby*, 44 M.J. at 428 (citation omitted).

32. *Id.*

cretion by refusing to give the requested instruction, but also observed that the requested instruction “marshals questions that would be an appropriate vehicle for argument to the fact finders.”<sup>33</sup> This observation, however, does not apply to requested instructions that are declined because they are *inaccurate* statements of the law, but instead applies only to those requested instructions that, while correct, were found by the military judge to be either unnecessary or inconsequential.<sup>34</sup>

### *Homicide: Premeditation and Heat of Passion*

The scenarios that typically give rise to allegations of premeditated murder can occasionally raise the issue of whether the killing was done in the heat of sudden passion.<sup>35</sup> Evidence of this passion is relevant to the charge in at least two ways: the passion may affect the ability of the accused to premeditate,<sup>36</sup> or it may place the lesser included offense of voluntary manslaughter in issue.<sup>37</sup> If the military judge determines that either of these matters is in issue,<sup>38</sup> then “[t]he military judge shall give the members appropriate instructions on findings.”<sup>39</sup>

The decision by the military judge that a matter is “in issue,” as well as the form of any instruction ultimately given, are both subject, in appropriate circumstances, to appellate review.<sup>40</sup> Both these issues are considered in the latest CAAF opinion in *United States v. Curtis*.<sup>41</sup> The accused was charged with a variety of offenses including two specifications of premeditated murder in violation of Article 118(1), UCMJ.<sup>42</sup> At approximately midnight on 13 April 1987, the accused gained entry to the home of his supervisor, First Lieutenant James Lotz, by telling Lotz that “one of his friends needed help because he had

been in an accident.”<sup>43</sup> The accused had a knife with an eight inch blade that he had stolen from the unit supply room earlier that evening.<sup>44</sup> The opinion of the court tells what happened next:

When LT Lotz tried to telephone for help, appellant “plunged” the knife into Lotz chest. Although at this time Lotz was still alive, this wound turned out to be the fatal injury because it punctured the victim's heart. LT Lotz struggled and picked up a chair to defend himself. Appellant then went around the chair and stabbed Lotz a second time. During this struggle, LT Lotz called for his wife, Joan. She appeared on the scene, ran up to her husband, and then turned to appellant and called out his name. She started kicking him, albeit with her bare feet. Then appellant stabbed her eight times, the fatal wound being a heart puncture. Appellant grabbed Joan by the legs as she was dying, pulled her toward him, “ripped off her panties,” and fondled her genitalia.<sup>45</sup>

According to the court, “[t]he strategy of the defense both at trial and at sentencing was to present appellant as a young man adopted at age 2 1/2 and raised in a good Christian home whose dignity and self-worth had been systematically destroyed by LT Lotz’ racist treatment of him.”<sup>46</sup> In light of this defense, the military judge gave a tailored instruction on voluntary manslaughter as to the killing of Lieutenant Lotz; no such instruc-

33. *Id.* *But cf. Levell*, 43 M.J. at 852 (asserting without citation to authority that accused “was not free to use” the language from the requested instruction in argument).

34. *See supra* note 30 and accompanying text.

35. *E.g.*, *United States v. Curtis*, 44 M.J. 106 (1996). The *Benchmark* provides that “[p]assion means a degree of anger, rage, pain, or fear which prevents cool reflection.” *BENCHMARK*, *supra* note 1, para. 3-43-1.d., at 401 n.5; *cf. MCM*, *supra* note 6, pt. IV, para. 44.c.(1)(a) (“Heat of passion may result from fear or rage.”).

36. *BENCHMARK*, *supra* note 1, para. 3-43-1.d, n.5.

37. *Id.* n.6.

38. *MCM*, *supra* note 6, R.C.M. 920(e) discussion.

39. *Id.* at 920(a).

40. *E.g.*, *United States v. Mance*, 26 M.J. 244, 255 (C.M.A.) (describing standards for appellate review of instructions relating to elements of offense), *cert. denied*, 488 U.S. 942 (1988). *But cf. MCM supra* note 6, R.C.M. 920(f) (“Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error.”).

41. 44 M.J. 106 (1996). The appellant actually raised these and seventy-four additional issues that were considered by the court in this opinion. *See id.* at 113-16.

42. *Id.* at 116.

43. *Id.* at 117.

44. *Id.*

45. *Id.*

46. *Id.* at 120.

tion was given with regard to the killing of Mrs. Lotz.<sup>47</sup> The accused was convicted of the premeditated murder of both victims, sentenced to death by the members, and the convening authority approved the sentence.<sup>48</sup> On appeal, the accused alleged that the military judge erred by failing to instruct the members on voluntary manslaughter with regard to the killing of Mrs. Lotz.<sup>49</sup> The defense apparently asserted that the rage that the accused testified that he possessed toward Lieutenant Lotz was transferred to Ms. Lotz, thereby justifying an instruction on voluntary manslaughter for the killing of *each* victim.<sup>50</sup> The CAAF held that no such instruction was required, reasoning that “[i]n this instance, there was no adequate provocation by Joan Lotz, and a transfer of rage would not be adequate provocation.”<sup>51</sup>

The opinion of the court in *Curtis* raises a number of issues of concern to practitioners, especially in the law of instructions. The most important issue in this area concerns the concept of “transferred rage.” It is not explained in either the court’s opinion in *Curtis*<sup>52</sup> nor in the *Manual for Courts-Martial*;<sup>53</sup> no pattern instruction on the topic is found in the *Military Judges’ Benchbook*,<sup>54</sup> and no discussion of the theory is found in military precedent.<sup>55</sup> The CAAF nonetheless asserted that “a transfer of rage would not be adequate provocation” to warrant an instruction on voluntary manslaughter,<sup>56</sup> a conclusion that is potentially confusing to the practitioner and may be a problematic statement of the law in this area.

