SOME THOUGHTS ABOUT *In Re A.J.W.* (NMCCA 2021): A JUDICIARY SENTENCING PERPLEXITY

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Perplexity is the beginning of knowledge.[1]

On 12 January 2021, the U.S. Navy-Marine Corps Court of Criminal Appeals [NMCCA], decided *In Re A.J.W. [AJW]*.[2] If not reversed by the U.S. Court of Appeals for the Armed Forces [CAAF],[3] *AJW* introduces some perplexing (and arguably incorrect) precedent to military sentencing jurisprudence. There are issues of standing, jurisdiction, confrontation, due process, and whether or not the court's holding, elevates alleged sexual assault victims to *de facto parties* to court-martial proceedings, etc. This essay will attempt to identify and elucidate some of those issues.

I. THE FACTUAL BACKGROUND OF THE CASE.

The relevant facts from the court's decision are as follows:

1. The government charged the accused [TTG][4] with a number of offenses, to include two Specifications of sexual assault;

2. The case was referred to a *Special* court-martial;

3. The Accused entered into a Pretrial Agreement [PTA] which the Convening Authority

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[+] Special thanks to a couple of colleagues gracious enough to peer-review and critique prior drafts. Your comments made this a far better paper; faults and errors belong solely to me.

[1] Khalil Gibran, *The Voice of the Master.*

[2] __M.J.__, 2021 WL 99630 (NMCCA 2021).

[3] Whether CAAF has jurisdiction for a "writ appeal," is dubious per *Randolph v. HV*, 76 M.J. 27 (CAAF 2017). Yet, considering the appellate scheme of the UCMJ, here, giving a CCA final authority is an anomaly, especially within the context of "writ appeals." Furthermore, Article 67(a)(3) and (b), UCMJ, facially appears to give CAAF jurisdiction.

[4] I use his initials because, while the NMCCA designated him as the *Real Party in Interest* [RPI] (and used his full name), he simply was not. The RPI here was AJW, *see, e.g.* Maj Sean P. Mahoney, *Taking Victims' Rights to the Next Level: Appellate Rights of Crime Victims under the Uniform Code of Military Justice*, 225 Mil. L. Rev. 682, 690, and 717-18 (2017) [hereinafter "*Appellate Rights*"]. While I disagree with some of the article's comments and suggestions, it is exceptionally well-researched and well worth the read.

approved. It provided *inter alia,* that if the Accused pled guilty to various offenses, the two sexual assault Specifications would be *withdrawn and dismissed*;

4. Presumably, AJW, the alleged victim of the sexual assault allegations, had no objections to the terms and conditions of the PTA as nothing in the *AJW* opinion alludes to any such objections;[5]

5. The Accused's pleas were found to be provident, TTG was found guilty per his pleas, without any apparent objections by either the government or AJW;

6. The sexual assault Specifications were then withdrawn and dismissed pursuant to the terms of the PTA;

7. The case proceeded to sentencing where the government did *not* introduce AJW's *Victim Impact Statement* [VIS] as evidence in aggravation for unknown reasons;

8. The VLC tendered an unsworn, written VIS which included commentary about the now dismissed sexual assault Specifications;

9. The Trial Defense Counsel [TDC] for TTG objected to those portions of the VIS which addressed the now dismissed sexual assault Specifications as irrelevant;

10. The MJ agreed with the defense and struck those portions of the VIS dealing with the sexual assault allegations;

11. The VLC "objected" to this preclusion,[6] which the MJ overruled;

12. The VLC moved to "stay" the proceedings to seek appellate relief pursuant to Article 6b(c);

13. The MJ denied the Motion to Stay the proceedings;

14. Sentencing proceeded, but AJW's VLC did not seek at stay at the NMCCA;

15. TTG was sentenced to be reduced from E-3 to E-1 and 140 days of confinement (thus not triggering any automatic appellate review under Article 66, UCMJ;

16. Post-trial proceedings were completed and the MJ filed the *Entry of Judgment*;

17. *After* the *Entry of Judgment* was filed, AJW file a Petition for Extraordinary Relief

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[5] Assuming such, it does not appear that anyone addressed the obvious issue of whether the failure to object to the terms and conditions of the PTA, *forfeited* AJW's right to later object, as happened here.

