

CRIMINAL LAW DESKBOOK

Volume II

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Pre and Post Trial Procedure

The Judge Advocate General's School, US Army
Charlottesville, Virginia

FOREWORD

The Criminal Law Department at The Judge Advocate General's Legal Center and School, US Army, (TJAGLCS) produces this deskbook as a resource for Judge Advocates, both in training and in the field, and for use by other military justice practitioners. This deskbook covers many aspects of military justice, including Substantive Military Justice (Volume I), Pre- and Post-Trial Procedure (Volume II), Trial and Evidence (Volume III), and Special Topics in Military Justice (Volume IV). Military justice practitioners and military justice managers are free to reproduce as many paper copies as needed.

The deskbook is neither an all-encompassing academic treatise nor a definitive digest of all military criminal caselaw. Practitioners should always consult relevant primary sources, including the decisions in cases referenced herein. Nevertheless, to the extent possible, it is an accurate, current, and comprehensive resource. Readers noting any discrepancies or having suggestions for this deskbook's improvement are encouraged to contact the TJAGLCS Criminal Law Department. Current departmental contact information is provided at the back of this deskbook.

CRIMINAL LAW DESKBOOK
VOLUME II

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See the CRIMINAL LAW DESKBOOK VOL. I (SUBSTANTIVE MILITARY JUSTICE) for: pleadings, scope of criminal liability, inchoate offenses, military offenses, conventional offenses, and defenses.

See the CRIMINAL LAW DESKBOOK VOL. III (TRIAL AND EVIDENCE) for: case construction, trial notebooks and checklists, interviewing witnesses, preparing witnesses, negotiations, motions, voir dire and challenges, opening story, direct, using evidence, cross exam, objections, experts, instructions, findings, sentencing, arguments, evidence, classified evidence, and confrontation clause.

See the CRIMINAL LAW DESKBOOK VOL. IV (SPECIAL TOPICS IN MILITARY JUSTICE) for: cyber law, urinalysis, sexual crimes and domestic violence, commissions, protection of military installations/SAUSA, media, capital litigation, and mental responsibility, competence, and sanity boards.



OVERVIEW OF THE MILITARY JUSTICE SYSTEM

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MILITARY JUSTICE SYSTEM

Outline of Instruction

I. INTRODUCTION

- A. Basic Goals. A basic objective of any criminal law system is to discover the truth, acquit the innocent without unnecessary delay or expense, punish the guilty proportionately with their crimes, and prevent and deter future crime. Military justice shares these objectives in part, but also serves to enhance good order and discipline within the military.
- B. Separate System. A question that has been debated often, especially whenever there is a high profile case that captures the public's attention, is why do we have a separate military justice system? Often, what comes out of those debates is that fact that "the military is, by necessity, a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733 (1974). As the U.S. Supreme Court noted in *Parker v. Levy*, the "differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.'" *Id.* at 743, citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). Recognizing that the military is a "separate society" the reasons most often provided for a separate military justice system are based upon the following rationale:
1. The worldwide deployment of military personnel;
 2. The need for instant mobility of personnel;
 3. The need for speed trial to avoid loss of witnesses due to combat effects and needs;
 4. The peculiar nature of military life, with the attendant stress of combat or preparation for combat; and
 5. The need for disciplined personnel. *See* FRANCIS A GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE, Third Edition, v (2007).
- C. Good Order and Discipline. Of all the reasons provided for a separate system, perhaps the most persuasive is our need for disciplined personnel. Members of the Armed Forces are subject to rules, orders, proceedings, and consequences different from the rights and obligations of their civilian counterparts. *United States v. Watson*, 69 M.J. 415 (2011). In the military justice system, discipline can be viewed as being as important as individual liberty interests. The Preamble to the 2008 MCM recognizes the importance of discipline as part of military justice. It states: "The purpose of military law is to promote justice, *to assist in maintaining good order and discipline in the armed forces*, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." Manual for Courts-Martial, Preamble, Paragraph 3, (2008). Given the need for discipline in the military, military justice is under the overall control of the commander.
1. Commander's Discretion. Commanders have a wide variety of options available to them to deal with disciplinary problems. These options include administrative actions ranging from an informal counseling, extra training, withdrawal or limitation of privileges, and administrative separations, to punitive options such as punishment under Article 15, UCMJ, and trial by court-martial.
 2. Prosecutorial Discretion. Prosecutorial discretion lies with the commander and not the judge advocate. This truth is a foreign concept to those familiar with

civilian practice where prosecutorial discretion is entrusted to an attorney. In the military, it is the commander, not the Staff Judge Advocate that decides whether a case will be resolved administratively or referred to a court-martial. If the case is referred to a court-martial, it is the commander that decides what the charges will be. Although the commander receives advice and administrative support from the Staff Judge Advocate, it is the commander that ultimately must make the decision whether prosecution is warranted.

D. Key References.

1. Military Justice – Army Regulation 27-10
2. Manual for Courts-Martial (MCM)
3. Rule for Courts-Martial (R.C.M.)
4. Military Rule of Evidence (M.R.E.)
5. Uniform Code of Military Justice (UCMJ)
6. Military Judges' Benchbook – DA Pam 27-9

II. CREATION OF THE MILITARY JUSTICE SYSTEM

- A. Authority. In order to provide for the common defense, the Constitution gives Congress the power to raise, support and regulate the Armed Forces. U.S. Const., Preamble, art. I, § 8, cls. 11-14 (War Power). Under this authority, Congress has enacted the UCMJ in 1950. 10 U.S.C. §§ 801-941. The UCMJ is the code of military criminal laws applicable to all U.S. military members worldwide.
- B. Implementation. The Constitution makes the President the Commander-in-Chief of the Armed Forces. U.S. Const., art. II, § 2, cl. 1. Under this authority, the President implemented the UCMJ through the MCM. Executive Order 12473 (April 13, 1984). The MCM contains the UCMJ, the RCMs, and the MREs. The rules of procedures and rules of evidence for courts-martial are established by the President and authorized by Article 36 of the UCMJ. 10 U.S.C. § 836. The MCM covers almost all aspects of military law. Each service, however, supplements the MCM to meet its individual needs. The Army has Army Regulation 27-10; the Navy and Marine Corps have the Manual for the Judge Advocate General; and the Air Force has Air Force Instructions.
1. Rules for Courts-Martial. The rules that govern the procedures and punishments in all courts-martial. These rules are the equivalent of the Federal Rules of Criminal Procedure.
 2. Military Rules of Evidence. The rules that are applicable in courts-martial. The rules are intended to ensure fairness in administration of military justice, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence. M.R.E. 102.
 3. Uniform Code of Military Justice. The Congressional Code of Military Criminal Law applicable to all servicemembers. It serves as the foundation of military law.

III. JURISDICTION

- A. The UCMJ gives courts-martial jurisdiction over all servicemembers (U.S. Army, U.S. Marine Corps, U.S. Navy, U.S. Air Force, and the U.S. Coast Guard.). The UCMJ also provides for jurisdiction over several other categories of individuals, including retired members of a regular component of the Armed Forces entitled to pay; retired members of a reserve component who are hospitalized in a military hospital; persons in custody of the military serving a sentence imposed by a court-martial; members of the National Oceanic

and Atmospheric Administration and Public Health Service and other organizations, when assigned to serve with the military; enemy prisoners of war in custody of the military; and persons with or accompanying the military in the field during “times of war,” limited to declared wars. Article 2, UCMJ; 10 U.S.C. § 802.

- B. Court-Martial Jurisdiction. Under the MCM, jurisdiction of a court-martial means “the power to hear a case and to render a legally competent decision.” *See* discussion to R.C.M. 201(a)(1). Under R.C.M. 201(b), a court-martial has jurisdiction if the following is true:
1. The court-martial must be convened by an official empowered to convene it;
 2. The court-martial must be composed in accordance with the Rules for Courts-Martial with respect to number and qualifications of its personnel (military judge and members must have proper qualifications);
 3. Each charge before the court-martial must be referred to it by competent authority;
 4. The accused must be a person subject to court-martial jurisdiction (personal jurisdiction); and
 5. The offense must be subject to court-martial jurisdiction (subject matter jurisdiction).
- C. The nuances of court-martial jurisdiction are beyond the scope of this outline, however, it is enough that you understand generally that jurisdiction of a court-martial does not depend on where the offense was committed; it depends solely on the status of the accused. *See Solorio v. United States*, 483 U.S. 435, 447 (1987).

IV. TYPES OF OFFENSES

- A. Overview: A court-martial may try any offense which is listed in the punitive articles of the UCMJ. The punitive articles run from Articles 77 through 134 of the UCMJ. 10 U.S.C. §§ 877-934. Some of the offenses listed within Articles 77 through 134 have a civilian analog, but some are exclusive to the military.
1. Civilian Analog Offenses. Some examples of civilian analog offenses under the UCMJ would be conspiracy (Article 81); murder (Article 118); rape (Article 120) robbery (Article 122); and assault (Article 128).
 2. Military-Specific Offenses. Examples of military-specific offenses include desertion (Article 85); absence without leave (Article 86); insubordinate conduct (Article 91); mutiny and sedition (Article 94); misconduct as a prisoner (Article 105); malingering (Article 115); and conduct unbecoming an officer (Article 133).
- B. General Article 134. In addition to the enumerated offenses above, a servicemember may be tried at a court-martial for offenses not specifically covered within the punitive articles. Under General Article 134, which states that all “crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court martial, according to the nature and degree of the offense.”
1. Federal Assimilative Crimes Act (18 U.S.C. § 13). The military uses Article 134 to assimilate state and federal offenses for which there is no analogous crime in the UCMJ in order to impose court-martial jurisdiction. The potential punishments for violations generally match those applicable to the corresponding civilian offense.
 2. Preemption doctrine. The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132.

V. INVESTIGATION OF OFFENSES

- A. Report of misconduct. When a servicemember has reportedly committed an offense, the chain of command normally finds out either by civilian law enforcement notification, from notification through the military channels (commonly referred to as “blotter reports”), a report from an alleged victim, or through direct observation of the alleged misconduct. After receiving notification, the command will normally conduct an inquiry pursuant to R.C.M. 303.
- B. Commander’s Inquiry. The inquiry by the command may range from an examination of the possible charges and an investigative report to a more extensive investigation depending on the offense(s) alleged and the complexity of the case. The investigation may be conducted by members of the command or, in more complex cases, military and civilian law enforcement officials.
- C. Commander’s Options. Once the investigation is complete, the commander can choose to dispose of the charges by:
 - 1. Taking no action;
 - 2. Initiating administrative action (which can include separation from the Army);
 - 3. Imposing non-judicial punishment (a form of punishment that is not considered a conviction, but can result of loss of rank, pay, and other privileges);
 - 4. Preferring charges (the process of formally charging a soldier with an offense for resolution at court-martial); OR
 - 5. Forwarding to a higher authority for referral of charges (R.C.M. 306(c)).
- D. Referral of Charges. The first formal step in a court-martial, referral of charges, consists of drafting a charge sheet containing the charges and specifications against the accused. A specification is a plain and concise statement of the essential facts constituting the offense charged. R.C.M. 307(c)(3). The M.C.M. contains model specifications to assist trial counsel and the chain of command in drafting the specifications. The charge sheet must be signed by the accuser under oath before a commissioned officer authorized to administer oaths. R.C.M. 307(b). Any person subject to the UCMJ may prefer charges as the accuser. R.C.M. 307(a).
- E. Referral of Charges. Once charges have been preferred they may be referred to one of three types of courts-martial: summary, special, or general. R.C.M. 401(c). The process of “referral” is simply the order that states that charges against an accused will be tried by a specific court-martial. The determination of which level of court-martial to refer the charge(s) to is made by the Court Martial Convening Authority (CMCA). R.C.M. 504. The CMCA is an appropriate level of commander who, in consultation with the Staff Judge Advocate’s Office, makes her determination. Usually, the seriousness of the offenses alleged determines the type of court-martial.

VI. TYPES OF COURTS-MARTIAL

- A. Unlike Article III federal district courts, military courts are not continuing courts. As such, military courts are created by individual Court-Martial Convening Orders (CMCO). Without a CMCO, there is no court and thus no authorization to adjudicate any charged offense. Congress, in creating the military justice system, established three types of courts-martial: (1) summary court-martial, (2) special court-martial, and (3) general court-martial. Article 16, UCMJ; 10 U.S.C. § 816. While the Rules of Courts-Martial and the Military Rules of Evidence are applicable to all courts-martial, the jurisdiction and authorized punishments vary among the different courts-martial types.

- B. Summary Courts-Martial. The function of the summary court-martial is to “promptly adjudicate minor offenses under a simple procedure” and “thoroughly and impartially inquire into both sides of the matter” ensuring that the “interests of both the Government and the accused are safeguarded and that justice is done.” R.C.M. 1301(b). The summary court-martial can adjudicate minor offense allegedly committed by enlisted servicemembers.
1. Jurisdiction. Summary courts-martial have the power to try only enlisted members. A summary court-martial may not try a commissioned officer, warrant officer, cadet, aviation cadet or midshipmen. R.C.M. 1301(c). A summary court-martial may only considered noncapital offenses. Id.
 2. Punishments. A summary court-martial can adjudge maximum punishments of 30 days confinement; hard labor without confinement for 45 days; restriction to specified limits for 45 days; forfeiture of two-thirds’ pay per month for one month; and reduction to the lowest pay grade. R.C.M. 1301(d)(1). In the case of enlisted members above the pay grade of E-4, the summary court-martial may not adjudge confinement or hard labor without confinement and can only reduce the servicemember to the next lower pay grade. R.C.M. 1301(d)(2).
 3. Composition. Summary courts-martial are composed of one commissioned officer who need not be a lawyer. R.C.M. 1301(a). The accused must consent to the proceedings. R.C.M. 1303. If an accused refuses to consent to a trial by summary court-martial, a trial may be ordered by special or general court-martial at the discretion of the convening authority. See discussion to R.C.M. 1303.
 4. Representation. If the accused consents, he or she normally is not entitled to a lawyer during the proceeding. R.C.M. 1301(e). However, if the accused elects to hire civilian counsel, he or she may be represented by such counsel as long as it would not “unreasonably delay the proceedings and if military exigencies do not preclude it.” Id.
- C. Special Courts-Martial. Special courts-martial generally try offenses that are considered misdemeanors. The formality and procedural protections are much more involved in a special court-martial as opposed to a summary court-martial.
1. Jurisdiction. A special court-martial can try any servicemember for any noncapital offense or, as provided in the governing rule for courts-martial, for capital offense. R.C.M. 201(f)(2)(A), (f)(2)(C).
 2. Punishments. The maximum punishment allowed at a special court-martial is confinement for one year (only enlisted soldiers); hard labor without confinement for up to three months; forfeiture of two-thirds’ pay per month for up to one year; reduction to the lowest pay grade (enlisted members only); and a bad-conduct discharge (enlisted members only).
 3. Composition. A special court-martial can be composed of not less than three members, a military judge alone, or not less than three members with a military judge. R.C.M. 501(a)(2)(although permitted under the rule to have a special court-martial without a military judge, it is exceedingly rare). Members in the military justice system are the equivalent of jurors and are composed of officers selected by the CMCA. Enlisted servicemembers may request that the members’ be composed of at least one-third enlisted members. R.C.M. 903. If an accused elects to be tried by military judge alone, the military judge will decide if the accused is guilty or not, and if guilty, what the appropriate punishment should be. However, if an accused elects to be tried by members, then the members will decide if the accused is guilty or not, and if guilty, what the appropriate

punishment should be. Contrary to civilian criminal trials, the agreement of only two-thirds of the members of a court-martial is needed to find the accused guilty. R.C.M. 921(c)(2)(B). Otherwise, the accused is acquitted. R.C.M. 921(c)(3). There are no “hung juries” in courts-martial. If found guilty, then two-thirds of the members must agree on a specific sentence for the accused.

4. Representation. The accused is entitled to an appointed military attorney, a military counsel of his or her selection, or he or she can hire a civilian counsel at no expense to the government. See generally, R.C.M. 201(b)(ii)(a); R.C.M. 502(d)(1); *United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2010).
- D. General Courts-Martial. A general court-martial is the highest trial level in military law and is usually used for the most serious offenses.
1. Jurisdiction. A general court-martial can try any servicemember for any offense. Prior to convening a general court-martial, a pretrial investigation must be conducted. This investigation, known as an Article 32 hearing, is meant to ensure that there is a basis for prosecution. R.C.M. 405(a). An investigating officer, who must be a commissioned officer presides over the Article 32 investigation. R.C.M. 405(d)(1). The investigating officer should be an officer in the grade of major or higher or one with legal training. *Id.* The accused has the same entitlements to counsel at the Article 32 investigation. However, unlike in a civilian grand jury investigation, where the accused has no access to the proceedings, the accused is afforded the opportunity to examine the evidence presented against him or her, cross-examine witnesses, and present his or her own witnesses, evidence and arguments. R.C.M. 405(f). Once the Article 32 investigation is complete, the investigating officer makes a recommendation to the convening authority through the Staff Judge Advocate’s Office. The Staff Judge Advocate’s Office provides a formal written recommendation, known as the Article 34 advice, as to the disposition of the charges. The convening authority then determines whether to convene a court-martial or dismiss the charge(s). Articles 33-35, UCMJ; R.C.M. 407.
 2. Punishments. A general court-martial can adjudge, within the limits prescribed for each offense, a wide range of punishments to include confinement; reprimand; forfeitures of up to all pay and allowances; reduction to the lowest enlisted pay grade; punitive discharge (bad-conduct discharge, dishonorable discharge, or dismissal); restriction; fines; and, for certain offenses, death. A sentence of confinement in excess of 10 years may only be adjudged with the concurrence of three-fourths of all the members of the court-martial. Similarly, a sentence of death may only be adjudged with the concurrence of all members of the court-martial. R.C.M. 1004.
 3. Composition. A general court-martial is composed of a military judge sitting alone or not less than five members and a military judge. As with a special court-martial, the accused has the right to choose the composition of the court-martial. The only limitation on this right is in capital cases. In capital cases, the accused is required to be tried by members. R.C.M. 201(f)(1)(C). Additionally, in a capital case, the accused is required to be tried by not less than twelve members (unless 12 members are not reasonably available). R.C.M. 501(a)(1)(B).
 4. Representation. The accused is entitled to a detailed military defense counsel or a military counsel of his or her selection, or the accused can hire civilian counsel at no expense to the government.

VII. PROCEDURAL SAFEGUARDS

- A. The Constitution specifically exempts military members accused of a crime from the Fifth Amendment right to a grand jury indictment. Based upon this exemption, the Supreme Court has inferred there is no right to a civil jury in courts-martial. *See Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Despite this exemption, the military justice system has created, in most instances, equal if not greater procedural protections for military members. For instance, Congress has, in Article 32, UCMJ, provided for a pretrial hearing that performs the same basic function as a grand jury. However, the Article 32 has the added benefit of allowing the accused to call witnesses, present evidence, and cross examine the witnesses against her.
- B. Below are the various procedural safeguards for an accused in a court-martial.

<p>Constitutional Safeguard: Presumption of Innocence</p> <p>“The principle that there is a presumption of innocence in favor of the accused is undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”</p> <p><i>Coffin v. United States</i>, 156 U.S. 432, 453 (1895)</p>	<p>General Courts-Martial</p> <p>If the accused fails to enter a proper plea, a plea of not guilty will be entered. R.C.M. 910(b).</p> <p>Members of a court-martial must be instructed that the “accused must be presumed to be innocent until the accused’s guilt is established by legal and competent evidence beyond a reasonable doubt.” R.C.M. 920(e).</p> <p>The accused shall be properly attired in uniform with grade insignia and any decorations to which entitled. Physical restraint shall not be imposed unless prescribed by the military judge. R.C.M. 804</p>
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<p>Constitutional Safeguard: Right to Remain Silent</p> <p>“No person ... shall be compelled in any criminal case to be a witness against himself”</p> <p>Amendment V.</p>	<p>General Courts-Martial</p> <p>Coerced confessions or confessions made without statutory equivalent of Miranda warning are not admissible as evidence. Article 31, UCMJ, 10 U.S.C. § 831.</p> <p>The trial counsel must notify the defense of any incriminating statements made by the accused that are relevant to the case prior to the arraignment. Motions to suppress such statements must be made prior to pleading. M.R.E. 304.</p>
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<p>Constitutional Safeguard: Freedom from Unreasonable Searches & Seizures</p> <p>“The right of the people to be secure ... against unreasonable searches and seizures, shall not be violated; no Warrants shall issue, but upon probable cause...”</p> <p>Amendment IV.</p>	<p>General Courts-Martial</p> <p>“Evidence obtained as a result of an unlawful search or seizure ... is inadmissible against the accused ...” unless certain exceptions apply. M.R.E. 311.</p> <p>“Authorization to search” may be oral or written, and may be issued by a military judge or an officer in command of the area to be searched, or if the area is not under military control, with authority over persons subject to military law or the law of war. It must be based on probable cause. M.R.E. 315.</p>
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	<p>Interception of wire and oral communications within the United States requires judicial application in accordance with 18 U.S.C. §§ 2516 <i>et seq.</i> M.R.E. 317.</p> <p>A search conducted by foreign officials is unlawful only if the accused is subject to “gross and brutal treatment.” M.R.E. 311(c).</p>
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<p>Constitutional Safeguard: Assistance of Effective Counsel</p> <p>“In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.”</p> <p>Amendment VI.</p>	<p>General Courts-Martial</p> <p>The accused has a right to military counsel at government expense. An accused may choose individual military counsel, if that attorney is reasonably available, and may hire a civilian attorney in addition to military counsel. Article 38, UCMJ, 10 U.S.C. § 838.</p> <p>Appointed counsel must be certified as qualified and may not be someone who has taken any part in the investigation or prosecution, unless explicitly requested by the accused. Article 27, UCMJ, 10 U.S.C. § 827.</p> <p>The military recognizes an attorney-client privilege. M.R.E. 502.</p>
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<p>Constitutional Safeguard: Right to Indictment and Presentment</p> <p>“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger”</p> <p>Amendment V.</p>	<p>General Courts-Martial</p> <p>The right to indictment by grand jury is explicitly excluded in “cases arising in the land or naval forces.” Amendment V.</p> <p>Whenever an offense is alleged, the commander is responsible for initiating a preliminary inquiry and deciding how to dispose of the offense. R.C.M. 303-06.</p> <p>Prior to convening a general court-martial, a pretrial investigation must be conducted. This investigation, known as an Article 32 hearing, is meant to ensure that there is a basis for prosecution. R.C.M. 405(a).</p>
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<p>Constitutional Safeguard: Right to Written Statement of Charges</p> <p>“In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; ...”</p> <p>Amendment VI.</p>	<p>General Courts-Martial</p> <p>Charges and specifications must be signed under oath and made known to the accused as soon as practicable. Article 30, UCMJ, 10 U.S.C. § 830</p>
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<p>Constitutional Safeguard: Right to be Present at Trial</p> <p>The Confrontation Clause of Amendment VI guarantees the accused’s right to be present in the courtroom at every stage of his trial.</p> <p><i>Illinois v. Allen</i>, 397 U.S. 337 (1970).</p>	<p>General Courts-Martial</p> <p>The presence of the accused is required during arraignment, at the plea, and at every stage of the court-martial unless the accused waives the right by voluntarily absenting him or herself from the proceedings after the arraignment or by persisting in conduct that justifies the trial judge in ordering the removal of the accused from the proceedings. R.C.M. 801.</p>
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<p>Constitutional Safeguard: Prohibition against Ex Post Facto Crimes</p> <p>“No ... ex post facto law shall be passed.”</p> <p>Art. I, § 9, cl. 3.</p>	<p>General Courts-Martial</p> <p>Courts-martial will not enforce an ex post facto law, including increasing amount of pay to be forfeited for specific crimes. <i>United States v. Gorki</i>, 47 M.J. 370 (C.A.A.F. 1997).</p>
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<p>Constitutional Safeguard: Protection against Double Jeopardy</p> <p>“... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ...”</p> <p>Amendment V.</p> <p>Subject to “dual sovereign” doctrine, that is, federal and state courts may prosecute an individual for the same conduct without violating the clause.</p>	<p>General Courts-Martial</p> <p>Double jeopardy clause applies. <i>See Wade v. Hunter</i>, 336 US 684, 688-89 (1949).</p> <p>Article 44, UCMJ prohibits double jeopardy, provides for jeopardy to attach after introduction of evidence. 10 U.S.C. § 844.</p> <p>General court-martial proceeding is considered to be a federal trial for double jeopardy purposes. Double jeopardy does not result from charges brought in state or foreign courts, although court-martial in such cases is disfavored. <i>United States v. Stokes</i>, 12 M.J. 229 (C.M.A. 1982).</p> <p>Once military authorities have turned service member over to civil authorities for trial, military may have waived jurisdiction for that crime, although it may be possible to charge the individual for another crime arising from the same conduct. <i>See</i> 54 AM. JUR. 2D, Military and Civil Defense §§ 227-28.</p>
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<p>Constitutional Safeguard: Speedy & Public Trial</p> <p>“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,”</p> <p>Amendment VI.</p>	<p>General Courts-Martial</p> <p>In general, accused must be brought to trial within 120 days of the preferral of charges or the imposition of restraint, whichever date is earliest. R.C.M. 707(a).</p> <p>The right to a public trial applies in courts-martial but is not absolute. R.C.M. 806.</p> <p>The military trial judge may exclude the public from portions of a proceeding for the purpose of protecting classified information if the prosecution demonstrates an overriding need to do so and the closure is no broader than necessary. <i>United States v. Grunden</i>, 2 M.J. 116 (CMA 1977).</p>
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<p>Constitutional Safeguard: Burden & Standard of Proof</p> <p>Due Process requires the prosecution to prove the defendant guilty of each element of a crime beyond a reasonable doubt.</p> <p><i>In re Winship</i>, 397 U.S. 358 (1970).</p>	<p>General Courts-Martial</p> <p>Members of court martial must be instructed that the burden of proof to establish guilt is upon the government and that any reasonable doubt must be resolved in favor of the accused. R.C.M. 920(e).</p>
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<p>Constitutional Safeguard: Privilege Against Self- Incrimination</p>	<p>General Courts-Martial</p> <p>No person subject to the UCMJ may compel any</p>
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<p>“No person ... shall be compelled in any criminal case to be a witness against himself...”</p> <p>Amendment V.</p>	<p>person to answer incriminating questions. Article 31(a) UCMJ, 10 U.S.C. § 831(a).</p> <p>Accused may not be compelled to give testimony that is immaterial or potentially degrading. Article 31(c), UCMJ, 10 U.S.C. § 831(c).</p> <p>No adverse inference is to be drawn from an accused’s refusal to answer any questions or testify at court-martial. M.R.E. 301(f).</p> <p>Witnesses may not be compelled to give testimony that may be incriminating unless granted immunity for that testimony by a general court-martial convening authority, as authorized by the Attorney General, if required. 18 U.S.C. § 6002; R.C.M. 704.</p>
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<p>Constitutional Safeguard: Right to Examine or Have Examined Adverse Witnesses</p> <p>“In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him;”</p> <p>Amendment VI.</p>	<p>General Courts-Martial</p> <p>Hearsay rules apply as in federal court. M.R.E. 801 <i>et seq.</i></p> <p>In capital cases, sworn depositions may not be used in lieu of witness, unless court-martial is treated as non-capital or it is introduced by the defense. Article 49, UCMJ, 10 U.S.C. § 849.</p>
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<p>Constitutional Safeguard: Right to Compulsory Process to Obtain Witnesses</p> <p>“In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor,”</p> <p>Amendment VI.</p>	<p>General Courts-Martial</p> <p>An accused has the right to compel appearance of witnesses necessary to their defense. R.C.M. 703.</p> <p>Process to compel witnesses in a court-martial is to be similar to the process used in federal courts. Article 46, UCMJ, 10 U.S.C. § 846.</p>
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<p>Constitutional Safeguard: Right to Trial by Impartial Judge</p> <p>“The Judicial Power of the United States, shall be vested in one supreme Court, and in ... inferior courts The Judges ... shall hold their Offices during good behaviour, and shall receive ... a compensation, which shall not be diminished during their continuance in office.”</p> <p>Article III § 1.</p>	<p>General Courts-Martial</p> <p>A qualified military judge is detailed to preside over the court-martial. The convening authority may not prepare or review any report concerning the performance or effectiveness of the military judge. Article 26, UCMJ, 10 U.S.C. § 826.</p> <p>Article 37, UCMJ, prohibits unlawful influence of courts-martial through admonishment, censure, or reprimand of its members by the convening authority or commanding officer, or any unlawful attempt by a person subject to the UCMJ to coerce or influence the action of a court-martial or convening authority. Article 37, UCMJ, 10 U.S.C. § 837.</p>
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<p>Constitutional Safeguard: Right to Trial By Impartial Jury</p> <p>“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury;”</p> <p>Art III § 2 cl. 3.</p> <p>“In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury of the state”</p> <p>Amendment VI.</p>	<p>General Courts-Martial</p> <p>A military accused has no Sixth Amendment right to a trial by petit jury. <i>Ex Parte Quirin</i>, 317 U.S. 1, 39-40 (1942) (<i>dicta</i>).</p> <p>However, “Congress has provided for trial by members at a court-martial.” <i>United States v. Witham</i>, 47 MJ 297, 301 (C.A.A.F. 1997); Article 25, UCMJ, 10 U.S.C. § 825.</p> <p>The Sixth Amendment requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual members, but also their conduct during the trial proceedings and the subsequent deliberations. <i>United States v. Lambert</i>, 55 M.J. 293 (C.A.A.F. 2001).</p>
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<p>Constitutional Safeguard: Right to Appeal to Independent Reviewing Authority</p> <p>“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it”</p> <p>Article I § 9 cl. 2.</p>	<p>General Courts-Martial</p> <p>The writ of <i>habeas corpus</i> provides the primary means by which those sentenced by military court, having exhausted military appeals, can challenge a conviction or sentence in a civilian court. The scope of matters that a court will address is narrower than in challenges of federal or state convictions.</p> <p><i>Burns v. Wilson</i>, 346 U.S. 137 (1953).</p> <p>However, Congress created a military court with all civilian justices (non-military retirees), the Court of Appeals for the Armed Forces, to review military cases.</p>
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<p>Constitutional Safeguard: Protection against Excessive Penalties</p>	<p>General Courts-Martial</p> <p>Death may only be adjudged for certain crimes</p>
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<p>“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”</p> <p>Amendment VIII.</p>	<p>where the accused is found guilty by unanimous vote of court-martial members present at the time of the vote. Prior to arraignment, the trial counsel must give the defense written notice of aggravating factors the prosecution intends to prove. R.C.M. 1004.</p> <p>A conviction of spying during time of war under Article 106, UCMJ, carries a mandatory death penalty. 10 U.S.C. § 906.</p>
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VIII. POST TRIAL REVIEW

- A. Generally. Any conviction at a court-martial is subject to an automatic post-trial review by the convening authority.
- B. Process. The process starts with a review of the trial record by the staff judge advocate. R.C.M. 1104. The accused is then given an opportunity to present matters to the convening authority. R.C.M. 1105. The accused may submit anything that he or she feels might influence the convening authority’s decision. *Id.* Before the convening authority takes “action” under R.C.M. 1107, the staff judge advocate for the convening authority provides a recommendation to the convening authority as to what action to take. R.C.M. 1107.
 - 1. Action. After considering the matters submitted by the accused and the staff judge advocate’s advice, the convening authority takes action on the case. The convening authority has broad powers in taking action. It has frequently been stated that the accused’s best hope for relief is based upon the convening authority’s review.
 - 2. Powers. The convening authority may, among other remedies, suspend all or part of the sentence, disapprove a finding or conviction, or lower the sentence. R.C.M. 1107. The one limitation on the convening authority’s power is that he or she may not increase the sentence.

IX. APPELLATE REVIEW

- A. Generally. Once the convening authority takes action, the case is ripe for appellate review. Convictions by special or general court-martial are subject to an automatic appellate review by a service Court of Criminal Appeals if the sentence includes confinement for one year or more, a bad-conduct or dishonorable discharge, death, or a dismissal in the case of a commissioned officer, cadet, or midshipman. R.C.M. 1203.
 - 1. Wavier. Military appellate courts are required to review cases over which they have jurisdiction unless the appellant waives his or her right to an appeal. An appellant may not waive his or her right to an appeal when the sentence includes death. R.C.M. 1110.
 - 2. Non-qualifying convictions. All court-martial convictions not reviewable by the service courts are reviewed by a judge advocate to determine if the findings and sentence, as approved by the convening authority, are correct in law and fact. Article 64, UCMJ, 10 U.S.C. § 864, R.C.M. 1111, 1112, and 1306.
- B. Review. If the conviction is affirmed by the service court, the appellant may request review by the Court of Appeals for the Armed Forces (CAAF). R.C.M. 1204. The CAAF is a court composed of five civilian judges appointed by the President. Article 67 UCMJ; 10 U.S.C. § 867. With the exception of a case where the sentence is death, the review by

the CAAF is discretionary. The appellant may also seek review by the U.S. Supreme Court. R.C.M. 1205. As with the review by CAAF, the review by the Supreme Court is discretionary. However, the Supreme Court review by writ of certiorari is limited to those cases where CAAF has conducted a review, whether mandatory or discretionary, or has granted a petition for extraordinary relief. The Court does not have jurisdiction to consider denials of petitions for extraordinary relief. R.C.M. 1205(a)(4). Service-members whose petitions for review or for extraordinary relief are denied by CAAF may seek additional review only through collateral means, for example, petitioning for habeas corpus to an Article III court, which could provide an alternate avenue for Supreme Court review.