In their treatise *Substantive Criminal Law*,<sup>57</sup> Professors LaFave and Scott make the following observation concerning provocation by one other than the victim of a homicide.

It sometimes happens that the source of the provocation is a person other than the individual killed by the defendant while in a heat of passion. This may happen (1) because the defendant is mistaken as to the person responsible for the acts of provocation; (2) because the defendant attempts to kill his provoker but instead kills an innocent bystander; or (3) because the defendant strikes out in a rage at a third party.<sup>58</sup>

Military law provides that the first two examples offered by LaFave and Scott may still be voluntary manslaughter, rather than some other form of homicide.<sup>59</sup> The third example describes the concept of transferred rage, and it is less clear what type of homicide has been committed in this circumstance. The majority of jurisdictions that have considered the issue hold that “[i]f one who has received adequate provocation is so enraged that he intentionally vents his wrath upon an innocent bystander, causing his death, he will be guilty of murder.”<sup>60</sup>

Nevertheless, some statutory systems do not so limit provocation; the Model Penal Code, for example, provides that “[c]riminal homicide constitutes manslaughter when . . . a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance

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47. *See id.* at 151.

48. *Id.* at 116.

49. *Id.* at 151. The accused also challenged the form of the voluntary manslaughter instruction given concerning the killing of Lieutenant Lotz, but the court found waiver and, in any event, no error. *Id.*

50. *See id.*

51. *Id.* The CAAF also held that the evidence was legally sufficient to support the conviction for the premeditated murder of Mrs. Lotz. *Id.* at 146-49.

52. *See id.* at 151.

53. *See MCM, supra* note 6, pt. IV, para. 44.

54. *See BENCHBOOK, supra* note 1, paras. 3-43-1, 3-43-2, & 3-44-1. The notion of transferred *intent* is discussed in the instructions cited, but this is a distinct legal concept from transferred rage or passion. *See infra* notes 57-60 and accompanying text.

55. Electronic search of the relevant military justice databases revealed that the instant case is the only military decision to explicitly refer to the term “transferred rage.”

56. *Curtis*, 44 M.J. at 151.

57. *See* LAFAVE & SCOTT, *supra* note 10.

58. *See* LAFAVE & SCOTT, *supra* note 10, § 7.10(g), at 268 (footnotes omitted).

59. *See BENCHBOOK, supra* note 1, para. 3-44-1.d., n.4. It is interesting to note that some civil jurisdictions have limited by statute the availability of voluntary manslaughter to instances when the defendant can show provocation by the homicide victim. LAFAVE & SCOTT, *supra* note 10, § 7.10, at 269 n.103.

60. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 102 (3rd ed. 1982) [hereinafter PERKINS & BOYCE]; *see* LAFAVE & SCOTT, *supra* note 10, § 7.10(g).

## Defenses

### *Involuntary Intoxication*

for which there is reasonable explanation or excuse.”<sup>61</sup> This form of the offense is broader than that of the majority of jurisdictions in that “the provocation need not have come from the victim.”<sup>62</sup> Article 119(a), UCMJ, is very similar to the Model Penal Code provision, and provides that “[a]ny person subject to this chapter who, with an intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation is guilty of voluntary manslaughter.”<sup>63</sup> Like the Model Penal Code, the text of Article 119(a), UCMJ, does not limit the offense to those circumstances in which the accused was provoked by the homicide victim.<sup>64</sup> As such, the assertion that “a transfer of rage would not be adequate provocation” cannot be grounded in the plain text of the statute, and its source should therefore be explained to the practitioner in the field to allow the crafting of appropriate instructions in this regard.<sup>65</sup>

It is well-settled in military law that “[v]oluntary intoxication, whether caused by alcohol or drugs, is not a defense.”<sup>66</sup> Evidence of voluntary intoxication may nevertheless be “introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense.”<sup>67</sup> Nevertheless, the status of involuntary intoxication as a defense in the military justice system was, until recently, less certain.<sup>68</sup> Most civil jurisdictions recognize a defense of involuntary intoxication,<sup>69</sup> and “[w]here the defense is permitted, it most commonly has a formulation parallel to one of the formulations of the insanity defense.”<sup>70</sup> Other jurisdictions, while declining to link involuntary intoxication and insanity, may limit the defense to cases of involuntary intoxication resulting from mistake, duress, or medical advice.<sup>71</sup> Until now, however, neither judge nor counsel could be certain of which form the defense took in the military legal system;<sup>72</sup> this situation may now be remedied.