[6] Why someone at that point didn't just tell the VLC to "sit down and be quiet, you have no *standing* on this issue at this point in time," is also perplexing.

pursuant to Article 6b, UCMJ, seeking a Writ of Mandamus seeking a sentencing rehearing;

18. The NMCCA denies relief *on the merits* because AJW has not satisfied the requisite standards for mandamus;

19. TTG's *appellate* DC [AppDC] files nothing on his behalf at the NMCCA.[7]

II. THE PROCEDURAL POSTURE OF THE CASE.

A USMC Special Court-Martial convicted Lance Corporal (E-3) TTG of various offenses under the UCMJ, pursuant to his pleas and in accordance with a pretrial agreement [PTA]. The Military Judge [MJ] sentenced TTG to confinement for 140 days and reduction to E-1].[8] However,

> [As part of] a plea agreement, two specifications charging the RPI with sexually assaulting Petitioner in violation of Article 120, UCMJ, were withdrawn and dismissed.[9]

Then,

> At the presentencing hearing, Petitioner's victims' legal counsel [VLC] offered a *written*[10] victim impact statement[11] from Petitioner pursuant to Rule for Courts-Martial [R.C.M.] 1001(c)[12]. The RPI's trial defense counsel objected that parts of the statement were not relevant because they referenced an alleged sexual assault which was not one of the charges of which the RPI was found guilty.[Emphasis added].[13]

The MJ agreed and struck a number of paragraphs from the VIS over the VLC's objections. The

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[7] *See e.g., United States v. Hemmingsen,* 80 M.J. 340 (CAAF 2020) [Remand on *appellate* IAC issue for failing to be an *advocate* for the accused].

[8] *AJW,* at *1.

[9] *Id.*

[10] This implicates an accused's *confrontation* rights, but there is no indicia in the opinion that such an objection was made at trial–at least it is not discussed in the court's decision. It likewise will be discussed *infra.*

[11] The opinion is silent as to whether or not this VIS was unsworn or not.

[12] It does not appear that TTG's TDC objected to the obvious Confrontation Clause issue. The Accused, however, suffered no prejudice in this case.

[13] *AJW,* at *1.

VLC sought a stay from the MJ, who denied it.[14] Rather than immediately seeking a stay of the court-martial proceedings from the NMCCA so as to perfect an appeal of the MJ's ruling per Article 6b(e)(1), UCMJ,[15] the court-martial proceeded, the accused was sentenced as noted above, and the Entry of Judgment accomplished.[16] Only then did AJW petition the NMCCA for a writ of mandamus under Article 6b(e)(1), UCMJ. It was too late.

A. *"Timing Is Everything,"* and Other Legal Perplexities.

The failure to address the delay in seeking relief by the VLC, is not only significant (and perplexing), but was fatal to any relief.[17] But, with the likelihood that AJW may seek review of the NMCCA's decision at CAAF[18] and to provide military practitioners another point of view, some commentary is respectfully in order. These will be addressed in no particular order.

1. Standing. This perplexity asks, how–under Article 6b(e), UCMJ–did AJW have *standing*, post-judgment, to do anything at the NMCCA? Whether or not the MJ was right or wrong pertaining to her VIS ruling, for AJW the case was over once the *Entry of Judgment* was filed. At that juncture, AJW was legally *not* a victim of a qualifying offense for purposes of her seeking relief at NMCCA under Article 6b, UCMJ, as the two sexual assault Specifications had been withdrawn and dismissed pursuant to the PTA. Absent "victim" status, it is difficult to grasp (and the court did not address), how AJW had *standing* in this case, *post-judgment*.

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[14] The court's opinion does not specifically say why, but presumably based upon the accused's objections.

[15] This reads in full:

> If the victim of an offense under this chapter believes that a preliminary hearing ruling under section 832 of this title (article 32) or *a court-martial ruling* violates the rights of the victim afforded by a section (article) or rule specified in paragraph (4), the victim may petition the Court of Criminal Appeals for a writ of mandamus to require the preliminary hearing officer or *the court-martial* to comply with the section (article) or rule. [Emphasis added].