X. CONCLUSION

APPENDIX A

FIELD GRADE NJP v. SCM CHEAT SHEET (Enlisted Soldiers)

	NJP	SCM
Punishment: E1-E4	45 extra duty/45 restriction (60 if no extra duty); reduce to E1; ½ of one month's pay for 2 months	1 month confinement , or 45 extra duty/45 restriction (60 if no extra duty); reduce to E1; 2/3s pay for one month
Punishment: E5-E6	45 extra duty /45 restriction (60 if no extra duty); reduce one grade; ½ of one month's pay for 2 months	2 months restriction; reduce one grade; 2/3s pay for one month
Punishment: E7-E9	45 extra duty /45 restriction (60 if no extra duty); ½ of one month's pay for 2 months	2 months restriction; reduce one grade ; 2/3s pay for one month
UCI applies	Yes	Yes
Soldier can turn down	Yes	Yes
Considered a conviction	No	No
Bring all known offenses at once	Yes	Yes
Bring action after state conviction (DUIs)	Yes (requires GCMCA approval)	Yes (requires GCMCA approval)
Double jeopardy attaches	Yes for other NJP; No for court-martial	Yes
Type of offense	Minor (BCD, 1 year of less)	Minor or Major (except capital offenses, mandatory minimum cases)
Proof beyond a reasonable doubt	Yes	Yes
Military Rules of Evidence apply	No	Yes
Adversarial (cross-exam)	No	Yes
Counsel rights	Consult with counsel; spokesman at hearing (at own expense)	Consult with counsel; lawyer at trial (at own expense)
Appeal or clemency	Soldier has 5 days to file; command acts within 5 days.	Accused has 7 days to submit matters (may get an additional 20)
Review	A judge advocate (usually the TC)	An independent judge advocate (usually an administrative law attorney)

APPENDIX B

MAXIMUM PUNISHMENT CHEAT SHEET

Type	Restriction/Confinement	Forfeitures	Reduction	Discharge
Summarized Art. 15	14 days extra duty/restriction	None	None	None
Company grade Art. 15	14 days extra duty/restriction	7 days	1 grade (E1-E4)	None
Field grade Art. 15	45 days extra duty/restriction (60 days restriction if no extra duty)	½ of 1 month's pay for 2 months	1 or more grades (E1-E4); 1 grade (E5-E6)	None
General officer Art. 15	Same as field grade for enlisted; for officers, 60 days restriction or 30 days house arrest	Same as field grade	Same as field grade	None
Summary CM (enlisted only)	1 month confinement (E1-E4); or 45 days hard labor without confinement (E1-E4); 2 months restriction (E1-E9) (max combination of restriction/hard labor without confinement is 45 days).	2/3 pay for one month	1 or more grades (E1-E4); 1 grade (E5-E9)	None
Special CM	12 months (enlisted only)	2/3 pay per month for 1 year	Lowest enlisted grade. Officers may not be reduced	BCD (enlisted only)
General CM	Maximum for the offense	Total forfeitures of pay and allowances	Lowest enlisted grade. Officers may not be reduced.	DD (E1-E9, noncommissioned warrant officers); dismissal (commissioned officers)

B



UNLAWFUL COMMAND INFLUENCE

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LTC Eric Carpenter
Summer 2012

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UNLAWFUL COMMAND INFLUENCE

Outline of Instruction

I. GENERAL.

A. Basics.

1. Unlawful command influence (UCI) is the improper use, or perception of use of superior authority to interfere with the court-martial process. *See Gilligan and Lederer, Court-Martial Procedure* § 18-28.00 (3d ed. 2006).
2. The primary legal source for the prohibition against UCI is Article 37. This article is reproduced as Rule for Court-Martial (R.C.M.) 104.

B. UCI is consistently called “the mortal enemy of military justice.” *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986); *United States v. Gore*, 60 M.J. 178 (C.A.A.F. 2004); *United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010).

1. The mere *appearance* of UCI can be as devastating to public perception about the fairness of our system as *actual* UCI: “This Court has consistently held that any circumstance which gives even the appearance of improperly influencing the court-martial proceedings against the accused must be condemned.” *United States v. Hawthorne*, 22 C.M.R. 83, 87 (C.M.A. 1956).
2. The values underlying the apparent versus actual distinction in the UCI context are the same as those behind implied versus actual bias in the *voir dire* context. In fact, the *voir dire* issue could be thought of as a subset of UCI analysis. The ability of the convening authority to pick panel members may make the public wonder if the convening authority is improperly influencing the court-martial. Court-stacking will be discussed below, and should be considered in context with the *voir dire* issue, discussed separately in that outline.

C. Accusatory v. Adjudicative UCI.

1. Unlawful command influenced is divided into two types: accusatory, that is, unlawful influence in how the case is brought to trial; and adjudicative, that is, unlawful command influence in how the case is tried.
2. Accusatory UCI includes issues related to preferral, forwarding, and referral of charges. Adjudicative UCI relates to interference with witnesses, judges, members, and counsel. *United States v. Weasler*, 43 M.J. 15 (C.A.A.F. 1995).

D. Who can commit UCI.

1. We are generally on alert for when commanders (or their staff) commit UCI – but *anyone* subject to the code can commit UCI.
 - a. *Convening authorities* are prohibited from censuring members, the military judge, or counsel with respect to the findings or sentence or the exercise of their functions in the proceeding. Art. 37(a); R.C.M. 104(a)(2).

- b. *Anyone subject to the code* is prohibited from attempting to coerce or improperly influence the court-martial or the members, or a convening, reviewing, or approving authority in with respect to his judicial acts. Art. 37(a); R.C.M. 104(a)(2).
 - 2. SJAs can commit UCI. To avoid committing UCI themselves, SJAs and legal advisor need to be clear with commanders when they are giving their personal legal views and when they are expressing the views of their commander. *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994); *see generally United States v. Kitts*, 23 M.J. 105.
 - 3. CAAF has used a “mantle of authority” test. The best way to interpret these cases is to say that *former leaders, peers, and subordinates* of potential witnesses generally do not commit UCI when they discourage someone from supporting an accused. Someone needs to use their rank or status to try to influence the action – friendship, neutral mentorship, or peer pressure is not enough.
 - a. *United States v. Ayala*, 43 M.J. 296 (C.A.A.F. 1995).
 - (1) A friend of the appellant sought letters in support of clemency for the appellant from many members of his unit, and even though some promised him letters, all but one declined. According to the friend, the current command sergeant major had asked one witness to review the appellant’s counseling file, and then that person decided not to provide a letter; a former sergeant major said he would not provide a letter unless the current sergeant major was also providing one; the current sergeant major told the friend that what he was doing was putting the friend’s career at risk; the current and former company commanders did not want to provide a letter because that would be inconsistent with the chain of command; and the battalion commander did not want to speak out against the chain of command. The court said that the appellant did not sufficient allege UCI because, among other things, he did not allege that anyone acting under a “mantle of authority” worked to influence these potential witnesses.
 - (2) The court cited *United States v. Strambaugh*, 40 M.J. 208 (C.M.A. 1994) for that proposition. In that case, the alleged UCI came from the *peers* of a lieutenant. The court clearly included convening authorities, commanders, and staff judge advocates in the category of “mantle of authority” but excluded peers.
 - (3) The dissent noted that the majority’s reasoning was “fatally flawed” because Article 37(a) clearly states that *anyone* can commit this kind of UCI.
- E. CAUTION! When you go through the case law on UCI, recognize that our current framework for analyzing the problem arrived in 1999, in *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999). Look to pre-*Biagase* cases for help on what types of facts constitute UCI, but look to post-*Biagase* cases for how to analyze the problem. The pre-*Biagase* case law contains inconsistent statements of law.

- F. CAUTION! The case law on whether an accused forfeits claims of accusatorial UCI if he does not raise it at trial changed in 1996, to where the accused does forfeit claims of accusatorial UCI if not raised at trial. *United States v. Drayton*, 45 M.J. 180 (C.A.A.F. 1996); *United States v. Brown*, 45 M.J. 389 (C.A.A.F. 1996). The pre-*Drayton/Brown* cases on accusatorial UCI cases may contain bad law on this point.
- G. Relationship of UCI to Pretrial Punishment.
 - 1. The facts of a case might implicate both Article 37 (UCI) and Article 13 (Pretrial Punishment). Generally, in order for facts that would satisfy Article 13 to also satisfy Article 37, there needs to be some connecting between the disparaging remarks or treatment and the reluctance of witnesses to appear, the accused feeling forced into entering a plea agreement, or an impact on the actual panel members. *See United States v. Stamper*, 39 M.J. 1097 (A.C.M.R. 1994); *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987).
- H. Relationship between UCI and convening authority disqualification in post-trial matters.
 - 1. If a convening authority has otherwise engaged in unlawful command influence, particularly for communicating an inflexible attitude toward punishment or clemency, then he or she might later be challenged on the post-trial action for lack of impartiality. *See United States v. Glidewell*, 19 M.J. 797 (A.C.M.R. 1985); *see generally United States v. Walker*, 56 M.J. 617 (A.F. Ct. Crim. App. 2001); *United States v. Davis*, 58 M.J. 100 (C.A.A.F. 2003). Note that this disqualification is based on a different source of law than UCI.
- I. Someone who commits UCI in a court-martial could be punished under Article 98 (Noncompliance with procedural rules). While UCI is a court-martial concept (see generally *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009)), someone who commits something similar to adjudicative UCI in an administrative proceeding could be punished under Article 134 (Wrongful interference with an adverse administrative proceeding).
- J. While UCI is generally related to the trial itself, the accused can argue that documents submitted in sentencing (like Article 15s) were themselves tainted by UCI and so should not be admitted. The theory is that the admission of tainted documents might infect the later trial.
 - 1. *United States v. Lorenzen*, 47 M.J. 8 (C.A.A.F. 1997). During sentencing phase of trial, the defense litigated the admissibility of NJP based on a claim of unlawful command influence. The service court said that if the appellant had wanted to contest the UCI issue, he could have turned down the Article 15. CAAF disagreed. An accused does not waive UCI issues related to an Article 15 by accepting the Article 15 as his forum. However, in this case, there was no prejudice.

II. ADJUDICATIVE UCI.

- A. Witness intimidation.
 - 1. Direct attempts to influence witnesses.

- a. *United States v. Gore*, 60 M.J. 178 (C.A.A.F. 2004). Prior to trial, the defense attempted to obtain character witnesses but was prevented from doing so due to unlawful command influence on the part of the convening authority, a naval commander. The military judge conducted *Biagase* analysis, found UCI, and applied the remedy of dismissal of the charges and specifications with prejudice. The NMCCA agreed that there was UCI, but “concluded that the military judge abused his discretion in fashioning a remedy,” and ordered the military judge to “select an appropriate remedy short of dismissal.” CAAF applied the abuse of discretion standard of review and “recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range.” While the court has long held that dismissal is a drastic remedy, “dismissal of charges is appropriate when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings.” The MJ “precisely identified the extent and negative impact of the [UCI] in his findings of fact.” The MJ further concluded the Government failed to prove that the UCI had no impact on the proceedings. The MJ explained why other remedies were insufficient.
- b. *United States v. Stombaugh*, 40 M.J. 208 (C.M.A. 1994). An officer witness for the accused testified that members of the Junior Officers Protection Association (JOPA) pressured him not to testify. This did not amount to UCI because JOPA lacked “the mantle of command authority” but may have been obstruction of justice. A petty officer also was harassed by someone who outranked him and advised not to get involved. This did amount to UCI, but that UCI was harmless beyond a reasonable doubt.
- c. *United States v. Gleason*, 43 M.J. 69 (C.A.A.F. 1995). A sergeant major was put on trial for, among other things, contacting a retired soldier to kill the captain who reported him for misconduct. The service court found: “there was no single act on which to hang the label of unlawful command influence. Rather, it was a command climate or atmosphere created by the action of [the commander]. His actions of relieving the command structure of Company B without explanation; the characterization of the defense counsel as the enemy; returning the appellant to Okinawa in chains and under guard and placing him in the brig and requiring unit members to receive command permission to visit him; the inspections and unit lock downs without explanation; adverse officer efficiency reports and reliefs of individual [sic] without explanation shortly after testifying for the appellant created . . . a pervasive atmosphere in the battalion that bordered on paranoia. We find that the command climate, atmosphere, attitude, and actions had such a chilling effect on members of the command that there was a feeling that if you testified for the appellant your career was in jeopardy.” CAAF agreed, found that UCI pervaded entire trial, and set aside the contesting findings and sentence.

- d. *United States v. Levite*, 25 M.J. 334 (C.M.A. 1987). The chain of command briefed members of the command before trial on the “bad character” of the accused, to include disclosing his unit file. During trial, the 1SG “ranted and raved” outside the courtroom about NCOs condoning drug use. After trial, NCOs who testified for the accused were told “that they had embarrassed” the unit. Court found UCI necessitated setting aside findings of guilt and the sentence.
- e. *United States v. Newbold*, 45 M.J. 109 (C.A.A.F. 1996). Ship commander held all-hands formation at which he referred to four sailors accused of rape as “rapists,” “scumbags” and “low-lives.” He repeated this at additional formations and in meetings with woman crewmembers. CAAF found no UCI because the commander was not a convening authority, no panel members were drawn from the ship in question, there was no allegation that the accused was deprived of witnesses, and the UCI did not cause the accused to plead guilty.
- f. *United States v. Plumb*, 47 M.J. 771 (A.F. Ct. Crim. App. 1997). The appellant was a captain in the Air Force Office of Special Investigations (AFOSI). He was accused of fraternization, adultery, and conduct unbecoming. AFOSI agents (in this case, members of the appellant’s chain of command or otherwise agents of the commander) pressured, harassed, targeted for prosecution, and otherwise interfered with and intimidated defense witnesses. The court agreed with the trial judge that the defense presented some evidence of UCI but said that the trial judge did not do take enough remedial measures to ensure that there was no appearance that UCI affected the proceedings, and here, where there was such a large volume of potential UCI issues, that was needed. The court reversed the findings.
- g. *United States v. Jameson*, 33 M.J. 669 (N.M.C.M.R. 1991); *United States v. Jones*, 30 M.J. 849 (N.M.C.M.R. 1990); *United States v. Jones*, 33 M.J. 1040 (N.M.C.M.R. 1991) (related cases). Two witnesses testified on behalf of an accused who was charged with engaging in lesbian activities. The command distributed copies of transcripts of their testimony and they were relieved of drill sergeant duties and had their MOSs revoked. This was evidence of unlawful command influence that might have affected the action in the case.
- h. *United States v. Bradley*, 48 M.J. 777 (A.F. Ct. Crim. App. 1998) (following remand to *Dubay* hearing in *United States v. Bradley*, 47 M.J. 715 (A.F. Ct. Crim. App. 1997)). A potential defense witness called the OSJA to find out where to go for trial. The person who answered the phone was the SJA, who identified himself. The defense witness then began asking questions about the case, which the SJA answered appropriately. After hearing about the case, the defense witness said that he might now not want to testify. The SJA then realized he was talking to a defense witness and said he had to testify and that it was not his intention to dissuade the witness from testifying. The court found that because the witness was the one that initiated the questions and because the SJA gave the witness appropriate instructions, there was no UCI.

- i. *United States v. Clemons*, 35 M.J. 770, 772 (A.C.M.R. 1992). Prior to the court-martial, the battalion commander called in three potential defense witnesses and told them that they needed to be careful who they were character references for. The military judge found UCI and ordered several remedies. The court found that the military judge's remedies prevented the proceedings from being tainted.
 - j. *United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010). The senior recruiter at the appellant's office ordered the appellant not to talk to any potential witnesses; prohibited the appellant from contacting anyone in the unit for non-work related issues; openly disparaged the appellant and expressed his certainty of the appellant's guilt in front of others; intimidated potential defense witnesses; and intimidated the appellant from filing an IG complaint about these activities. The military judge found UCI and implemented some remedies (the military judge did not follow *Biagase* analysis, though). CAAF reversed the findings and sentence because there was no evidence in the record that the remedies were actually implemented.
2. Indirect or unintended influence.
- a. *United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984). CG addressed groups over several months on the inconsistency of recommending discharge-level courts and then having leaders testify that the accused was a "good soldier" who should be retained. The message received by many was "don't testify for convicted soldiers." The guilty plea was affirmed but the sentence was reversed. *See also United States v. Glidewell*, 19 M.J. 797 (A.C.M.R. 1985); *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986); *United States v. Giarratano*, 20 M.J. 553 (A.C.M.R. 1985); *United States v. Souther*, 18 M.J. 795 (A.C.M.R. 1984) (related cases).
 - b. *United States v. Francis*, 54 M.J. 636 (A. Ct. Crim. App. 2000). Accused's squad and platoon leaders told other NCOs and soldiers in the unit to stay away from the accused and they feared "trouble by association." Without ruling that those facts did or did not amount to some evidence of UCI, the court found that the government satisfied its burden under *Biagase*.

- c. *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998) (companion case to *Griffin*, discussed in the Accusatorial UCI section, below). In addition to a command policy letter that has UCI issues (but which was quickly remedied), the battery commander said at a PT formation that there were drug dealers in the battery and that Soldiers should stay away from those involved with drugs. The CG ordered a 15-6 investigation when he learned about that and the company commander retracted his statements at another formation. Later, the trial counsel directed that the command should interview some potential alibi witnesses and had the commander read the witnesses their rights. The military judge conducted exhaustive fact finding and found no actual UCI. CAAF said that it had no reason to believe that the military judge was affected by UCI, and the appellant had not raised an issue that he chose a judge alone trial because he was concerned about having his panel tainted by UCI. While some evidence of UCI was raised, the court was satisfied beyond a reasonable doubt (particularly because of the thorough actions taken by the military judge) that the proceeding was not affected by UCI.
 - d. *United States v. Drayton*, 45 M.J. 180 (C.A.A.F. 1996). The appellant was convicted of shoplifting from the PX. Two weeks after he was charged with shoplifting, the battalion commander held an NCOPD where he showed the NCOs security tapes from the PX (but not the ones he was in). Six witnesses testified for the appellant during sentencing. The court found that this amounted to just a bare allegation because there was no allegation that any witness was actually influenced.
 - e. *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009). The appellant did not show that comments made by senior officials following the Aviano gondola incident amounted to some evidence of UCI.
- B. Panel member composition. Court-martial stacking is a form of unlawful command influence.
1. *United States v. Upshaw*, 49 M.J. 111 (C.A.A.F. 1998). The issue is the convening authorities intent. If the motive for choosing a certain panel composition (even if mistaken) is benign, then systematic inclusion or exclusion of certain members may not be improper. In this case, the exclusion of some members was just a mistake, so no UCI. *See also United States v. McKinney*, 61 M.J.767, (A.F.Ct. Crim. App. 2005).
 2. *United States v. White*, 48 M.J. 251 (C.A.A.F. 1998). Convening authority's memo directing subordinate commands to nominate "best and brightest staff officers," and that "I regard all my commanders and their deputies as available to serve as members" did not constitute court packing.
 3. *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986). The staff judge advocate excluded junior members because he believed that they were more likely to adjudge light sentences. This belief came from discussion with past panel members, and the convening authority considered recent, unusually light sentences at the time that he made his selections. The court reversed the sentence (the trial was a guilty plea before a panel).

4. *United States v. Redman*, 33 M.J. 679 (A.C.M.R. 1991). After a series of results that they disagreed with, the SJA and trial counsel decided to try to exclude certain members from the panel through the use of peremptory challenges. When the military judge denied these challenges, the SJA decided to shuffle the panel. After an investigation, the higher level commander withdrew the original convening authority's power to convene courts. While the initial convening authority's actions were UCI, the accused was tried by a new panel that was not tainted by the UCI so no prejudice.
5. *United States v. Brocks*, 55 M.J. 614 (A.F.Ct. Crim App. 2001). Base legal office intentionally excluded all officers from the Medical Group from the list of court member nominees sent to the convening authority. The SJA and chief of justice based this action on fact that all four alleged conspirators to distribute cocaine and many witnesses came from the Medical Group. Decision to exclude came from desire to avoid conflicts and unnecessary challenges for cause. The exclusion of the Group nominees did not constitute UCI. Motive of SJA and staff was to protect the fairness of the court-martial, not to improperly influence it.

C. Influencing the panel members' decisions.

1. Article 37 says that the convening authority cannot censure the panel members based on their findings or sentence, and no one may not consider a person's service on the panel when preparing evaluation reports or when making assignment decisions.
2. Through command or commander policy in the deliberation courtroom.
 - a. *United States v. Kirkpatrick*, 33 M.J. 132, 133 (C.M.A. 1991). The military judge gave an explicit sentencing instruction on the Army's policy regarding use of illegal drugs: "[H]ere we have a senior noncommissioned officer directly in violation of that open, express, notorious policy of the Army: Through[sic] shalt not [use marijuana]." The court noted that it has long condemned any reference to department or command policies being placed before members charged with sentencing responsibilities. This implicated UCI concerns and constituted plain error which was not waived by the defense failure to object; sentence set aside.

- b. *United States v. Stoneman*, 57 M.J. 35 (C.A.A.F. 2002). SPCMCA sent an email to subordinate commanders “declaring war on all leaders not leading by example.” The email also stated the following: “No more platoon sergeants getting DUIs, no more NCOs raping female soldiers, no more E7s coming up ‘hot’ for coke, no more stolen equipment, no more approved personnel actions for leaders with less than 260 on the APFT, . . . , -- all of this is BULLSHIT, and I’m going to CRUSH leaders who fail to lead by example, both on and off duty.” At a subsequent leaders’ training session, the commander reiterated his concerns. After consulting with the SJA, the commander issued a second email to clarify the comments in the first. The commander stated that he was expressing his concerns about misconduct, but emphasized that he was not suggesting courses of action to subordinates, and that each case should be handled individually and appropriately in light of all circumstances. He specifically addressed duties as a court-martial panel member and witness. At trial, the defense counsel challenged all of the panel members from the brigade based on implied bias and potential for unlawful command influence. The military judge denied the challenge using R.C.M. 912 as the framework. CAAF remanded for a DuBay hearing, stating that the military judge should have used an unlawful command influence framework to determine the facts, decide whether those facts constituted unlawful command influence, and conclude whether the proceedings were tainted.
- c. *United States v. Baldwin*, 54 M.J. 308 (C.A.A.F. 2001). Nine months after her court-martial, appellant filed affidavit alleging that the GCMCA conducted OPDs where he commented that officer court-martial sentences were too lenient and stated that the minimum should be at least one year. Appellant also alleged that her court-martial was interrupted by one of these sessions (mandatory for all officers assigned to the installation). The court stated, “We have long held that the use of command meetings in determining a court-martial sentence violates Article 37.” The court found that this allegation was sufficient to raise a UCI issue and remanded for a limited hearing.

- d. *United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003). Appellant was convicted of various offenses to include rape, indecent assaults, indecent acts, and maltreatment of trainees at Aberdeen Proving Ground. He contended that he was denied a fair trial because of apparent UCI related to pretrial publicity and official comments related to his case. As support, appellant cited the Army's "zero tolerance" policy on sexual harassment; a chilling effect on the command decision-making process stemming from the Secretary of the Army's creation of the Senior Review Panel to examine gender relations; public statements made by senior military officials suggestive of appellant's guilt; and public comments by members of Congress and military officials regarding the "Aberdeen sex scandal." In preparation for filing motions at trial, the defense counsel interviewed the GCMCA and SPCMCA and cross-examined at trial, and conducted extensive voir dire of the panel members on this issue. The court held that there was no nexus between the purported unlawful or unfair actions of senior military officials and the convening authority's decision to refer the case. Additionally, there was no nexus between acts complained of and any unfairness at trial and no evidence that court members were influenced to return guilty verdicts because that is what the Army or superiors wanted. CAAF listed several factors that existed in this case that showed that, in this case, the government proved beyond a reasonable doubt that UCI (if it existed) did not taint the proceeding.
- e. *United States v. Dugan*, 58 M.J. 253 (C.A.A.F. 2003). Junior panel member provided defense counsel with a letter after court-martial detailing her concerns regarding statements made during sentencing deliberations. Panel member alleged that another member reminded the panel that the GCMCA would review their sentence and they needed to make sure they sent a "consistent message." (GCMCA held a "Commander's Call" several weeks before during which drug use was discussed). Defense counsel requested a post-trial Article 39a session. Military judge denied the request. CAAF determined the defense counsel successfully raised unlawful command influence and the Government must rebut the allegation and remanded for *DuBay* hearing. Of note, CAAF pointed out the limitations in place in questioning the panel members during the *DuBay* hearing.
- f. *United States v. Youngblood*, 47 M.J. 338 (C.A.A.F. 1997). Staff meeting at which Wing commander and SJA shared perceptions of how previous subordinate commanders had "underreacted" to misconduct created implied bias among three senior court members in attendance. The court reversed the case because the military judge failed to grant challenges for cause against those members without reaching the UCI issue. The court noted that despite the member's response that they could disregard the comments, it is "asking too much" to expect members to adjudge sentence without regard for potential impact on their careers.

- g. *United States v. Martinez*, 42 M.J. 327 (C.A.A.F. 1995). Wing commander's "We Care About You" policy letter setting out reduction in grade and \$500 fine "as a starting point" for first-time drunk drivers was clearly UCI, notwithstanding letter's preface that "[p]unishment for DWI will be individualized." However, the defense counsel was able to conduct extensive *voir dire* of the panel members and the military judge gave a proper curative instruction, so UCI was harmless beyond a reasonable doubt.
 - h. *United States v. Pope*, 63 M.J. 68 (C.A.A.F. 2006). Appellant was an Air Force recruiter involved in unprofessional conduct with prospective applicants. The Military Judge admitted (over defense objection) that this was injecting command policy into the deliberation process) a letter offered by the government at sentencing which argued Air Force core values and endorsed "harsh adverse action" for those who committed recruiter misconduct. CAAF held that admitting the letter (especially without a limiting instruction) raised the appearance of improper command influence because it conveyed the commander's view that harsh action should be taken against an accused. CAAF was not convinced beyond a reasonable doubt that the members were not influenced by the letter. The sentence was set aside with a rehearing authorized.
 - i. *United States v. Reed*, 65 M.J. 487 (C.A.A.F. 2008). In support of an unlawful command influence motion, appellant introduced an email from the convening authority to his subordinates addressing a variety of command management issues and containing a thirty-one page slideshow. One slide contained the following statement: "Senior NCO and Officer misconduct – I am absolutely uncompromising about discipline in the leader ranks." Some noted examples included: "BAH Fraud, Fraternalization, DUI, Curfew violations, Soldier abuse, Sexual misconduct." The appellant was charged with BAH fraud. Later, the CA, upon SJA advice, issued a clarifying email. The military judge allowed the defense to fully litigate the issue. The other convening authorities in transmittal chain testified that they had exercised independent judgment, and the military judge allowed extensive *voir dire* of the panel members. CAAF held that the government met its burden of demonstrating beyond a reasonable doubt that the proceedings were not affected by actual unlawful command influence or the appearance of unlawful command influence.
 - j. *United States v. Ayers*, 54 M.J. 85 (C.A.A.F. 2000). The appellant engaged in misconduct with a trainee at Fort Lee about the same time that the trainee abuse scandal at Aberdeen Proving Ground was happening. He filed a UCI motion based on the news coverage that accompanied the Aberdeen Proving Ground incidents, saying that the senior leaders comments associated with that scandal and others around the country would also affect his trial, or at least cause the perception of UCI at his trial. Here, the court could find no facts that connected any of that coverage to his actual trial, so the appellant failed the first *Biagase* factor.
3. By the commander physically being in the courtroom.

- a. *United States v. Harvey*, 64 M.J. 13 (C.A.A.F. 2006). During the government’s closing argument on findings, the convening authority was present in the courtroom wearing a flight suit. Based on the apparent recognition of the convening authority by several panel members, defense counsel moved for a mistrial, which was denied by the military judge. CAAF set aside the findings and sentence without prejudice, but limited the approved sentence at any rehearing to a punitive discharge. The military judge is the “last sentinel” in the trial process to protect a court-martial from UCI. The trial developments in this case raised “some evidence” of unlawful command influence and the military judge failed to inquire adequately into the issue. Specifically, the convening authority was present in the courtroom wearing a flight suit when the government’s argument characterized appellant’s conduct as a threat to the aviation community; the senior member of the panel was a subordinate member of the convening authority’s command (and the subject of an unsuccessful challenge for cause); and there was some evidence that the panel was watching the convening authority during argument. Further, the military judge failed to then conduct *Biagase* analysis. CAAF noted that convening authority’s are not barred from attending a court-martial, “But as this case illustrates, the presence of the convening authority at a court-martial may raise issues.”)
 - b. *United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979). The military judge abused his discretion in denying mistrial where accuser’s company commander’s presence throughout proceedings was “ubiquitous” and commander engaged in “patent meddling in the proceedings.”
 - c. While it is not *per se* UCI for the commander to be in the courtroom, if the defense raises the issue, it is fair to say that the commander being in the courtroom will *per se* satisfy the first *Biagase* factor. The burden will now shift to the government to prove beyond a reasonable doubt that the commander being in the courtroom did not constitute UCI, or if it did, that it did not influence the proceeding. So, the ultimate question is, if the commander wants to be in the courtroom (or if the SJA wants to be in the courtroom), is it worth it? In *Harvey*, the court stated: “We share [the responsibility to guard against UCI] with military commanders, staff judge advocates, military judges, and others involved in the administration of military justice. Fulfilling this responsibility is fundamental to fostering public confidence in the actual and apparent fairness of our system of justice.” *Harvey*, 64 M.J. at 17. Probably the best solution is to find a way to observe the court-martial without physically being in the courtroom, or save observation moments for contested judge-alone cases.
4. By bringing the commander in the courtroom via argument.

- a. *United States v. Mallett*, 61 M.J.761 (A.F. Ct. Crim. App.2005). Trial counsel’s sentencing argument injected unlawful command influence into the proceedings because the TC referred to commanders in her argument. Specifically, the TC referred to “commander’s calls” where the commander “would warn us to stay away . . . not to use drugs.” After stating that the commander could not impose any particular punishment, but could only send the charges to court-martial, the TC then posited, “what would a commander say to get his unit’s attention and say, ‘I mean business about drugs,’ if he had the authority to be the judge and jury in a case where you are, in essence, the jury deciding this?” The TC concluded that, a sentence that would “get people’s attention” is “18 months [of] confinement and a bad conduct discharge.” Trial defense counsel did not object to the argument. The court held that the TC’s comments were improper under R.C.M. 1001(g), which expressly prohibits making reference to a convening authority or command policy in sentencing arguments and amounted to plain error, despite the lack of defense objection at trial. The court found that the appellant suffered prejudice and so set aside the sentence.
 - b. *United States v. Sparrow*, 33 M.J. 139 (C.M.A. 1991). The trial counsel argued that “General Graves has selected you. He said, “Be here. Do it. You have good judgment. I trust you. I know you’ll do the right thing.” The defense did not object. The court said that if there was UCI, it did not affect the proceeding.
5. Through the exercise of rank in the deliberation room.
- a. Improper for senior ranking court members to use rank to influence vote within the deliberation room, *e.g.*, to coerce a subordinate to vote in a particular manner. Discussion, Mil. R. Evid. 606.
 - b. *United States v. Accordino*, 20 M.J. 102 (C.M.A. 1985) (allegation that senior officer cut off discussion by junior members, remanded to determine if senior officer used rank to “enhance” an argument).
 - c. *United States v. Lawson*, 16 M.J. 38, 41 (C.M.A. 1983). Straw votes are informal votes taken by members to see where they stand on the issues. They are not authorized by the RCMs or the UCMJ but are not specifically prohibited by these sources. However, the use of straw votes allows rank to enter the courtroom because it works against the anonymity rules.
 - d. *United States v. Reynolds*, 40 M.J. 198 (C.M.A. 1994). A split court could not agree whether the president of the panel (a major) made remarks (calling other members “captain” and using a tone of voice to impress inferiority of their rank) amounted to UCI.
6. Through surrogate witnesses.
- a. *United States v. Yerich*, 47 M.J. 615 (A. Ct. Crim. App. 1997). Testimony from a government witness (SFC) that the accused had no rehabilitative potential in the military did not constitute unlawful command influence. Court rejects argument that SFC’s testimony was adopted, and therefore attributable to, the commanding officer.

7. Through improper rehabilitation evidence in sentencing.
 - a. *United States v. Cherry*, 31 M.J. 1, 5 (C.M.A. 1990); *United States v. Ohrt*, 28 M.J. One of the problems (of many) with having a commander say, “No rehabilitation potential in the military” is that the commander has essentially told the panel what he or she thinks is the appropriate punishment: one that includes a punitive discharge.
 8. Through the terms of a co-accused’s agreement with the convening authority.
 - a. *United States v. Schnitzer*, 44 M.J. 380 (C.A.A.F 1996). Disclosure, during members trial, of the terms of co-accused’s pretrial agreement does not *per se* bring the CA into the courtroom, provided it is otherwise admitted for a valid purpose.
- D. Influencing the independent discretion of the military judge.
1. Prohibition: “No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case” UCMJ, art. 37(a).
 2. Efficiency Ratings: “[N]either the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge.” UCMJ art. 26(c).
 3. In cases involving the military judge, the pressure will often come people other than the convening authority – like other military judges or staff judge advocates.
 - a. *United States v. Rice*, 16 M.J. 770 (A.C.M.R. 1983). Improper for DSJA to request that the senior judge telephone the magistrate to explain the seriousness of a certain pretrial confinement issue.
 - b. *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991). Senior judge’s letter, written to increase sentence severity, subjected judges to unlawful command influence.
 - c. *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976). Commander and SJA inquiries that question or seek justification for a judge’s decision are prohibited.
 - d. *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006).
 - (1) The trial counsel, in concert with the staff judge advocate, attacked the character of the military judge in voir dire, accusing her of having a social interaction (a date) with the civilian defense counsel that was on the case. The military judge denied the government challenge and the government filed a motion to reconsider, which she also denied. The defense filed a motion to dismiss based on UCI and prosecutorial misconduct and called the SJA, who testified that he advised the TC regarding trial tactics. The SJA also characterized an incident where the MJ and CDC were seen together as a “date.” The SJA was combative on the witness stand, including addressing comments to the CDC, interrupting the CDC, and arguing with the CDC.

(2) The MJ recused herself because she could not remain impartial following the government's attack on her character. A second MJ was detailed who also recused himself because he was "shocked and appalled" at the government's conduct. A third judge heard an expedited defense motion, and a fourth judge presided over additional motions and trial. The trial judge granted a motion for a change of venue, disqualified the SJA and the convening authority from taking post-trial action in the case, and barred the SJA from attending the remainder of the trial.

(3) CAAF found that improperly seeking recusal of the military judge was actual UCI. Because the trial counsel that was initially part of the UCI remained an active member of the prosecution, the government's later actions and remedial steps were undermined. Further, a reasonable observer would have significant doubt about the fairness of this court-martial in light of the government's conduct. Neither actual nor apparent unlawful command influence have been cured beyond a reasonable doubt in this case. CAAF dismissed the case with prejudice.

- e. *United States v. Tilghman*, 44 M.J. 493 (C.A.A.F. 1996). Unlawful command interference when commander placed accused into pretrial confinement in violation of trial judge's ruling.
- f. *United States v. Campos*, 42 M.J. 253 (C.A.A.F. 1995). The military judge said on the record that he believed he was relieved of his position as senior judge because his superiors believed he was giving lenient sentences. During *voir dire*, he said he thought he could still be fair. Based on extensive trial record, CAAF found no nexus between assignment of other judge and accused's trial, that appearance taken care of at Art. 39(a) session and trial, and no abuse of discretion in not recusing himself.
- g. *United States v. Allen*, 33 M.J. 209 (C.M.A. 1991). When making the decision to detail a judge to a case, a senior judge made the comment that a judge that was under consideration had a reputation for being a light sentencer and pro-defense. At a conference of SJAs, one session discussed "Problems with the Judiciary" where one of the action items was to approach the TJAG about how to deal with "inappropriate" judges. The court found that this raised the appearance of UCI, however, the UCI did not affect the proceeding.

E. Influencing the defense counsel.

- 1. Article 37 prohibits the convening authority from censuring, reprimanding, or admonishing the defense counsel with respect to the exercise of his or her functions in the conduct of the proceeding.