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61. MODEL PENAL CODE § 210.3(1)(b), *cited in* LAFAYE & SCOTT, *supra* note 10, § 7.10(g), at 269 & n.105.

62. 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 102(a), at 482 (1986) [hereinafter ROBINSON].

63. UCMJ art. 119(a) (1988).

64. By reference to the statutory text, the victim need only be “a human being,” and the provocation need only be “adequate.” *See id.* *But cf.* Foster v. State, 444 S.E.2d 296, 297 (Ga. 1994) (observing that similar language in civil voluntary manslaughter statute “should be construed so as to authorize a conviction for that form of homicide only where the defendant can show provocation by the homicide victim”), *cited in* LAFAYE & SCOTT, *supra* note 10, § 7.10 n.103 (Supp. 1996).

65. This is not to suggest that the doctrine of transferred rage should be recognized by the military appellate courts, but simply suggests that it is unclear whether the basis for CAAF’s assertion in *Curtis* was legal, *i.e.*, rage can never be transferred to an innocent victim, or factual, *i.e.*, the failure to instruct in this particular factual scenario was not error. The ramifications are significant; if the doctrine of transferred rage is inapplicable as a matter of law, then the *Manual*, if not Article 119, UCMJ, itself, should be amended to reflect that construction. If the specific facts of *Curtis* simply do not raise the issue, then that would seem to indicate that the doctrine is recognized as a matter of military law; explanation of the doctrine in the *Manual* and pattern instructions in the *Benchbook* would therefore be appropriate, as neither currently exist.

66. MCM, *supra* note 6, R.C.M. 916(l)(2).

67. *Id.*

68. *See* United States v. Hensler, 44 M.J. 184, 187 (1996) (observing that the CAAF had not expressly ruled on this issue). *But cf.* United States v. Santiago-Vargas, 5 M.J. 41, 42-43 (C.M.A. 1978) (assuming without deciding that pathological intoxication is a defense under military law); United States v. Ward, 14 M.J. 950, 953 (A.C.M.R. 1982) (observing in dicta that involuntary intoxication caused by innocent ingestion of intoxicant should be a defense).

69. *See* ROBINSON, *supra* note 62, § 176(a), at 338.

70. *Id.* at 339.

71. *See* LAFAYE & SCOTT, *supra* note 10, § 4.10, at 558-60.

72. *Cf.* United States v. Santiago-Vargas, 5 M.J. 41, 42-43 (C.M.A. 1978) (assuming without deciding that pathological intoxication is a defense under military law); United States v. Ward, 14 M.J. 950, 953 (A.C.M.R. 1982) (observing in dicta that involuntary intoxication caused by innocent ingestion of intoxicant should be a defense).

In *United States v. Hensler*,<sup>73</sup> the CAAF considered the questions of the viability and form of the involuntary intoxication defense in military law. The accused, a commissioned officer, was charged with unbecoming conduct and fraternization, both charges stemming from her social and sexual relationships with subordinates.<sup>74</sup> The defense at trial was that the accused “lacked mental responsibility because of ‘a confluence of her drugs, her personality traits, her depression, and the introduction of alcohol.’”<sup>75</sup> Evidence placing this defense in issue was introduced by the defense, and “[t]he military judge provided the members the traditional instruction on the insanity defense.”<sup>76</sup> On appeal from her convictions for the charged offenses, Hensler alleged that the military judge erred because the instruction concerning lack of mental responsibility “did not include involuntary intoxication as a basis upon which the

members may find that the appellant lacked mental responsibility.”<sup>77</sup> The service court found the military judge did not err in giving a general instruction on the defense of mental responsibility because “there was no evidence to support an instruction tailored to involuntary intoxication.”<sup>78</sup>

The CAAF affirmed the decision of the lower court,<sup>79</sup> reasoning that “[i]nvoluntary intoxication is treated like legal insanity. It is defined in terms of lack of mental responsibility.”<sup>80</sup> The opinion of the court concluded that “[t]he instructions could have been better tailored to the evidence, but we are satisfied, based on this record, that the question of appellant’s mental responsibility was fully presented to the members in a correct legal framework.”<sup>81</sup>

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73. 44 M.J. 184 (1996).

74. *Id.* at 185-86.

75. *Id.* at 187. The accused was apparently intoxicated during some of her misconduct, and was taking a number of prescription drugs. *United States v. Hensler*, 40 M.J. 892, 894-95 (N.M.C.M.R. 1994). At least one defense witness testified that the accused “suffered from decreased liver function, the result of a prior bout with hepatitis. This condition affected her body’s ability to process alcohol and drug medication with the result that the effects of those substances may have lasted longer than normal.” *Id.* at 895. Even more significant was the expert testimony that “the intoxicating effects of the different prescribed drugs and the alcohol ‘potentiated’ each other, i.e., that the effect of each was magnified by the presence of the others.” *Id.* at 899. The defense theory was that the accused was probably unaware, at least initially, of these effects, and as such her intoxicated state during some of her misconduct was involuntary. *Id.*

76. *United States v. Hensler*, 40 M.J. 892, 895 (N.M.C.M.R. 1994), *aff’d*, 44 M.J. 184 (1996). The service court opinion described the instructions as follows:

Specifically, he instructed them that they could presume the accused to be sane unless they were persuaded by clear and convincing evidence that she suffered from a severe mental disease or defect and that, as a result of her severe mental disease or defect, she was unable to appreciate the nature and quality or wrongfulness of her acts. He added that the appellant had the burden to establish that she was not mentally responsible. The military judge further instructed the members that intoxication resulting from the compulsion of alcoholism or chemical dependence was not a defense, although voluntary intoxication could raise a reasonable doubt that the appellant knew that the men with whom she was fraternizing were enlisted men. The appellant voiced no objection to the instructions given by the military judge, although she did offer her own version of an insanity instruction which he rejected. The proposed instruction directed the members to find the appellant not criminally responsible only if they found that, as a result of the combination of her decreased liver function, chronic psychological problems, and ingestion of prescription medications, she suffered from a delusion that caused her to believe that her behavior was not criminal or that compelled her to commit the offenses.

*Id.* at 895-96.

The CAAF described the instructions somewhat differently:

The military judge instructed the members: “An issue before you is the accused’s sanity at the time of the offenses.” He defined mental responsibility. He advised the members “that the term, ‘severe mental disease or defect’ can be no better be defined in the law than by the use of those terms themselves.” He used the term “involuntary intoxication” with respect to the issue of whether appellant “knew that she was fraternizing with enlisted personnel.” He instructed the members that “alcoholism and chemical dependency is recognized by the medical profession as a disease involving a compulsion towards intoxication.” He did not specifically link the term “involuntary intoxication” with lack of mental responsibility.

*Hensler*, 44 M.J. at 187.

The use of quotations from the record of trial in appellate opinions concerning the form of instructions cannot but help the judge and counsel seeking to understand the nature and breadth of the court’s holding.

77. *Hensler*, 40 M.J. at 896. The service court also considered whether the military judge had erred by failing “to distinguish between voluntary and involuntary intoxication when discussing the effect of the former on her knowledge of the enlisted status of her fraternizing partners.” *Id.* at 896-97. The court concluded that the military judge did not err in the instruction. *Id.* at 900.

78. *Id.* at 900.

79. *Hensler*, 44 M.J. at 188.

80. *Id.*

The decision in *Hensler* has a number of effects on the practitioner. As a threshold matter, the CAAF confirms that involuntary intoxication is indeed a defense under military law.<sup>82</sup> It is, however, a limited defense; involuntary intoxication excuses misconduct only if it causes a lack of mental responsibility, and “is not available if an accused is aware of his or her reduced tolerance for alcohol but chooses to consume alcohol anyway.”<sup>83</sup> Moreover, because the defense is “treated like legal insanity,”<sup>84</sup> the accused has the burden of proving by clear and convincing evidence that she was “not mentally responsible at the time of the alleged offense.”<sup>85</sup>

There are also a number of issues that remain unanswered in the wake of *Hensler*. The CAAF’s opinion appears to equate involuntary intoxication solely with pathological intoxication,<sup>86</sup> the latter being “defined as grossly excessive intoxication given the amount of the intoxicant, to which the actor does not know he is susceptible.”<sup>87</sup> However, some military decisions have observed that “[i]nvoluntary intoxication exists when intoxication occurs through force, the fraud or trickery of another, or an actual ignorance of the intoxicating character of a substance.”<sup>88</sup> Similarly, the Army Court of Military Review has stated that in cases when an accused asserts involuntary intoxication as a defense, “[t]he question then becomes whether his mental disease or defect was culpably incurred.”<sup>89</sup> As such, counsel cannot be certain after *Hensler* whether pathological intoxication is the only form of involuntary intoxication recognized under military law, or if a more general inquiry into whether the intoxication was culpably incurred is appropriate in these cases.

Another issue is raised by the CAAF’s observation in *Hensler* that the military judge failed to distinguish between involuntary and voluntary intoxication when instructing the

members; as such, the potential defense of involuntary intoxication was “gratuitously extended . . . to all six episodes” that were the subject of the charges in this case, even though the CAAF found involuntary intoxication to be in issue only as to one.<sup>90</sup> Such an outcome can be avoided by military judges simply by following the advice offered by the Navy-Marine Corps Court of Military Review in its decision in *Hensler*: “When evidence of involuntary intoxication is introduced, it is essential to distinguish it from voluntary intoxication through proper instructions and, in particular, to avoid reference to the generic term ‘intoxication’ without defining it as one term or the other.”<sup>91</sup> The problem confronting the military judge is that there is currently no pattern instruction available in the *Benchbook* that distinguishes involuntary from voluntary intoxication; indeed, there cannot be a pattern instruction until the CAAF determines whether pathological intoxication is the only form of involuntary intoxication recognized as a defense under military law, or if some broader formulation of the defense is applicable.<sup>92</sup>

### Evidentiary Instructions

The military judge ordinarily has no *sua sponte* duty to give evidentiary instructions. However, the military judge may have an obligation to instruct when faced with the improper introduction of constitutionally excludable evidence.<sup>93</sup> In *United States v. Riley*,<sup>94</sup> the Navy-Marine Corps Court of Criminal Appeals (NMCCA) found the military judge erred when he failed to give a curative instruction after a witness commented on the accused’s invocation of his right to remain silent.