[16] Presumably, the VLC could have sought Article 6b(e), UCMJ, relief during this time-frame.

[17] In light of the NMCCA's ultimate holding that AJW did not satisfy the legal standard required for mandamus relief–i.e., they reached the "right result" but for the wrong reasons–most of the opinion is thus, *obiter dicta.*

[18] *But see, Randolph v. HV*, 76 M.J. 27 (CAAF 2017).

As the Supreme Court stated regarding standing in *Flast v. Cohen*:[19]

> The fundamental aspect of standing is that it focuses *on the party* seeking to get his complaint before a federal court and *not on the issues he wishes to have adjudicated.* [Emphasis added].

The Court subsequently expounded upon this concept in *Valley Forge Christian College v. Americans United,*[20] by establishing a two-part test. *First,* the party seeking judicial relief [here, AJW] must have suffered some injury, actual or threatened, as a result of the defendant/respondent's actions: here, allegedly sustaining TTG's objections to those portions of the VIS addressing the *withdrawn and dismissed* sexual assault allegations, something required under the terms and conditions of the PTA.[21]

It strains credulity to claim that an *evidentiary* ruling pursuant to a PTA contrary to the wishes of AJW and her VLC, rises to the level of "legal injury," under the facts of this case. This is so–at least in this case–because the VIS "was not offered by the trial counsel as evidence in aggravation;"[22] something which further diluted any standing considerations AJW may have had, post-judgment.

Second, and perhaps most important under *Valley Forge, supra,* is that for standing purposes, the "injury" must be capable of being redressed by favorable decision by the court.[23] Thus, assuming *arguendo,* even if AJW could somehow demonstrate *ex post facto* a cognizable legal injury, the NMCCA (and also CAAF) was incapable of redressing her "injury." *Constitutional*–and perhaps statutory[24]–former jeopardy principles would prohibit *in this case*, any increase in the sentence

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[19] 392 U.S. 83, 99 (1968).

[20] 454 U.S. 464 (1982).

[21] While not addressed in the court's opinion, presumably AJW and her VLC, consented to the PTA terms. *See* Article 6b(a)(5), UCMJ.

[22] *AJW,* at *2.

[23] 454 U.S. at 472,

[24] *Cf.* Article 44, UCMJ.

imposed on TTG.[25]

A more fundamental question here is this: how does an alleged victim under historical American jurisprudential concepts, i.e., the "adversarial system," achieve any legitimate "standing" sufficient to rise to the level of being able to object to: (a) what the *government*/prosecution did not do, *viz.,* seek to introduce AJW's VIS as an exhibit in aggravation for sentencing purposes?[26] And (b), object to the Accused's objections to her VIS without being, from a legal perspective, a *de facto* party to the proceedings?[27]

Even before the Founding, colonial America's criminal jurisprudence recognized two–and only two–parties to criminal litigation: the plaintiff on behalf of the sovereign (government) and the defendant (accused). Nor does our Constitutional scheme, especially considering our *Bill of Rights*, recognize any other format or parties.[28] This is not to say that *bona fide* victims should not have certain rights, e.g., notice of proceedings, the right to be heard (consistent with Confrontation and hearsay requirements), restitution etc., only that *their* rights cannot restrict or diminish the rights of

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[25] *See, e.g., Green v. United States,* 355 U.S. 184, 189 (1957); and Article 63(a), UCMJ.

[26] Indeed, historically, the role of the American defense counsel–while certainly more robust than his English counterparts–was itself limited. *See, e.g.,* Jonakait, *The Rise of the American Adversary System: America before England*, 14 Widener L. Rev. 323 (2009. Available at: https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1748;context=fac_articles_chapters [Last accessed: 25 January 2021].