2. *United States v. Fisher*, 45 M.J. 159 (C.A.A.F. 1996). During a recess interview with the DC just before he was to be cross-examined on suppression motion, the CA told the DC that he questioned the ethics of anyone who would try to get results of urinalysis suppressed. The court found that this violated Art. 37, but found no effect on trial process because the defense counsel skillfully crossed the CA, and because defense never raised the claim until after trial. The court granted a remedy of sending the case back for a new action by a different convening authority.
 3. *United States v. Crawford*, 46 M.J. 771 (C.G.Ct.Crim.App. 1997). The convening authority “dressed down” the defense counsel, told her the sentence was too light, that the appellant had lied to her and encouraged her to put on false evidence. The defense counsel took offense and told him he better have proof of accusations like that. The convening authority turned to the appellant, who was also there, and said he was going to investigate whether he had perjured himself. The court found a violation of Art. 37. This happened after trial, so there was no effect on the trial. As a preventative matter, the convening authority withdrew himself from acting on the case. With him no longer involved in the case, the court could find no prejudice.
- F. Influencing a subordinate commander in the exercise of their clemency actions.
1. *United States v. Johnson*, 54 M.J. 32 (C.A.A.F. 2000). The appellant alleged that the intermediate commander strongly supported a suspension of some punishment. The original convening authority left command and a new convening authority, with a tougher stance, came in. Then, the intermediate commander decided not to go to bat for him. Following a *Dubay* hearing, the *Dubay* military judge found no evidence of UCI and the court found that military judge’s findings were not clearly erroneous.
- G. Influencing the accused to plead guilty.
1. If the accused enters his pleas of guilty because he is afraid to go to trial before a court that he believes has been unlawfully influenced (and so will not give him a fair trial), then courts may find that UCI has impacted the proceedings. *United States v. Gleason*, 43 M.J. 69 (C.A.A.F. 1995); *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986); *United States v. Kitts*, 23 M.J. 105 (C.M.A. 1986).
 2. Note that this is different than the accused negotiating for a better pretrial agreement in exchange for waiving an accusatorial UCI issue. *United States v. Weasler*, 43 M.J. 15 (C.A.A.F. 1995);

III. ACCUSATORY UCI

- A. Independent discretion by each commander.
1. Article 37(a) states that *no one* may attempt to coerce or influence the action of *any* convening, approving, or reviewing authority with respect to his judicial acts.
 2. R.C.M. 306 says that each commander has discretion to dispose of offenses, and that a superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.

3. The key to these problems is to recognize that if the superior commander disagrees with how the subordinate commander is disposing of the case, the superior commander should withhold that case to his or herself rather than trying to get the subordinate commander to change his or her mind. This may cause some logistical problems but that is the cost of preventing UCI.

B. Cases.

1. *United States v. Martinez*, 42 M.J. 327 (C.A.A.F. 1995). The UCI occurred after the GCMCA has referred the case, so no impact on the accusatorial process.
2. *United States v. Rivera*, 45 C.M.R. 582, 583 (A.C.M.R. 1972). It was improper for a battalion commander to return a request for Article 15 to company commander with comment, "Returned for consideration for action under Special Court-Martial with Bad Conduct Discharge." The court noted that "The fine line between lawful command guidance and unlawful command control is determined by whether the subordinate commander, though he may give consideration to the policies and wishes of his superior, fully understands and believes that he has a realistic choice to accept or reject them." Here, the court found that the company commander did not and so reversed the case.
3. *United States v. Griffin*, 41 M.J. 607 (A. Ct. Crim. App. 1994). The division commander issued a five-page policy letter on physical fitness and physical training addressed other fitness considerations such as weight, smoking, drinking and drugs, and which said: "There is no place in our Army for illegal drugs *or for those who use them*. This message should be transmitted clearly to our soldiers, and we must work hard to ensure that we identify drug users through random urinalysis and health and welfare inspections." The SJA took action when he learned about the letter and had the CG issue a new letter without the offensive language. The defense counsel further improved his client's position by negotiating a waiver of the issue. While there could have theoretically been UCI in the referral process, the issue was waived. See also *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998) (arose out of the same facts as *Griffin*).

4. *United States v. Reed*, 65 M.J. 487 (C.A.A.F. 2008). In support of an unlawful command influence motion, appellant introduced an email from the convening authority to his subordinates addressing a variety of command management issues and containing a thirty-one page slideshow. One slide contained the following statement: “Senior NCO and Officer misconduct – I am absolutely uncompromising about discipline in the leader ranks.” Some noted examples included: “BAH Fraud, Fraternalization, DUI, Curfew violations, Soldier abuse, Sexual misconduct.” The appellant was charged with BAH fraud. The defense also presented evidence that a deputy commander of a subordinate unit addressed a “newcomer’s briefing” with a warning that “BAH fraud is an automatic court-martial here.” Further, the CA contacted the appellant’s rater and senior rater during the preferral process to ensure that the accused got bad remarks on his evaluation. Later, the CA, upon SJA advice, issued a clarifying email. The military judge allowed full litigation on the issue, and the other convening authorities in transmittal chain testified that they had exercised independent judgment, and the military judge allowed extensive voir dire of the panel members. CAAF held that the government met its burden of demonstrating beyond a reasonable doubt that the proceedings were not affected by actual unlawful command influence or the appearance of unlawful command influence.

5. *United States v. Gerlich*, 45 M.J. 309 (C.A.A.F. 1996). After a commander subordinate to the SPCMCA adjudged an Art. 15, the victim went to the IG, when then wrote to GCMCA, who told the SPCMCA that he needed to relook the case because he thought that the Art. 15 would not achieve the GCMCA’s justice goals. He told the SPCMCA to decide whether further action under the UCMJ was warranted. The SPCMCA then directed the lower commander to set aside the Art. 15. Charges were ultimately referred. The SPCMCA eventually testified and said that he used his independent judgment when deciding on the ultimate disposition and changed his mind based on what he learned in the subsequent investigation. CAAF stated, “[W]e have previously recognized the difficulty of a subordinate ascertaining for himself or herself the actual influence a superior as on that subordinate.” Here, the court thought that the SPCMCA *considered all of the relevant information prior to being told to relook the case* and only changed his mind after receiving a letter from the superior commander *that suggested that he change his mind*. CAAF found that the government had not met its burden to show no UCI and so reversed the findings.

6. *United States v. Wallace*, 39 M.J. 284 (C.M.A. 1994). A company commander imposed Art. 15 punishment on the accused. The battalion commander learned of *additional* misconduct by the accused and told subordinate commander, “You may want to reconsider the [company grade] Article 15 and consider setting it aside based on additional charges.” The company commander considered the new information, set aside the Article 15, preferred charges and recommended a court-martial. The company commander testified that he felt influenced to reconsider his original decision, but not to come to any certain conclusion after having reconsidered the new information, and that he did not feel any pressure related to making his final decision. CAAF said that these facts did not amount to UCI (note, this is a pre-*Biagase* case so that analysis was not used). The military judge had fully developed the record and CAAF agreed with the trial judge that the company commander had exercised independent discretion.
7. *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004). In a conference call with three subordinate officers, the senior officer “very clearly and forcefully made his opinion known” to subordinate that case was too serious for nonjudicial punishment and that article 32(b) investigation was warranted. The military judge also found that the subordinate officer knew that the disposition of the case was his to make. While in a void the conference call would look like UCI, the military judge’s factfinding filled in that void and showed that UCI did not actual occur. In particular, the subordinate commander was the one that initiate the conference call, and that after the conference call, it was clear that the subordinate commander was free to make his own decision.
8. *United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984). No evidence that the commander’s improper comments had any impact on any subordinate’s decision to swear to charges or recommend a particular disposition of charges.
9. *United States v. Johnston*, 39 M.J. 242 (C.M.A. 1994). The appellant did not present any evidence that the subordinate commanders were pressured into preferring or transmitting charges.
10. *United States v. Drayton*, 45 M.J. 180 (C.A.A.F. 1996). In a post-trial affidavit, the appellant asserted that when he talked to his company command, he said he thought that referral to a court-martial was a bit harsh for shoplifting. The appellant said that the commander told him that he agreed but the battalion commander wanted a court-martial. The company commander, in an affidavit, said that met with the battalion commander and discussed the case, but that he exercised independent discretion. The court held that the appellant waived this claim by not raising it at trial.
11. *United States v. Brown*, 45 M.J. 389 (C.A.A.F. 1996). The original brigade commander went on television and said that a group of Soldiers in his command had brought shame to the Brigade. The SJA advised him to step aside in the case and he did. The case was transferred to a different brigade commander. The court found no error, saying that no one presented any information that this subsequent commander did not exercise complete, independent control over his jurisdiction.

12. *United States v. Weasler*, 43 M.J. 15 (1995). The company commander was going to go on leave. She told her subordinate (who would be the acting commander) to sign the papers when they came in. She testified that if he had done anything differently than she had directed, then she would have re-preferred the charges. The appellant waived the issue as part of a pretrial agreement but raised the ability to waive UCI in a pretrial agreement on appeal. The court found that this was UCI, but because it was accusatorial UCI, could be waived as part of a pretrial agreement.
13. *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994). The company commander gave the appellant an Article 15. The SJA, described as “aggressive,” believed the case should be resolved at a court-martial and directed his subordinates to tell the brigade commander to prosecute this case, or else they would take the case up their level (to the commanding general). The brigade commander’s first reaction was that the case probably should be at a field grade Art. 15. He eventually preferred charges and transmitted the case to the commanding general but said he did not feel pressured to do so. The court found that the SJA was expressing his personal opinion and not that of the superior commander and that the brigade commander’s decision was not tainted by UCI.
14. *United States v. Richter*, 51 M.J. 213 (C.A.A.F. 1999). In a post-trial affidavit, the appellant alleged that the commander was coerced into preferring charges by the staff judge advocate’s office, who threatened to remove the command team from the command if they didn’t prefer charges. The court found that the accused forfeited this claim by not raising it at trial because there was no evidence that the appellant could not have found out about this problem before trial.
15. *United States v. Villareal*, 52 M.J. 27 (C.A.A.F. 1999). The parties signed a pretrial agreement. Then, the convening authority withdrew from the agreement. He said that he received a lot of pressure from the victim’s family members so he sought the advice of a mentor, who happened to be the acting superior convening authority. The superior commander said, “what would it hurt to send the issue to trial,” and then the convening authority withdrew from the agreement. Following the withdrawal, the case was transferred to a new command. The court found that because the subordinate commander reached out for the advice, there was no actual UCI and even if there was apparent UCI, that was cured by the transfer of jurisdiction. (The court then examined if the withdrawal from the PTA was otherwise proper).

IV. LITIGATING UCI CLAIMS

- A. Basic framework. *United States v. Biagase*, 50 M.J. 143, 150-51 (C.A.A.F. 1999).
 1. The defense has the burden to present sufficient evidence, which if true, constitute UCI, and which UCI has a logical connection to potential unfairness in the court-martial.
 - a. The threshold is low – some evidence.
 - b. However, there must be more than a mere allegation or general speculation; something more than just “command influence in the air.” *United States v. Johnston*, 39 M.J. 242 (C.M.A. 1994).

2. The burden then shifts to the government to prove, beyond a reasonable doubt, that:
 - a. The predicate facts do not exist; or
 - b. If true, the facts do not amount to UCI; or
 - c. If at trial, if the facts do amount to UCI (by producing evidence that the UCI will not affect the proceedings).
 - d. If on appeal, if the facts did amount to UCI, that the UCI had no prejudicial impact on the court-martial.
- B. CAUTION! Prior to *Biagase*, the case law is very inconsistent. Look to pre-*Biagase* cases for help on what types of facts constitute UCI, but look to post-*Biagase* cases for how to analyze the problem.
- C. If government fails to produce rebuttal evidence, the “military judge must find unlawful command influence exists and then take whatever measures are necessary . . . to ensure [beyond a reasonable doubt] that the findings and sentence” are not affected. *United States v. Jones*, 30 M.J. 849, 854 (N.M.C.M.R. 1990).
- D. Any time before authentication or action the MJ or CA may direct a post-trial session to resolve any matter which affects the legal sufficiency of any findings of guilty or the sentence. *See United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998).
- E. The military judge needs to build the record. *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994). “Where the issue of unlawful command influence is litigated on the record, the military judge’s findings of fact are reviewed under a clearly-erroneous standard, but the question of command influence flowing from those facts is a question of law that this Court reviews *de novo*.”

V. REMEDIAL ACTIONS.

- A. If the defense raises present sufficient evidence, which if true, constitute UCI, then the burden is going to shift to the government to prove that those facts did not exist; if they did, that the facts do not amount to UCI; or if the facts do amount to UCI, then the proceedings will not be affected by UCI. By taking remedial actions – either the convening authority before referral, or the military judge or convening authority after referral – the government may be able to prevent the UCI from tainting the proceedings.
- B. The remedies that follow are not mandatory for each case. *United States v. Roser*, 21 M.J. 883 (A.C.M.R. 1986). Remedies should be appropriately tailored for each case.
- C. Before trial (directed by the convening authority or SJA).
 1. Adjudicative UCI.
 - a. Rescind or clarify letters and pronouncements. *See United States v. Rivers*, 48 M.J. (C.A.A.F. 1998); *United States v. Stoneman*, 57 M.J. 35 (C.A.A.F. 2002); *United States v. Reed*, 65 M.J. 487 (C.A.A.F. 2008).
 - b. Tell the witness that they need to testify and that no one is intending to influence him or her. *See United States v. Bradley*, 48 M.J. 777 (A.F. Ct. Crim. App. 1998).

- c. Reprimand the offending official in front of the people that he tried to improperly influence. *United States v. Roser*, 21 M.J. 883 (A.C.M.R. 1986).
2. Accusatorial UCI.
- a. Rescind or clarify letters and pronouncements. *United States v. Griffin*, 41 M.J. 607 (A. Ct. Crim. App. 1994).
 - b. Tell the subordinate commander (in writing) that he or she is free to choose any disposition that he or she thinks is appropriate. *See generally United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004).
 - c. The defense can seek to waive the issue in exchange for a favorable pretrial agreement. *United States v. Weasler*, 43 M.J. 15 (C.A.A.F. 1995).
- D. At trial (directed by the military judge or convening authority).
1. Adjudicative UCI.
- a. Allow extensive *voir dire*. *United States v. Stoneman*, 57 M.J. 35 (C.A.A.F. 2002); *United States v. Martinez*, 42 M.J. 327 (C.A.A.F. 1995).
 - b. Allow extensive fact finding, to include interviews of and cross examination of those who may have committed UCI. *United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003).
 - c. Issue curative instructions. *United States v. Martinez*, 42 M.J. 327 (C.A.A.F. 1995).
 - d. Order the government to retract the offending policy statement. *United States v. Sullivan*, 26 M.J. 442 (C.M.A. 1998).
 - e. Grant continuances to investigate the issue. *United States v. Sullivan*, 26 M.J. 442 (C.M.A. 1998); *United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010).
 - f. Issue a blanket order to produce all witnesses requested by the defense. *United States v. Sullivan*, 26 M.J. 442 (C.M.A. 1998).
 - g. Advise each witness that it is his duty to testify and assure them that no adverse consequences would follow. *United States v. Sullivan*, 26 M.J. 442 (C.M.A. 1998); *United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010) (the parties fashioned a letter that was to be given to potential witnesses).
 - h. Order that the government to transfer the person who committed UCI. *United States v. Sullivan*, 26 M.J. 442 (C.M.A. 1998); *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999).
 - i. Prevent the government from calling aggravation evidence. *United States v. Clemons*, 35 M.J. 770 (A.C.M.R. 1992).
 - j. Not allow the government to attacked the accused's reputation by opinion or reputation testimony. *United States v. Clemons*, 35 M.J. 770 (A.C.M.R. 1992); *United States v. Giarratano*, 20 M.J. 553 (A.C.M.R. 1985).

- k. Give the defense wide latitude with witnesses. *United States v. Clemons*, 35 M.J. 770 (A.C.M.R. 1992).
 - l. Allow the accused to testify about what he *thought* witnesses might have said (as substantive evidence on merits or E&M). *United States v. Clemons*, 35 M.J. 770 (A.C.M.R. 1992).
 - m. Preclude the government from presenting evidence through direct or cross examination about the accused's rehabilitative potential. *United States v. Souther*, 18 M.J. 795, 796 (A.C.M.R. 1984).
 - n. Offer to sustain any challenge for cause against any member who was present in command during period of UCI. *United States v. Souther*, 18 M.J. 795, 796 (A.C.M.R. 1984); *United States v. Giarratano*, 20 M.J. 553 (A.C.M.R. 1985).
 - o. Disqualify the offending official from any reviewing authority duties. *United States v. Giarratano*, 20 M.J. 553 (A.C.M.R. 1985);
 - p. Dismiss the case with prejudice.
 - (1) *United States v. Gore*, 60 M.J. 178 (C.A.A.F. 2004). CAAF upholds military judge's decision to dismiss case with prejudice due to witness intimidation.
 - (2) Dismissal should be the last resort. "If and only if the trial judge finds that command influence exists . . . and finds, further, that there is no way to prevent it from adversely affecting the findings or sentence beyond a reasonable doubt should the case be dismissed." *United States v. Jones*, 30 M.J. 849, 854 (N.M.C.M.R. 1990).
2. Accusatorial UCI.
- a. If a commander has been coerced into preferring charges that he does not believe are true, the charges are treated as unsigned and unsworn. *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994).
- E. Military judges: Remember to complete the *Biagase* analysis.
- 1. *United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010). The military judge must follow up on the remedies and put it on the record that the remedies were fully implemented. Complete the *Biagase* analysis by saying what was done and that now the UCI that was found to exist will not prejudice the case beyond a reasonable doubt. If the military judge finds UCI but then does not complete the analysis, then the presumption still stands that the UCI will affect the proceeding. The record needs to reflect that the government has met its burden.

VI. WAIVER AND FORFEITURE.

- A. Accusatory UCI is *forfeited* if not raised at trial unless (1) the evidence was concealed from the accused at trial; or (2) the accused was deterred from raising it at trial by the UCI. *United States v. Drayton*, 45 M.J. 180 (C.A.A.F. 1996); *United States v. Brown*, 45 M.J. 389 (C.A.A.F. 1996); *United States v. Richter*, 51 M.J. 213 (1999).

- B. Accusatory UCI can be affirmatively *waived* by the defense as part of a pretrial agreement, if the waiver originates from the accused. *United States v. Weasler*, 43 M.J. 15 (C.A.A.F. 1995); *see generally United States v. Bartley*, 47 M.J. 182 (C.A.A.F. 1997).
- C. Adjudicative UCI is not forfeited if the defense fails to raise the issue at trial. *United States v. Baldwin*, 54 M.J. 308 (C.A.A.F. 2001); *United States v. Richter*, 51 M.J. 213 (C.A.A.F. 1999); *United States v. Kirkpatrick*, 33 M.J. 132 (C.M.A. 1991); *United States v. Sparrow*, 33 M.J. 139 (C.M.A. 1991); *United States v. Dykes*, 38 M.J. 270 (C.M.A. 1993).
- D. It is unclear whether an accused can affirmatively waive adjudicative UCI or whether doing so as part of a pretrial agreement would violate public policy. *See United States v. Reynolds*, 40 M.J. 198 (C.A.A.F. 1994) (no majority opinion, split on whether the defense could affirmatively waive an issue of superiority of rank in the deliberation room, which the defense did at trial).

VII. FURTHER READING.

- A. Robert A. Burrell, *Recent Developments in Unlawful Command Influence*, ARMY LAW., May 2001.
- B. James F. Garrett, *Recent Developments in Unlawful Command Influence*, "I Really Didn't Say Everything I Said," ARMY LAW., May 2002.
- C. James F. Garrett, *Recent Developments in Unlawful Command Influence*, ARMY LAW., May 2004.
- D. Patricia A. Ham, *Revitalizing the Last Sentinel: The Year in Unlawful Command Influence*, ARMY LAW., May 2005.
- E. Patricia A. Ham, *Still Waters Run Deep? The Year in Unlawful Command Influence*, ARMY LAW., June 2006.
- F. Mark L. Johnson, *Confronting the Mortal Enemy of Military Justice: New Developments in Unlawful Command Influence*, ARMY LAW., June 2007.
- G. Mark L. Johnson, *Unlawful Command Influence--Still with Us; Perspectives of the Chair in the Continuing Struggle Against the "Mortal Enemy" of Military Justice*, ARMY LAW., June 2008.
- H. Daniel G. Brookhart, *Physician Heal Thyself- How Judge Advocates Can Commit Unlawful Command Influence*, ARMY LAW., March 2010.

APPENDIX A

**THE 10 COMMANDMENTS
OF
UNLAWFUL COMMAND INFLUENCE**

COMMANDMENT 1	Do not stack the panel, nor select nor remove court-members in order to obtain a particular result in a particular trial.
COMMANDMENT 2	Do not disparage the defense counsel or the military judge.
COMMANDMENT 3	Do not communicate an inflexible policy on disposition or punishment.
COMMANDMENT 4	Do not place outside pressure on the judge or court-members to obtain a particular decision.
COMMANDMENT 5	Do not intimidate witnesses or discouraged them from testifying.
COMMANDMENT 6	Do not order a subordinate to dispose of a case in a certain way.
COMMANDMENT 7	Do not coach or mentor subordinate commanders on military justice without talking to your legal advisor first.
COMMANDMENT 8	Do not disparage the accused or tell others not to associate with him, and do not allow subordinates to do so, either.
COMMANDMENT 9	Ensure that subordinates and staff do not commit unlawful command influence, inadvertently or not.
COMMANDMENT 10	If a mistake is made, raise the issue immediately and cure with an appropriate remedy.

APPENDIX B

RECURRING PROBLEM: THE POLICY STATEMENT

When commanders make policy statements about the military justice system, particularly about what types of offenses warrant what kinds of courts or sentences, commanders run the risk that they will commit both adjudicative UCI (some witnesses may not now come forward on the accused's behalf, and some panel members may now punish in accordance with what they believe the convening authority believes) and accusatory UCI (some commanders may transmit a case because that is what they think their commander wants them to do, not because that is their independent decision).

Commanders are used to coaching and mentoring their subordinates in all areas of command responsibility and leadership, but here, the law has carved out an exception. Commanders should consult with their staff judge advocates before entering this area.

Note that Art. 37(a) exempts general instructional or informational courses on military justice if such courses are designed solely for the purpose of instructing members of the command in the substantive and procedural aspects of courts-martial. Commanders should consider asking their staff judge advocate to provide general instruction, and should allow judge advocates to give advice on particular cases.

The readings below help illuminate the line between mentorship and unlawful command influence.

United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984)

The duties of a division commander as a court-martial convening authority and as the primary leader responsible for discipline within the division are among the most challenging a commander can perform. On the one hand, effective leadership requires a commander to supervise the activities of his subordinates diligently and ensure that state of good order and discipline which is vital to combat effectiveness. On the other hand, he must exercise restraint when overseeing military justice matters to avoid unlawful interference with the discretionary functions his subordinates must perform. The process of maintaining discipline yet ensuring fairness in military justice requires what the United States Court of Military Appeals has called "a delicate balance" in an area filled with perils for the unwary. Many experienced line officers have expressed similar conclusions. Excerpts from two particularly useful and authoritative examples are reproduced [below].

Correction of procedural deficiencies in the military justice system is within the scope of a convening authority's supervisory responsibility. Yet in this area, the band of permissible activity by the commander is narrow, and the risks of overstepping its boundaries are great. Interference with the discretionary functions of subordinates is particularly hazardous. While a commander is not absolutely prohibited from publishing general policies and guidance which may relate to the discretionary military justice functions of his subordinates, several decades of practical experience under the Uniform Code of Military Justice have demonstrated that the risks often outweigh the benefits. The balance between the command problem to be resolved and the risks of transgressing the limits set by the Uniform Code of Military Justice is to be drawn by the commander with the professional assistance of his staff judge advocate. Although the commander is ultimately responsible, both he and his staff judge advocate have a duty to ensure that directives in the area of military justice are accurately stated, clearly understood and properly executed.

Excerpts from a letter which the Powell Committee recommended The Judge Advocate General of the Army send to officers newly appointed as general court-martial convening authorities. (Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army: Report to Honorable Wilber M. Bruckner, Secretary to the Army, 17-21 (18 Jan 1960)).

Dear :

Because it is of the utmost importance that commanders maintain the confidence of the military and the public alike in the Army military justice system, the following suggestions are offered you as a commander who has recently become a general court-martial convening authority, in the hope that they will aid you in the successful accomplishment of your military functions and your over-all command mission.

A serious danger in the administration of military justice is illegal command influence. Congress, in enacting the Uniform Code of Military Justice, sought to comply with what it regarded as a public mandate, growing out of World War II, to prevent undue command influence, and that idea pervades the entire legislation. It is an easy matter for a convening authority to exceed the bounds of his legitimate command functions and to fall into the practice of exercising undue command influence. In the event that you should consider it necessary to issue a directive designed to control the disposition of cases at lower echelons, it should be directed to officers of the command generally and should provide for exceptions and individual consideration of every case on the basis of its own circumstances or merits. For example, directives which could be interpreted as requiring that all cases of a certain type, such as larceny or prolonged absence without leave, or all cases involving a certain category of offenders, such as repeated offenders or offenses involving officers, be recommended or referred for trial by general court-martial, must be avoided. This type of directive has been condemned as illegal by the United States Court of Military Appeals because it is calculated to interfere with the exercise of the independent personal discretion of commanders subordinate to you in recommending such disposition of each individual case as they conclude is appropriate, based upon all the circumstances of the particular case. The accused's right to the exercise of that unbiased discretion is a valuable pretrial right which must be protected. All pretrial directives, orientations, and instructions should be in writing and, if not initiated or conducted by the staff judge advocate, should be approved and monitored by him.

The results of court-martial trials may not always be pleasing, particularly when it may appear that an acquittal is unjustified or a sentence inadequate. Results like these, however, are to be expected on occasion. Courts-martial, like other human institutions, are not infallible and they make mistakes. In any event, the Uniform Code prohibits censuring or admonishing court members, counsel, or the law officer with respect to the exercise of their judicial functions. My suggestion is that, like the balls and strikes of an umpire, a court's findings or sentence which may not be to your liking be taken as 'one of those things.' Courts have the legal right and duty to make their findings and sentences unfettered by prior improper instruction or later coercion or censure.

Excerpts from an article by General William C. Westmoreland discussing the relationship of military justice to good order and discipline in the Army. (Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 *Am.Crim.L.Rev.* 5, 5–8 (1971)).

As a soldier and former commander, and now as Chief of Staff of the Army, I appreciate the need for a workable system of military justice. Military commanders continue to rely on this system to guarantee justice to the individual and preserve law and order within the military.

An effective system of military justice must provide the commander with the authority and means needed to discharge efficiently his responsibilities for developing and maintaining good order and discipline within his organization. Learning and developing military discipline is little different from learning any discipline, behavioral pattern, skill, or precept. In all, correction of individuals is indispensable.... The military commander should have the widest possible authority to use measures to correct individuals, but some types of corrective action are so severe that they should not be entrusted solely to the discretion of the commander. At some point he must bring into play judicial processes. At this point the sole concern should be to accomplish justice under the law, justice not only to the individual but to the Army and society as well.

I do not mean to imply that justice should be meted out by the commander who refers a case to trial or by anyone not duly constituted to fulfill a judicial role. A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function, it will promote discipline.

The protection of individual human rights is more than ever a central issue within our society today. An effective system of military justice, therefore, must provide of necessity practical checks and balances to assure protection of the rights of individuals. It must prevent abuses of punitive powers, and it should promote the confidence of military personnel and the general public in its overall fairness. It should set an example of efficient and enlightened disposition of criminal charges within the framework of American legal principles. Military justice should be efficient, speedy, and fair.



PROFESSIONAL RESPONSIBILITY

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MAJ Benjamin Grimes
Summer 2012

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PROFESSIONAL RESPONSIBILITY

I. REFERENCES.

A. Primary.

1. [Army Regulation 27-26, Rules of Professional Conduct For Lawyers \(1 May 92\).](#)
2. [The ABA Standards for Criminal Justice \(February 2008\).](#)
3. [The ABA Code of Judicial Conduct \(2007 edition\).](#)
4. [The Army Code of Judicial Conduct \(2008 edition\).](#)

B. Secondary.

1. [AR 27-1, Judge Advocate Legal Service \(30 SEP 96; RAR 13 SEP 11\).](#)
2. [AR 27-3, The Army Legal Assistance Program \(21 Feb 96; RAR 13 SEP 11\).](#)
3. DA Pam 27-173, *Trial Procedure* (31 Dec 92). 
4. [AR 27-10, Military Justice \(3 OCT 11\).](#)
5. [American Bar Association Model Rules of Professional Conduct \(Feb 2009 revisions\).](#)
6. [American Bar Association Model Code of Professional Responsibility \(Aug 1980\).](#)
7. Ingold, [An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers](#), 124 MIL. L. REV. 1 (1989).
8. ABA/BNA Lawyers' Manual of Professional Conduct.
9. The Legislative History of the Model Rules of Professional Conduct, ABA (1999).
10. The Annotated Model Rules of Professional Conduct, ABA (6th ed.).

C. Web sites

1. State ethics rules: <http://www.abanet.org/cpr/links.html#States>
2. ABA links to Professional Conduct material:
<http://www.abanet.org/cpr/pubs/ethicopinions.html>

II. INTRODUCTION.

III. SCOPE AND GOVERNING STANDARDS.

A. Regulatory Standards Imposed by the Army.

1. The Rules of Professional Conduct For Lawyers [hereinafter referred to as Army Rules].
 - a. Rules apply to:
 - (1) All Army judge advocates;
 - (2) Civilian attorneys employed by Department of the Army;
 - (3) Civilian attorneys appearing before courts-martial (AR 27-1, para. 7-4; AR 27-10, para. 5-8 and App. C; Glossary, Army Rules), and
 - (4) Army legal support personnel (i.e. 27Ds, interns, paralegals).
 - b. Attorneys must adhere to both the letter and the spirit of the rule.
 - c. Rules state a standard to be followed.
 - (1) Provide a basis for taking action should a lawyer fail to comply or meet the standard. Does not provide a basis for civil cause of action against either the Army or an attorney.

- (2) Comments are non-binding guidance.
 - 2. **State Rules.** "Every lawyer subject to these Rules is also subject to rules promulgated by his or her licensing authority or authorities." (Comment, Army Rule 8.5).
 - 3. **ABA Standards for Criminal Justice** also apply to military judges, counsel, and clerical support personnel of Army courts-martial (AR 27-10, para. 5-8).
 - a. Moe Starts
- B. Conflicts Between the Applicable Rules.
 - 1. **Army Rule 8.5** provides that if there is a conflict with state rules, the lawyer should seek assistance from his or her supervisory lawyer. If not resolved, then:
 - a. Army Rules supersede rules of licensing jurisdiction in the performance of official duties.
 - b. Army Rules do not control if attorney is practicing in state or federal civilian courts.
 - (a) The Basic Rule in conflicts is that the Army Rule Wins. The comments say that CONFLICTS are THEORETICAL, but may NOT be. For example, National Security Exemption to Confidentiality. So you may have to deal with a conflict between the Army rules and others. There is some help for you in the rule and we will discuss some practical methods of resolving the conflict. Remember, though, that the bottom line rule is that
 - (b) The PRIMARY THING, though, is to consult your supervisor. She may be able to help resolve the situation.
 - (c) SECOND, If you are in state or federal court follow those rules.
 - (d) So the Basics that come out of the Rule is that for official duties, the Army rules trump, for private matters, follow your state rules.
 - c. **ABA Model Rule 8.5.** Disciplinary authority must make a choice of law:
 - (1) For conduct in connection with a court action, apply the rules of the jurisdiction where the court sits.
 - (2) For other conduct, apply the rules of the jurisdiction in which the lawyer principally practices.
 - d. The ABA has amended its conflicts rule and the ARMY has not adopted it. However, your STATE may have. So there are a couple of things to consider.
 - e. FIRST, The Rule says that you apply the Courts rules if your in court and the rules of the place where you "principally practice" otherwise. PROBLEM: In Legal Assistance, where do you practice – where you are stationed? Where the client is from? Your home state?
 - f. SECOND, an exception to that general rule is that other rules may apply if the "predominant effect" of your action is in that jurisdiction. So you could end up with your state applying/interpreting the Army rules because that's where the predominant effect is.
 - g. BOTTOM LINE: Know your state's position. Otherwise, you won't be able to effectively manage conflicts.
 - h. NOW, lets get to the practical - you understand the Army's position and you are familiar with your state rules. There is a conflict, what do you do?
- C. Resolving Conflicts.

1. Judge advocates should follow the most restrictive standard. If a course of conduct is permitted under one standard and mandatory under another, follow the mandatory standard.
2. Employ practical alternatives, examples include:
 - a. Find the client new counsel.
 - b. Obtain exception from state bar. See, e.g., Oregon Informal Ethics Opinion 88-19, which provides that military lawyers will not be subject to discipline in Oregon as long as their conduct is not unethical under the applicable military code of ethics. NOTE: Discuss this option with your technical supervisory chain, to include the Standards of Conduct Office, if necessary.

IV. THE LAWYER-CLIENT RELATIONSHIP.

- A. Scope of Representation (Army Rule 1.2).
 1. A client's decisions concerning the objectives of representation are controlling on counsel. Counsel shall consult with the client as to the means by which these decisions are to be pursued. A lawyer may, however, limit the objectives of the representation with the client's consent.
 2. Example: Representation by Defense Counsel.
 - a. Client decides --
 - (1) Choice of counsel.
 - (2) What plea to enter.
 - (3) Selection of trial forum.
 - (4) Whether to enter into pretrial agreement.
 - (5) Whether to testify.
 - b. Defense counsel decides --
 - (1) What motions to make.
 - (2) Which court members to select.
 - (3) Which witnesses to call.
 - (4) How cross-examination will be conducted.
 - (5) General strategic and tactical decisions.
 - c. Comment to Army Rule 1.2; see also Standards for Criminal Justice 4-5.2(b)).
 3. A lawyer should assume responsibility for technical and legal tactical issues.
 4. A lawyer shall not counsel a client to engage in conduct the lawyer knows is criminal. (Army Rule 1.2(d))
- B. The Army as the Client (Army Rule 1.13).
 1. A judge advocate or other Army lawyer represents the Army acting through its authorized officials (e.g. commanders).
 2. The lawyer-client relationship exists between the lawyer and the Army.
 3. Regulations may authorize representation of individual clients. For example, legal assistance attorneys and defense counsel are authorized to represent individual clients, not the Army. See AR 27-1, para. 2-5 and AR 27-3, para. 2-3a.
 4. If not authorized to form an attorney-client relationship with the client, an Army lawyer must advise the individual that no such relationship exists between them. (Army Rule 1.13(b)).