Dental Technician Third Class Leonardo Riley was charged with various child sexual abuse offenses committed upon a ten year old girl. At trial, the Naval Criminal Investigative Service

81. *Id.*

82. *See id.* at 187-88.

83. *Id.*

84. *Id.* at 188.

85. MCM, *supra* note 6, R.C.M. 916(k)(3).

86. *Hensler*, 44 M.J. at 187.

87. *Hensler*, 40 M.J. at 897.

88. *United States v. Travels*, No. 31437, slip op. at 2 (A.F. Ct. Crim. App. 1996) (citing *United States v. Ward*, 14 M.J. 950, 953 (A.C.M.R. 1982)).

89. *United States v. Ward*, 14 M.J. 950, 953 (A.C.M.R. 1982).

90. *Hensler*, 44 M.J. at 188. *But cf.* 40 M.J. at 899 (stating “there is no evidence that the appellant suffered from ‘pathological intoxication’”).

91. 40 M.J. at 900 n.8.

92. *See supra* notes 86-89 and accompanying text.

93. *See, e.g., United States v. Earnesty*, 34 M.J. 1179, 1181 (A.F.C.M.R. 1992). (Stating “The lack of a defense objection does not relieve the military judge of his paramount responsibility to instruct the members regarding . . . improper evidence”).

94. 44 M.J. 671 (N.M.Ct.Crim.App. 1996).

(NCIS) agent in charge of the case testified on direct examination that he had, at the beginning of his investigation, brought the accused in for an interview. The agent said that he advised Riley of his constitutional and military rights against self-incrimination, which Riley invoked. The agent further testified that Riley called him the next day, said he had spoken to an attorney and, based on that advice, would continue to remain silent and not participate in any further interrogation.<sup>95</sup> There was no objection from the defense during or following the NCIS agent's testimony.<sup>96</sup> Neither counsel made any reference to the accused's invocation during the remainder of the trial and the military judge did not mention it during his instructions to the members.<sup>97</sup>

It is error to bring to the court's attention evidence that the accused exercised his pretrial rights to remain silent or to request a lawyer,<sup>98</sup> and the agent should not have referred to it during his testimony.<sup>99</sup> Not every constitutional error requires reversal but such errors must be harmless beyond a reasonable doubt.<sup>100</sup> In assessing the impact the evidence had on Riley's conviction, the court pointed out that the agent's testimony was brief, only part of it concerned Riley's invocation of his right to remain silent, and counsel did not mention it during argument.<sup>101</sup> Under these circumstances, the court held that the error was harmless beyond a reasonable doubt.<sup>102</sup>

As the court noted, the lack of a defense objection does not relieve the military judge from the paramount duty to instruct the members regarding the improper introduction of evidence.<sup>103</sup> Therefore, when evidence is introduced concerning the accused's invocation of constitutional and statutory rights through argument or examination, the better practice is for the military judge to give a curative instruction even absent a defense objection. To do so "may judicially salvage an otherwise sinking appellate case."<sup>104</sup>

From the accused's perspective, one of the most important instructions is the reasonable doubt instruction. The instruction contained in the old *Military Judges' Benchbook* included language that "proof beyond a reasonable doubt means proof to a moral certainty although not necessarily an absolute or mathematical certainty."<sup>105</sup> While appellants claimed this language violated due process,<sup>106</sup> the Supreme Court recently concluded that instructions incorporating use of "moral certainty" verbiage do not violate due process.<sup>107</sup> The Court nevertheless criticized the use of such language and recommended adoption of a more precise definition.<sup>108</sup> In *United States v. Meeks*,<sup>109</sup> the Court of Military Appeals, following the rationale set forth by the Supreme Court, held the military judge did not err in giving a reasonable doubt instruction incorporating moral certainty language, but likewise suggested reexamination of the instruction.<sup>110</sup> The new *Military Judges' Benchbook* has, in fact,

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95. *Id.* at 673

96. *Id.*

97. *Id.*

98. "The fact that the accused during official questioning and in exercise of rights under the Fifth Amendment to the Constitution of the United States or Article 31, remained silent, refused to answer a certain question, requested counsel, or requested that the questioning be terminated is inadmissible against the accused." MCM, *supra* note 6, MIL. R. EVID. 301(f)(3).

99. *See, e.g.,* *Wainwright v. Greenfield*, 474 U.S. 284 (1986).

100. *United States v. Earnesty*, 34 M.J. 1179, 1182 (A.F.C.M.R. 1992).

101. *United States v. Riley*, 44 M.J. 671, 677 (N.M.Ct.Crim.App. 1996).

102. *Id.* (emphasis added).

103. *Id.* at 673 n.3.

104. *United States v. Barrow*, 42 M.J. 655, 664 (A.F. Ct. Crim. App. 1995).

105. DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK, para. 2-34 (1 May 1982) (C2, 15 Oct. 1986).

106. *See United States v. Czekala*, 42 M.J. 168 (1995); *United States v. Loving*, 41 M.J. 213, 281 (1994), *aff'd on other grounds*, 116 S. Ct. 1737 (1996).