[27] *See LRM v. Kastenberg,* 73 M.J. 364, 368 (CAAF 2013)["LRM's position as a ***nonparty*** to the court-martial . . . does not preclude standing." (Emphasis added). But, over the dissent of Judges Stucky and Ryan]; *EV v. United States,* 75 M.J. 331 (CAAF 2016)[CAAF lacks jurisdiction for relief under Article 6b(e), UCMJ. *But see, Center for Constitutional Rights v. United States,*72 M.J. 126, 129 (CAAF 2013)["We thus are asked to adjudicate what amounts to a civil action, maintained by persons who are strangers to the court-martial, asking for relief . . .that has no bearing on any findings and sentence that may eventually be adjudged by the court-martial."]; *Randolph v. HV,* 76 M.J. 27 (CAAF 2017)[No CAAF jurisdiction under Article 6b(e), UCMJ. *But see,* dissents of C.J. Erdmann and J. Sparks, *id.* at 33]; and *United States v. Hamilton,* 78 M.J. 335 (CAAF 2019) [victim's *statutory* right to be "reasonably heard." But, that right cannot override an Accused's constitutional rights to Due Process under the Fifth Amendment, and the right of Confrontation contained in the Sixth.]

[28] The American adversarial system is based upon the "procedural principle that ***the parties*** are responsible for production of all the evidence upon which the decision will be based." Landsman, *A Brief Survey of the Development of the Adversary System*, 44 Ohio St. L.J. 713, 715 (1983)[Emphasis added]. Available at: https://kb.osu.edu/bitstream/handle/1811/65263/1/OSLJ_V44N3_0713.pdf [Last accessed: 25 January 2021].

the accused, much less be greater than the rights of the Accused.[29] Here, AJW had a statutory right to seek review at the NMCCA, a right denied for all-intents-and-purposes, to the accused, TTG.

2. Prudential (or Whatever You Call It) Standing Preclusion. Even if AJW was somehow able to lift her tardy claim to the level of having personal standing, the NMCCA would have been justified in rejecting her mandamus claims under principles of prudential standing. In *Gladstone, Realtors v. Village of Bellmont,*[30] the Court concluded: "a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import *where no individual rights would be vindicated* . . . ." [Emphasis added]. Thus, under the parameters of *Valley Forge, supra,* AJW's belated claims of "injury" were–under the circumstances of this case–not capable of being vindicated by the NMCCA. That court indirectly acknowledged this by its conclusion that AJW had not established that she was entitled to extraordinary, mandamus relief.

The Supreme Court has modified the concept of "prudential standing" to a more accurate "zone of interests" test. In *Lexmark Intern. Inc. v. Static Control Components, Inc.,*[31] the Court stated:

> Whether a plaintiff comes within "the 'zone of interests' " is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim. [internal citations omitted] . . . [T]he question this case presents is whether Static Control falls within the class of plaintiffs whom Congress has authorized to sue . . . . In other words, we ask whether Static Control has a cause of action under the statute. That question requires us to

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[29] For an international comparative legal analysis, *see* Freedman, *Our Constitutionalized Adversary System*, 1 Chap. L. Rev. 57 (1998). Available at: https://digitalcommons.chapman.edu/cgi/viewcontent.cgi?article=1006&context=chapman-law-review [Last accessed: 25 January 2021]. Italy, e.g., permits parallel *civil* proceedings on behalf of alleged "victims" within the *criminal* adjudicative process. But, that works for them because in their *criminal* context, there is no "jury of one's peers" deciding guilt or innocence, as the U.S. Constitution mandates. [I am indebted to my Italian colleague (and friend), Dottoressa Alessia Oltremari for her guidance and assistance on this point].

[30] 441 U.S. 91, 99-100 (1979).

[31] 572 U.S. 118, 127-28 (2014).

> determine the meaning of the congressionally enacted provision creating a cause of action. In doing so, we apply traditional principles of statutory interpretation. [Footnote omitted].

The question here then is, did AJW come within "the zone of interests" under Article 6b(e)(1), UCMJ? The answer is "no," for reasons discussed below.

3. "Case or Controversy." Even assuming *arguendo* that AJW somehow had standing post-judgment, there is another fundamental problem. Almost 200 years ago, Chief Justice John Marshall held that for something to be a "case" under the Constitution, the party seeking judicial relief–here, AJW–must assert her rights "in a form prescribed by law."[32] That did *not* happen here, as AJW's claim seeking mandamus relief was *not* "in a form prescribed by law," i.e., the petition seeking extraordinary relief post entry of judgment, was not timely under Article 6b(e), UCMJ.