5. While an attorney may be permitted by law or regulation to form an attorney-client relationship, situations may arise in which doing so may lead to a conflict. Army attorneys should exercise considerable discretion in handling the personal legal problems of Army officials, and receiving client confidences, when the Army attorney is not assigned to a client service organization such as Legal Assistance or Trial Defense Service.
 6. Illegal Acts: If an official of the Army (e.g., a commander) is acting illegally or intends to act illegally, and the action might be imputed to the Army, the lawyer shall--
 - a. Proceed as is reasonably necessary in the best interest of the Army.
 - b. Consider utilizing the following measures:
 - (1) Asking the official to reconsider.
 - (2) Advising the official to get a separate legal opinion.
 - (3) Advising the official that his or her personal legal interests are at risk and he or she should consult counsel.
 - (4) Advising the official that counsel is ethically bound to serve Army interests and must discuss the matter with supervisory lawyers.
 - (5) Referring the matter to or seeking guidance from higher authority in the technical chain of supervision.
 - c. If unsuccessful, the lawyer may terminate representation with respect to the matter in question.
 - d. Moe Starts
 - e. We are now going to talk about some very basic rules that we tend to overlook. However, they are critical. For example:
 - f. MN Bar Article - Feb. 1997: 35-40% of all disciplinary complaints are the result of neglecting the case (diligence) or lack of commo.
 - g. Of course, the first question is whether you are competent to handle the case in the first place.
- C. Competence (Army Rule 1.1).
1. Competence requires legal knowledge, skill, thoroughness, and preparation to the extent reasonably necessary for representation.
 - a. The required proficiency is that generally afforded to clients in similar matters.
 - b. Supervisor makes the initial determination as to competence for a particular assignment.
 - c. *United States v. Hanson*, 24 M.J. 377 (C.M.A. 1987). Judge believed defense counsel incompetent; properly appointed another detailed counsel without severing existing attorney-client relationship.
 - d. *United States v. Weathersby*, 48 M.J. 668 (Army Ct. Crim. App. 1998). Lack of defense sentencing case.
 - e. *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998). Lack of defense sentencing case in capital case.
 2. Principles
 - a. Know the law.
 - b. Know the consequences of conviction

- c. *United States v. Denedo*, 2010 WL 996432 (UNPUBLISHED) (N.M.Ct.Crim.App.). A civilian defense counsel’s bad advice on immigration consequences of guilty plea did not render plea involuntary. *But see: U.S. v. Miller* (duty to warn of sex registration offenses) and *U.S. v. Rose* (duty to answer questions about sex registration) *infra*.
 - d. *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). Padilla is a U.S. permanent resident of forty years who served in the U.S. military during Vietnam. He was charged with felony drug trafficking, among other things. He asked his attorney if a guilty plea would impact his immigration status, and his attorney told him he “did not have to worry about immigration status since he has been in the country so long.” Padilla’s attorney’s advice was incorrect and but for his appeal that he pled guilty in reliance on his attorney’s advice, he would have been deported. While the Supreme Court did not decide the ultimate issue of whether there was prejudice in this case, they did grant a new entitlement under the Sixth Amendment that Justice Scalia in his dissent terms a “Padilla warning” that now requires that where the law “is truly clear,” as the court found in this case, “the duty to give correct advice is equally clear.” *See also: United States v. Vargaspuentes*, 70 M.J. 501 (A.C.C.A. 2011) addressing the need to properly advise in an immigration case. Because the court resolved the case on other grounds, it did not substantively address counsel’s duty to investigate when a Soldier’s birthplace is listed as outside the U.S. on the ERB, but noted the point in passing.
 - e. *United States v. Larson*, 66 M.J. 212 (C.A.A.F. 2008). A defense counsel may concede guilt on lesser charges to gain credibility on the main charge despite an accused’s NG plea.
 - f. Psychotherapist-patient privilege. *United States v. Paaluhi*, 54 M.J. 181 (C.A.A.F. 2000). Trial Defense Counsel erroneously interpreted possible psychotherapist-patient privilege in the military. The CAAF reversed lower court’s judgment and set-aside appellant’s conviction and sentence, because defense counsel rendered ineffective assistance in improperly evaluating military privilege law. The resulting confession secured Paaluhi’s conviction. Without his confession there might have been reasonable doubt as to his guilt.
3. A lawyer can provide adequate representation in a wholly novel field through necessary study or consultation with a lawyer of established competence in the field in question.
 4. If a lawyer becomes involved in representing a client whose needs exceed either the lawyer’s competence or authority to act, the lawyer should refer the matter to another lawyer.
 5. Lawyers may give advice and assistance even if they do not have skill ordinarily required if referral or consultation with another lawyer is impractical.
- D. Diligence (Army Rule 1.3).
1. Lawyers must act with reasonable diligence and promptness.
 - a. *United States v. Gibson*, 51 M.J. 198 (C.A.A.F. 1999). Civilian defense counsel found ineffective where the CDC failed to pursue leads contained in the CID report that was provided by the trial counsel. The accused was charged with rape and adultery. The undeveloped information in the CID report included summarized interviews with teachers and students at the 15 year old victim’s school, that she may have alleged rape to distract school officials from her behavior, that she had a record of exaggerating her sexual experience, that she related conflicting versions of the alleged rape, and that she did not enjoy a good reputation for truthfulness.

- b. *Porter v. McCollum*, 130 S. Ct. 447, 454 (2009). Attorney required to perform adequate background investigation and present evidence in sentencing even if client not helpful. Defendant's status as a veteran and his struggles with posttraumatic stress disorder and subsequent substance, as well as his impaired mental capacity and abusive childhood is highly relevant mitigation evidence.
- c. *United States v. Boone*, 42 M.J. 308 (Army Ct. Crim. App. 1996), *rev'd* 49 M.J. 187 (1998). In cases where the client has retained civilian defense counsel, military defense counsel must not be lulled into inactivity and complete deference to their civilian counterparts; military defense counsel are not relieved of professional or ethical obligations to the client.
- d. *United States v. Sorbera*, 43 M.J. 818 (A.F. Ct. Crim. App. 1996). Civilian defense counsel whose advice to accused led to an additional charge provided incompetent pretrial representation.
- e. *United States v. McDuffie*, 43 M.J. 646 (A.F. Ct. Crim. App. 1995); *see also* ABA Standard for Criminal Justice 4-4.3(b). Defense counsel has no professional obligation as part of trial preparation to discuss pertinent evidentiary rules with a witness.
- f. Post-trial submissions. *United States v. Johnston*, 51 M.J. 227 (C.A.A.F. 1999). The record of trial was returned to the convening authority for a new recommendation and action. The new post trial recommendation was served on the accused's defense counsel, who was then a civilian. Substitute counsel was not appointed. The new recommendation was not served on the accused, nor did the defense counsel contact the accused. No matters were submitted by the accused or counsel. The court found the accused was not represented at a critical point in the proceedings against him in violation of Article 27 (b).
- g. *United States v. Wean*, 45 M.J. 461 (C.A.A.F. 1997). After post-trial 39a hearing, MJ concluded, "the collective failings and inactions . . . resulted in representation of the appellant that was lacking in legal knowledge, skill, thoroughness, and preparation."
- h. *United States v. Fordyce*, 69 M.J. 501 (Army Ct. Crim. App. 2010). DC neglected to advise on waiver and Post Trial and Appellate Rights (PTAR) form did not cover it. The court has found this to be an ongoing problem and their "patience is at a limit." There was also question whether client consulted on clemency submissions. Court highly encourages an accused co-sign R.C.M. 1105 and 1106 submissions, as well as putting it on the record the client has fully been advised of the post-trial submission process. Court did not find counsel ineffective but found error in the post-trial handling of the case because the court was not convinced the appellant was "afforded a full opportunity to present matters to the convening authority." Consequently, the court set aside the action and returned it for a new one.
- i. Qualifications of Counsel. *United States v. Williams*, 51 M.J. 592 (N.M.Ct.Crim.App. 1999). Appellant contended that his civilian defense counsel was ineffective *per se* because he was on "inactive status" with respect to his admissions to practice law in three states. The Navy- Marine Court disagreed and found nothing in R.C.M. 502(d)(3)(A) requiring the practitioner to be able to practice in the home state. 51 M.J. at 597. Counsel had submitted to the trial court various related documents to include one affirming that he was a "lawyer in good standing" in the state of Iowa. *See also U.S. v. Morris*, 54 MJ 898 (N.M.Ct.Crim.App. 2001). DC's inactive status with his state bar does not make him *per se* ineffective or deprive the appellant of the right to counsel; *U.S. v. Steele*, 53 M.J. 274 (2000). CDC's inactive status with his state bar does not make him *per se* ineffective or deprive the appellant of the right to counsel.

- j. Notification of requirement to register. *United States v. Miller*, 63 M.J. 452 (C.A.A.F. 2006). Appellant averred that he was never told that pleading to an offense of possessing child pornography would require him to register as a TX sex offender. His failure to register led him to be incarcerated in TX. The court failed to find IAC for failure to inform the accused. The court did specify for cases tried after November 2006 that counsel must notify accused that any qualifying offense under DODI 1325.7 (sex + violence or minority) requires sex offender registration.
 - k. Obligation to answer reasonable questions. *United States v. Rose*, __ M.J. __ (C.A.A.F. 2012). IAC where defendant's reasonable request for information regarding sex offender registration went unanswered which resulted in accused pleading guilty when he otherwise would not have if he had known the answer to his question.
 - 2. Lawyers must consult with clients as often as necessary.
 - 3. A lawyer should carry through to conclusion all matters undertaken for a client.
- E. The Lawyer as Advisor.
 - 1. A lawyer may refer to moral, economic, social, and political factors when rendering advice to clients (Army Rule 2.1).
 - a. Purely technical legal advice may sometimes be inadequate.
 - b. NOT a moral advisor as such. Discuss how other factors influence the way the law will be applied.
 - c. For a discussion of some ways such "beyond the law" topics can be integrated into client counseling, see these articles by CPT Evan Seamone: [*Attorney as First Responder: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veterans' Legal Decision-Making Process*](#) (202 Mil. L. Rev., 144-184 (2009)), [*Veterans' Lawyer as Counselor: Using Therapeutic Jurisprudence to Enhance Client Counseling for Combat Veterans With Posttraumatic Stress Disorder*](#) (202 Mil. L. Rev., 185-257 (2009)), and [*Divine Intervention: The Ethics of Religion, Spirituality, and Clergy Collaboration in Legal Counseling*](#) (29 Quinnipiac L. Rev., 289-373 (2011)).
 - 2. Lawyers must exercise independent judgment when advising a client (Army Rule 5.4).
 - a. Rule explicitly allows for individual representation when detailed or assigned.
 - b. Unfettered loyalty & professional independence to the same extent as lawyers in private practice when assigned individual client.
- F. Communication (Army Rule 1.4).
 - 1. Lawyers have a duty to keep clients reasonably informed about the status of a matter and to comply with client requests for information.
 - 2. Lawyers also must explain matters to clients to permit them to make "informed decisions."
- G. Confidentiality (Army Rule 1.6).
 - 1. General rule. A lawyer shall not reveal any information relating to the representation of a client.
 - a. Applies to all sources of information, not just that which comes from the client.
 - b. Applies to information obtained prior to formation of attorney-client relationship.
 - c. The duty of confidentiality continues after the lawyer-client relationship has terminated.
 - d. The duty also applies to Army legal support personnel.

2. Exceptions to confidentiality.
 - a. A client may consent to disclosure of confidences (Army Rule 1.6(a)).
 - b. Disclosure may be impliedly authorized in order to carry out the representation (Army Rule 1.6(a)). (See, e.g. *United States v. Province*, 45 M.J. 359 (C.A.A.F. 1997).)
 - c. Disclosure is permitted to establish a claim or defense in a controversy with a client (Army Rule 1.6(b)).
 - d. Intention to commit a crime.
 - (1) Army Rule 1.6(b) mandates disclosure of information a lawyer reasonably believes necessary to prevent a client from committing a crime which is likely to:
 - (a) result in imminent death or substantial bodily harm, or
 - (b) significantly impair the readiness or capability of a military unit, vessel, aircraft, or weapon system.
 - (2) There is no authority for revealing information of other potential offenses or past crimes under the Army Rules. Example: no obligation to reveal the whereabouts of a fugitive nor to disclose the location of contraband. This conforms to the ABA Rules; see ABA Formal Opinion 84-349 (1984).
 - e. Compare to Mil. R. Evid. 502 - Lawyer-Client Privilege.
 - (1) Protects against disclosure of privileged communication between attorney and client.
 - (2) Does not protect against other disclosures (*e.g.*, information gained from sources other than the client).
 - (3) More narrow than Rule 1.6 (*e.g.*, no restriction to just future crimes).

H. Terminating the Relationship. (Army Rule 1.16)

1. Notwithstanding any other provision of the rule, a lawyer shall continue the representation when ordered to do so by a tribunal or other competent authority.
2. A lawyer SHALL seek withdrawal (or not commence representation) if -
 - a. the representation will violate the rules
 - b. the lawyer's physical or mental condition materially impairs her ability to represent the client; OR
 - c. the lawyer is dismissed by the client.
3. A lawyer MAY seek withdrawal if it can be accomplished without material adverse impact to the client's interests OR -
 - a. the client persists in a course of action which the lawyer reasonably believes to be criminal or fraudulent;
 - b. the client has used the lawyer's services to perpetrate a crime or a fraud;
 - c. the client persists in pursuing an objective which the lawyer considers repugnant or imprudent; OR
 - d. other good cause for withdrawal exists.
4. A lawyer must take reasonable steps to protect a client's interests upon termination of the relationship (Army Rule 1.16).
5. Steps should include giving notice to the client, allowing time for employment of other counsel, and surrendering all papers and property.

6. *United States v. Spriggs*, 52 M.J. 235 (C.A.A.F. 2000). TDS counsel represented Spriggs at a prior court-martial resulting in an acquittal. After additional charges were preferred, including perjury charges from his first court-martial, appellant made an IMC request for his first DC. DC had left active duty. The CAAF ruled that release of the TDS counsel from active duty constituted good cause for severance of the attorney-client relationship. Additionally, appellant did not establish that there was an ongoing attorney-client relationship. *But see United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011). Court faulted the judge for not establishing reason for DC withdraw prior to DC resigning from military service after being part of the trial defense team for a year. The court found there was not a knowing release and allowing the DC to EAS (ETS in the Army) because he had completed his commitment did not constitute “good cause.” Unlike NMCCA, however, CAAF was unwilling to presume prejudice and did not set aside the findings or approved sentence. CAAF has further opined, in the matter of Frank D. Wuterich, Appellant CCA 200800183, that in the event of a termination, particularly where there is a conflict involved, the military judge should ensure there is a verbatim transcript that reflects the facts, nature, type, and source of the conflict.

I. Fees and Self-Referral (Army Rule 1.5).

1. A lawyer shall not accept a gratuity, salary or other compensation from a client for services performed as an officer of the U.S. Army.
2. A lawyer shall not receive compensation for making a referral of a client to a private practitioner.
3. A legal assistance attorney shall not receive any actual or constructive compensation or benefit for referring to a private-practitioner (including himself) a matter the lawyer first became involved with in a military legal assistance capacity. Comment to Army Rule 1.5; see also AR 27-3, para. 4-7d & d(1).
 - a. Does not subsequently prohibit a reserve component lawyer from representing military personnel or dependents in a private capacity so long as the representation does not concern the “same general matter” that the attorney provided legal assistance on. AR 27-3, para. 4-7d(2) & (3) “Same general matter” means
 - (1) One or more types of cases within any one of the ten categories of legal assistance; OR
 - (2) Which arises out of the same factual situation or course of events.
 - b. Prohibits lawyer from using official position to solicit or obtain clients for private practice.

J. Conflicts of Interest (Army Rules 1.7, 1.8 & 1.9).

1. Directly adverse to the current client. A lawyer shall not represent a client if the representation of the client will be directly adverse to another client unless:
 - a. The lawyer reasonably believes the representation will not adversely affect the other relationship, and
 - b. Each client consents after consultation (Army Rule 1.7(a)).
 - c. If a conflict develops after representation has been undertaken, the attorney must seek to withdraw. The Army Rules adopt an objective approach. Relevant factors in determining whether multiple representation should be undertaken include:
 - (1) duration and intimacy of the lawyer's relationship with the clients involved,
 - (2) likelihood actual conflict will arise, and
 - (3) likely prejudice to the client if conflict does arise.
 - d. Potential conflicts in legal assistance:

- (1) Estate planning.
 - (2) Debtor-creditor and seller-purchaser. *Compare Atlantic Richfield Co. v. Sybert*, 456 A.2d 20 (1983) (no conflict) with *Hill v. Okay Construction Co.*, 252 N.W. 2d 107 (1977) (conflict).
 - (3) Domestic relations. *Coulson v. Coulson*, 448 N.E.2d 809 (1983); *Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).
- e. Potential conflict in criminal practice -- representing multiple accused.
- (1) Ordinarily a lawyer should refuse to act for more than one of several co-defendants (Comment to Army Rule 1.7). *See Standards for Criminal Justice 4-3.5(b)*.
 - (2) Consult AR 27-10 and USATDS SOP for procedures on handling a co-accused situation. Generally:
 - (a) Co-accused will initially be contacted by separate defense counsel.
 - (b) Co-accused may submit request for the same individual military counsel.
 - (c) Chief, USATDS decides whether to grant the request. No request will be granted unless each co-accused has signed a statement reflecting informed consent to multiple representation and it is clearly shown that a conflict of interest is not likely to develop.
2. Representation materially limited. A lawyer is also precluded from representing a client if the representation would be materially limited by the lawyer's responsibility to another client, a third party, or by the lawyer's own interests (Army Rule 1.7(b)). Example: Defense counsel materially limited by loyalty to Army. *United States v. Bryant*, 35 M.J. 739 (A.C.M.R. 1992).
- a. A possible conflict does not preclude representation.
 - b. Representation is permitted if the lawyer reasonably believes that it will not be adversely affected by the interest and the client consents after consultation.
3. Business transactions. A lawyer shall not enter into a business transaction with a client (Army Rule 1.8).
4. Former client. A lawyer who has represented a former client shall not thereafter represent another person in the same matter or use information to the disadvantage of a former client (Army Rule 1.9).
- K. Imputed Disqualification (Army Rule 1.10).
1. Lawyers working in the same military law office are not automatically disqualified from representing clients with conflicting interests. A functional analysis is required (Army Rule 1.10. Compare ABA Model Rule 1.10.)
 2. Army policy may discourage representation of both parties in certain instances, e.g. AR 27-3, para. 4-9c. (Representation of both parties in a domestic dispute discouraged).

V. THE LAWYER AS AN ADVOCATE.

- A. Disclosure of Adverse Legal Authority (Army Rule 3.3).
1. A lawyer shall not knowingly fail to disclose to the tribunal, legal authority in the controlling jurisdiction, known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.
 2. A lawyer should disclose authority from a collateral jurisdiction if the judge "would reasonably consider it important to resolving the issue being litigated." (Comment to Army Rule 3.3). ABA Formal Opinion 280 (1949); ABA Informal Opinion 84-1505 (March 1984).

- B. Disruption of the Tribunal (Army Rule 3.5(c)).
- C. Expressing Personal Opinion at Trial (Army Rule 3.4(e)).
- D. Trial Publicity (Army Rule 3.6).
 - 1. A lawyer shall not make public statements that will have a substantial likelihood of prejudicing a proceeding. *See Gentile v. Nevada State Bar*, 111 S. Ct. 2720 (1991).
 - 2. Other publicity considerations.
 - a. TJAG Memorandum on Relations with News Media - OSJA attorneys must get approval from their SJA before any information is released to the media.
 - b. USATDS SOP - Defense counsel must consult with their Regional Defense Counsel and the Office of the Chief, TDS, prior to release. The ultimate decision to release information rests with the defense counsel, however.
 - 3. Information that is releasable is listed at Rule 3.6(c).
- E. *Ex Parte* Discussions with Military Judge and Panel Members (Army Rule 3.5).
 - 1. A lawyer shall not communicate *ex parte* with a judge or juror except as permitted by law. *See United States v. Copening*, 34 M.J. 28 (C.M.A. 1992); *United States v. Hamilton*, 41 M.J. 22 (C.M.A. 1994).
 - 2. It is unprofessional conduct for a prosecutor to engage in unauthorized *ex parte* discussions with or submission of material to a judge relating to a particular case that is or may come before the judge (Standards for Criminal Justice 3-2.8(c)).
- F. Prosecutorial Disclosure (Army Rule 3.8(d)).
 - 1. A lawyer prosecuting a criminal case shall make timely disclosure to the defense of all evidence or information known to the lawyer that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigation information known to the lawyer.
 - 2. This is commonly referred to as “Brady” material and failure to turn it over is a “Brady Violation” after the case *Brady v. Maryland*, 373 U.S. 83 (1963).
- G. Handling Evidence or Contraband (Army Rule 3.4(a)).
 - 1. If the client informs the lawyer of the existence of the evidence but does not relinquish possession.
 - a. Lawyer should inform the client of the lawyer's legal and ethical obligations regarding the evidence.
 - b. Lawyer should refrain from either taking possession or advising the client what to do regarding the evidence.
 - 2. If the lawyer receives the evidence or contraband.
 - a. A lawyer shall not --
 - (1) Unlawfully obstruct another party's access to evidence
 - (2) Unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or
 - (3) Assist another person to do so.

- b. A lawyer who receives an item of physical evidence implicating the client in criminal conduct shall disclose the location of or shall deliver that item to proper authorities when required by law or court order (Comment, Army Rule 3.4(a)). *United States v. Rhea*, 33 M.J. 413 (C.M.A. 1991) (defense counsel have a duty to surrender evidence which implicates their clients to prosecution). But see also *United States v. Province*, 45 M.J. 359 (1997) (no duty where Government has equal access to evidence).
 - c. If a lawyer receives contraband, the lawyer has no legal right to possess it and must always surrender it to lawful authorities (Comment, Army Rule 3.4).
 - d. If a lawyer receives stolen property, the lawyer must surrender it to the owner or lawful authority to avoid violating the law (Comment, Army Rule 3.4).
 - e. Concealment, destruction, alteration, etc. could be a violation of UCMJ art. 134, Obstruction of Justice.
3. If the lawyer discloses the location of or delivers an item of physical evidence to proper authorities, it should be done in a way designed to protect the client's interests, including -
- a. Client's identity.
 - b. Client's words concerning the item.
 - c. Client's privilege against self-incrimination.
 - d. Other confidential information.
4. Advice on handling evidence or contraband:
- a. Do not accept the item!!
 - b. Advise the client of the consequences of continued possession and voluntary turn-in. Do not advise the client of what to do regarding the evidence. Also advise the client of the lawyer's obligations regarding the evidence.
 - c. If possession cannot be avoided, turn it over to the proper authorities.
 - (1) Don't dispose of it or conceal it.
 - (2) Don't destroy or alter the evidentiary quality.
 - (3) Upon turn-in, refuse to disclose client identity and circumstances of your possession to the extent permitted by applicable case law.
- H. Client Perjury (Army Rule 3.3; ABA Formal Opinion 87-353 (1987)).
1. A lawyer who knows that his client intends to testify falsely should (must under ABA formal opinion):
- a. Advise the client not to do so and explain the consequences of doing so, including the lawyer's duty to disclose.
 - b. Attempt to withdraw (if the lawyer's efforts to dissuade the client from testifying falsely are unsuccessful).
 - c. Limit examination to truthful areas.
 - d. If not possible, disclose to the tribunal the client's intention to commit perjury.
 - e. A lawyer who knows that the client has already testified falsely must:
 - (1) Persuade the client to rectify it.
 - (2) Disclose the perjury if unsuccessful.

- f. A lawyer "knows" that a client intends to testify falsely if the accused has admitted facts to the lawyer which establish guilt and the lawyer's independent investigation establishes that the admissions are true, but the accused insists on testifying (Comment, Army Rule 3.3).
2. *United States v. Baker*, 65 MJ 691 (C.A.A.F. 2007). Provides additional nonbinding guidance on how defense counsel and military trial judges should handle issues of client perjury at trial. Counsel should:
 - a. Conduct an investigation into all evidence prior to taking any action with regard to the alleged perjury.
 - b. Ethical obligations only exist if you have a "firm factual basis" to conclude that client has committed perjury.
 - c. Review potential consequences with client.
 - d. Request an on the record ex-parte discussion with the Military Judge to notify the military judge that the client will testify in narrative form without benefit of counsel *without* expressing why.
 - e. Refrain from using the perjured testimony in any way (i.e. in argument, cross or direct of other witnesses.)
- I. Witness Perjury (Army Rule 3.3).
1. Avoiding the use of perjured testimony.
 - a. When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes (Army Rule 3.3).
 - b. "A lawyer may refuse to offer evidence that the lawyer reasonably believes is false." (Army Rule 3.3(c)).
 2. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures (Army Rule 3.3(a)(4)). This obligation ends at the conclusion of the proceeding. (Comment—*Duration of Obligation*).
- J. Prosecutorial Conduct.
1. The duty of the prosecutor is to seek justice, not merely to convict. ABA Standard 3-1.2c.
 - a. A lawyer prosecuting a criminal case shall recommend to the convening authority that any charge or specification not warranted by the evidence be withdrawn. Military Rule 3.8(a).
 - b. A prosecutor should not intentionally avoid pursuit of evidence because he believes it will damage the prosecution's case or aid the accused. ABA Standard 3-3.11c.
 - c. Trial counsel should report to the convening authority any substantial irregularity in the convening orders, charges, or allied papers . . . bring to the attention of the convening authority any case in which trial counsel finds trial inadvisable for lack of evidence or other reasons (R.C.M. 502(d)(6) (Discussion)).
 2. Cross-examination of a truthful witness. ABA Standard 3-5.7.
 - a. Fair and objective cross-examination is permitted.
 - b. Unnecessary intimidation and humiliation of witness on cross-examination is prohibited.
 - c. If the prosecutor *believes* that the witness is truthful.
 - (1) Cross-examination is not precluded.

- (2) But manner and tenor ought to be restricted.
- d. If the prosecutor *knows* that the witness is truthful, cross-examination may not be used to discredit or undermine the truth.
- 3. It is unprofessional conduct for a prosecutor knowingly to make false statements or representations in the course of plea discussions. ABA Standard 3-4.1c.
- 4. A prosecutor may argue to the jury all reasonable inferences from the evidence in the record, but it is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw. Rule 3.4(e); ABA Standard 3-5.8(a).
- 5. It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. Rule 3.4(e); ABA Standard 3-5.8(b)..
- 6. Prosecutors should not:
 - a. Make arguments calculated to inflame the passions or prejudices of the jury. ABA Standard 3-5.8c.
 - (a) *United States v. Difffoot*, 54 M.J. 149 (2000). Comments made by the trial counsel during closing argument regarding accused's ethnicity and urging a conviction based on guilt by association amounted to plain error and materially prejudiced appellant's substantial rights.
 - b. Make arguments that would divert the jury from its duty to decide the case on the evidence. ABA Standard 3-5.8(d).
 - (a) *United States v. Baer*, 53 M.J. 235 (C.A.A.F. 2000). The CAAF held that golden rule arguments asking the members to put themselves in the victim's place are improper and impermissible in the military justice system. However, they did recognize the validity of an argument asking the members to imagine the victim's fear, pain, terror and anguish. When improper argument is made, it must be looked at in context to determine whether it substantially impacted on the right of the accused to a fair and impartial trial. The CAAF held no such impact here and affirmed the case.
 - c. Ask the defendant during cross-examination to comment on the truthfulness of other witnesses.
 - (a) *United States v. Harrison*, 585 F.3d 1155 (9th Cir. 2009), where the SAUSA asked the defendant to comment on the truthfulness of the MP's he allegedly assaulted.
- 7. Threaten Criminal Prosecution

- (a) Under ABA Code DR 7-105, lawyers could not present, participate in presenting, or threaten to present criminal charges "solely to gain an advantage in a civil matter." See *Iowa State Bar v. Michelson*, 345 N.W.2d 112 (Iowa 1984); TJAG Opinions, *The Army Lawyer*, March 1993 and May 1977. See also *United States v. Edmond*, 63 M.J. 343 (C.A.A.F. 2006) where a trial counsel threatened a civilian witness (former Soldier) with prosecution by the SAUSA if he testified and then had the SAUSA reiterate the threat of prosecution.
 - (b) There is no parallel provision in the Army Rules (or ABA Model Rules). Threatening or filing criminal charges may, however, violate more narrow provisions of Rules 3.1, 3.3, 3.4, 3.5, 3.8, 4.4, 8.4(b), or 8.4(e).
8. Prosecutors may refer to or argue facts outside the record only if the facts are matters of common public knowledge based on ordinary human experience. ABA Standard 3-5.9.
9. Vindictive Prosecution
- (1) To support a claim of vindictive prosecution, one must show that (1) "others similarly situated" were not charged; (2) "he has been singled out for prosecution"; and (3) "his 'selection . . . for prosecution' was 'invidious or in bad faith, *i.e.*, based on such impermissible considerations such as race, religion, or the desire to prevent his exercise of constitutional rights.'" Failure to show any of the three prongs of the test must result in the failure of a claim of vindictive prosecution. Because the burden to establish a claim of vindictive prosecution falls on the moving party, challenging a case on grounds of vindictive prosecution can be difficult. See *Unites States v. Martinez*, 2009 WL 1508451 (A.F. Ct. Crim. App. 2009). Air Force Captain alleged that he had "identified problems with operating procedures, equipment and standard of care," which he claimed irritated the SJA, convening authority, the Article 32 IO, the judge, TC, DC, "and a myriad of others."

K. Lawyer as a Witness (Army Rule 3.7).

- 1. A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
 - a. The testimony relates to an uncontested issue;
 - b. The testimony relates to the nature and quality of legal services rendered in the case; or
 - c. Disqualification of the lawyer would work a substantial hardship on the client.
- 2. Unless the lawyer for the accused is prepared to forego impeachment of a witness by the lawyer's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, the lawyer should avoid interviewing a prospective witness except in the presence of a third person. Standards for Criminal Justice 4-4.3(d).

VI. OBLIGATIONS TO THIRD PARTIES.

A. Truthfulness in Statements to Others.

- 1. A lawyer shall not make a false statement of law or fact to third parties (Army Rule 4.1(a)).
 - a. Knowledge of falsity generally required.
 - b. Misrepresentations can occur if a lawyer affirms a false statement of another person.

2. A lawyer may not fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act, unless disclosure is prohibited by Rule 1.6 (Army Rule 4.1(b)).
 3. A lawyer also has an obligation to disclose prior misstatements.
- B. Respect for the Rights of Third Parties (Army Rule 4.4).
1. A lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third party or use methods of obtaining evidence that violate the rights of third parties (Army Rule 4.4).
 2. Other obligations to third parties:
 - a. A lawyer has a duty of candor when dealing with third parties. *People v Berge*, 620 P.2d 23 (Colo. 1980).
 - b. A lawyer is forbidden from engaging in illegal, dishonest, and fraudulent conduct. *Office of Disciplinary Counsel v Kissel*, 442 A.2d 217 (Pa. 1982).
 - c. Lawyers must not make derogatory remarks about opposing counsel or opposing parties. Professional Responsibility, *The Army Lawyer* (Sept. 1978) ("lowly, dishonest, welsher"). See also *State v Turner*, 538 P.2d 966 (Kan. 1975).
- C. Communications with Opposing Parties.
1. A lawyer shall not discuss a case with another party who is represented by an attorney (Army Rule 4.2). See also ABA Code DR 7-104.
 - a. A lawyer may not accomplish communication indirectly through an agent or encourage clients to contact opposing parties.
 - (a) Trial counsel, following on the heels of military defense counsel, barged into a meeting between civilian defense counsel and accused. Trial counsel proceeded to tell the accused that his civilian lawyer had not interviewed witnesses and was ineffective. This was inappropriate contact with the accused. *United States v. Meek*, 44 M.J. 1 (C.A.A.F. 1996).
 - b. Communication with a party concerning matters outside the representation is permissible.
 - c. A lawyer may communicate with the commander of an opposing party even if the party is represented by counsel.
 2. A lawyer is not precluded from communicating with an unrepresented party (Army Rule 4.3).
 - a. Lawyers may not state or imply that they are disinterested.
 - b. Lawyers should refrain from giving advice to unrepresented persons (Comment to Army Rule 4.3). See also ABA Code DR 7-104(A)(2).
- D. Threatening Criminal Prosecution.
1. Under ABA Code DR 7-105, lawyers could not present, participate in presenting, or threaten to present criminal charges "solely to gain an advantage in a civil matter." See *Iowa State Bar v. Michelson*, 345 N.W.2d 112 (Iowa 1984); TJAG Opinions, *The Army Lawyer*, March 1993 and May 1977. See also *United States v. Edmond*, 63 M.J. 343 (C.A.A.F. 2006) where a trial counsel threatened a civilian witness (former Soldier) with prosecution by the SAUSA if he testified and then had the SAUSA reiterate the threat of prosecution.
 2. There is no parallel provision in the Army Rules (or ABA Model Rules). Threatening or filing criminal charges may, however, violate more narrow provisions of Rules 3.1, 3.3, 3.4, 3.5, 3.8, 4.4, 8.4(b), or 8.4(e).

3. Practical application.
 - a. Attorneys should exercise caution when writing to collect support payments or debts on behalf of clients. *See Iowa State Bar v. Michelson*, 345 N.W.2d 112 (Iowa 1984); OTJAG Ethics Opinions, *The Army Lawyer*, March 1993, September 1978, and May 1977.
 - b. Complaints to the opposing party's commander are permissible.
 - c. Lawyers should avoid making threats of initiating criminal charges. A lawyer may not circumvent this rule by encouraging clients to make threats. *In re Charles*, 618 P.2d 1281 (1980).
 - d. Neutral statements of fact concerning criminal penalties are permissible. *See* TJAG Professional Responsibility Opinion 89-01. (Found on JAGCNET under Administrative and Civil Law, then click on "Ethics: Attorney Professional Responsibility," click "By Category." One of the categories is "Ethics Opinions: TJAG's PRC." <https://www.jagcnet2.army.mil/85256762006321e7>)

VII. DUTIES OF SUBORDINATES AND SUPERVISORS.

- A. Responsibilities of Supervisory Attorneys (Army Rule 5.1).
 1. Supervisors must make reasonable efforts to ensure subordinates comply with Rules (Army Rule 5.1). Includes nonlawyers under supervision (Army Rule 5.3).
 2. A supervisor assumes imputed responsibility for acts of subordinates if:
 - a. The lawyer orders or ratifies a subordinate's violation, or
 - b. The lawyer knows of and fails to take remedial action to avoid or mitigate the consequences of a violation.
- B. Responsibilities of Subordinate Attorneys (Army Rule 5.2).
 1. A subordinate is bound by the Rules of Professional Conduct even if he or she acts at the direction of another.
 2. Subordinate attorneys may rely on ethical judgment of a supervisor if the issue is subject to question. If the ethical question can be answered only one way, the subordinate must comply with the Rules.