107. *Victor v. Nebraska*, 114 S. Ct. 1239 (1994).

108. *See Holland & Masterton, Annual Review on Developments in Instructions*, ARMY LAW., Mar. 1995, at 11.

109. 41 M.J. 150, 157 n.2 (C.M.A. 1994).

110. The military appellate courts addressed the reasonable doubt instruction in one case last year. In *United States v. Stockman*, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) held that the military judge's explanation of "beyond a reasonable doubt," by equating reasonable doubt to moral certainty rather than evidentiary certainty, was not plain error.

replaced “moral certainty” with “evidentiary certainty,” so future problems with this instruction should be eliminated.<sup>111</sup>

### Procedural Instructions

It is not uncommon for the government to allege multiple acts in one specification.<sup>112</sup> In *United States v. Fitzgerald*,<sup>113</sup> the accused was charged with two specifications of sodomy with a child and with two specifications of indecent acts with a child.<sup>114</sup> The two specifications of indecent acts with a child allegedly occurred on divers occasions over sequential periods of time--at the accused’s prior and then current duty stations. Specification one alleged five different indecent acts and specification two alleged four different indecent acts.<sup>115</sup> During findings instructions, the military judge gave the standard instruction on findings by exceptions and substitutions.<sup>116</sup> In response to this instruction, the members began a “discussion” with the military judge concerning how they were to decide what portions of the specifications to except out if they believed the accused committed some but not all of the misconduct. Among other “instructions”<sup>117</sup> given by the military judge during his colloquy with the members, he informed them as follows:

You [members] would be talking about the specifications of what you believe, and the members would reach a consensus as to what they didn’t have a reasonable doubt about--what they were convinced beyond a reasonable doubt about. For example--I’m just trying to help you in your deliberations--say that Colonel Padgett was talking about it and you

were all talking about it. *In your discussions, seven or more members decided, well, we believe that he did all of these things except this.* Let’s vote on that.<sup>118</sup>

There were no objections from either side to this instruction, nor to any instruction *or discussion* between the military judge and the members. On appeal, it was alleged that the instructions on voting by exceptions were incorrect in that they allowed the members to vote more than once on each specification.<sup>119</sup>

The CAAF began its analysis by defining the standard for appellate review: absent plain error, failure to object to instructions constitutes waiver.<sup>120</sup> Additionally, CAAF noted that the appellant had the burden of proving plain error.<sup>121</sup> Next, CAAF explained that when two acts are alleged within the same specification, the military judge may instruct the members that they may find the accused guilty of either or both of the criminal acts alleged in the specification. For this proposition the court cited *United States v. Cowan*,<sup>122</sup> in which the accused was charged with unpremeditated murder of another sailor. The Article 118 specification alleged the murder by two very different means--“by means of stabbing him with a knife, and by wrongfully, intentionally, omitting to render timely assistance after . . . [the victim] had been stabbed.”<sup>123</sup> The military judge in *Cowan* informed the members that they could find either the stabbing, the failure to render assistance, or both, as the basis for a conviction of murder or the lesser included offenses of involuntary manslaughter and negligent homicide. While holding incorrect the instruction that the accused’s failure to act *without a legal duty to act* could support a finding of guilty to involuntary man-

111. BENCHBOOK, *supra* note 1, at 52.

112. See *United States v. Mincey*, 42 M.J. 376 (1995) (holding maximum punishment for bad-check mega-spec is computed by adding the maximum punishments as if all checks had been separately charged). *But see* MCM, *supra* note 6, R.C.M. 905(b)(5) (concerning severance of a duplicitous specification into two or more specifications).

113. *United States v. Fitzgerald*, 44 M.J. 434 (1996).

114. UCMJ arts. 125 & 134 (1988).

115. *Fitzgerald*, 44 M.J. at 434-35.

116. BENCHBOOK, *supra* note 1, para. 7-15.

117. Counsel should note that even though the military judge appeared to be having a “discussion” with the members, this discussion is an *instruction*. As a result, the test on appeal, absent an objection, will be plain error. See MCM, *supra* note 6, R.C.M. 920(f) (“Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error.”).

118. *Fitzgerald*, 44 M.J. at 436.

119. *Id.* at 434.

120. MCM, *supra* note 6, R.C.M. 920(f).

121. *United States v. Olano*, 507 U.S. 725, 734 (1993).

122. 42 M.J. 475 (1995).

123. *Id.* at 475.

slaughter by culpable negligence,<sup>124</sup> the court nonetheless recognized the basic premise that an accused charged with multiple acts within a specification could be found guilty of one, some, or all of the acts and the resulting specification. Having reaffirmed this premise, the issue in *Fitzgerald* was whether the military judge committed plain error in his procedural instructions to the members in response to their questions concerning how to procedurally vote on “component” acts within specifications.