While perhaps obscure, *Muskrat v. United States,*[33] delineates the standard. There the Court held–as relevant here:

> [The] judicial power . . . is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. . . . It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants.

Here, as in *Muskrat,* the United States was the named respondent, but it had under the circumstances of this case, "no interest adverse" to AJW–indeed, the NMCCA admits this by then designating the accused, TTG, the RPI.

If there was in fact someone with an adverse interest to AJW post-judgment, it was *not* TTG–it was the military judge/the United States–whose rulings on the contents of the VIS were at issue. But,

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[32] *Osborn v. U.S. Bank,* 22 U.S. (9 Wheat.) 738, 819 (1824).

[33] 219 U.S. 346, 361 (1911).

under the idiosyncracies of the UCMJ and the peculiar facts of this case, once the Entry of Judgment was filed, the court-martial ceased to exist and the MJ was literally and legally out of the picture. That left only the generic "United States" as a nominal respondent–an entity with no demonstrable *adverse interest* to AJW.

B. Jurisdictional Issues.

The legal basis of the NMCCA's jurisdiction is not addressed in the Court's opinion–indeed, there is no indicia that either the government or TTG ever challenged the court's jurisdictional basis to hear AJW's Petition. The only mention of anything approaching jurisdiction are two conclusory statements. First, a statement in the heading of the Decision: "Review of Petition Pursuant to Article 6b, Uniform Code of Military Justice . . . ." Second

> This Court has jurisdiction over the Petition under Article 6b, UCMJ, under which a victim may petition this Court when the victim "believes . . . a court-martial ruling violates the rights of the victim afforded by ... [Article 6b, UCMJ]."[34]

Article 6b, UCMJ.

Jurisdiction in *AJW* was premised upon this provision. However, under the facts and circumstances of this case, NMCCA lacked any jurisdictional basis for its decision and respectfully, should have simply dismissed AJW's Petition for lack of jurisdiction. Two provisions of Article 6b, UCMJ, were pertinent in *AJW*:

1. Article 6b(a)(4)(B), UCMJ. This section provides that a *bona fide* victim has the "right to be *reasonably heard* at . . . (B) A sentencing hearing relating to the offense." [Emphasis added]. As the opinion in *AJW* amply demonstrates, she was, via her VLC, "reasonably heard" during the presentencing process in TTG's court-martial.

[34] *AJW* at *3

2. Article 6b(e)(1), UCMJ. The relevant language there is as follows:

> If a victim of an offense under this chapter believes that . . . a court-martial ruling violates the rights of the victim . . . the victim may petition the Court of Criminal Appeals for a writ of mandamus to require the ***court-martial*** to comply with the section (article) or rule. [Emphasis added].

Presumably, the court and the parties believed that this section provided NMCCA's jurisdictional basis in *AJW.* Under the specific facts of the case–and those facts are what closed the jurisdictional door to the courthouse here–AJW's VLC *forfeited* her right to seek extraordinary mandamus relief, because her Petition was not timely filed.

Subparagraph (e)(1) of Article 6b, provides a jurisdictional basis for ***interlocutory*** appellate relief. There are two reasons why such relief must be interpreted as being limited to interlocutory relief. First, the plain language of the statute, compels it.[35] Here, the specific language of the statute clearly and unambiguously (as relevant herein) *limits* a victim's right to mandamus relief to where the CCA can "require . . . the court-martial to comply . . . ." That can only mean–in the court-martial context–interlocutory relief, as the court-martial here, *United States v. TTG,* had ceased to exist as a legal entity upon the *Entry of Judgment. See,* RCM 1111(a)(2) ["The entry of judgment terminates the trial proceedings. . . ."] Thus, as a matter of law, there was no court-martial to which the NMCCA could order "to comply" with anything at issue at the time AJW filed her Petition.

The second reason that demonstrates that the victim's "relief" here must be limited to *interlocutory* relief is that this is one of the times where the legislative history *clearly* demonstrates that such relief was expressly limited by Congress to interlocutory relief while the court-martial was still pending. As one commentator has noted:

> The current statutory structure does not address any post-trial rights of

[35] *See, United States v. Tucker,* 76 M.J. 257, 258 (CAAF 2017).