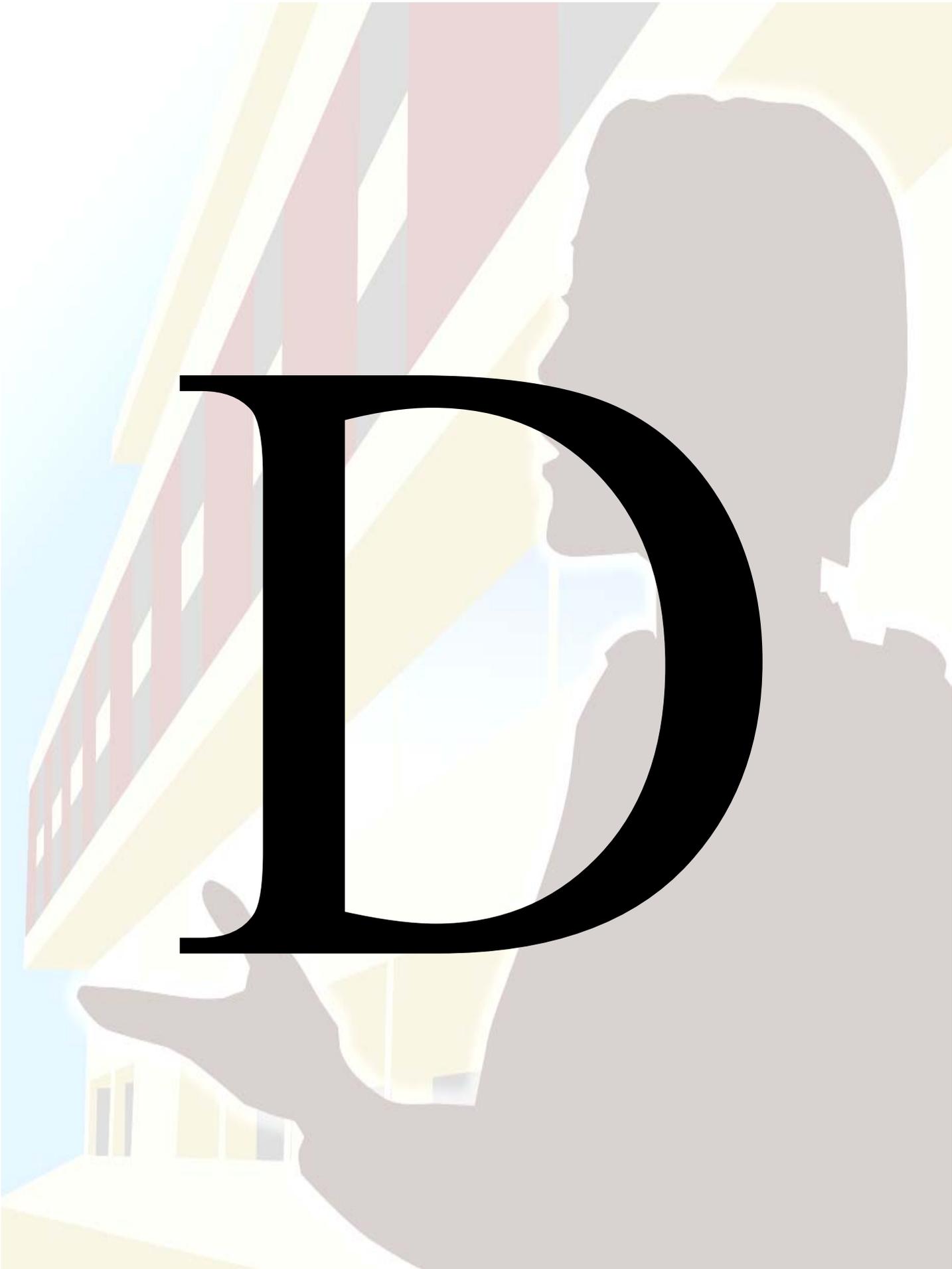
VIII. PROFESSIONAL RESPONSIBILITY COMPLAINTS.

- A. Professional Misconduct (Army Rule 8.4).
 1. It is professional misconduct for a lawyer to violate or attempt to violate these rules, to do so through the acts of others, or to knowingly assist another in violating the rules.
 2. A lawyer is professionally answerable for criminal acts that indicate lack of a characteristic relevant to the practice of law. Examples include offenses involving violence, dishonesty, breach of trust, or interference with justice.
 3. A lawyer also commits professional misconduct by engaging in conduct (even if not criminal) involving dishonesty, fraud, deceit, or misrepresentation, or that is prejudicial to the administration of justice.
- B. Professional misconduct distinguished from personal misconduct.
 1. Cases normally in the scope of AR 27-1.
 - a. Dishonesty – false claims, shoplifting, obtaining false official orders, firearms violations, stalking, or illegal surveillance.
 - b. Sexual misconduct – Bigamy, sexual relationships involving a conflict of interest, sexual crimes.

- c. Insulting Behavior – Mismanaging by uttering insulting ethnic or sexual comments, displaying offensive visual material or by inappropriate touching of subordinates, clients, witnesses, or staff workers.
 - d. Dealing with Subordinates – Mismanaging by having personal business transactions with subordinates or imposing on subordinates for personal favors.
 - 2. Cases normally not in scope of AR 27-1.
 - a. Discretionary Administrative Action – OERs, NCOERs, award recommendations, pass, or leave actions.
 - b. Personal misconduct or questionable sexual activity (including adultery) unless it involves mismanagement or is a criminal act that reflects on fitness to practice law (i.e. having sex with a married client).
 - c. DWIs or minor traffic offenses.
 - d. Insulting Behavior – rudeness and name-calling unless directed toward judges or investigating officers or as listed in C.1.c., above.
 - e. Conduct is being investigated as criminal misconduct, punishable under the UCMJ.
- C. Reporting Misconduct (Army Rule 8.3).
 - 1. A lawyer with knowledge of a violation of a Rule of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer, must report the violation.
 - 2. Minor or inadvertent violations need not be reported.
 - 3. Disclosure of information protected under Rule 1.6 is not required.
 - 4. There is no requirement to confront a violator.
 - 5. Army system implemented in AR 27-1.
 - a. Allegations are reviewed by several supervisory JAs up to and including DJAG before a formal preliminary screening inquiry (PSI) is ordered.
 - b. Increased due process protections for the accused attorney.
 - c. Designed to protect the interests of both the Army and the attorney.
 - d. OTJAG determines whether to report violation to state bar.
- D. Self-Reporting Requirement (AR 27-1).
 - 1. AR 27-1, para 7-10a. A JA is required to self-report to OTJAG (Professional Responsibility Branch) when he or she is first notified that he or she is being investigated by his or her licensing authority under circumstances that could result in being disciplined as an attorney or a judge.
 - 2. If a JA claimed they had never been notified as his or her defense for not self-reporting, TJAG could still, at his discretion, decide that he has lost faith and trust in the JA and could then discipline the JA IAW his authority under Art 27(b) and RCM 109(a) of the UCMJ and under 10 USC 3037.
- E. Advisory Opinions (AR 27-1, para. 7-7).
 - 1. Requests should be forwarded through technical channels to the Executive, OTJAG.
 - 2. Opinions will be rendered only for important issues of general applicability to the JAG Corps.
- F. Determining Ineffective Assistance of Counsel (IAC).

1. The Supreme Court has recognized that simply providing counsel is insufficient to meet the burden imposed by the Sixth Amdt. of the U.S. Constitution. “That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. An accused is entitled to be assisted by an attorney... who plays the role necessary to ensure that the trial is fair.” *Strickland v. Washington*, 466 U.S. 668, 685 (1984). The test for determining whether counsel’s conduct has fallen below the acceptable line is measured in a two-part test. First the court looks at whether counsel’s performance was deficient, compared to what is expected of reasonably competent counsel, without the benefit of hindsight, and using the standards in place at the time, and then examining whether appellant was harmed by the deficiency, assuming there was one. If either prong of the test fails, then the court will not find IAC.
2. On 19 January 2011, the Supreme Court released two cases, *Harrington v. Richter* and *Premo v. Moore*, using this analysis in examining whether defense counsel was deficient for not calling a blood spatter expert or failing to attempt to suppress an admission before entering into a guilty plea.

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VICTIM/WITNESS ASSISTANCE PROGRAM (VWAP)

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PROF. JIM CLARK
JULY 12, 2012

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VICTIM/WITNESS ASSISTANCE PROGRAM (VWAP)

Outline of Instructions

I. REFERENCES.

- A. Justice for All Act of 2004, 18 U.S.C. § 3771 (repeals Section 502 of Victims' Rights and Restitution Act of 1990 (42 U.S.C. §§ 10606-10607)).
http://www.law.cornell.edu/uscode/18/uscode_sec_18_00003771----000-.html
- B. Victim Rights Clarification Act of 1997, 18 U.S.C. § 3510.
http://www.law.cornell.edu/uscode/search/display.html?terms=3510&url=/uscode/html/uscode18/uscode_sec_18_00003510----000-.html
- C. Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 1503, 1505, 1510, 1512-1515, 3146, 3579, 3580.
- D. Victims of Crime Act of 1984, 42 U.S.C. §§ 10601-10603.
http://www.law.cornell.edu/uscode/uscode_sec_42_00010601----000-.html
- E. 38 U.S.C. §1311-1314 (Dependency and Indemnity Compensation).
<http://www.law.cornell.edu/uscode/text/38/1311>
- F. 10 U.S.C. §1059 (Transitional Compensation).
<http://www.law.cornell.edu/uscode/text/10/1059>
- G. DoD Directive (DoD Dir.) 1030.1, Victim and Witness Assistance (April 13, 2004).
<http://www.dtic.mil/whs/directives/corres/pdf/103001p.pdf>
- H. DoD Instruction (DoDI) 1030.2, Victim and Witness Assistance Procedures (June 4, 2004). <http://www.dtic.mil/whs/directives/corres/pdf/103002p.pdf>
- I. Dep't of Army Reg. 27-10, Military Justice, Chapter 17 (3 October 2011).
http://www.apd.army.mil/pdffiles/r27_10.pdf
- J. Dep't of Army Reg. 600-20, Army Command Policy, Ch. 8 (4 August 2011).
- K. Dep't of Army Reg. 635-200, Active Duty Enlisted Administrative Separations, (6 September 2011). http://www.apd.army.mil/pdffiles/r635_200.pdf
- L. Dep't of Air Force Instruction (AFI) 51-201, Victim and Witness Assistance, ch. 7 (3 February 2010). <http://www.e-publishing.af.mil/shared/media/epubs/afi51-201.pdf>
- M. OPNAV Instruction 5800.7A, Victim and Witness Assistance Program (4 March 2008).
<http://doni.daps.dla.mil/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-800%20Laws%20and%20Legal%20Services/5800.7A.pdf>
- N. Marine Corps Order P5800.16A, Victim and Witness Assistance Program (VWAP), ch 6 (28 November 2005).
<http://www.donsapro.navy.mil/PolicyandInstrutions/MCO%20P5800.16A%20CH%201-5.pdf>
- O. US Coast Guard Commandant Instruction M5810.1D, Victim and Witness Protection, ch 3.M. (17 August 2000). http://www.uscg.mil/legal/mj/MJ_Doc/MJM113.pdf
- P. OTJAG POC: Mr. Charles Cosgrove, Pentagon Room 3B548, 2200 Army Pentagon, Washington, D.C. 20310-2200; 571-256-8137 (Voice). charles.cosgrove@us.army.mil.

II. DEFINITIONS.

- A. Victim: a person who has suffered direct physical, emotional or pecuniary harm as the result of a commission of a crime in violation of the UCMJ (or in violation of the law of another jurisdiction if any portion of the investigation is conducted primarily by the DoD components), including but not limited to:
1. Military members and their family members;
 2. When stationed OCONUS, DoD civilian employees and contractors, and their family members;
 3. Institutional entity's representative (federal, state and local agencies are not eligible for services available to individual victims);
 4. Victim under age 18, incompetent, incapacitated, or deceased (in order of preference): a spouse, legal guardian, parent, child, sibling, other family member, or court designated person; and
 5. Includes victims identified as a result of investigations of potential UCMJ violations conducted under the provisions of AR 15-6.
- B. Witness: person who has information or evidence about a crime, and provides that knowledge to a DoD component about an offense within the component's investigative jurisdiction. If witness is a minor, includes a family member of legal guardian. BUT not a defense witness, perpetrator or accomplice.

III. CRIME VICTIM'S RIGHTS. AR 27-10, PARA. 18-10.

- A. Fair treatment and respect for dignity and privacy;
- B. Reasonable protection from accused;
- C. Notification of court proceedings;
- D. Presence at all public court proceedings related to the offense, unless court determines victim's testimony would be materially affected by other testimony;
- E. Confer with Government attorney;
- F. Receive available restitution; and
- G. Receive information about conviction, sentencing, imprisonment and release of accused.

IV. COMMAND RESPONSIBILITIES.

- A. SJA's are designated as the "local responsible official" and have the following responsibilities:
1. Establish and supervise Victim/Witness Assistance Program (VWAP) within their GCM jurisdiction. Ensure establishment of local policies and procedures to accord crime victims' the rights described in the Bill of Rights above.
 2. Establish a Victim and Witness Assistance Council to extent practicable, at "each significant military installation," to ensure interdisciplinary cooperation.
 3. Designate, in writing, Victim/Witness Liaison (VWL).
 - a. Preference for a commissioned or warrant officer or civilian (GS-11 and above).
 - b. Exceptional circumstances allow SSG and above, or GS-6 and above.
 - c. VWL's should be outside the military justice section "to the extent permitted by resources."

- d. To the extent resources permit, SJA's "should refrain from appointing attorneys as VWL's."
 4. COMMUNICATE WITH THE VICTIM. Victims have a right to be informed at the earliest opportunity of significant events in the status of the case, and every 30 days following proffer of charges. Keeping victims informed is a requirement of the victim's bill of rights. Keeping witnesses informed is good practice to maintain a cooperative relationship.
 5. Ensure Law Enforcement Agencies (LEA) inform victims and witnesses of VWL's name, location and phone number.
 6. TRAINING! Must ensure annual training is provided to all agencies involved in program. At a minimum, training will cover victims' rights; available compensation through federal, state, and local agencies, providers' responsibilities under the VWAP program, and requirements and procedures of AR 27-10, Chapter 17.
 7. Ensure DoD Victim and Witness Bill of Rights is posted in office of commanders and agencies providing victim and witness assistance.
 8. Establish separate waiting areas at courts-martial and other investigative proceedings. "In a deployed environment, victims and Government witnesses should be afforded a separate waiting area to the greatest extent practicable."
 9. Ensure victims and witnesses are advised that their interests are protected by administrative and criminal sanctions, i.e. obstruction of justice charges, etc., and that victims and witnesses should promptly report any attempted intimidation, harassment, or other tampering to military authorities.
 10. Ensure appropriate law enforcement agencies are immediately notified in case where the life, well-being, or safety of a victim or witness is jeopardized by his or her participation in the criminal investigation or prosecution process.
 11. Ensure victim's and witness' requests for investigative reports or other documents are processed under FOIA or Privacy Act.
 12. Ensure DD Forms are distributed/completed.
 13. Coordinate with criminal investigative agents to ensure all noncontraband property seized as evidence is safeguarded and returned; ensure victims are informed of applicable procedures for requesting return of property.
 14. REPORTING REQUIREMENTS!! See Section VI, below.
- B. DD and DA Forms.
1. DD Form 2701, Initial Information for Victims and Witnesses of Crime.
 2. DD Form 2702, Court-Martial Information for Victims and Witnesses of Crime.
 3. DD Form 2703, Post-Trial Information for Victims and Witnesses of Crime.
 4. DD Form 2704, Victim/Witness Certification and Election Concerning Inmate Status.
 5. DD Form 2705, Victim/Witness Notification of Confinee Status.
 6. DD Form 2706, Annual Report on Victim and Witness Assistance.
 7. DA Form 7568, Army Victim/Witness Liaison Program Evaluation.
- C. Responsibilities (VWL, trial counsel, or other government representative).

1. VWL (recommended).
 - a. As soon as possible, but NLT appointment of Art. 32 Investigating Officer or referral of charges, ensure victims and witnesses are provided DD Form 2701 (Initial Information for Victims and Witnesses of Crime).
 - b. Inform victim of the place where the victim may receive emergency medical care and social service support.
 - c. Inform victims of where they can obtain financial, legal, and other support, including right to file Article 139 claim and right to transitional compensation, if applicable.
 - d. During investigation and prosecution of crime, will provide victims the earliest possible notice of significant events in the case, to include:
 - (1) Status of investigation of crime, with limits.
 - (2) Apprehension of suspected offender.
 - (3) Decision to prefer or dismiss charges.
 - (4) Initial appearance of suspect before pretrial confinement hearing or at Article 32, UCMJ investigation.
 - (5) Scheduling of each court proceeding victim is required or entitled to attend.
 - (6) Detention or release from detention of offender or suspected offender.
 - (7) Acceptance of plea of guilty or other verdict.
 - (8) Result of trial.
 - (9) If sentenced to confinement, probable parole date.
 - (10) General information regarding corrections process.
 - (11) Opportunity to consult with trial counsel concerning evidence in aggravation.
 - (12) How to submit victim impact statement to Army Clemency and Parole Board.
 - (13) The VWL will “make reasonable efforts to notify witnesses and representatives of witnesses, when applicable and at the earliest opportunity” of numbers one through ten above.
 - e. Advise victims and witnesses of protections from intimidation. See Military Protective Order, Section V and Appendix, below.
 - f. Act as intermediary between victims and witnesses, when requested, to arrange interviews by defense or government.
 - g. Advise victims on property return and restitution.
 - h. Notification of victims’ and witness’ employers and creditors.
 - i. Witness fees and costs.
 - j. During trial and investigative proceedings, provide to victims and witnesses:
 - (1) Assistance in obtaining child care.

- (2) Transportation/parking.
 - (3) Lodging.
 - (4) Separate waiting area outside presence of accused and defense witnesses.
 - (5) Translators/interpreters
 - k. Upon sentence to confinement provide victims (and witnesses “adversely affected by the offender”):
 - (1) General information regarding post-trial procedures (DD Form 2703).
 - (2) Prepare DD Form 2704. Victims and witnesses elect whether they want notification of changes in inmate status. Ensure copy forwarded to confinement facility and ensure offender does not have access to copy of information.
2. Trial counsel.
- a. Consult victims concerning:
 - (1) Decision not to prefer charges;
 - (2) Decisions concerning pretrial restraint or release;
 - (3) Pretrial dismissal of charges; and
 - (4) Negotiations of pretrial agreements and their potential terms.

Note: Victim does not have veto power over command’s decision on these matters; view is considered, not controlling.
 - b. Establish separate waiting areas at courts-martial and other investigative proceedings.
 - c. In coordination with SJA and CMCA, consider making restitution a term and condition of pretrial agreements. Also consider whether restitution was made when action is taken.
3. Commander, Confinement Facility.
- a. Upon entry into confinement facility commander ensures receipt of DD Form 2704 and determines whether victim and/or witness requested notification of changes in confinement status. If victim and/or witness so indicated, commander will advise of:
 - (1) Offender’s place of confinement and minimum release date.
 - (2) Earliest possible notice of:
 - (a) Clemency/parole hearing dates.
 - (b) Transfer of inmate to another facility.
 - (c) Escape, recapture, or other form of release from confinement.
 - (d) Release from supervised parole.
 - (e) Death of inmate.
 - b. Forward DD Form 2704 if inmate is transferred.

- c. Protect against disclosure to inmate of victim and witness addresses.
- d. Reporting requirements as set forth below.

V. REPORTING REQUIREMENTS.

- A. For each calendar year (CY), not later than 15 February of each year, SJA of each command having GCM jurisdiction must report:
 - 1. The number of persons who received DD Form 2701 or 2702 from trial counsel, Victim Witness Liaison (VWL) or designee;
 - 2. The number of victims and witnesses who received DD Form 2703 from trial counsel, VWL or designee.
 - 3. SJA will obtain data for their reports from subordinate commands attached or assigned to their GCM jurisdiction for military justice purposes, including RC units.
 - 4. Negative reports are required.
 - 5. Use DD Form 2706.
 - 6. Forward report through MACOM channels to Criminal Law Division, ATTN: DAJA-CL, HQDA, Office of The Judge Advocate General, 1777 North Kent Street, Rosslyn, VA 22209-2194.
- B. Other required reports (*Negative reports required*).
 - 1. Military Police channels report the number of:
 - a. Victims and witnesses who received DD Form 2701 or 2702 from LEA personnel.
 - b. Victims and witnesses who were informed of their right (via DD Form 2704 or otherwise) to notification of changes in inmate status.
 - c. Victims and witnesses who were notified using DD Form 2705.
 - d. Confinees, by service, in Army facilities about whom victim/witness notifications must be made.
 - 2. OTJAG Criminal Law prepares consolidated report for submission to DoD Under Secretary for Personnel and Readiness, Legal Policy Office)

VI. EVALUATION OF VICTIM/WITNESS LIAISON PROGRAM

- A. SJAs will ensure that each victim and witness in an incident that is prosecuted at a GCM or SPCM, or investigated pursuant to UCMJ, Art. 32, in those cases not disposed of by GCM or SPCM, receives a victim/witness evaluation form.
 - 1. SJAs will use DA 7568 (Army Victim/Witness Liaison Program Evaluation).
 - 2. Evaluation forms will be reviewed locally by the SJA and copies forwarded quarterly to Criminal Law Division, ATTN: DAJA-CL, ATTN: Victim/Witness Coordinator, Office of The Judge Advocate General, HQDA, 1777 North Kent Street, Rosslyn, VA 22209-2194, by mail or electronically.
- B. Anonymous submission requirement for DA 7568 and SJA cover letter.
 - 1. The evaluation form may be provided to victims and witnesses by hand, by mail or otherwise, but must be returned in an anonymous manner. AR 27-10, paragraph 18-28d suggests the installation of a drop box away from the military

justice section or the provision of a pre-addressed envelope or "other anonymous means of return" to victims and witnesses.

2. The recipients of the evaluation form must be advised that the form will be returned in an anonymous manner and cannot be accepted in any other manner. The evaluation form will be accompanied by a cover letter under the signature of the SJA. The cover letter will thank the victim/witness for assisting the prosecution, and emphasize the need for a response and the anonymous nature of the response.

VII. OTHER ASSISTANCE AVAILABLE TO VICTIMS.

- A. Installation assistance. VWL will assist victim in contacting agencies or individuals responsible for providing necessary services and relief.
 1. Command Chaplain.
 2. Family Advocacy Center/Army Community Service.
 3. Emergency Relief Funds.
 4. Legal Assistance, if appropriate.
 5. American Red Cross.
 6. If victims are not eligible for military services, or where military services are not available, "the VWL will provide liaison assistance in seeking any available nonmilitary services within the civilian community."
- B. Pretrial Agreements - negotiated restitution.
- C. Transportation and shipment of household goods. (See JFTR).
- D. State and local assistance.
- E. Transitional Compensation. 10 U.S.C. § 1059; DoD Instruction 1342.24, Change 1 (16 January 1997); AR 608-1, *Army Community Service*, (19 September 2007).
 1. Dependent-abuse offenses resulting in separation of servicemember from active duty or total forfeiture of all pay and allowances pursuant to court-martial conviction or administrative separation.
 - a. Applies to cases on or after 30 November 1993.
 - b. Applies to voluntary and involuntary separation proceedings (example: discharge in lieu of trial by court-martial UP Chapter 10, AR 635-200).
 - c. Dependent-abuse offenses - conduct by an individual while a member of the armed forces on active duty for a period of more than thirty days that involves abuse of the then-current spouse or dependent child of the member and that is a criminal offense defined by the Uniform Code of Military Justice or other criminal code applicable to the jurisdiction where the act of abuse is committed. Offenses that may qualify as dependent abuse offenses include sexual assault, rape, sodomy, assault, battery, murder, and manslaughter. This is not an exhaustive listing of dependent abuse offenses.
 - d. Dependent Child. An unmarried child, including an adopted child or stepchild, who was residing with the member at the time of the dependent abuse offense and who is
 - (1) Under 18 years of age;

- (2) Eighteen or older and incapable of self-support because of mental or physical incapacity that existed prior to age 18 and who is dependent on the member for over one-half of the child's support;
- (3) 18 or older, but less than 23, and is a college student and who is dependent on the member for over one-half of the child's support.

2. Compensation.

- a. Duration of payments dependent upon the unserved portion of the member's obligated active duty service (no less than 12 months, but no more than 36 months).
- b. Start-date: date sentence is adjudged if the sentence, as adjudged, includes a dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances; or
- c. However, if there is a pretrial agreement that provides for disapproval or suspension of a dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances, then start date is the date of the approval of the court-martial sentence if the sentence, as approved, includes an unsuspended dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances; or,
- d. If pursuant to administrative separation, the date of initiation of separation proceedings.
- e. Amount of compensation increases with each dependent. See 38 U.S.C. § 1311(a)(1).
- f. Dependent loses payments if remarries or cohabitates with abuser, or is an active participant in the abuse.
- g. Payment stops if administrative separation is disapproved.
- h. Payment stops if dismissal, dishonorable discharge, of bad-conduct discharge is remitted, set aside, or mitigated to a lesser punishment that does not include any such punishment.
- i. Application for transitional compensation: individual submits request through military service of member.
- j. Requires annual certification of entitlement to funds by spouse and dependent children.
- k. Payment is from Operation and Maintenance Funds. Defense Finance and Accounting Service issues the payments, and administrative oversight of the funds (approval of payments and such) is through the Community and Family Support Center (CFSC), a DA level organization.

3. Other benefits –

- a. Commissary and exchange privileges for length of time eligible for transitional compensation;
- b. Medical and dental care for up to one year for injuries related to dependent abuse offense(s). Applies to dependents of a member separated due to dependent abuse offense (includes discharge as result of conviction as well as administrative separation).

F. Deferral and waiver of forfeitures.

1. Deferral.
 - a. Accused may request, in writing, deferment of forfeitures. RCM 1101(c)(2).
 - b. Accused burden to show “the interests of the accused and the community in deferral outweigh the community’s interest in imposition of the punishment on its effective date [e.g., forfeitures].” RCM 1101(c)(3).
 - c. Applies to adjudged forfeitures (Article 57(a)(2), UCMJ; RCM 1101(c)) AND automatic forfeitures (Article 58b(a)(1), UCMJ). *United States v. Lundy*, 60 M.J. 52 (C.A.A.F. 2004); *United States v. Adney*, 61 M.J. 554 (A. Ct. Crim. App. 2005).
 2. Waiver of forfeitures.
 - a. Accused may request waiver of automatic forfeitures (Article 58b, UCMJ) or the CA may waive *sua sponte*. Request does not have to be made by accused; may be made by dependents or someone (VWL) on behalf of dependents.
 - b. The accused’s request should be in writing.
 - c. Waiver is allowed for a period not to exceed six months and is for the purpose of providing support to the accused’s dependents, as defined in 37 U.S.C. § 401.
 - d. Factors CA may consider include: “the length of the accused’s confinement, the number and age(s) of the accused’s family members, whether the accused requested waiver, any debts owed by the accused, the ability of the accused’s family members to find employment, and the availability of transitional compensation for abused dependents permitted under 10 U.S.C. 1059.” RCM 1101(d)(2).
 - e. Waiver of forfeitures is authorized as soon as they become effective; need not wait until action.
- G. UCMJ, art. 139.
1. Redress of injuries to property.
 2. Willful damage or theft.
 3. No conviction is required.

VIII. VICTIM ATTENDANCE AT COURT PROCEEDINGS.

- A. Military Rule of Evidence 615 (Exclusion of Witnesses) prohibits the military judge from sequestering certain categories of witnesses to prevent them from hearing the testimony of other witnesses, including: “(4) a person authorized by statute to be present at courts-martial, or (5) any victim of an offense from the trial of an accused for that offense because such victim may testify or present any information in relation to the sentence or that offense during the presentencing proceedings.” These provisions of the Military Rules of Evidence were effective on 15 May 2002.
- B. Subparagraph 4 extends to victims at courts-martial the same rights granted to victims by the Victims’ Rights and Restitution Act of 1990, 42 U.S.C. §10606(b)(4). That statute gives crime “victims” “the right to be present at all public proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard the testimony at trial.”
- C. Subpararaph 5 implements the Victims Rights Clarification Act of 1997, 18 U.S.C. §3510, and basically prohibits the military judge from sequestering a “victim” who will only testify in the presentencing proceeding. This section does not incorporate the balancing test of subparagraph 4, and does not permit the military judge to sequester a victim who will testify only on sentencing even where that victim’s testimony may be materially affected by hearing other testimony at trial.
 - 1. The Victim Rights Clarification Act was passed in response to the federal district court judge’s ruling in the Oklahoma City bombing trial of Timothy McVeigh that precluded victims from attending the trial proceedings on the grounds that their victim impact testimony on sentencing would be materially affected by observing other parts of the trial on the merits.
- D. A “victim” for purposes of Mil. R. Evid. 615 is defined as “a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime, including (A) in the case of a victim that is an institutional entity, an authorized representative of the entity; and (B) in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, one of the following (in order of preference): (i) a spouse; (ii) a legal guardian; (iii) a parent; (iv) a child; (v) a sibling; (vi) another family member; or (vii) another person designated by the court.”
- E. The rules allowing victims to remain in the courtroom are subject to other rules, such as those regarding classified information, witness deportment, and conduct in the courtroom.

IX. CASE LAW DISCUSSING VICTIMS’ RIGHTS.

- A. *Saum v. Widnall*, 912 F. Supp. 1384 (D. Col 1996). A female Air Force Academy cadet sued the Secretary of the Air Force and others seeking declaratory and injunctive relief based on alleged sexual harassment during training, in violation of her due process and equal protection rights. The alleged harassment included a videotaped simulated “rape and exploitation” scenario as part of SERE (survival, evasion, resistance, and escape) training, during which she received injuries requiring medical attention. As part of her requested relief, plaintiff sought a declaratory judgment that she is a “crime victim” as defined by the Victims’ Rights and Restitution Act of 1990 and DoD 1030.2. The Air Force argued that her claim should be dismissed because there is no private right of action under the Victims Rights Act. The court found that argument “without merit,” and denied the Air Force’s motion to dismiss. Although the court determined that the government “is not required to do anything under the Victims’ Rights Act in the absence of an ongoing criminal investigation,” if the Air Force was required to have launched such an investigation under the circumstances presented, Cadet Saum may be entitled to

relief. Cadet Saum and the Air Force settled the case and it was dismissed with prejudice in 1997. *Saum v. Widnall*, 959 F.Supp. 1310 (D. Col. 1997).

- B. *United States v. Rorie*, 58 M.J. 399 (C.A.A.F. 2003). CAAF overturns 53 years of precedent and holds that it will no longer follow a policy of *abatement ab initio* for appellants who die following review by the intermediate service courts but prior to final review by the Court of Appeals for the Armed Forces. The rationale for overturning the abatement policy rested on two grounds: first, even after the death of a military defendant “there remains a substantial punitive interest in preserving otherwise lawful and just military convictions”; and second, the impact of abatement *ab initio* on victims’ rights, and, in particular, the issue of restitution as a condition of a pretrial agreements, reduced sentence, clemency, or parole. “Particularly where there has been one level of appeal of right, abatement *ab initio* at this level frustrates a victim’s legitimate interest in restitution and compensation.”
- C. *United States v. Spann*, 51 M.J. 89 (C.A.A.F. 1999). The Victim Rights and Restitution Act of 1990, and the Victim Rights Clarification Act of 1997, amending F.R.E. 615, did not apply to the military prior to the dates those changes would automatically become effective under Mil. R. Evid. 1102 (18 months after the effective date in the federal system). As it happens, the President enacted changes to Mil. R. Evid. 615, effective 15 May 2002 (adding subparts 4 and 5, discussed above), which differed somewhat from the F.R.E. amendment.
- D. *United States v. Lundy*, 60 M.J. 52 (2004). Accused entered into PTA term, whereby the CA agreed to defer any and all reductions and forfeitures until the sentence was approved and suspend all adjudged and waive any and all automatic reductions and forfeitures. For sexually assaulting his children, the Accused (a SSG) was sentenced to a DD, confinement for 23 years, and reduction to E-1, which subjected him to automatic reduction and forfeitures. The CA attempted to suspend the automatic reduction IAW the PTA to provide the Accused’s family with waived forfeitures at the E-6, as opposed to the E-1, rate. The parties, however, overlooked AR 600-8-19 which precludes a CA from suspending an automatic reduction unless the CA also suspends any related confinement or discharge which triggered the automatic reduction. ACCA stated no remedial action was required because the Accused’s family was adequately compensated with transitional compensation (TC), which ACCA concluded the Accused’s family was not entitled to because they were receiving waived forfeitures, albeit at the E-1 rate. The CAAF, in reversing, held if a material term of a PTA is not met by the government three options exist: (1) the government’s specific performance of the term; (2) withdrawal by the accused from the PTA, or (3) alternative relief, if the accused consents to such relief. Additionally, the CAAF held an Accused’s family could receive TC while receiving either deferred or waived forfeitures if the receipt of TC was based on a discharge and if the receipt of TC was based only on the Accused receiving forfeitures, the family could receive TC if not actively receiving the deferred or waived forfeitures. Case remanded to determine if the Gov’t could provide specific performance.
- E. *United States v. Bright*, 44 M.J. 749 (C.G. Ct. Crim. App. 1996). Appellant was convicted of larceny of BAH and false official statements. Appellant’s wife submitted an adverse letter to the convening authority, purportedly “in the spirit of the DoD Victim and Witness Assistance Program implementing the Victims’ Rights and Restitution Act of 1990.” Appellant contended on appeal that his estranged wife was not a “victim” in any sense of the word as it is defined in the relevant victim rights statutes. The court held that, while appellant may be correct, the convening authority was permitted to consider the letter upon some other basis, so long as appellant was notified properly by the SJA addendum. Further, the court held that although there may be limits to what the

convening authority could consider, by failing to challenge the appropriateness of the letter at the time it was served upon him, the appellant waived the issue.

- F. *United States v. Ducharme*, 59 M.J. 816 (N-M. Ct. Crim. App. 2004). Appellant was tried in July, 1999, prior to the effective date of changes to MRE 615 permitting sentencing witnesses to observe trial on the merits (the effective date of those changes is 15 May 2002). The court held that the military judge did not err when he ruled that, under Mil. R. Evid. 806 (control of spectators), one of the government's sentencing witnesses (negligent homicide victim's mother) could remain in the courtroom throughout trial. In addition, under Mil. R. Evid. 615 as it existed at the time of appellant's trial which required sequestration of witnesses upon request of either party, the trial defense counsel waived the issue. Finally, even assuming the military judge erred under Mil. R. Evid. 615 as it existed at the time of appellant's trial, any error was harmless.