The CAAF did not find plain error<sup>125</sup> in this “straw votes”<sup>126</sup> instruction. The CAAF held that permissible straw votes were taken when “the members would *reach a consensus* as to what they didn’t have a reasonable doubt about”<sup>127</sup> and when “*seven or more members decided . . . that he did all of these things except this.*”<sup>128</sup>

*United States v. Fitzgerald* illustrates two important points. First, military judges must carefully word their answers to members’ questions.<sup>129</sup> Even though the appellate court affirmed on the basis of “straw vote” instructions, these “informal” votes have never been encouraged and can lead to additional questions and issues.<sup>130</sup> Second, counsel must remain attentive throughout instructions. This is especially true when military judges enter into dialogues with members that deviate from standard *Benchbook* instructions and attempt to navigate

uncharted waters. If counsel fail to object, the standard for review will be “plain-error.”<sup>131</sup>

In *United States v. Miller*,<sup>132</sup> it was alleged that the accused committed numerous criminal acts with teenage children.<sup>133</sup> In two specifications it was alleged that the accused “compelled, enticed, or procured an act or acts of sexual intercourse.”<sup>134</sup> The military judge instructed the members that they could add the term “and sodomy” after the phrase “sexual intercourse” in these two specifications. The accused did not object, and the members found the accused guilty with the additional words “and sodomy.”

On appeal, the issue was whether these were proper findings by exceptions and substitutions to conform to the evidence.<sup>135</sup> R.C.M. 918(a)(1) provides, “Exceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it.”<sup>136</sup>

The appellate court held that adding “and sodomy” to the specifications changed the nature of the offenses and increased the severity of the offenses. Additionally, the court noted that the accused was not provided proper notice that these alleged offenses included solicitation of sodomy. The court disapproved the findings as to the words “and sodomy” in both specifications and reassessed the sentence.<sup>137</sup>

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124. MCM, *supra* note 6, para. 44c(2)(a)(ii).

125. The court wrote that “There were no objections to these possible voting options because the instructions inured to the appellant’s benefit . . . As a result, we hold that there was an absence of plain error and a waiver of any objection.” *Fitzgerald*, 44 M.J. at 438.

126. A straw poll is an informal, non-binding vote. Although they are not prohibited, they are discouraged because of the potential for abuse of superiority in rank. See *United States v. Lawson*, 16 M.J. 38 (C.M.A. 1983); *United States v. Loving*, 41 M.J. 213, 235 (1994), *aff’d on other grounds*, 116 S. Ct. 1737 (1996).

127. *Fitzgerald*, 44 M.J. at 436.

128. *Id.*

129. In this case, the military judge never mentioned the words straw vote or practice vote. Nonetheless, the appellate courts affirmed on that basis. The recommended solution is to reread the *Benchbook* instruction on findings by exceptions and exceptions and substitutions. See *BENCHBOOK*, *supra* note 1, para. 7-15.

130. For example, what happens if members decide the straw vote is the verdict? Must they vote again, or just adopt the straw vote? What happens if a member does not understand that it was a practice vote and demands that the straw vote be the single vote of the court in accordance with MCM, *supra* note 6, R.C.M. 921(c)(3)? How many straw votes can the president of the panel order before the issue of undue influence of rank arises? See MCM, *supra* note 6, R.C.M. 923 (impeachment of findings); Mil. R. Evid. 606 (competency of court member as witness).

131. MCM, *supra* note 6, R.C.M. 920(f).

132. *United States v. Miller*, 44 M.J. 549 (A.F. Ct. Crim. App. 1996).

133. The accused was charged with pandering, obstruction of justice, indecent acts with a minor, showing pornography to minors, supplying alcohol to minors, assault, attempted indecent acts with a minor, and rape. UCMJ arts. 134, 128, 92, 80, & 120, respectively. *Miller*, 44 M.J. at 552-53.

134. *Id.* at 556.

135. MCM, *supra* note 6, R.C.M. 918(a)(1).

136. *Id.*

137. *Miller*, 44 M.J. at 557.

*Miller* provides the following instructions lesson: If new misconduct is discovered for the first time at trial,<sup>138</sup> all parties to the trial must apply the R.C.M. 918(a)(1) standard to that new evidence prior to the military judge providing the variance instruction.<sup>139</sup> However, *Miller* also provides defense counsel an important trial advocacy lesson. Defense counsel should object in an Article 39(a) session prior to the introduction of uncharged misconduct that is not relevant to proving a charged offense.<sup>140</sup> Solicitation of sodomy was not charged, violated the test of R.C.M. 918(a)(1), and should never have been presented to the members in the first instance.

### Sentencing

In *United States v. Weatherspoon*,<sup>141</sup> the accused was convicted of premeditated murder and breaking restriction.<sup>142</sup> After deliberating on an appropriate sentence for nine minutes, the members returned and asked, “The question is, must we impose confinement for life or must we merely vote for life?” The military judge instructed them as follows: “The bottom line is, you must vote for a sentence which includes confinement for life. You can, as a court, collectively or individually, recommend clemency with respect to that length of confinement.” The military judge also instructed them that for clem-

ency to be recommended “by the court,” the same number of members as required to vote for the sentence being imposed would have to vote to recommend clemency. The military judge instructed that because confinement for life was a required punishment, three-fourths or seven of the nine members would have to vote for clemency for it to be “the court’s” recommendation.