> victims beyond notice of parole or clemency proceedings, or the release or escape of the accused. The Senate version of the 2017 National Defense Authorization Act (NDAA) included a provision that would have amended Article 6b to provide victims with standing as a real party in interest during appellate review. The amendment would have allowed victims to file pleadings if an accused appeals his conviction. The House version did not have such a provision and ***in committee, the decision was made to leave out any changes to victim appellate rights*** because the congressionally created Judicial Proceedings Panel (JPP) was continuing to study the issue. [Emphasis added; internal footnotes omitted].[36]
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> Congress' initial focus has been on ensuring victims have the ability to file an ***interlocutory appeal***, thereby ***immediately*** seeking relief from the ruling of a trial judge that infringed on a privacy right or privilege held by a victim. [Emphasis added].[37]
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> An interlocutory appeal is simply an appeal that occurs ***before the trial court's final ruling.*** [Emphasis added].[38]

Rhetorically, assuming *arguendo* that the NMCCA had *jurisdiction* to grant extraordinary, mandamus relief to AJW, just what relief–extraordinary or not–was possible? The answer to that provides yet another reason demonstrating that Congress intended Article 6b(e)(1), UCMJ, relief to be limited to interlocutory relief. If interlocutory, TTG's court-martial would still be pending and generally, he would not have been sentenced. But, factually and procedurally, that was not the case here. Furthermore, assuming jurisdiction for the moment, the relief sought by AJW was to mandate "a new sentencing hearing" which would include the stricken portions of her VIS. However, *constitutional* jeopardy as well as statutory jeopardy under Article 44(c)(2)(B), UCMJ, attached, as the sexual assault charges at issue, had been withdrawn and dismissed pursuant to the PTA. There is no question of waiver, as the appeal was not by TTG, so his sentence could not be increased in any

[36] Mahoney, *Appellate Rights, supra* at 690.

[37] *Id.*

[38] *Id.* at 691.

event.[39] In other words, AJW was beating the proverbial dead horse.[40]

II. CONFRONTATION CLAUSE ISSUES–*NOT* A PINK ELEPHANT IN THE ROOM.

There is an important, but unaddressed issue in *AJW* that deserves attention–TTG's right to confront AJW during sentencing. For reasons unknown, this issue seems to have escaped the attention of military practitioners. It is beyond cavil, that sentencing is a "critical stage" of a criminal proceeding. This premise was established over 40 years ago.

> [I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. . . . [S]entencing is a critical stage of the criminal proceeding. . . . [citation omitted].

Gardner v. Florida, 430 U.S. 349, 358 (1977). *Accord, Mempa v. Rhay*, 389 U.S. 128, 137 (1967) [Sixth Amendment applies to sentencing]. Thus, in an adversarial sentencing scheme, such as the UCMJ's, the Confrontation Clause is applicable.

RCM 1001A(b)(4)(B)'s, allowance of an *unsworn* VIS is unconstitutional. *Crawford v. Washington,*[41] and its progeny post-date the *dicta* in *United States v. McDonald,*[42] which held to the contrary. The Supreme Court has held that upon conviction, a defendant still "retains an interest in a sentencing proceeding that is fundamentally fair."[43] Furthermore, *McDonald* pre-dates the Court's decision in *United States v. Booker,*[44] where it held in the context of sentencing, "It is an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment

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[39] RCM 819(d)(1); and *United States v. Mitchell,* 58 M.J. 446 (CAAF 2003).

[40] Since her right to counsel was purely statutory versus constitutional, AJW has no right to claim "ineffective assistance of counsel," under constitutional principles.

[41] 541 U.S. 36 (2004).

[42] 55 M.J. 173 (CAAF 2001).

[43] *Betterman v. Montana,* 136 S.Ct. 1609, 1617 (2016).

[44] 543 U.S. 220, 237 (2005).

substance." An accused is entitled to "a fair trial on the issue of punishment."[45]

Just because the *Manual for Courts-Martial* provides for something, does not mean that it comports to constitutional standards. Yet, unless counsel objects to the denial of the accused's right to confront a victim's unsworn, written VIS, there will be no basis–other than the plain error rule–when post-conviction defense counsel learns that the VIS was a "pack of lies."