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SEXUAL HARASSMENT/ASSAULT RESPONSE & PREVENTION

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APPENDIX A17

**PROF. JAMES CLARK
JULY 2012**

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SEXUAL HARASSMENT/ASSAULT RESPONSE & PREVENTION, DOMESTIC ABUSE PROGRAM

Outline of Instruction

I. REFERENCES.

- A. SHARP Program website : www.sexualassault.army.mil .
- B. ALARACT 007/2012 (1/12/2012): SHARP Program Implementation Guidance.
http://www.sexualassault.army.mil/files/ALARACT%20007_2012_SHARP.pdf
- C. ALARACT 182/2010 (6/10/2010): SHARP Program Implementation & Training.
http://www.sexualassault.army.mil/files/ALARACT_182_2010_SHARP_Impl_Tng.pdf
- D. Gun Control Act of 1968, 18 U.S.C. § 921-928 (Supp. 1997).
<http://www.gpo.gov/fdsys/pkg/USCODE-2011-title18/pdf/USCODE-2011-title18-partI-chap44.pdf>
- E. The “Lautenberg Amendment” to the Brady Handgun Violence Prevention Act, P.L. 104-208, Title VI, section 658, 110 Stat. 3009.371; codified at 18 U.S.C. § 922(d)(9), § 922(g)(9); § 925(a)(1); (effective 30 Sept. 1996).
- F. Under Secretary of Defense for Personnel and Readiness Policy Memorandum, "Restricted Reporting Policy for Incidents of Domestic Abuse" (January 22, 2006), <http://www.usmc-mccs.org/victimadv/domestic/Restricted%20Reporting%20signed.pdf>
- G. DoD Directive (DoDD) 6495.01, Sexual Assault Prevention and Response Program (January 23, 2012), <http://www.dtic.mil/whs/directives/corres/pdf/649501p.pdf> .
- H. DoD Instruction (DoDI) 6495.02, Sexual Assault Prevention and Response Program Procedures (November 13, 2008), <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf>
- I. Army Policy on Harassment (31 July 2008) :
<http://www.sexualassault.army.mil/files/Army%20Policy%20on%20Sexual%20Harassment.pdf>
- J. DoD Instruction (DoDI) 6400.06, Domestic Abuse Involving DoD Military and Certain Affiliated Personnel (August 21, 2007),
<http://www.dtic.mil/whs/directives/corres/pdf/640006p.pdf> .
- K. Dep’t of Army Reg. 27-10, Military Justice, Chapter 17 (16 November 2005),
http://www.apd.army.mil/pdf/r27_10.pdf .
- L. Dep’t of Army Reg. 600-20, Army Command Policy, Sexual Assault, Ch. 8 (RAR, 27 April 2010), http://www.apd.army.mil/pdf/r600_20.pdf .
- M. Dep’t of Army Reg. 600-20, Army Command Policy, Sexual Harassment, Ch. 7 (RAR, 27 April 2010),
<http://www.sexualassault.army.mil/files/Chapter%207%20Sexual%20Harassment.pdf> .
- N. Dep’t of Army Reg. 608-18, The Army Family Advocacy Program (13 September 2011),
http://www.apd.army.mil/pdf/r608_18.pdf .

- O. Military Homefront Domestic Abuse Page:
<http://www.militaryhomefront.dod.mil/tf/domesticabuse> .
- P. Dep't of Air Force Instruction (AFI) 36-6001, Sexual Assault Prevention and Response Program (30 September 2009).
- Q. OPNAV Instruction 1752.1B, Sexual Assault Victim Intervention Program (29 December 2006).
- R. Marine Corps Order 1752.5A, Sexual Assault Prevention and Response Program (5 February 2008).
- S. US Coast Guard Commandant Instruction 1754.10c, Sexual Assault Prevention and Response Program (20 December 2007).
- T. A National Protocol for Sexual Assault Medical Forensic Examinations, U.S. Department Of Justice Office on the Violence Against Women (September 2004).
<https://www.ncjrs.gov/pdffiles1/ovw/206554.pdf>

II. SEXUAL HARASSMENT/ASSAULT RESPONSE AND PREVENTION PROGRAM

- A. Basics.
 - 1. The Sexual Harassment/Assault Response and Prevention (SHARP) Program reinforces the Army's commitment to eliminate incidents of sexual assault through a comprehensive policy that centers on awareness and prevention, training and education, victim advocacy, response, reporting and follow-up. Army policy promotes sensitive care and confidential reporting for victims of sexual assault and accountability for those who commit these crimes.
 - 2. Sexual Assault Policy. Sexual assault is a criminal offense that has no place in the Army. It degrades mission readiness by devastating the Army's ability to work effectively as a team. Every Soldier who is aware of a sexual assault, should immediately (within 24 hours) report incidents of sexual assault. It is incompatible with the Army Values and is punishable under the UCMJ and other federal and local civilian laws.
 - 3. SecArmy and CSA Sends: "The prevention of sexual assault needs our full attention. It is our duty and moral obligation to set the climate and the conditions which leave no doubt that such behavior has no place in our ranks. . . . [W]e want the Army to be recognized as the national leader in sexual assault and sexual harassment prevention. Reaching this goal requires a clear cultural change that repudiates sexual assault. . . . Your Army leadership is joining with Soldiers across the Army in a commitment to eliminate sexual assault and harassment from our ranks. . . . As our Army erased the ugly stain of racism and built our Nation's model organization for color-blind opportunity, so must we succeed in this effort."
- B. Definition of Sexual Assault. For the purpose of DoD-wide sexual assault prevention and response awareness training and education, the term "sexual assault" is defined as intentional sexual contact, characterized by use of force, physical threat or abuse of authority or when the victim does not or cannot consent. This definition does not affect in any way definition of any offenses under the UCMJ.
 - 1. Sexual assault includes rape, nonconsensual sodomy (oral or anal sex), indecent assault (unwanted, inappropriate sexual contact or fondling), or attempts to commit these acts. Sexual assault can occur without regard to gender or spousal relationship or age of victim.

2. “Consent” shall not be deemed or construed to mean the failure by the victim to offer physical resistance. Consent is not given when a person uses force, threat of force, coercion, or when the victim is asleep, incapacitated, or unconscious.

C. Definition of Sexual Harassment :

1. “. . . is a form of gender discrimination that involves unwelcomed sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature between the same or opposite genders when:
 - a. submission to , or rejection of, such conduct is made either explicitly or implicitly a term or condition of a person’s job, pay, career or
 - b. submission to , or rejection of, such conduct by a person is used as a basis for career or employment decisions affecting that person;
 - c. such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creates an intimidating, hostile or offensive working environment.
2. Any person in a supervisory or command position who uses *or condones* implicit or explicit sexual behavior to control, influence, or affect the career, pay, or job of a Soldier or civilian employee is engaging in sexual harassment. Similarly, any Soldier or civilian employee who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature is engaging in sexual harassment.”

Categories of Sexual Harassment:

- a. Verbal : telling sexual jokes, using sexually explicit profanity, threats, sexually oriented cadences, or sexual comments. Can include “honey, sweetheart, babe, hunk”.
- b. Non-verbal : blowing kisses, winking, staring (undressing with eyes).
- c. Physical : touching, but also blocking hallways, unsolicited back or neck rubs.

Types of Sexual Harassment:

- a. Quid pro quo: conditions placed on career or terms of employment in return for favors. Includes implicit or explicit threats of adverse action. Can include third-party victims who are affected by job actions granted to another in exchange for sexual favors.
- b. Hostile environment: Brings the topic of sex or gender differences into the workplace. Need not be quid pro quo. If physical acts, sexual comments, or non-verbal actions unreasonably interfere with the job performance of another, it is sexual harassment. Can include comments about body parts, sexual jokes, suggestive pictures.

Complaints of sexual harassment follow same procedures as Equal Opportunity complaints.

See AR 600-20, chapter 7, for details.

- D. Victim Advocacy Program. Victim’s use of advocacy services is optional; however, commanders must ensure that victims have access to a well-coordinated, highly responsive sexual assault victim advocacy program that is available 24 hours a day/seven days a week both in garrison and in a deployed environment.

1. **SARC/SHARP**: is the **single point of contact (POC)** for all sexual assault and sexual harassment complaints. This is a **2012 change** from past practice, in which sexual harassment was handled by Equal Opportunity officers.
 - a. Required at the Battallion & Installation level
 - b. Senior Command SARC/SHARP: direct report to the Senior Commander
 - c. Organizationally, part of Family Advocacy Program, reports to FAPManager
 - d. Oversees all VA/SHARPs battalion & below
 - e. Appointed Installation or Brigade SARC/SHARP reports to Senior Command SARC/SHARP
 - f. Supervises & oversees entire SHARP program:
 - (1) Supervises VA/SHARP & (until full staffing is complete) Installation VAs
 - (2) Serve as the program manager of victim support services who coordinates and oversees the local implementation and execution of the Sexual Assault Prevention and Response Program.
 - (3) Ensure overall local management of sexual assault awareness, prevention, training, and victim advocacy.
 - (4) Oversee Victim Advocates and Unit Victim Advocates in the performance of their duties providing victim services.
 - (5) Ensure victims are properly advised of their options for restricted and unrestricted reporting. Ensure victim acknowledges in writing his/her preference for restricted or unrestricted reporting on a DD Form 2910, Victim Reporting Preference Statement (VRPS).
 - (6) Ensure all unrestricted reported incidents of sexual assault are reported to the first O-5 in the chain of command, CID, MPs and the Installation Provost Marshal with 24 hours of receipt.

- (7) Ensure that non-identifying personal information/details related to a restricted report of sexual assault is provided to the Installation Commander within 24 hours of occurrence. This information may include: rank, gender, age, race, service component, status, time and location. Ensure that information is disclosed in a manner that preserves a victim's anonymity. Careful consideration of which details to include is of particular significance at installations or other locations where there are a limited number of minority females or female officers assigned.

- g. Scheduled to be full-time deployable civilian personnel by 30 Sep 2012. Delayed funding may delay appointment. Commander must appoint collateral duty personnel until funding available.

- h. Requires 80-hour TRADOC MTT-provided training course.

- i. Requires 90-day "right seat" training w/ VA and EO personnel.

- j. Training must be 100% by 30 Sept 2012.

- k. Grade/Rank requirement:
 - (1) Battalion level SARC/SHARP: SFC, MAJ, CW3, GS-11 or higher

 - (2) Brigade and below VA/SHARP: SSG, 1LT, CW2, GS-9 or higher

- 2. VA/SHARP:
 - a. Planned as full-time deployable civilian. Funding issues make this unlikely in near future. Commanders must assign collateral-duty personnel to position in interim.

 - b. 80-hour TRADOC MTT-provided training course

 - c. 90-day "right seat" training w/ VA and EO personnel

 - d. Grade/rank: SSG, 1LT, CW2, GS-9 or higher

 - e. Duties:

- (1) When assigned by the SARC, provide crisis intervention, referral, and ongoing non-clinical support to the victim. The victim alone will decide whether to accept the offer of victim advocacy services. VAs are not counselors, they are facilitators of services.
 - (2) Referral to services includes : psychological treatment, medical, legal, housing assistance; full range of FAP and civilian victim support services
 - (3) Report to and coordinate directly with the SARC when assigned to assist a victim.
 - (4) Inform victims of their options for restricted and unrestricted reporting, and explain the scope and limitations of the SARC's role as an advocate.
 - (5) If the victim chooses restricted reporting, ensure the victim is taken to a healthcare provider in lieu of reporting the incident to law enforcement or chain of command.
 - (6) If victim chooses the unrestricted reporting option, UVA will immediately notify law enforcement and healthcare provider.
- f. Safeguard documents in their possession pertaining to sexual assault incidents and protect information that is case related.
3. **LEGACY SHARP ORGANIZATION:** what follows is superceded no later than 30 September 2012 by the SARC/SHARP – VA/SHARP organization described above in 1. and 2.
- a. Garrison environment. Three echelons of sexual assault victim advocates.
 - b. The Installation Sexual Assault Response Coordinator (SARC) is responsible for coordinating the local program. The Installation SARC is a DA or contract civilian employee who works for the Family Advocacy Program Manager (FAPM) and reports directly to the Installation Commander for matters concerning incidents of sexual assault. SARCs will:
 - (1)
 - c. Victim advocates work directly with the SARC, victims of sexual assault, unit victim advocates, and other installation response agencies.
 - (1) Installation Victim Advocates (IVAs). The IVAs are DA civilian or contract employees trained to provide advocacy services to victims of sexual assault. The IVA reports directly to the SARC for sexual assault cases.

- (2) Unit Victim Advocates (UVA) are Soldiers trained to provide victim advocacy as a collateral duty. There are two UVAs appointed on orders by each Battalion-level commander and trained to perform collateral duties in support of victims of sexual assault particularly in deployed environments. UVAs are supervised in the performance of their duties by the SARC. The UVA will be an NCO (SSG or higher), Officer (1LT/CW2 or higher), or Civilian (GS-9 or higher). UVAs will:
 - (a) When assigned by the SARC, provide crisis intervention, referral, and ongoing non-clinical support to the victim. The victim alone will decide whether to accept the offer of victim advocacy services.
 - (b) Report to and coordinate directly with the SARC or designated IVA when assigned to assist a victim.
 - (c) Inform victims of their options for restricted and unrestricted reporting, and explain the scope and limitations of the SARC's role as an advocate.
 - (i) If the victim chooses restricted reporting, ensure the victim is taken to a healthcare provider in lieu of reporting the incident to law enforcement or chain of command.
 - (ii) If victim chooses the unrestricted reporting option, UVA will immediately notify law enforcement and healthcare provider.
 - (iii) Safeguard documents in their possession pertaining to sexual assault incidents and protect information that is case related.

d. Deployed environment. Two echelons of victim advocates.

- (1) Deployable SARCs are Soldiers trained and responsible for coordinating the sexual assault prevention and response program as a collateral duty in a specified area of a deployed theater. There is one deployable SARC at each brigade and higher echelon. The deployable SARC will be an NCO (SFC or higher), Officer (MAJ/CW3 or higher), or Civilian (GS-11 or higher).
 - (a) Ensure overall management of sexual assault awareness, prevention, training and victim advocacy.
 - (b) Be trained by the Installation SARC prior to assuming duty.
 - (c) Advise the victim on their options for restricted and unrestricted reporting. Ensure victim acknowledges in

writing his/her preference for restricted or unrestricted reporting on the VRPS.

- (2) Unit Victim Advocates (UVA) are Soldiers trained to provide victim advocacy as a collateral duty. There are two UVAs for each battalion-sized unit.
 - (3) The deployable SARC and the UVA must be carefully selected as they are likely to become involved in highly charged, emotionally stressful situations in assisting victims of sexual assault. As a result all candidates must be properly screened and complete training in responding appropriately to victims of sexual assault.
4. Unit commanders' must take the following actions for **unrestricted reports** of sexual assault.
- a. Ensure the victim's physical safety. This frequently will involve issuing a Military Protective Order (MPO). Ensure that victims of sexual assault receive sensitive care and support and are not re-victimized as a result of reporting the incident.
 - b. Collaborate closely with the SARC, legal, medical, and chaplain offices and other service providers to provide timely, coordinated, and appropriate responses to sexual assault issues and concerns.
 - c. Make administrative & logistical coordination for movement of victim to receive care.
 - d. Notify CID and the Sexual Assault Response Coordinator.
 - e. Report all incidents of sexual assault to the office of the staff judge advocate within 24 hours.
 - f. Flag any Soldier under charges, restraint, or investigation for sexual assault in accordance with AR 600-8-2, and suspend the Soldier's security clearance in accordance with AR 380-67.
5. Disposal of cases resulting from allegations of sexual assault are withheld to the Battalion commander level, O-6 and above. A commander authorized to dispose of cases involving an allegation of sexual assault may do so **only** after receiving the advice of the servicing judge advocate. As with any case, any disposition decision involving an allegation of sexual assault is subject to review by higher level commanders as appropriate. This does not affect the process of prefferal of charges, Article 32 investigations, or other administrative stages in the court martial process. It only involves the pre-GCM disposition of charges. DODM April 20, 2012: Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases
6. Expedited transfer of sexual assault victims :
- a. Threats to life or safety: immediate report to command & law enforcement
 - b. Soldier must request transfer.

- c. Commander of soldier's unit must act w/in 72 of request.
- d. If transfer denied, soldier can file a request for review to the first General or Flag Officer (or equal SES) in the chain of command.
- e. GO or FO has 72 hours to act.

7. Training. The objective of SAPR training is to eliminate incidents of sexual assault through a comprehensive program that focuses on awareness and prevention, education, victim advocacy, reporting, response, and follow up. There are four categories of training for the SAPR Program. The categories are Professional Military Education (PME) training, Unit Level training, Pre-Deployment training, and Responder training. Training is now handled by Mobile Training Teams, arranged through the SHARP/SARC.

- a. PME training is progressive and sequential in areas such as (including but not limited to):
 - (1) Initial Entry Training;
 - (2) Pre-commissioning/Basic Officer Leadership Instruction – I (BOLC I) to include ROTC;
 - (3) Captain's Career Course;
 - (4) Pre-command Course.
- b. Unit Level Training. All Soldiers will attend and participate in unit level SAPR training annually. Training will be scenario based, using real life situations to demonstrate the entire cycle of reporting, response, and accountability procedures. The I.AM.STRONG campaign is the primary provider of soldier training, which will no longer be presented by the local SARC
- c. Responder Training. Primary responders to sexual assault incidents will receive the same baseline training throughout the DoD, to ensure that any Service member who is assaulted will receive the same level of response regardless of Service component. SARC & VA training will be provided by TRADOC MTTs. Other first responder components will design their own training. Training should emphasize that coordinating victim support services is a team effort and to be effective all the team members must be allowed to do their job and must understand the role of the others on the team. First responders agencies include:
 - (1) Healthcare;
 - (2) MPs and CID;
 - (3) Judge Advocates;
 - (4) Chaplains;
 - (5) SARCs; and
 - (6) Victim Advocates

8. Confidential Reporting. Confidential Reporting allows a uniformed member of the Army to report a sexual assault to specified individuals. Confidential reporting consists of two components: Restricted and Unrestricted reporting.
- a. Restricted Reporting. Restricted reporting allows a Soldier who is a sexual assault victim, on a confidential basis, to disclose the details of his/her assault to specifically identified individuals and receive medical treatment and counseling, without triggering the official investigative process. Soldiers who are sexually assaulted and desire restricted reporting under this policy should report the assault to the Sexual Assault Response Coordinator (SARC), victim advocate, Chaplain or a healthcare provider.
- (1) Restricted reporting may be made only to the following individuals:
- (a) The SARC
- (b) Healthcare Provider
- (c) Chaplain
- (d) VA
- (2) A restricted report does not guarantee anonymity. If any member of the chain of command learns of the sexual assault from any source, s/he must report that information to the command and to CID. It then becomes an unrestricted report. As a practical matter, if anyone other than the four listed above learns of the sexual assault, it is no longer unrestricted.
- b. Unrestricted Reporting. Unrestricted reporting allows a Soldier who is sexually assaulted and desires medical treatment, counseling, and an official investigation of his/her allegation to use current reporting channels (e.g., chain of command, law enforcement, or he/she may report the incident to the SARC or the on-call Victim advocate). Upon notification of a reported sexual assault, the SARC will immediately notify a victim advocate. Additionally, with the victim's consent, the healthcare provider shall conduct a forensic examination, which should include the collection of evidence. Details regarding the incident will be limited to only those personnel who have a legitimate need to know.
9. Sexual Assault Forensic Examination (SAFE). If a DoD healthcare provider is not available, the victim will be appropriately referred to a civilian provider for the forensic examination, if the victim requests such a forensic examination.
- a. Whenever possible, military installations should have established formal memoranda of understanding (MOU) with military facilities or off-base non-military facilities for the purpose of conducting sexual assault examinations.
- b. The SARC or victim advocate will ensure that a victim is aware of any local or state sexual assault reporting requirements that may limit the possibility of

restricted reporting, prior to proceeding with the SAFE at the local off-post non-military facility.

10. Restricted Report Case Number (RRCN).

- a. Each Military Service will designate a military agency to generate an alphanumeric RRCN, unique to each incident, that will be used in lieu of personal-identifying information to label and identify the evidence collected from a SAFE (i.e., Sexual Assault Evidence Collection kit (SAE kit), accompanying documentation, personal effects, clothing).
- b. Upon completion of the SAFE, the HCP will package and label the evidence with the RRCN and notify the service-designated military agency trained and capable of collecting and preserving evidence, to assume custody of the evidence using established “chain of custody” procedures. MOUs with off-post non-military facilities should include instructions for the notification of a SARC, receipt and application of a RRCN and disposition of evidence back to the military agency. The RRCN and general description of the evidence shall be entered into a log to be maintained by the military agency.
- c. Five year storage period for restricted SAFE evidence.
 - (1) Thirty days prior to the expiration of the five-year storage period, the military agency shall notify the appropriate SARC that the storage period is about to expire. The SARC shall notify the victim accordingly.
 - (2) If a victim does not desire to change to an unrestricted report and does not request the return of any personal effects or clothing maintained as part of the evidence prior to the expiration of the storage period, in accordance with established procedures for the destruction of evidence, the military agency shall destroy the evidence maintained under the victim’s RRCN.
 - (3) The evidence shall similarly be destroyed if, at the expiration of five years, victims do not advise the SARC of their decision or the SARC is unable to notify a victim because the victim’s whereabouts are no longer known.
 - (4) If, at any time, a victim elects to change their reporting preference to the unrestricted reporting option, the SARC shall notify CID, who will then assume custody of the evidence maintained by the RRCN from the military agency under established chain of custody procedures.

11. Confidential Communication.

- a. Regardless of whether the Soldier elects restricted or unrestricted reporting, confidentiality of medical information will be maintained IAW current guidelines on Health Information Privacy Portability Act (HIPPA).
- b. In cases where a victim elects restricted reporting, the SARC, assigned VA (whether uniformed or civilian), and healthcare providers may not disclose covered communications to law enforcement or command authorities, either within or outside DoD, except as provided in the exceptions below.
- c. Covered communications are oral, written or electronic communications of personally identifiable information made by a victim to the SARC, assigned VA or to a healthcare provider related to the sexual assault.

- d. In the event that information about a sexual assault is disclosed to the commander from a source independent of the restricted reporting avenues, or to law enforcement and law enforcement from other sources, the commander will report the matter to law enforcement and law enforcement remains authorized to initiate its own independent investigation of the matter presented.
 - e. Additionally, a victim's disclosure of his/her sexual assault to persons outside the prospective sphere of persons covered by this policy may result in an investigation of the allegations.
 - f. This SAPR policy does not create any actionable rights for the alleged offender or the victim, nor constitute a grant of immunity for any actionable conduct by the offender or victim. Covered communications that have been disclosed may be used in disciplinary proceedings against the offender or the victim, even if such communications were improperly disclosed.
 - g. Improper disclosure of covered communications, improper release of medical information, and other violations of this policy are prohibited and may result in discipline under the UCMJ, loss of credentials, or other adverse personnel or administrative action.
12. Exceptions to Confidentiality. In cases in which victims elect restricted reporting, the prohibition on disclosing covered communications is waived to the following persons when disclosure would be for the following reasons:
- a. Command officials or law enforcement when disclosure is authorized by the victim in writing.
 - b. Command officials or law enforcement when disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of the victim or another.
 - c. Disability Retirement Boards and officials when disclosure by a healthcare provider is required for fitness for duty for disability retirement determinations, limited to only that information which is necessary to process disability retirement determination.
 - d. SARC, VAs or healthcare provider when disclosure is required for the supervision of victim services.
 - e. Military or civilian courts of competent jurisdiction when disclosure is ordered by or is required by federal or state statute. SARC, VAs, and healthcare providers will consult with the servicing legal office in the same manner as other recipients of privileged information to determine if the criteria apply and they have a duty to obey. Until those determinations are made, non-identifying information should only be disclosed.
13. Collateral Misconduct of Victim. In unrestricted reported sexual assault cases where there is evidence of collateral victim misconduct (most likely underage drinking or use of drugs), to prevent the erroneous perception that the Department of Defense views a victim's collateral misconduct as more serious than the crime of sexual assault, commanders should consider deferring discipline of any victim's misconduct until all investigations are complete and the sexual assault allegation has been resolved, unless extenuating or other overriding circumstances make delay inappropriate in the judgment of the commander and/or legal counsel.

- a. Additionally, for those sexual assault cases for which command action on victim's collateral misconduct is deferred, Military Service command action reporting and processing requirements should take such deferrals into consideration and allow for the time deferred to be subtracted from applicable metrics and processing times.
 - b. Commanders and judge advocates must also be mindful of any potential statute of limitations when determining whether to defer action.
 - c. Deferral is bad trial strategy. A victim whose own misconduct is deferred is subject to attack on the theory that she has complained of sexual assault for the purpose of avoiding punishment for her drinking, or other behavior. If the misconduct is punished beforehand (for alcohol, the routine punishment is generally minimal), then this defense is negated. The victim should be consulted, and the pros & cons explained before proceeding with un-deferred collateral misconduct punishment.
14. Administrative separations.
- a. GCMCA lowest separation authority for cases involving Soldiers who filed an unrestricted report of sexual assault in the last 24 months.
 - b. When initiating an administrative separation on any Soldier for any reason (voluntary or involuntary), include on the Notification / Acknowledge / Election of Rights form:
 - (1) Whether the Soldier filed an unrestricted report of sexual assault in the last 24 months.
 - (2) Whether the Soldier does / does not believe that this separation is a direct / indirect result of the sexual assault.
 - c. If the separation appears to be in retaliation for the Soldier filing an unrestricted report of sexual assault. If so, consult with the JA.
 - d. If the separation involves a medical condition that is related to the sexual assault, to include PTSD. If so, consult with the appropriate medical personnel.
 - e. If the separation is in the best interests of the Army, the Soldier, or both. If not, consult with the JA.
 - f. The status of the case against the alleged offender, and the effect of the Soldier's (victim's) separation on the disposition or prosecution of the case. If the case is still open, consult with the servicing CID unit and JA.
15. Essential Training Tasks for Judge Advocates. All judge advocates shall receive training at initial military legal and periodic refresher training on the DoD and Army Sexual Assault Response Policies:
- a. Confidentiality Policy Rules and Limitations.
 - (1) Use of "restricted" reports by command, investigative agencies, trial and defense counsel.
 - (2) Relationship of "restricted" reports to MREs. The SAPR policy does not create any privileges outside of those already contained in the MREs (e.g., MRE 503 and MRE 513).
 - b. Victim Rights:

- (1) Familiarity with VWAP.
 - (2) VWAP challenges in the deployed environment.
- E. **Victimology.** The process of analyzing victim types or victims and their behavior after an assault. Victims experience a variety of negative mental health effects from a sexual assault such as:
1. Post-traumatic stress symptoms.
 2. Reactions of family and friends.
 3. Secondary victimization experiences when they seek help.
 4. Processing the rape and post-rape experiences.
 5. Post Traumatic Stress Disorder (PTSD). Rape is one of the most common causes of PTSD.
 6. Traumatic Event. Experienced an event that involved actual or threatened death or serious injury or a threat to the physical integrity of self or others.
 7. Rape Trauma “Syndrome”. The acuter phase and the long-term reorganization process that results from a forcible or attempted forcible rape, consisting of behavioral, somatic, and psychological reactions to the attack. This normally not a categorized syndrome. It is a common-sense constellation of reactions that are typical of trauma victims generally, not only sexual assault victims. This term pre-dates PTSD. However, it is not a DSM-IV classification. Many consider it a subcategory of PTSD.
 8. Common and Counterintuitive Victim Behaviors.
 - a. Easily Explained Victim Behaviors: withdrawal, depression, aversion to being touched.
 - b. Counterintuitive Behaviors.
 - (1) Delayed Reporting. (More common than not to report 24-72 hours after)
 - (2) Not screaming, lack of resistance (fear)
 - (3) Destroying evidence (bathing, washing sheets = feeling unclean)
 - (4) Denial, Minimization, Recantation. (Common to trauma victims)
 - (5) Inconsistent Disclosure. (Psychologically common to remember trauma in distinct segments)
 - c. Other factors to consider:
 - 1) Motivations for False Accusations: collateral victim consequences, effects on other personal relationships
 - 2) Military Considerations: DoD recommended deferred action on collateral victim activity until prosecution of offender is complete
 - 3) Alcohol Intoxication and Memory: Blackout/passout distinction; incomplete memory of events.
 - 4) Expert Testimony: frequently helpful to explain counterintuitive behaviors, effects of alcohol
- F. **Understanding Sex Offenders.**

- a. Stereotypes/myths.
- (1) Rapists are usually a stranger to the victim. This is rarely true in the military.
 - (2) Rapists usually use a weapon or inflict significant physical injury. Most rapists use the least force necessary. The most common weapon is alcohol.
 - (3) Rapists act a certain way. Men who rape frequently appear to be normal members of society. Their methods are not predictable, although most are adept at selecting victims.
 - (4) False allegations of rape are common. There are no reliable studies for the military. Civilian surveys range from 6-16% of false or exaggerated allegations.
- b. Rapists in the Military:
- 98.9% of *identified* offenders are male
 - 30.2% NCOs
 - 35% of perpetrators were in chain of command above enlisted victims
 - 33% had harassed victim prior to the assault
- c. The Predator Rapist. The rapist who displays behavior often seen in the college dorm or barracks acquaintance rape situation. This offender is motivated by sexual gratification in that they intend to have sex with the victim whether the victims consents or not. These offenders plan the assault. They use alcohol or drugs to reduce the victim's inhibitions or to incapacitate. They become adept at selecting vulnerable victims. They seldom use a weapon. Instead they use alcohol, size, and strength to commit the rape.
- d. Undetected rapists : 6- 14% of college age men in one study admitted committing some sexual act that met the legal definition of Rape or sexual assault, without ever getting caught. 91% of these rapes were committed by serial rapists (raped more than one victim). A 2009 Navy study of in-coming recruits found statistically similar numbers.

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APPENDIX A

Commander's Sexual Assault Victim Assistance Checklist

The actions in the following list are to be taken in the event of receiving a report of sexual assault. Although the commander has significant leadership responsibility for actions after a report of sexual assault, not necessarily all of the actions listed below will be taken by the commander.

1. ___ Ensure the physical safety of the victim-determine if the alleged offender is still nearby and if the victim needs protection.
2. ___ Advise the victim of the need to preserve evidence (for example, by not bathing, showering, washing garments).
3. ___ Encourage the victim to report the incident and get a medical examination immediately (even if the incident occurred prior to the past 72 hours).
4. ___ Make appropriate administrative and logistical coordination for movement of victim to receive care. (Involve the minimum number of personnel possible and only on a need-to-know basis).
5. ___ Ask if the victim needs a support person (for example, a personal friend, victim advocate, chaplain) to immediately join the victim.
6. ___ Notify the Sexual Assault Response Coordinator (SARC) immediately.
7. ___ Notify the Chaplain if the victim requests pastoral counseling or assistance.
8. ___ Notify the Criminal Investigation Command, military police, installation provost marshal (per AR 195-1, paragraph 6), and commanders in the chain of command (as appropriate) within 24 hours (as soon as the victim's safety is established and victim's medical treatment procedures are in motion) and:
 - ___ Limit the details regarding the incident to only those personnel who have a legitimate need to know.
 - ___ Take action to safeguard the victim from any formal or informal investigative interviews or inquiries, except by those personnel who may have a "need to know," including but not limited to, the Criminal Investigation Command investigator(s) and the trial counsel.
 - ___ Collect only the necessary information (for example, victim's identity, location and time of the incident, name and/or description of alleged offender(s)). Do not ask detailed questions and/or pressure the victim for responses.
9. ___ Ensure the victim is made aware of, and encouraged to exercise, their options during each phase of the medical, investigative, and legal processes.
10. ___ Ensure the CID notifies victims and witnesses of their rights through a completed Victims and Witnesses of Crime form, DD Form 2701. (Reference AR 27-10).
11. ___ Inform the victim of the resources in theater that are available through the Victim and Witness Assistance Program (VWAP) (AR 27-10). Also, inform the victim of resources accessible from anywhere in the world (that is, Military One Source (from U.S.: 1-800-464-8107; International: 800-464-81077; International collect: 484-530-5889, 24-hours-a-day, 7-days-a-week)).
12. ___ Provide emotional support to the victim, including—
 - ___ Throughout the investigation, consult with the victim and, to the extent practicable, accommodate the victim's wishes, as long as a full and complete investigation is not compromised.

___ Listen/engage in quiet support of the victim, as needed. Be available in the weeks and months following the sexual assault, and ensure the victim that she/he can rely on the commander's support.

___ Emphasize to the victim the availability of additional avenues of support; refer to available counseling groups and other victim services.

___ Confer with the commander's legal representative and/or servicing SJA office to consider legal options, responsibilities (for example, pretrial restraint, military protective order), and appropriate disposition of the alleged offense.

___ If the alleged offender is a foreign national or from a coalition force, confer with SJA on responsibilities, options, and victim's rights (in theater).

___ Determine the best courses of action for separating the victim and the alleged offender during the investigation:

-Determine whether the victim desires to be transferred to another unit.

-Determine if the alleged offender needs/desires to be transferred to another unit.

-Consider whether a Military Protection Order (MPO) (DD Form 2873), referred to as "no contact order," is appropriate.

-Coordinate with sexual assault response agencies and the chain of command (involve as few people as possible and only on a need to know basis, protecting the victim's privacy) to determine if the victim's condition warrants redeployment or reassignment until there is a final legal disposition of the sexual assault case and/or the victim is no longer in danger.

-To the extent practicable, preferential consideration related to the reassignment should be based on the victim's desires.

13. ___ Flag (suspend favorable personnel actions) any Soldier under charges, restraint, or investigation for sexual assault in accordance with AR 600-8-2 (Suspension of Favorable Actions), and suspend the Soldier's security clearance in accordance with AR 380-67, The Department of the Army Personnel Security Program.

14. ___ Avoid automatic suspension or revocation of the victim's security and/or personnel reliability program clearance, when possible, as the victim can be treated for their related trauma. Consider the negative impact that suspension of a victim's security clearance has on both the victim's sensitivity and the service climate for reporting. Commanders should consider making this decision in consultation with a credentialed behavioral health professional.

15. ___ Determine how to best dispose of the victim's collateral misconduct. Absent overriding considerations, commanders should consider exercising their authority in appropriate cases to defer disciplinary actions for the victim's misconduct until after the final disposition of the sexual assault case.

16. ___ Update the battalion or higher-level commander on the status of the victim and alleged offender(s) within 14 calendar days, and on a monthly basis thereafter, until the case is officially closed. If the victim or alleged offender is transferred or redeployed prior to the case closing, coordinate with investigative and SJA personnel before ceasing monthly updates on parties involved.

17. ___ Update the victim on a monthly basis on the sexual assault investigation until its final disposition. Furthermore, initiate follow-up with the victim within 45 days after disposition of the case.

18. ___ Consult with the servicing legal office, criminal investigative organization, and notify the assigned victim advocate prior to taking any administrative action affecting the victim.

19. ___ Ensure unit personnel are abreast of risk factors associated with sexual assault, especially those risk factors unique to the deployed environment.