On appeal, the issue was the required number of members for a clemency recommendation to be of “the court-martial.” The CAAF recognized two possibilities: (1) the same percentage that is required to adjudge the sentence; or (2) a simple majority.<sup>143</sup> The court did not find the answer in the *Manual*.<sup>144</sup> Resolving this case, CAAF held that the record provided that only four of the nine members would have recommended clemency; therefore, there was not even a bare majority. The facts mooted the issue.<sup>145</sup> The court did recommend that the issue be reviewed, and that the President amend an appropriate Rule for Courts-Martial to resolve the issue.<sup>146</sup>

Until the President clarifies the issue,<sup>147</sup> military judges should answer members’ clemency questions by using the appropriate *Benchbook* instruction on Clemency (Recommendation for Suspension)<sup>148</sup> or on Clemency (Additional Instructions).<sup>149</sup> These instructions allow a clemency recommendation

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138. A trial advocacy comment--new misconduct should not be discovered for the first time at trial. Counsel must establish a rapport with witnesses and ask “uncomfortable” questions (such as asking a teenage girl if the accused solicited sodomy).

139. See BENCHBOOK, *supra* note 1, para. 7-15.

140. MCM, *supra* note 6, Mil. R. Evid. 401, Definition of “relevant evidence.” See also Mil. R. Evid. 403 & 404(b).

141. 44 M.J. 211 (1996).

142. UCMJ arts. 118 & 134 (1988).

143. *Weatherspoon*, 44 M.J. at 213.

144. *But see* UCMJ art. 52, para. c: “All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote . . . .”

145. *Weatherspoon*, 44 M.J. at 214.

146. *Id.* n.2.

147. One could debate whether the President should follow CAAF’s recommendation and amend a Rule for Courts-Martial such that it clarifies the number needed for a clemency recommendation to be “the court’s.” There is no requirement that a clemency recommendation be of “the court.” One, some, or all of the members can recommend clemency. See *id.* at 214 (Sullivan, J., concurring in the result) (citing C. CLODE, THE ADMINISTRATION OF JUSTICE UNDER MILITARY AND MARTIAL LAW 166 (1874)).

by one, some, or all the members. They avoid the issue of defining a number required for a recommendation to be of “the court.”

Lastly, in *United States v. Figura*,<sup>150</sup> the stipulation of fact in a guilty plea case failed to note the dates of forged checks, and when and where the forged checks were cashed. Counsel for both sides agreed that the military judge would provide this information as part of an instruction to the members. There was no defense objection to the instruction once given. On appeal, CAAF held: “There is no demonstrative right or wrong way to introduce evidence taken during a guilty plea inquiry . . . . The judge should permit the parties ultimately to choose a method of presentation. That was done in this case.”<sup>151</sup> Judge Sullivan, concurring *cum admonitu*, provides advice as follows: “My suggestion to the military judges--use your power under R.C.M. 920 to give the jury a good, exhaustive, accurate, and

fair view of the facts in the case so the jury can do its job on a more informed basis.”<sup>152</sup>

## Conclusion

Members who lack proper instructions cannot perform their duties, and all parties to the trial have a responsibility to work with the military judge and ensure that the members receive clear and concise instructions. The *Military Judges’ Benchbook* and the *Computer Benchbook* are useful tools for creating these instructions. Counsel need to remain ever vigilant. When there is no established jurisprudence or when military judges stray from the *Benchbook*, issues arise. When military judges enter into dialogues with members, counsel should pay very close attention to what is stated. If counsel fail to object to alleged erroneous instructions, the appellate standard of review will typically be “plain error”--a difficult standard for appellants to meet.

148. The instruction on page 129 of the BENCHBOOK *supra* note 1, provides as follows:

You are advised that, although you have no authority to suspend either a portion of or the entire sentence that you impose, you may recommend such suspension. However, you must keep in mind during deliberation that such a recommendation is not binding on the convening or higher authority. Therefore, in arriving at a sentence, you must be satisfied that it is appropriate for the offense(s) of which the accused has been convicted even if the convening or higher authority refuses to adopt your recommendation or suspension.

*If fewer than all members of the court wish to recommend suspension of a portion of, or the entire sentence, then the names of those making such a recommendation, or not joining in such a recommendation, whichever is less, should be listed at the bottom of the sentence worksheet.*

Where such a recommendation is made, then the president, after announcing the sentence, may announce the recommendation, and the number of members joining in that recommendation. Whether to make any recommendation for suspension of a portion or the sentence in entirety is solely a matter within the discretion of the court.

However, you should keep in mind your responsibility to adjudge a sentence which you regard as fair and just at the time it is imposed, and not a sentence which will become fair and just only if your recommendation is adopted by the convening or higher authority.

149. This instruction, on page 130 of the BENCHBOOK, *supra* note 1, provides:

You are reminded that it is your independent responsibility to adjudge an appropriate sentence for the offense(s) of which the accused has been convicted. However, *if any or all of you wish to make a recommendation for clemency, it is within your authority to do so after the sentence is announced.*

150. 44 M.J. 308 (1996).

151. *Id.* at 310.

152. *Id.* at 311.