III. "DUE PROCESS MARCHES ON"–AN ALTERNATIVE ROADMAP.[46]

A little known case may provide a better legal roadmap. In *Specht v. Patterson*, 386 U.S. 605 (1967), a case involving an early sex offender adjudication and sentencing, the Court noted:

> Due process . . . requires that he be present with counsel, have an opportunity to be heard, ***be confronted with witnesses against him, have the right to cross-examine***, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed.

Id. at 610 [Emphasis added]. *Specht* involved a subsequent proceeding after being convicted–not unlike the subsequent sentencing proceedings in litigated courts-martial.[47] The issue in *Specht* is not precisely the same as here, but it does point us in the right direction.

Citing *Specht,* a plurality (speaking for the Court) in *Gardener v. Florida,*[48] held:

> [I]t is now clear that *the sentencing process*, as well as the trial itself, *must satisfy the requirements of the Due Process Clause*. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the *sentencing is a critical stage of the criminal*

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[45] *Green v. Georgia,* 442 U.S. 95, 97 (1979).

[46] Rehkopf, Comment, *Due Process Marches On–A Comment on* Averich v. Sec'y Navy, 3 Capital U. L. Rev. 302 (1974).

[47] *See also,* McMurray, *Challenging Untested Facts at Sentencing: The Applicability of* Crawford *at Sentencing after* Booker, 37 McGeorge L. Rev. 589 (2006). Available at: https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=2932&context=mlr [Last accessed: 25 January 2021]; Sanders, *The Value of Confrontation as a Felony Sentencing Right*, 25 Widener L. J. 103 (2016). Available at: https://digitalcommons.law.uidaho.edu/cgi/viewcontent.cgi?article=1033&context=faculty_scholarship [Last accessed: 25 January 2021]; and Howell, *Constitutional Law—Sixth Amendment—Braving Confrontation: Arkansas's Progressive Position Regarding Criminal Defendants' Confrontation Rights at Sentencing*, 35 U. Ark. Little Rock L. Rev. 691 (2013). Available at: https://lawrepository.ualr.edu/lawreview/vol35/iss3/9/ [Last accessed: 25 January 2021].

[48] 430 U.S. 349 (1977).

> *proceeding* at which he is entitled to the effective assistance of counsel. [citing *Mempa, supra,* and *Specht;* emphasis added].[49]

The Court went on to state: "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." [Citation omitted].[50] At issue in *Gardner,* was a procedure that allowed the sentencing judge to consider "confidential information which is not disclosed to the defendant or his counsel."[51]

The opposite scenario was at issue in *AJW*–the Accused and his counsel knew the contested content of her VIS, objected, and the military judge agreed and redacted the now "irrelevant" portions of the VIS. Certainly, as the military judge's holding implies, TTG had a due process right to *not* be sentenced on irrelevant VIS claims, claims where he could not under the "process" involved, confront and cross-examine AJW. That is precisely what *Specht* demands.[52]

In *United States v. McDonald,*[53] CAAF addressed the following granted issue:

> WHETHER THE LOWER COURT ERRED IN HOLDING THAT THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE DOES NOT APPLY TO THE PRESENTENCING PORTION OF A COURT–MARTIAL, CONTRARY TO THIS COURT'S DECISION IN *UNITED STATES V. GEORGE,* 52 MJ 259 (2000).

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[49] *Id.* at 358.

[50] *Id.*

[51] *Id.*

[52] *Specht's* obscurity to today's world is no doubt due to a combination of factors, e.g., the enactment of the federal Sentencing Guidelines [*see, e.g.,* 28 U.S.C. § 991]; *Apprendi v. New Jersey,* 530 U.S. 466 (2000) [Due Process requires that factual matters authorizing increased sentencing, must be made by fact-finder using with "proof beyond a reasonable doubt" standard]; *Crawford v. Washington*, 541 U.S. 36 (2004)[revising Confrontation principles]; and *United States v. Booker,* 543 U.S. 220 (2005) [holding that constitutionally, Federal Sentencing Guidelines could not be made mandatory, only "advisory"].