DOMESTIC ABUSE & THE LAUTENBERG AMENDMENT

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DOMESTIC ABUSE PROGRAM
OUTLINE OF INSTRUCTION

I. REFERENCES.

- A. Gun Control Act of 1968, 18 U.S.C. § 921-928 (Supp. 1997).
<http://www.gpo.gov/fdsys/pkg/USCODE-2011-title18/pdf/USCODE-2011-title18-partI-chap44.pdf>
- B. The "Lautenberg Amendment" to the Brady Handgun Violence Prevention Act, P.L. 104-208, Title VI, section 658, 110 Stat. 3009.371; codified at 18 U.S.C. § 922(d)(9), § 922(g)(9); § 925(a)(1); (effective 30 Sept. 1996).
- C. UNCLAS ALARACT 131/2003 (October 3, 2003) : Final implementation of Lautenberg Amendment to the Gun Control Act of 1968
http://www.monterey.army.mil/legal/criminal_law/lautenberg_final.pdf
- D. AR 600-20, ch. 4-23 : Domestic Violence Amendment to the Gun Control Act of 1968
http://www.apd.army.mil/pdffiles/r600_20.pdf
- E. Under Secretary of Defense for Personnel and Readiness Policy Memorandum, "Restricted Reporting Policy for Incidents of Domestic Abuse" (January 22, 2006),
<http://www.usmc-mccs.org/victimadv/domestic/Restricted%20Reporting%20signed.pdf>
- F. DoD Instruction (DoDI) 6400.06, Domestic Abuse Involving DoD Military and Certain Affiliated Personnel (August 21, 2007),
<http://www.dtic.mil/whs/directives/corres/pdf/640006p.pdf> .
- G. Dep't of Army Reg. 27-10, Military Justice, Chapter 17 (16 November 2005),
http://www.apd.army.mil/pdffiles/r27_10.pdf .
- H. Dep't of Army Reg. 608-18, The Army Family Advocacy Program (13 September 2011),
http://www.apd.army.mil/pdffiles/r608_18.pdf .
- I. Military Homefront Domestic Abuse Page:
<http://www.militaryhomefront.dod.mil/tf/domesticabuse>

II. DOMESTIC ABUSE PROGRAM.

- A. Army policy for domestic abuse.
 1. Domestic violence is a pervasive problem not only in society, but also in the military.
 - a. In the ten-year period from FY98-07, the military averaged 14.67 substantiated incidents of spousal abuse per 1000 couples. *See* Department of Defense Family Advocacy Program, *Child Abuse and Spouse Abuse Data Trends from 1998 to 2007*, available at http://www.militaryhomefront.dod.mil/dav/lsn/LSN/BINARY_RESOURCE/BINARY_CONTENT/2265251.pdf (last visited 11 October 2009). Abuse includes acts of physical violence and/or sexual violence and/or emotional abuse. Every year showed a significant downward trend: 19.8

substantiated incidents of spousal abuse per 1000 couples in FY 98 compared to 10.2 in FY 07.

- b. Also in the same time period, FY98-07, the military averaged 6.29 substantiated incidents of child abuse per 1000. Id. These rates were fairly constant throughout the nine-year period.
- c. A recent Army funded study published in the Journal of the American Medical Association concluded that “[a]mong families of enlisted Soldiers in the US Army with substantiated reports of child maltreatment, rates of maltreatment are greater when the Soldiers are on combat related deployments.” Deborah A. Gibbs, MSPH; Sandra L. Martin, PhD, Lawrence L. Kupper, PhD; Ruby E. Johnson, MS, *Child Maltreatment in Enlisted Soldiers’ Families During Combat-Related Deployments*, 298 JAMA (Aug. 1, 2007), available at <http://jama.ama-assn.org/cgi/content/abstract/298/5/528> (last visited 11 October 2009). The study found that among female civilian spouses, the rate of maltreatment during deployment was more than 3 times greater, the rate of child neglect was almost 4 times greater, and the rate of physical abuse was nearly twice as great. Id.

2. Department of Defense (DoD) Policy. “Domestic violence is an “offense against the institutional values of the Military Services of the United States of America.” Leaders at all levels within the DoD must “take appropriate steps to prevent domestic violence, protect victims, and hold those who commit it accountable.”
3. Like the Sexual Assault Prevention and Response Program, the domestic violence policy does not create any actionable rights for the alleged offender or the victim, nor constitute a grant of immunity for any actionable conduct by the alleged offender or victim, nor does it create any form of evidentiary or testimonial privilege.
4. Army Regulation 608-18, The Army Family Advocacy Program (30 October 2007), establishes Army policy for handling domestic violence issues.
5. DA takes a 4-part approach to child and spouse abuse:
 - a. **Prevent** incidents of abuse.
 - b. **Protect** victims of abuse.
 - c. **Treat** those affected by abuse.
 - d. **Train** personnel to intervene and respond properly to allegations of abuse.

B. Responsibilities.

1. At DA level, the ACSIM has responsibility for the Family Advocacy Program.
2. The Commander, U.S. Army Community and Family Support Center develops policy and programs.
3. Installation Commanders:
 - a. Establish programs for preventing, reporting, and treating spouse and child abuse as per AR 608-18 (13 Sept 2011).
http://www.apd.army.mil/pdffiles/r608_18.pdf

- b. Appoint an installation Family Advocacy Program (FAP) Manager on orders to manage the program and ensure compliance with regulation.
 - c. Review and approve FAP funding.
 - d. Submit consolidated FAP budget requirements through MACOM for forwarding to CFSC.
 - e. Designate a reporting point of contact (RPOC) and ensure a 24-hour emergency response system.
 - f. Establish mandatory counseling and educational programs under the FAP for Soldiers involved in substantiated abuse.
 - g. Establish voluntary educational and counseling programs and encourage maximum participation.
 - h. Consider CRC recommendations when taking or recommending disciplinary or administrative actions on Soldiers or civilians involved in abuse.
 - i. Direct development of an MOA with Child Protective Services (CPS) and other civilian agencies adjoining Army installations.
 - j. Appoint members of the CRC, FAC, and fatality review committees by written order and name for a minimum 1-year appointment.
 - k. Review CRC and FAC minutes and FRC recommendations.
 - l. Establish training to ensure that all subordinate commanders and senior enlisted advisers (E-7 to E-9) are briefed on FAP within 45 days of assuming command, and annually thereafter.
4. Unit Commanders:
- a. Attend spouse and child abuse commander education programs designed for unit commanders.
 - b. Schedule time for Soldiers to attend troop awareness briefings.
 - c. Be familiar with rehabilitative, administrative, and disciplinary procedures relating to abuse.
 - d. Report and investigate suspected abuse to RPOC.
 - e. Direct Soldier to participate in FAP assessment.
 - f. Attend Case Review Committee (CRC) presentations when unit Soldiers involved.
 - g. Encourage Soldier cooperation in Family Advocacy Programs (also ensuring that Soldiers are properly advised of Article 31 rights).
 - h. Provide written no-contact orders, as appropriate; counsel Soldiers; and take other actions, as appropriate, regarding compliance with civilian orders of protection.
 - i. Support and comply with CRC recommendations to maximum extent possible.
 - j. Consider CRC recommendations before taking administrative or disciplinary action.

- k. Notify CRC chairperson when reassigning Soldiers or moving family members who are involved in treatment for abuse.
 - l. Encourage participation of civilian family members in treatment programs.
 - m. Be aware of Lautenberg Amendment issues.
5. The Family Advocacy Program Manager (FAPM) - works for the director of Army Community Services on-post. The FAPM has numerous responsibilities, among them:
- a. Coordinates all FAP efforts to ensure compliance with regulation.
 - b. Ensures that all abuse reports from ACS are forwarded to the RPOC.
 - c. Central installation POC for all FAP briefing or training requests.
 - d. Supervises ACS prevention staff.
 - e. Provides liaison with civilian and military service providers. Has lead responsibility for developing and coordinating an installation MOA.
 - f. Assesses the special FAP needs of military families on installation and in surrounding communities.
 - g. Identifies prevention and treatment resources and submits budget requests.
 - h. Develops training programs, provides statistical reports.
6. The Family Advocacy Committee (FAC):
- a. is the multidisciplinary team that advises installation commander on FAP policy and procedure.
 - b. is chaired by the garrison or base support battalion commander or designee.
 - c. is composed of:
 - (1) Pediatrician or other MD.
 - (2) Community Health Nurse (ad hoc).
 - (3) DENTAC commander or representative.
 - (4) Provost Marshall or senior representative.
 - (5) CID representative.
 - (6) SJA or representatives (CRC representative and the victim/witness coordinator).
 - (7) ASAP clinical director or senior representative.
 - (8) Child and Youth Services coordinator.
 - (9) Installation Chaplain or representative.
 - (10) Installation Command Sergeant Major.
 - (11) Public Affairs Officer

- (12) Consultants (e.g. school liaison officers, child protective services, and local court representative).
- d. Meets at least quarterly.
- e. Identifies trends requiring a command or community response, coordinates civilian and military resources, facilitates an integrated community approach to the prevention of child and spouse abuse, develops community, command and troop education prevention programs, publicizes how to report abuse, and addresses administrative details.

7. Case Review Committee (CRC):

- a. Is a multidisciplinary team appointed on orders by the installation commander and supervised by the medical treatment facility (MTF) commander.
- b. chaired by the Chief, Social Work Services.
- c. the unit commander exercising UCMJ authority over the alleged abusers, will be invited to attend when the case involves one of his/her personnel.
- d. tracks and evaluates cases of reported abuse.
 - (1) cases are either substantiated or unsubstantiated.
 - (2) the standard is fairly low: a preponderance of the evidence.
 - (3) a majority of members must vote to substantiate.
- e. meets monthly; each case is reviewed at least quarterly.
- f. determines whether civilian courts should intervene.
- g. determines whether to recommend removal of children from home.
- h. recommends corrective measures.
- i. briefs the commander on status of case.
- j. recommendations, such as treatment, foster care, etc., do not preclude criminal or adverse administrative action against a Soldier.

C. Restricted Reporting Policy for Incidents of Domestic Abuse

- 1. The DoD is committed to ensuring victims of domestic abuse are protected, treated with dignity and respect, and provided support, advocacy, and care. DoD policy also strongly supports effective command awareness and prevention programs and law enforcement and criminal justice activities that will maximize accountability and prosecution of perpetrators of domestic abuse. To achieve these dual objectives, the DoD policy prefers that personnel report suspected domestic abuse incidents promptly to activate both victims' services and accountability actions. However, a requirement that all domestic abuse incidents be reported can represent a barrier for victims hoping to gain access to medical and victim advocacy services without command or law enforcement involvement.
- 2. In order to address these competing interests, the Department of Defense issued a new instruction, DoD Instruction 6400.06 providing victims of domestic violence two reporting options: unrestricted reporting and restricted reporting.

- a. **Unrestricted Reporting.** Victims of domestic abuse who want to pursue an official investigation of an incident should use current reporting channels, e.g., chain of command, Family Advocacy Program (FAP), or law enforcement. Upon notification of a reported domestic abuse incident, victim advocacy services and FAP clinical services will be offered to the victim. Additionally, at the victim's discretion/request, the healthcare provider shall conduct any forensic medical examination deemed appropriate. Details regarding this incident will be limited to only those personnel who have a legitimate need to know.
- b. **Restricted Reporting.** In cases where an adult victim elects restricted reporting, the victim advocate and healthcare providers may not disclose covered communications (defined in the policy memorandum) to either the victim's or offender's commander or to law enforcement either within or outside DoD, except as provided by exceptions within the policy memorandum.
 - (1) Restricted reports must be made to one of the following individuals:
 - (a) Victim advocate or healthcare provider (defined in the policy memo);
 - (b) Supervisor of victim advocate;
 - (c) Chaplain.
 - (2) Exceptions to Confidentiality. In cases in which victims elect restricted reporting, the prohibition on disclosing covered communications is waived to the following persons when disclosure would be for the following reasons:
 - (a) Named individuals when disclosure is authorized by the victim in writing.
 - (b) Command officials and law enforcement when necessary to prevent or lessen a serious and imminent threat to the health or safety of the victim or another person.
 - (c) FAP and any other agencies authorized by law to receive reports of child abuse or neglect when, as a result of the victim's disclosure, the victim advocate or healthcare provider has a reasonable belief that child abuse has also occurred. However, disclosure will be limited only to information related to the child abuse.
 - (d) Disability Retirement Boards and officials when disclosure by a healthcare provider is required for fitness for duty for disability retirement determinations, limited to only that information which is necessary to process the disability retirement determination.
 - (e) Supervisors of the victim advocate or healthcare provider when disclosure is required for the supervision of direct victim treatment or services.

- (f) Military or civilian courts of competent jurisdiction when a military, Federal, or State judge issues a subpoena for the covered communications to be presented to the court or to other officials or when required by Federal or State statute or applicable U.S. international agreement.

D. Reporting Requirements.

- 1. Report Point of Contact (RPOC). Para. 3-3.
 - a. Designated by installation commander as a central POC.
 - b. Normally the MTF emergency room or MP Desk.
 - c. Manned 24 hours.
- 2. Who must report suspected abuse?
 - a. All Soldiers, civilian employees and members of military community should be encouraged to report.
 - b. Law enforcement, medical, social work and school personnel, Family Advocacy personnel and Child Youth Services personnel must report.
 - c. Commanders must report.
- 3. When a family member reports abuse, the commander will be notified within 24 hours.

E. Records of Reported Abuse: Chapter 5.

- 1. The US Medical Command, Fort Sam Houston, maintains an Army-wide, centralized data bank containing a confidential index of victim-based reported spouse and child abuse cases – Army Central Registry (ACR). Used to assist in the early identification, verification, and retrieval of reported cases of spouse and child abuse.
- 2. Must be substantiated spouse and child abuse.
 - a. The standard used by the Case Review Committee – a preponderance of the evidence available indicates abuse occurred.
 - b. Distinguish the standard used by CID in titling decisions: credible information exists that a crime was committed and this person did it.
- 3. Commander's access governed by FOIA and Privacy Act.

F. Removal of Children from Home.

- 1. Medical Protective Custody. If the child is properly at the MTF, child may be taken into medical protective custody as follows:
 - a. Obtain parental consent, if possible.
 - b. If consent is not given, ask whether the child suffers from abuse or neglect by a parent to the extent that immediate removal from the home is necessary to avoid imminent danger to the child's life or health.
 - c. The treating physician makes the initial determination.

- d. Approved by MTF commander.
 - e. Unit commander will be notified.
2. Children cannot be removed from a home, school or child care facility unless a bona fide medical emergency exists. Coordination with civilian authorities may be appropriate.
 3. Foster Care.
 - a. Generally, need parental consent or order from state or foreign court with jurisdiction.
 - b. U.S. - seek court order and work with the local child protection service even if parental consent is given.
 - c. Foreign Country - Coordinate with host nation authorities.
 4. Emergency situations. The installation commander may authorized if abuse is substantiated and child at risk of imminent death or serious bodily harm, or serious mental or physical abuse.
- G. Military Protective Orders (MPOs).
1. On 10 March 2004, the Deputy Secretary of Defense for Personnel and Readiness issued a directive on Military Protective Orders. The directive provides a standard MPO, DD Form 2873, and gives specific guidance on its use.
 2. Definitions:
 - a. Domestic violence: An offense under the US Code, the UCMJ, or state law that involves the use, attempted use, or threatened use of force or violence against a person of the opposite sex, or a violation of a lawful order issued for the protection of a person of the opposite sex, who is:
 - (1) A current or former spouse;
 - (2) A person with whom the abuser shares a child in common; or
 - (3) A current or former intimate partner with whom the abuser shares or has shared a common domicile.
 - b. Child Abuse: The physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child. It does not include discipline administered by a parent or legal guardian to his or her child provided it is reasonable in manner and moderate in degree and otherwise does not constitute cruelty.
 3. Commanders will:
 - a. Issue MPOs when necessary to safeguard victims, quell disturbances, and maintain good order and discipline while victims have time to pursue issuance or enforcement of protective orders through the civilian courts.
 - b. Use DD Form 2873 for MPOs.
 - c. Provide distribution for DD Form 2873 as listed on the form.
 4. Issues for commanders to consider:
 - a. May want to limit SSN and address of victim in Block 2 of the form.

- b. Higher commanders may want to establish a level of authority for issuance of MPOs . . . should it be company or battalion level?
- c. Note the comprehensive nature of protections and limitations in the MPO: prohibits all direct and third-party contact, e-mail or telephonic contact; requires mandatory counseling; requires surrender and/or disposal of both government and privately-owned weapons.

III. LAUTENBURG AMENDMENT

A. Department of Defense Implementation:

1. Memorandum, Assistant Secretary of Defense, Force Management Policy, Subject: Interim DoD Policy on Domestic Violence Amendment to the Gun Control Act (22 Oct 1997).
2. Message, 151100Z Jan 98, Headquarters, Dep't of Army, DAPE-MPE, subject: HQDA Message on Interim Implementation of Lautenburg Amendment (15 Jan. 1998).
3. Message, 311108Z Oct 97, Headquarters, Dep't of Army, DAJA-LA, subject: Interim Guidance on Lautenburg Amendment Issues (31 Oct. 1997).
4. Message, 211105Z May 99, Headquarters, Dep't of Army, DAPE-MPE, subject: HQDA Guidance on Deployment Eligibility, Assignment, and Reporting of Solders Affected by the Lautenburg Amendment.
5. Memorandum, Under Secretary of Defense for Personnel and Readiness, Subject: Department of Defense Policy for Implementation of Domestic Violence Misdemeanor Amendment to the Gun Control Act for Military Personnel (27 Nov. 2002).
6. Final DA Implementation: Message, 221927Z October 2004, Headquarters, Dep't of Army, DAPE-MPE, subject: HQDA Message on Final Implementation of the Lautenberg Amendment to the Gun Control Act of 1968.
7. AR600-20, ch.4-23
8. JAGNet site for Lautenberg Amendment database:
<http://www.jagnet.army.mil/jagnet/lautenasgm.nsf>

B. Basic Provisions.

1. 18 U.S.C. § 922(d) prohibits the transfer of “any firearm or ammunition to any person whom you know or have reasonable cause to believe . . . has been convicted in any court of a misdemeanor crime of domestic violence.”
2. 18 U.S.C. § 922(g) prohibits “any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence . . . to receive any firearm or ammunition which has been shipped in interstate or foreign commerce.”
3. Violations of either prohibition are punishable by 10 years confinement, \$250,000 fine, or both. 18 U.S.C. § 924(a)(2).
4. 18 U.S.C. § 925 formerly exempted “any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof.” This “federal exemption” has been eliminated for individuals “convicted in any court of a misdemeanor crime of domestic violence.”

5. What is a “Misdemeanor Crime of Domestic Violence?” 18 U.S.C. § 921(a)(33).
 - a. The person was convicted of a crime classified as a misdemeanor in the jurisdiction where the conviction was entered.
 - b. The offense had as an *element* the use or attempted use of physical force, or threatened use of a deadly weapon. This is the *only* required element.
 - (1) *U.S. v. Hayes*, 555 U.S. 415 (2009) : in a prosecution for violation of the Gun Control Act, the court held that the *underlying misdemeanor* need only include an element of violence. To obtain the Gun Control conviction, however, the government must also prove beyond a reasonable doubt that the victim of the misdemeanor was a domestic partner.
 - (2) *U.S. v. Smith*, 56 M.J. 711, 714 (A.F. Court Crim. App. 2001) : look behind the misdemeanor violence conviction to find relationship of the victim
 - c. The offender was at the time of the offense:
 - (1) A current or former spouse, parent or guardian of the victim;
 - (2) A person with whom the victim shared a child in common;
 - (3) A person who was cohabiting with or has cohabited with the victim as a spouse, parent or guardian of the victim;
 - (4) A person who was similarly situated to a spouse, parent, or guardian of victim.
 - d. The convicted offender was represented by counsel, or knowingly and intelligently waived the right to counsel.
 - e. If entitled to have the case tried by jury, the case was actually tried by a jury or the person knowingly and intelligently waived the right to have the case tried by a jury.
 - f. The conviction has not been expunged or set aside, or the convicted offender has not been pardoned for the offense or had civil rights restored, unless the pardon, expungement, or restoration of civil rights provides that the offender may not ship, transport, possess, or receive firearms.

C. Dep’t of Defense and Dep’t of Army Response.

1. Interpretation.
 - a. Conviction of a misdemeanor crime of domestic violence does not include a summary court-martial conviction or nonjudicial punishment under Article 15.
 - b. The law does not apply to crew served weapons or major weapons systems (tanks, missiles, aircraft, etc.).
 - c. The law applies to all other Army issue and privately owned firearms and ammunition.

- d. The Army policy applies worldwide (including hostile fire areas).
2. There is no “military exception” to Lautenberg.
3. Pursuant to the 27 November 2002 DoD Policy Memorandum, felony crimes of domestic violence are now considered qualifying convictions for Lautenberg Amendment purposes.

D. AR600-20, 4-23:

1. Senior mission commander must:
 - a. Ensure immediate implementation of the message.
 - b. Display the message outside unit arms rooms and all facilities in which Government firearms or ammunition are stored, issued, disposed, or transformed.
 - c. Inform Soldiers that they have an affirmative and continuing obligation to inform their superiors if they have, or later obtain, a qualifying conviction. DD Form 2760 shall be used for this purpose. Soldiers will also be informed of the use immunity provisions of DD Form 2760 (neither the information nor evidence gained from filling out the form can be used in any prosecution against a Soldier for past violations of the Lautenberg Amendment).
 - (1) Ensure that company-level commanders collect completed DD Form 2760s and file in local MPRF.
 - (2) Ensure that local pre-command courses inform company-level commanders of their obligations.
 - d. Implement procedures to track domestic violence arrests and convictions off-post.
2. Reporting Requirements. All Soldiers with qualifying convictions must be identified and reported to ensure compliance with the law.
3. Commanders who have reasonable cause to believe there is a qualifying conviction should take action to investigate. An investigation may be initiated by ordering a Soldier to complete DD Form 2760.
4. Soldiers who have or believe they have a qualifying conviction should be referred to a legal assistance attorney for advice. Legal assistance attorneys can assist in seeking pardon or expungement of convictions.
5. Soldiers will be given a reasonable time to seek expungement or pardon for a qualifying conviction. Commanders can extend up to one year for that purpose. Factors to consider are in AR600-20, 4-23 (8).
6. If a Soldier has a qualifying conviction, or there is reasonable cause to believe he has one, the commander will immediately retrieve all government-issued firearms and ammunition and advise the Soldier to consult with a legal assistance attorney on the lawful disposal or sale of privately-owned firearms or ammunition.
7. Personnel policies.

- a. Utilization. Soldiers with qualifying convictions:
 - (1) Must be detailed to meaningful duties that do not require bearing weapons or ammunition.
 - (2) May be reassigned to TDA units that deny them access to weapons and ammunition.
 - (3) May not be appointed or assigned to leadership, supervisory, or property accountability positions that would require access to firearms or ammunition.
 - (4) May not attend any service school where instruction with firearms or ammunition is part of the curriculum.
 - (5) Must be counseled that inability to complete service schools could impact future promotion and retention.
- b. Mobilization/Deployment. Soldiers with qualifying convictions are not mobilization assets and are nondeployable for missions requiring possession of firearms or ammunition.
- c. Assignment.
 - (1) Lautenberg Soldiers are not eligible for OCONUS assignments.
 - (2) OCONUS active and AGR Soldiers will complete their tours.
 - (3) Soldiers will not be curtailed from OCONUS assignments.
 - (4) For purposes of this message, OCONUS does not include Alaska, Hawaii, or Puerto Rico.
- d. Retention.
 - (1) The Army does not have a specific "Lautenberg Chapter."
 - (2) Bar to reenlistment
 - (3) No waivers for enlistment
 - (4) Commanders may separate Soldiers based on the underlying conduct that led to the qualifying conviction or for the conviction itself.
 - (5) Soldiers may be temporarily accommodated pending a bar to reenlistment or involuntary separation. Must be assigned ETS not more than 12 months from notice of conviction.
 - (6) Inability to perform certain missions due to a qualifying conviction may be appropriate comments for evaluation and efficiency reports.
 - (7) Soldiers will not be given a waiver for enlistment or reenlistment.
 - (8) Soldiers with qualifying convictions are not eligible for indefinite reenlistment.
 - (9) Soldiers who have reenlisted for options requiring a CONUS PCS will proceed to new assignment.

- (10) OCONUS Soldiers will receive new assignment instructions from HRC.
 - (11) Soldiers who have reenlisted for retraining in an MOS where instruction includes weapons or ammunition training will be deleted from assignment instructions and may request voluntary separation.
- 8. Officers. Officers may request REFRAD or submit an unqualified resignation. RC officers not on active duty may submit an unqualified resignation or be recommended for involuntary separation.
- 9. Reporting Requirements.
 - a. Active Army. All Soldiers identified with qualifying convictions will be reported to HQDA.
 - b. Reserve Components. NGB will report for Army National Guard. USARC will report for USAR. Commander, USARC will submit AGR and IMA input. IRR, standby reserve, and retired reserve not subject to reporting requirement.
- 10. USR. Commanders will continue to report non-deployable personnel under this policy on the USR.



COURT-MARTIAL JURISDICTION

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COURT-MARTIAL JURISDICTION

I. INTRODUCTION.

Jurisdiction means the power of a court to try and determine a case, and to render a valid judgment. Courts-martial are courts of special and limited jurisdiction. For example, courts-martial jurisdiction applies worldwide, but is limited in application to a certain class of people—members of the armed forces. In general, three prerequisites must be met in order for courts-martial jurisdiction to vest. They are: (1) jurisdiction over the offense, (2) personal jurisdiction over the accused, and (3) a properly convened and composed court-martial.

Whether a court-martial is empowered to hear a case—whether it has jurisdiction—frequently turns on issues such as the status of the accused at the time of the offense, or the status of the accused at the time of trial. These issues of courts-martial jurisdiction relate to either subject matter jurisdiction (jurisdiction over the offense) or personal jurisdiction (personal jurisdiction over the accused). Subject matter jurisdiction focuses on the nature of the offense and the status of the accused at the time of the offense. If the offense is chargeable under the Uniform Code of Military Justice (UCMJ) and the accused is a servicemember at the time the offense is committed, subject matter jurisdiction is satisfied. Personal jurisdiction, however, focuses on the time of trial: can the government court-martial him? The answer is yes, so long as the accused has proper status; i.e., that the accused is a servicemember at the time of trial.

A. Sources of Jurisdiction.

1. The Constitution: Article I, section 8, clause 14
2. UCMJ, articles 2, 3 and 36
3. MCM, 2005 ed., RCM 201 - 204
4. Customary international law and treaties

B. Five Elements of Court-Martial Jurisdiction, R.C.M. 201(b):

1. Proper jurisdiction over the offense (subject matter jurisdiction).
2. Proper jurisdiction over the person (personal jurisdiction).
3. Properly composed court (military judge and members must have proper qualifications.) Absent evidence of coercion or ineffective assistance of counsel, accused's request to be tried by military judge alone can be inferred from the record of trial (applying "substantial compliance" doctrine to Article 16. *United States v. Turner*, 47 M.J. 348 (1997). Article 25 (request for enlisted members to serve on panel) is also satisfied by substantial compliance. *United States v. Townes*, 52 M.J. 275 (2000). *See also United States v. Morgan*, 57 M.J. 119 (2002). [See Tab E (Court-Martial Personnel) of this Deskbook for additional information]
4. Proper convening authority. A properly constituted court-martial may try any person subject to the UCMJ, even if the accused is not under the command of the convening authority. *United States v. Murphy*, 30 M.J. 1040 (A.C.M.R. 1990), *set aside, on other grounds*, 36 M.J. 8 (C.M.A. 1992); *accord, United States v. Randle*, 35 M.J. 789 (A.C.M.R. 1992). *See also United States v. Cantrell*, 44 M.J. 711 (A.F.Ct.Crim.App. 1996). [See Tab E (Court-Martial Personnel) of this Deskbook for additional information]

5. Properly referred charges. *United States v. Pate*, 54 M.J. 501 (Army Ct. Crim. App. 1997). The PTA was not signed by the GCMCA, but instead the word "accepted" was circled and a notation made indicating a voto to the SJA. The accused argued that since the CA never signed the PTA, the "new" charge to which the accused was pleading guilty was never referred and, therefore, the court-martial lacked jurisdiction over that charge. The Army Court held that jurisdiction existed since a proper referral does not need to be in writing and the lack of signature was "insignificant." *See also United States v. Williams*, 55 M.J. 302 (2001). *But see United States v. Henderson*, 59 M.J. 350 (2004). [See Tab G (*Initiation and Disposition of Charges*) of this Deskbook for additional information]

II. JURISDICTION OVER THE OFFENSE.

A. Historical Overview.

1. *O'Callahan v. Parker*, 395 U.S. 258 (1969). The Supreme Court establishes the "service-connection" test. *See also Relford v. Commandant, U.S. Disciplinary Barracks*, 401 U.S. 355 (1971) (the Court sets-forth the *Relford* factors as a template to determine "service-connection").
2. *Solorio v. United States*, 483 U.S. 435 (1987). The Supreme Court overrules *O'Callahan*, abandoning the "service-connection" test, and holds that jurisdiction of a court-martial depends solely on the accused's status as a member of the Armed Forces.

B. **BOTTOM LINE:** Subject matter jurisdiction is established by showing military status at the time of the offense.

C. **Administrative Double Jeopardy Policies.** Generally, a member of the Armed Forces will not be tried by court-martial or punished under Article 15, UCMJ, for the same act for which a civilian court has tried the Soldier. This policy is based on comity between the federal government and state or foreign governments. *See AR 27-10*, para. 4-2; JAGMAN, para. 0124.

D. Capital Cases.

1. *Loving v. United States*, 116 S.Ct. 1737 (1996). Justice Stevens (concurring) raised the question of whether a "service connection" requirement applies to capital cases. *See also United States v. Simoy*, 46 M.J. 601 (A.F. Ct. Crim. App. 1996) (a capital murder case in which the court made a specific finding that the felony murder was "service-connected").
2. *United States v. Gray*, 51 M.J. 1 (1999). The CAAF gives credence to Justice Stevens' concurring opinion in *Loving*. The CAAF makes a specific finding that there are sufficient facts present in *Gray*, a capital case, to establish a service connection to warrant trial by court-martial, but does not answer the question of whether a "service connection" requirement applies to capital cases.

E. Subject Matter Jurisdiction Over Reservists/National Guard.

1. The offense must be committed while the reservist has military status. *See, United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990) (Reserve Component warrant officer ordered to AD for training; provided urine sample that tested positive for cocaine pursuant to a urinalysis administered within 36 hours of initiation of AD period. Held: no subject matter jurisdiction because the government failed to prove beyond a reasonable doubt that the accused was subject to the UCMJ at the time he "used" the cocaine). *But see, United States v.*

Lopez, 37 M.J. 702 (A.C.M.R. 1993) (in a case where accused on AD for several months before given urinalysis, the court, in dicta, questioned the validity of the *Chodara* decision). See also, *United States v. Smith*, Case No. 9500065, WL35319910, (unpub.) (Army Ct. Crim. App. 1998) (holding there was no federal court-martial jurisdiction over an offense that the accused allegedly committed while he was enlisted in the Mississippi National Guard).

2. Jurisdiction attaches at 0001 hours of the effective date of the orders to active duty. *United States v. Cline*, 29 M.J. 83 (C.M.A. 1989), *cert. denied*, 493 U.S. 1045 (1990).
3. Jurisdiction may exist outside the parameters of the orders. *United States v. Phillips*, 58 M.J. 217 (2003). The accused was a reserve nurse ordered to perform her two-week annual training from 12-23 July 1999. Her orders authorized her one travel day (11 July) to get to her duty station. The accused traveled to her duty station on 11 July and checked into her government quarters. That evening, she consumed some marijuana brownies that she had brought with her from home. The accused tested positive for marijuana as part of a random urinalysis test conducted on 16 July. On appeal, the accused argued that the court lacked jurisdiction over her wrongful use of marijuana, because the use occurred prior to the start of her two-week active duty period. The CAAF disagreed and affirmed AFCCA's decision holding that jurisdiction existed over all of the offenses. The CAAF held that jurisdiction existed pursuant to Art 2(c), UCMJ, which "by its express terms, establishes a specific analytical framework." Applying a two-step analysis, the CAAF first held that the accused was "serving with" the armed forces on 11 July, because she was a reservist traveling to her duty station pursuant to orders issued for the purpose of performing active duty, she occupied government quarters, and she received compensation in the form of travel reimbursement, retirement credit, and base pay and allowances. For the second step in the analysis, the CAAF applied Art 2(c)'s four-part test, finding that on 11 July the accused: (1) submitted voluntarily to military authority; (2) met the minimum age and mental qualifications; (3) received pay and allowances; and (4) performed military duties by traveling to her duty station. The CAAF emphasized that "[t]he fact that her orders did not require her to report to a specific organization until July 12 does not detract from her voluntary performance of the duty, pursuant to orders, to travel on July 11."
4. Offenses committed as part of the accused's "official duties" may be subject to court-martial jurisdiction even where the accused is not on active duty. See *United States v. Morse*, No. ACM 33566, 2000 CCA LEXIS 233 (A.F. Ct. Crim. App. Oct. 4, 2000) *petition for grant of review denied*, 2001 CAAF LEXIS 1021 (Aug. 24, 2001) (finding subject matter jurisdiction existed even if the reserve officer signed his false travel vouchers after he completed his travel following active duty or inactive duty training).
5. If a member of the National Guard is performing duties in a Title 10 status, a unit or commander in Title 32 status does not have jurisdiction over him. In *United States v. Dimuccio*, 61 M.J. 588 (A.F. Ct. Crim. App. 2005), the appellant was a member of the Air National Guard in Arizona who had been mobilized under Title 10 and was performing duty at Davis-Monthan Air Force Base. The commander of his Air National Guard unit, while in Title 32 status, ordered a unit urinalysis inspection of the appellant's Air National Guard unit during a Unit Training Assembly. The appellant submitted to the inspection and had a positive result for cocaine metabolites. He subsequently confessed. The military judge suppressed the urinalysis and the confession, ruling that while in a Title 10 status and attached to another unit, the appellant was not subject to an inspection ordered by a commander from a unit that was in Title 32 status. The AFCCA affirmed.
6. Jurisdiction "is an interlocutory issue, to be decided by the military judge, with the burden placed on the Government to prove jurisdiction by a preponderance of the evidence."

United States v. Oliver, 57 M.J. 170 (2002). The CAAF found that the medical records submitted on appeal established that the accused had been retained on active duty beyond the expiration of his orders, thus satisfying subject-matter jurisdiction over the offense.

F. Time of the Offense.

1. *United States v. Kuemmerle*, 67 M.J. 141 (C.A.A.F. 2009). Prior to joining the Navy, accused posted sexually explicit image of a child to his Yahoo! email account profile. The image was accessible to other Internet users. After accused enlisted, he continued to access his account and did not remove the image. NCIS investigators accessed the accused's profile and viewed the image. Accused was charged and convicted at a court-martial with distributing child pornography. The C.A.A.F. held that the accused committed an offense while on active duty because he continued to maintain control over his account and others viewed the image he had posted on the account.

III. JURISDICTION OVER THE PERSON.

- A. General Rule: In general, a person becomes subject to court-martial jurisdiction upon enlistment in or induction into the Armed Forces, acceptance of a commission, or entry onto active duty pursuant to order. Court-martial jurisdiction terminates upon a valid discharge.
- B. General Provisions: UCMJ, art. 2, provides jurisdiction over categories of persons with military status:
 1. Enlistees; Inductees; Academy Cadets/Midshipmen;
 2. Retirees;
 - a) Jurisdiction over retirees is constitutional. *Pearson v. Bloss*, 28 M.J. 376 (C.M.A. 1989); *United States v. Hooper*, 26 C.M.R. 417 (C.M.A. 1958); *Sands v. Colby*, 35 M.J. 620 (A.C.M.R. 1992).
 - b) *United States v. Huey*, 57 M.J. 504 (N-M. Ct. Crim. App. 2002). The accused had served 20 years on active duty and was placed on the Retired List on 1 January 1989. In 1996 he worked as a Naval civilian employee in Okinawa. He confessed to engaging in sexual intercourse several times a week over a nine-month period with his 16-year old adopted daughter. By the time the raping stopped, the accused was 58 years old and his daughter was pregnant with his child. At trial, the accused moved to dismiss for lack of personal jurisdiction based upon a violation of constitutional due process under the Fifth Amendment. The accused cited to *Toth v. Quarles*, 350 U.S. 11 (1955) and argued that he had "obtained civilian status" and was being deprived of due process rights available only in a civilian courtroom. The service court disagreed stating that there "is no doubt that a court-martial has the power to try a person receiving retired pay."^{*}
 - c) *United States v. Stevenson*, 65 M.J. 639 (N.M.Ct.Crim.App. 2006). Accused was a sailor on the Temporary Disability Retirement List who waived his military disability pay in favor of Veteran's Affairs disability

^{*} The service court set aside the findings and sentence, dismissed the charges, and abated the proceedings in this case on 29 Aug 2002 due to the accused's death on 2 July 2002 (ten days before the opinion was decided). See *United States v. Huey*, 2002 CCA LEXIS 186 (Aug. 29, 2002).

compensation. Held: Court-martial had personal jurisdiction because accused was “entitled to pay”, even if he was not receiving pay.