[53] 55 M.J. 173 (CAAF), *cert. denied,* 534 U.S. 996 (2001). Of note, LT Mari-Rae Sopper, USNR, was McDonald's original AppDC.

It held that it did *not.*[54] However, CAAF went on to conclude that: "the Fifth Amendment's Due Process Clause does apply there."[55] CAAF's decision however, was, *under the circumstances,* correct. At issue was the testimony of the father of a minor sex offense victim who was an active-duty, Army Sergeant Major. The evening prior to his testimony, he was placed on a deployment alert, scheduled to deploy to the Middle East at 0600 hours the next morning–the day he was scheduled to testify. In view of that, the military judge authorized telephonic testimony over the Accused's "confrontation" objections. As the CAAF observed:

> The military judge, faced with an unusual situation and the likelihood that the testimony would be temporarily lost, had to craft a creative solution to meet the needs of a party or unforeseen military exigency.[56]

McDonald was not denied confrontation, only his preferred *method of confronting* the witness. While the CAAF found no Sixth Amendment confrontation violation, it turned to *Sprecht* for analysis and its ultimate conclusion that ***Due Process*** *does* apply to military sentencing procedures–something that military practitioners need to keep in mind.

Counsel needs to note some *caveats* in utilizing *McDonald* today.

1. It used *Sprecht's* preponderance of the evidence standard " to establish a fact that in turn invoked a mandatory minimum sentence."[57] *Apprendi* and its progeny now require proof beyond a reasonable doubt.

2. *McDonald* holds, importantly on this issue:

> [T]he Constitution requires that evidence admitted during sentencing must comport with the utilitarian purpose of the Due Process Clause, i.e., reliability, and procedural-due-process

[54] *Id.* at 174.

[55] *Id.*

[56] *Id.* at 177.

[57] *Id.* at 176.

requirements.[58]

3. Furthermore–and perhaps more important here–the Court held:

> [S]entencing in the military justice system, even in non-capital cases, ***is adversarial*** based on the procedure established by Congress and the President. [Emphasis added].[59]

4. At the time of *McDonald's* court-martial, the MCM (2000 ed.) controlled. There, the Drafter's Analysis to RCM 1001, noted that in the context of sentencing information, such fell "within the protections of an ***adversarial proceeding***, to which rules of evidence apply . . . although they may be relaxed for some purposes." [Emphasis added].[60]

5. Again, as important here, the Court in *McDonald* returned to Due Process, holding that: "the Due Process Clause requires that the evidence introduced in sentencing meet minimum standards of reliability."[61]

Thus, it is clear that Due Process concerns apply to military sentencing procedures, and most importantly, the *reliability* of VIS's must be considered–especially so where a VIS is ***unsworn.***[62] It is also important to keep in mind that *McDonald* was decided before *Crawford* and its confrontation progeny, as well as before *Booker*.[63]

CONCLUSION

In re AJW demonstrates just how nonsensical sentencing has become in military justice–especially in sex offenses. "Victims" have become *de facto* parties, with rights superior to the accused–as *AJW* demonstrates in the context of her having specific appellate rights under the UCMJ, denied to TTG. Furthermore, the case demonstrates the overreaching allowed by VLC's, attempting to make trial decisions, which (as here) the Trial Counsel declined to do, i.e., offer an

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[58] *Id.*

[59] *Id.*

[60] MCM (2000 ed.), at A21-69.

[61] 55 M.J. at 177.

[62] The Court's opinion in *AJW* does not indicate whether or not her VIS was sworn or unsworn.

[63] *See* footnote 47, *supra,* pertaining to "confrontation" at sentencing.

inappropriate VIS for sentencing purposes, something that the Trial Counsel declined to do.

The appellate case law is muddled at best, core constitutional principles such as confrontation and due process minimalized or ignored, and an apparent lack of critical cerebration by defense counsel have created a hydra-headed legal monster. And yes, Congress has put its proverbial thumbs on the scales of justice–something that calls for action, not inaction–something that will not happen by its own inertia.

Fighting the Hydra