- d) HQDA approval is required before prosecuting retirees (AR 27-10, para. 5-2). Failure to follow “policy” and obtain HQDA approval to try a retiree, however, is not jurisdictional error. *United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992).
 - e) The Article 2(d), UCMJ, involuntary recall process required for members of a reserve component, is not required to bring retirees and members of the Fleet Reserve or Fleet Marine Corps Reserve on to active duty in order to have jurisdiction over them. *United States v. Morris*, 54 M.J. 898 (N-M. Ct. Crim. App. 2001) *petition for review denied*, 2001 CAAF LEXIS 597 (May 22, 2001).
 - f) Involuntary Recall Retired Reservist. *Morgan v. Mahoney*, 50 M.J. 633 (A.F.Ct.Crim.App. 1999). Air Force retired reserve officer was involuntarily recalled to active duty under Art. 2(d)(1). Court held that the accused was subject to court-martial jurisdiction because 1) he was a “person lawfully called or ordered into...duty” under Art. 2(a)(1); 2) he could be ordered involuntarily to AD under Art. 2(d)(1) & (2) for offenses committed while the accused was on AD or IDT (within the statute of limitations); 3) he was amenable to the UCMJ under Art. 3(d) despite the termination of AD/IDT; 4) the AF Reserve is a “reserve component of the armed forces”; 5) he was in a “retired status” under 10 U.S.C. 10141(b); and 6) at the time of his recall, he was a member of the Retired Reserve. [Note: Retired Reservists who are receiving hospitalization from an armed force are subject to court-martial jurisdiction without being recalled to active duty].
3. Persons in custody;
- a) Jurisdiction terminates once an accused’s discharge is ordered executed (or enlistment expires) and he or she is released from confinement. The remaining suspended punishments are automatically remitted. *United States v. Gurganious*, 36 M.J. 1041 (N.M.C.M.R. 1993).
 - b) *Fisher v. Commander, Army Regional Confinement Facility*, 56 M.J. 691 (N-M. Ct. Crim. App. 2001). An accused that still has military confinement to serve pursuant to a court-martial sentence, is still a military prisoner subject to military jurisdiction under the concept of “continuing jurisdiction,” notwithstanding the execution of his punitive discharge and receipt of the DD Form 214. This is true even where the prisoner is serving time in a state civilian prison. The discharge merely terminated his status of active duty, but did not terminate his status as a military prisoner.
4. P.O.W.’s;
5. In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field. (covered in more detail in Part VI of this outline)
6. Reservists. “Reserve Component” includes USAR and Army National Guard of the United States (ARNGUS) soldiers in Title 10, U.S. Code, duty status. (See sections II.E. and IV. of this outline).

C. Inception of Court-Martial Jurisdiction.

1. **Enlistment:** A Contract Which Changes “Status.” UCMJ, art. 2(b).
 Art. 2(b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) of this section, and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.
2. **Involuntary enlistment:** *United States v. Catlow*, 23 C.M.A. 142, 48 C.M.R. 758 (1974) (coercion); *United States v. Lightfoot*, 4 M.J. 262 (C.M.A. 1978); and *United States v. Ghiglieri*, 25 M.J. 687 (A.C.M.R. 1987) (proposed enlistment as alternative to civil prosecution -no coercion).
3. **Constructive Enlistment.** The codification of *In Re Grimley*, 137 U.S. 147 (1890). UCMJ, art. 2(c) (as amended in 1979):
 Art. 2(c) Notwithstanding any other provision of law, a person serving with an armed force who—
 - (1) Submitted voluntarily to military authority;
 - (2) Met the mental competence and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;
 - (3) Received military pay or allowances; and
 - (4) Performed military duties;
 is subject to this chapter until such person’s active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.”

D. Termination of Jurisdiction Over the Person.

1. **General Rule:** Discharge Terminates Jurisdiction.
2. **ETS/EAS by itself does not terminate jurisdiction.**
 - a) RCM 202(a) discussion: “Completion of an enlistment or term of service does not by itself terminate court-martial jurisdiction . . . court-martial jurisdiction normally continues past the time of scheduled separation until a discharge certificate or its equivalent is delivered or until the Government fails to act within a reasonable time after the person objects to continued retention.”
 - b) *United States v. Poole*, 30 M.J. 149 (C.M.A. 1990). Jurisdiction to court-martial a servicemember exists despite delay—even unreasonable delay—by the government in discharging that person at the end of an enlistment. Even if the member objects, it is immaterial—the significant fact is that the member has yet to receive a discharge. Caveat: Unreasonable delay may provide a defense to “some military offenses.”
 - c) RCM 202(c)(1): “Court-martial jurisdiction attaches over a person when action with a view to trial of that person is taken. Actions by which court-martial jurisdiction attaches include: apprehension; imposition of restraint, such as restriction, arrest, or confinement; and preferral of charges.” See *United States v. Self*, 13 M.J. 132 (C.M.A. 1982); *United States v. Benford*, 27 M.J. 518 (N.M.C.M.R. 1988).

- d) *United States v. Lee*, 43 M.J. 794 (N.M. Ct. Crim. App. 1995). Focusing investigation on accused as prime suspect is enough to establish a “view towards trial” and preserve military jurisdiction beyond ETS/EAS. The court cites to apprehension, imposition of restraint, and preferral of charges as other actions, which attach court-martial jurisdiction, i.e., indicate a “view towards trial.” *See also Webb v. United States*, 67 M.J. 765 (A.F.C.C.A. 2009)(initiation of criminal investigation and SJA memorandum placing accused on administrative hold were each sufficient to trigger attachment of court-martial jurisdiction).
 - e) **Appellate Leave.** *United States v. Ray*, 24 M.J. 657 (A.F.C.M.R. 1987) (jurisdiction upheld where accused, on appellate leave, was not provided discharge due to governmental delay in executing punitive discharge).
3. When is discharge effective?
- a) **On delivery.** *United States v. Melanson*, 53 M.J. 1 (2000). Jurisdiction existed because pursuant to AR 635-200, a discharge takes effect at 2400 hours on the date of notice of discharge to the soldier. *See also United States v. Williams*, 53 M.J. 316 (2000). A valid legal hold had been placed on accused prior to expiration of the date that constituted the effective date of the discharge. *United States v. Scott*, 11 C.M.A. 646, 29 C.M.R. 462 (1960). A discharge takes effect at 2400 hours on the date of discharge; even if the discharge is delivered earlier in the day (unless it is clear that it was intended to be effective at the earlier time).
 - b) **Valid Discharge Certificate:** Discharge Authority’s Intent. Early delivery of a discharge certificate for administrative convenience (e.g., command does not want to keep personnel office open until 2400) does not terminate jurisdiction when certificate is clear on its face that the commander did not intend the discharge to take effect until later. *United States v. Batchelder*, 41 M.J. 337 (1994). *See also United States v. Guest*, 46 M.J. 778 (Army Ct. Crim. App. 1997).
 - c) **Final accounting of pay.** Final accounting of pay is later than the final appointment at the local finance office. Jurisdiction may still exist several days after a servicemember has undergone a clearing process and received their DD214, since the local finance office is only the first of many steps required to accomplish a final accounting of pay. *See United States v. Hart*, 66 M.J. 273 (C.A.A.F. 2008). *See also United States v. Howard*, 20 M.J. 353 (C.M.A. 1985) (jurisdiction terminates on delivery of discharge and final pay); *United States v. Coker*, 67 M.J. 571 (C.G.C.C.A. 2008) (finance office having all the information it needed to compute final pay did not make final pay “ready for delivery” within the meaning of the statute governing discharge); *United States v. Wiczorek*, NMCCA 201100036 (NMCCA 2011) (unpub.)(No *in personam* jurisdiction where no final accounting of pay, even when lack of final accounting is due to government pay clerk’s negligence).
 - d) **Undergo a clearing process.** *United States v. King*, 27 M.J. 327 (C.M.A. 1989) (sailor refused to complete re-enlistment ceremony after he received a discharge certificate). Three elements per King to effectuate an early discharge:
 - (1) Delivery of a valid discharge certificate;
 - (2) A final accounting of pay; and

- (3) Undergoing a “clearing” process as required under appropriate service regulations to separate the member from military service.
4. **Erroneous Delivery.** Erroneous delivery will not terminate jurisdiction. *United States v. Garvin*, 26 M.J. 194 (C.M.A. 1988) (premature delivery of a BCD certificate); *United States v. Brunton*, 24 M.J. 566 (N.M.C.M.R. 1987) (early delivery of discharge, in violation of Navy regulations, meant discharge was not effective on receipt).
5. **Post-arraignment Discharge.** A valid discharge of a soldier prior to trial operates as a formal waiver and abandonment of court-martial in personam jurisdiction, whether or not such jurisdiction had attached prior to discharge. *Smith v. Vanderbush*, 47 M.J. 56 (1997). In personam jurisdiction was lost when accused was discharged after arraignment but before lawful authority resolved the charges. The court considered the intent of the discharge authority and found that there was no evidence to show that the discharge authority (not CA) did not intend to discharge accused on his ETS. In determining a valid discharge the court considered: 1) delivery of discharge certificate; 2) final accounting of pay; and 3) intent of discharge authority. **Note:** AR 27-10, para 5-16, now provides that after any charge is preferred, the DD Form 458 will automatically act to suspend all favorable action and that any issuance of a discharge certificate is void until the charge is dismissed or the convening authority takes initial action on the case (thus avoiding the issue raised in *Smith v. Vanderbush*).
6. **Post-conviction Discharge.**
 - a) Effect on Appellate Review and Power of Convening Authority
 - (1) *Steele v. Van Riper*, 50 M.J. 89 (1999). After a court-martial conviction, but before the convening authority took action, the government honorably discharged the accused. When the convening authority finally took action, he approved the findings and sentence (which included a punitive discharge), declared that the honorable discharge was erroneous, and placed the accused in an involuntary appellate leave status. The accused challenged the invalidation of his honorable discharge. In a supplemental brief, the government concurred. As such, the CAAF denied the accused’s writ-appeal, but advised that the honorable discharge does not affect the power of the convening authority or appellate tribunals to act on the findings and sentence. *See also United States v. Stockman*, 50 M.J. 50 (1998).
 - (2) *United States v. Davis*, 63 M.J. 171 (C.A.A.F. 2006). Held: Where the appellate courts are invoked by an appellant and a rehearing is authorized, an intervening administrative discharge does not serve to terminate jurisdiction over the person of the accused for purposes of that rehearing. The power of the court-martial over appellant was established at his initial trial, and the intervening administrative discharge does not divest the appellate courts of the power to correct error, order further proceedings, and maintain appellate jurisdiction over the person during the pendency of those proceedings.

- b) **Post-conviction but Pre-Initial Action.** *United States v. Estrada*, 69 M.J.45 (C.A.A.F. 2010). Accused sentenced to a BCD. Prior to initial action, accused erroneously issued an administrative honorable discharge. Issue: Whether the administrative (honorable) discharge resulted in remission of the bad-conduct discharge. Held. The honorable discharge was automatically voided in accordance with Army Regulation (AR) 27-10, para. 5-16.
- c) **Post-conviction and Post-Initial Action.** *United States v. Watson*, 69 M.J. 415(C.A.A.F. 2011). The HRC Commander issued CPT Watson an administrative honorable discharge after a BCD was adjudged at her trial and after the Convening Authority took initial action. Despite an affidavit from the HRC Commander stating that she “did not intend the discharge to act...as a remission of the conviction” the CAAF held, 3-2, that the administrative discharge remitted the BCD. *See also, United States v. McPherson*, 68 M.J. 526 (Army Ct.Crim.App. 2009). Accused sentenced to a BCD. Accused received two administrative honorable discharges from HRC – one before initial action, and one after initial action. Held: The honorable discharge given prior to initial action was void pursuant to AR 27-10, but the honorable discharge given after initial action served to remit the punitive discharge. (Note: As of June 2011, a “gap” continues to exist in Army regulations. The next edition of AR 27-10 may fill the gap).
7. **Execution of Punitive Discharge.**
- a) *United States v. Keels*, 48 M.J. 431 (1998). Promulgation of a supplemental court-martial convening order that ordered executed a punitive discharge does not terminate court-martial jurisdiction. Even when there is a punitive discharge, jurisdiction does not terminate until delivery of the discharge certificate and final accounting of pay. There is not instantaneous termination of status upon completion of appellate review.
- b) *United States v. Byrd*, 53 M.J. 35 (2000). In October 1996, the Navy-Marine Corps Court affirmed the accused’s conviction and sentence, which included a punitive discharge. The accused did not petition CAAF for review until 22 January 1997. On 2 January 1997 the convening authority executed his sentence under Article 71. The service court held that since the accused did not petition CAAF for review within 60 days (a CAAF rule), the intervening discharge terminated jurisdiction. CAAF vacated the lower court's decision on the grounds that the Govt. failed to establish the petition for review as being untimely and, therefore, the sentence had been improperly executed. CAAF also held that jurisdiction existed notwithstanding execution of a punitive discharge under Article 71, and it was only a question of whether to consider the case under direct review or collateral review. *See also United States v. Engle*, 28 M.J. 299 (C.M.A. 1989).
8. **In Personam Jurisdiction in a Foreign Country.** *United States v. Murphy*, 50 M.J. 4 (1998). The accused was convicted of premeditated murder and sentenced to death for murders he committed while stationed in Germany. The accused challenged the jurisdiction of the court-martial. He argued that the military investigators misled the German Government to believe that the United States had primary jurisdiction of the case under the NATO SOFA. Based on this information, the German Government waived its jurisdiction. Had the German

Government asserted jurisdiction, the accused could not have been sentenced to death because the Constitution of Germany prohibits the death penalty. The CAAF held that the accused lacked standing to object to which sovereign prosecuted the case. The important jurisdictional question to answer is: Was the accused in a military status at the time of the offense and at the time of trial? The court found that the accused was. The case was set aside and remanded on other grounds.

9. **Exceptions to General Rule that Discharge Terminates Jurisdiction.**

- a) **Exception:** UCMJ, art. 3(a).
 - (1) a person is subject to the UCMJ at the time of the offense;
 - (2) the person is discharged without trial; and
 - (3) the person subsequently re-enters the service and is thus subject to the UCMJ at the time of trial.
- b) *Willenbring v. Neurauter*, 48 M.J. 152 (1998). The CAAF holds that under the 1986 version of Article 3(a), UCMJ, court-martial jurisdiction exists to prosecute a member of the reserve component for misconduct committed while a member of the active component so long as there has not been a complete termination of service between the active and reserve component service. In dicta, however, the CAAF advises that the current version of Article 3(a), UCMJ, “clearly provides for jurisdiction over prior-service offenses without regard to a break in service.” *See also Willenbring v. United States*, 559 F.3d 225 (4th Cir. 2009) (affirming District Court denial of Willenbring’s habeas corpus petition and reasoning that his service was not terminated because his early release and discharge from the regular component was conditioned upon a contractual obligation to immediately begin service in the reserve component. *But see, Murphy v. Dalton*, 81 F.3d 343 (3d Cir. 1996) (holding that it is improper to involuntarily recall a member of the reserve component to active duty for an Article 32(b) investigation when the alleged misconduct occurred while the service member was a member of the active component). [Note: *Murphy v. Dalton* notwithstanding, the CAAF decision in *Willenbring* is controlling legal authority]
- c) Break-In-Service. *United States v. Erickson*, 63 M.J. 504 (A.F. Ct. Crim. App. 2006). Appellant was convicted of violating a lawful order, rape and sodomy of a female under the age of 12, and indecent acts and liberties with a female under the age of 16. The crimes were committed while he was on active duty in the Army, he was discharged, and subsequently enlisted in the Air Force. He was sentenced to a DD and confinement for life with the possibility of parole. Where appellant was on active duty in the Army when he committed misconduct, was discharged and subsequently enlisted in the Air Force, and was on active duty at the time of trial, as here, the court-martial had jurisdiction over the appellant by virtue of Article 3(a), UCMJ.
- d) **Exception:** UCMJ, art. 3(b), person obtaining a fraudulent discharge.
 - (1) *Wickham v. Hall*, 12 M.J. 145 (C.M.A. 1981). May the government prosecute a soldier whose delivered discharge (Chapter 8 - pregnancy) was revoked for being obtained by fraud? C.M.A. allowed the court-martial proceedings to continue. The

5th Circuit affirmed the district court's denial of Wickham's request for habeas corpus relief. The court-martial may proceed. *Wickham v. Hall*, 706 F.2d 713 (5th Cir. 1983).

- (2) *United States v. Reid*, 46 M.J. 236 (1997). The government must secure a conviction for fraudulent discharge prior to prosecuting the accused for other offenses. Article 3(b) clearly requires a two-step trial process. QUERY: What about offenses committed after the fraudulent discharge? Article 3(b) does not confer jurisdiction over offenses committed after the fraudulent discharge. The service court, in dicta, reasoned that after conviction for the fraudulent discharge, jurisdiction would exist over offenses committed after the discharge under UCMJ, art. 2.
- (3) *United States v. Pou*, 43 M.J. 778 (A.F. Ct. Crim. App. 1995). Accused faked his own death. Air Force initially designated him as "missing" before declaring him "dead." Held: Declaring a missing person "dead" is not the equivalent of a discharge of that person, therefore, art. 3(b) is inapplicable, and court-martial jurisdiction exists.
- e) **Exception:** UCMJ, art. 3(c) - Deserter obtaining discharge for subsequent period of service. *United States v. Huff*, 7 C.M.A. 247, 22 C.M.R. 37 (1956).
- f) **Exception:** UCMJ, art. 2(a)(7) - Persons in custody of the armed forces serving a sentence imposed by court-martial. *United States v. Harry*, 25 M.J. 513 (A.F.C.M.R. 1987) (punishment cannot include another punitive discharge); *United States v. King*, 30 M.J. 334 (C.M.A. 1990) (prosecuted after BCD executed but still in confinement).
- g) **Exception:** UCMJ, art. 3(d) - Separation from Active Components to Reserve Status. Leaving a Title 10 status does not terminate court-martial jurisdiction.
- h) **Exception:** Intent of the Discharge Authority – When the command places a hold on the accused prior to 2359 on the date of discharge, even though the discharge certificate had been delivered earlier that day, the discharge does not terminate jurisdiction. In *United States v. Harmon*, 63 M.J. 98 (2006), the appellant was scheduled to be administratively separated from active duty on 17 May 2001. Early in the morning of 17 May, he participated in the robbery of another servicemember. By 0815, NIS had identified him as a suspect. At 0900, appellant received his DD 214 (which listed his effective discharge date and time as 2359 on 17 May) and got on a bus to go home. At 1020, appellant's command learned of his involvement in the robbery and revoked his administrative discharge. The CAAF held that because the command placed a hold on appellant prior to the time his discharge became effective, jurisdiction was never lost.

IV. JURISDICTION OVER THE RESERVE COMPONENT.

- A. **BOTTOM LINE:** Army policy states that Reserve Component soldiers are subject to the UCMJ whenever they are in a Title 10 status: Inactive Duty Training (IDT), Active Duty Training (ADT), Annual Training (AT), or Active Duty (AD). See, AR 27-10, para. 21-2.

1. *United States v. Wall*, 1992 WL 198418 (A.F.C.M.R. 1992) (unpub. opinion) (jurisdiction existed over the accused when absented himself during second half of training day).
 2. *United States v. Morse*, No. ACM 33566, 2000 CCA LEXIS 233 (A.F. Ct. Crim. App. Oct. 4, 2000) *petition for grant of review denied*, 2001 CAAF LEXIS 1021 (Aug. 24, 2001) (accused's duty was not complete until travel forms were signed even if he did not sign the fraudulent travel forms until after he completed his travel).
 3. *See also*, AR 27-10, Chp. 21; Air Force Instruction 51-201; and Paragraph II.E., this outline.
- B. UCMJ, art. 3(d). Prevents the termination of court-martial jurisdiction over a member of a Reserve Component who violates the UCMJ while in a Title 10 status by the member's release from active duty or inactive-duty training. Closes jurisdiction gaps recognized by *Duncan v. Usher*, 23 M.J. 29 (C.M.A. 1986).
- C. **Procedures and Restrictions:** AR 27-10, Chapter 21 establishes procedures for taking punitive action (Art. 15, court-martial) against RC Soldiers.
- D. Procedure: Involuntary Recall to Active Duty. UCMJ, art. 2(d), authorizes a member of a Reserve Component, who is the subject of proceedings under Articles 15 or 30, UCMJ to be ordered involuntarily to active duty for: Article 32 investigations, trial by court-martial, and nonjudicial punishment.
1. Restrictions on the involuntary recall process.
 - a) A member may only be ordered to active duty by an active component general court-martial convening authority (GCMCA). UCMJ, art. 2(d)(4); AR 27-10, para. 21-3.
 - b) Unless the order to involuntary active duty was approved by the appropriate Service Secretary, the member may not be:
 - (1) sentenced to confinement;
 - (2) forced to serve any punishment involving restriction on liberty except during a period of inactive duty training or active duty; or
 - (3) placed in pretrial confinement. UCMJ, art. 2(d)(5).
 - c) General and Special Courts-Martial. Prior to arraignment the reservist must be on active duty. R.C.M. 204(b)(1).
 - d) Summary Courts-Martial. Can be initiated and tried within the reserve structure and without active duty involvement. R.C.M. 204(b)(2). But the summary court-martial officer must be placed on active duty. UCMJ, art. 25; R.C.M. 1301.
- E. Impact on the National Guard.
1. 32 U.S.C. § 505 - Training in a state status - No federal military jurisdiction.
 2. 10 U.S.C. § 672 - Training in a federal status - Guard member is subject to jurisdiction and the reserve jurisdiction legislation's major provisions. This includes involuntary recall. *But see In United States v. Dimuccio*, 61 M.J. 588 (A.F. Ct. Crim. App. 2005) (holding that a Guard member in Title 10 status was not subject to an inspection under MRE 313 ordered by a commander in Title 32 status and suppressing the positive urinalysis resulting from that inspection).

3. Federal status continues until the guard member has completed his federal service (excluding AWOL time) and federal jurisdiction exists notwithstanding state action to terminating jurisdiction. *United States v. Wilson*, 53 M.J. 327 (2000).

V. PROCEDURAL CONSIDERATIONS.

- A. Pleading Jurisdiction. *See*, R.C.M. 307(c)(3) Discussion at (C)(iv) and (F).
- B. Lack of Jurisdiction: Raised by Motion to Dismiss, R.C.M. 907. May be made at any stage of the proceeding.
- C. Burden of Proof. Although R.C.M. 905 states that the burden of proof in a motion contesting jurisdiction is a preponderance of the evidence, if contested at trial, the government must prove jurisdiction beyond a reasonable doubt.
 1. *United States v. Bailey*, 6 M.J. 965 (N.M.C.M.R. 1979); R.C.M. 905(c)(1)(preponderance); R.C.M. 905(c)(2)(B) (burden of persuasion on government).
 2. *United States v. Marsh*, 15 M.J. 252 (C.M.A. 1983) (for “peculiarly military” offenses like AWOL, an accused’s military status is an element of the offense which must be proved beyond a reasonable doubt to the fact finders). *See also United States v. Roe*, 15 M.J. 819 (N.M.C.M.R. 1983).
 3. *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990) (Reserve Component warrant officer ordered to AD for training; provided urine sample that tested positive for cocaine pursuant to a urinalysis administered within 36 hours of initiation of AD period. Held: no subject matter jurisdiction because the government failed to prove beyond a reasonable doubt that the accused was subject to the UCMJ at the time he “used” the cocaine).

VI. JURISDICTION OVER CIVILIANS

- A. MEJA. Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261, Pub. L. No. 106-523.
 1. The MEJA was approved by Congress and signed into law by the President on 22 November 2000. This legislation *does not expand military jurisdiction*; it extends federal criminal jurisdiction over certain civilians (DOD employees, contractors, and dependents thereof, and military dependents) accompanying the military overseas. The implementing regulations went into effect on 3 March 2005. The Act was amended in 2005 to cover civilian employees, contractors, and contractor employees of any Federal agency “to the extent such employment relates to supporting the mission of the Department of Defense overseas.” *See* 2005 NDAA, Sec. 1088.
 2. The Act applies to felony level offenses that would apply under federal law if the offense had been committed within the "special maritime and territorial jurisdiction of the United States."
 3. The Act provides for an initial appearance proceeding, which may be carried out telephonically, conducted by a Federal magistrate judge. At this proceeding, the magistrate will determine if there is probable cause to believe a crime was committed and if the person committed it. If pretrial detention is an issue, the magistrate will also conduct a detention hearing as required by federal law. This detention hearing may also be conducted telephonically if the person so requests.
 4. The Act directly involves the military in two ways.

- a) The Act, depending on implementing rules, may authorize DOD law enforcement personnel to arrest those civilians covered by the Act.
 - b) The Act entitles those civilians covered by the Act, to representation by military counsel (i.e. judge advocates) at the initial hearing, if determined by the Federal magistrate.
5. MEJA Resources
- a) DODI 5525.11 (3 Mar 2005)
 - b) DA Message (13 May 2005)
 - c) OTJAG Info Paper (24 May 2005)
 - d) AR 27-10, CH 26 (16 November 2005)
 - e) Secretary of Defense Memorandum, “UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations.” (10 March 2008)
 - f) DoD General Counsel DTM 09-015 (16 February 2010)
- B. Patriot Act. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107–56.
- 1. One reason there was a jurisdictional gap prior to MEJA was that the definition of “special maritime and territorial jurisdiction of the United States,” (SMTJ) was interpreted as excluding U.S. military installations overseas. *See United States v. Gatlin*, 216 F. 3d 207 (2d Cir. 2000). In 2001, the Patriot Act amended the definition to include military installations overseas, however the definition excludes anyone already covered by the MEJA. *See* 18 U.S.C. § 7.
- C. Court-martial Jurisdiction under Amended Article 2(a)(10), UCMJ.
- 1. The 2007 National Defense Authorization Act amended Article 2(a)(10) as follows:
 - a) OLD: In time of war, persons serving with or accompanying an armed force in the field.
 - b) NEW: In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.
 - 2. “Contingency Operation,” 10 U.S.C. Sec. 101(a)(13): The term “contingency operation” means a military operation that-
 - a) is designated by the SECDEF as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or
 - b) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress.
 - c) Current operations in Afghanistan and Iraq clearly meet the definition of “contingency operation” above.

3. The only significant guidance to date on implementation of the amended Article 2(a)(10), UCMJ, is contained in a SECDEF Memorandum dated 10 March 2008. This memo reserves the authority to prefer charges or initiate NJP against a civilian to the GCMCA level, however each case must be sent up to SECDEF and over to DOJ first, for a decision on whether to prosecute under the MEJA rather than under the UCMJ. *See* Memorandum from the Secretary of Defense to the Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Undersecretaries of Defense and Commanders of the Combatant Commands, subject: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations (10 Mar. 2008).
4. There has been one civilian tried by court-martial using Article 2(a)(10) jurisdiction. In *United States v. Ali*, the accused, a Canadian/Iraqi citizen, pled guilty to three specifications involving possessing, hiding, and lying about a knife (the original charge was aggravated assault for stabbing another interpreter in the chest), and was sentenced to five months confinement (time already served in PTC). His case did not receive automatic review by the Army Court of Appeals because it was subjurisdictional. On 31 March 2010 The Judge Advocate General of the Army directed the Army Court of Criminal Appeals to review the case of *United States v. Ali* pursuant Article 69(d), UCMJ. TJAG requested that the court give attention to two issues: a) Whether the court-martial had jurisdiction over the accused pursuant to Article 2(a)(10), UCMJ; and b) Whether the court-martial had subject matter jurisdiction over the offenses. First, the Court held that appellant and his conduct fit within the statutory jurisdictional framework of the UCMJ. The Court found the offense and trial occurred during a “contingency operation,” finding that the offense and court-martial occurred during Operation Iraqi Freedom, a military operation that meets the definition of “contingency operation. The Court also found that appellant served “with or accompanied and armed force, finding that appellant had moved with a military operation and his presence was not merely incidental but directly connected with or dependent upon the activities of the armed force or its personnel. Specifically, appellant had moved by military aircraft into and throughout Iraq, he lived in a combat outpost with the 117th MP Company and depended on the Soldiers for protection and logistical support. He served side-by-side as they performed their daily military missions. Appellant’s duty was critical to the mission as the squad could not accomplish its mission without him. In addition, the Court found appellant was “in the field,” finding he had served in a combat zone and worked in a combat outpost in an area fighting against enemy insurgent groups. Appellant and the troops were under constant threat and, because of his critical role, he was subject to being personally targeted by the enemy. (It is unclear how determinative these facts were to the jurisdiction outcome, e.g. if he had arrived on a chartered aircraft or did not move around theater, but just remained at one location, thus not dependant on the military for transportation. Additionally, if he had only cleaned latrines, would that have made him “merely incidental”? Finally, if being in a combat zone is all that is required, why does the court go on to list additional factors such as combat in the area. This makes it seem like the prudent prosecutor should document any enemy action in the area to include any indirect fire.)

Second, the Court held that appellant’s court-martial had both personal and subject matter jurisdiction over appellant. In doing so, the Court recognized the long history in which military jurisdiction has been applied in narrow circumstances over civilians when necessary for commanders to maintain good

order and discipline in the battlefield. In addition, the Court distinguished this case from other unsuccessful efforts to extend UCMJ jurisdiction over civilians because the appellant's offenses and court-martial occurred (1) during a time of actual hostilities and (2) in a location where actual hostilities were taking place. The Court also noted that jurisdiction of military courts and the broad authority of commanders in the battlefield over civilians has been authorized in areas of actual fighting. *Reid v. Covert*, 354 U.S. 1, 33 (1957). Article 2(a)(10), UCMJ is specifically drafted to limit military jurisdiction over civilians by requiring either a formal declaration of war by Congress or to the existence of "contingency operations" as defined by section 101(a)(13), Title 10. Moreover, jurisdiction over civilians is limited to only those civilians who are "serving with or accompanying an armed force" and that the civilian be "in the field." (Practitioner's note: It would seem that the commander would lose jurisdiction of this case by transferring it to the rear or the cessation of hostilities. Potentially, even transferring the case to a peaceful portion of Iraq would be fatal to the case.) CAAF has accepted review of this case.



NONJUDICIAL PUNISHMENT – ARTICLE 15, UCMJ

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MAJ PHILIP STATEN
SPRING 2012

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NONJUDICIAL PUNISHMENT – ARTICLE 15, UCMJ

I. REFERENCES

- A. UCMJ art. 15.
- B. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. V (2008) [hereinafter MCM].
- C. U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE chs. 3, 4, 21 (3 October 2011) [hereinafter AR 27-10].

II. INTRODUCTION

- A. Purpose. Nonjudicial punishment (NJP) provides commanders with a prompt means of maintaining good order and discipline and promotes positive behavior changes in servicemembers without the stigma of a court-martial. MCM pt. V, para. 1c.
- B. Proceedings under Art. 15 are not criminal prosecutions. *United States v. Marshall*, 45 M.J. 268 (C.A.A.F 1996).

III. AUTHORITY TO IMPOSE NONJUDICIAL PUNISHMENT

- A. Who may impose?
 - 1. Commanders.
 - a) “Commanders” are commissioned or warrant officers who exercise primary command authority over an organization; is the person looked to by superior authorities as the individual chiefly responsible for maintaining discipline in the organization. AR 27-10, para. 3-7a.
 - b) Can include detachment commanders and commanders of provisional units. Whether an officer is a commander is determined by the duties he or she performs, not necessarily by the title of the position occupied. AR 27-10, para. 3-7a.
 - 2. Joint Commanders. *See* AR 27-10, para. 3-7b.
- B. Can Article 15 authority be delegated? AR 27-10, para. 3-7c.
 - 1. Article 15 authority may *not* be delegated.
 - 2. Exception: General court-martial convening authorities and commanding generals can delegate Article 15 authority to a deputy or assistant commander or to chief of staff (if general officer or frocked to general officer rank). Delegation must be written.
- C. Can Article 15 Authority Be Limited? *Yes*.
 - 1. Permissible limitations. AR 27-10, para. 3-4c.
 - a) Superior commander may *totally* withhold.
 - b) Superior commander may *partially* withhold (e.g., over categories of personnel, offenses, or individual cases).
 - (1) No requirement that limitations be written but probably a good idea (e.g., write a memorandum or publish in post regulation).
 - 2. Impermissible limitations. MCM pt. V, para. 1d(2); AR 27-10, para. 3-4b.
 - a) Superior commander cannot direct a subordinate commander to impose an Article 15.

- b) Superior commander cannot issue regulations, orders, or “guides” that either directly or indirectly suggest to subordinate commanders that --
 - (1) Certain categories of offenders or offenses are to be disposed of under Article 15.
 - (2) Predetermined kinds or amounts of punishment are to be imposed for certain categories of offenders or offenses.

IV. WHO CAN RECEIVE NONJUDICIAL PUNISHMENT

- A. Military Personnel of a Commander's Command. AR 27-10, para. 3-8.
 - 1. Assigned.
 - 2. Affiliated, attached, or detailed.
 - 3. The “Beans and Bullets” Rule. AR 27-10, para. 3-8a(3)(b).
- B. Personnel of Other Armed Forces (services). AR 27-10, para. 3-8c.
 - 1. An Army commander is not prohibited from imposing NJP on members of his or her command that are from other services. However, if an Army commander imposes NJP on members of another service, he or she may only do so under the circumstances and procedures outlined for imposing NJP prescribed by that member’s parent service.

V. HOW TO DECIDE WHAT OFFENSES ARE APPROPRIATE FOR NJP

- A. Relationship to administrative corrective measures.
 - 1. NJP should be used when administrative corrective measures (for example, denial of pass privileges, counseling, extra training, administrative reductions in grade, administrative reprimands) are inadequate due to the nature of the minor offense or because of the servicemember’s service record. MCM pt. V, para. 1d(1).
 - 2. NJP is generally used to address intentional disregard of or failure to comply with standards of military conduct, while administrative corrective measures generally are used to address misconduct resulting from simple neglect, forgetfulness, laziness, inattention to instructions, sloppy habits, and similar deficiencies. AR 27-10, para. 3-3a.
 - 3. Commanders and supervisors need to ensure that extra training does not become extra duty (punishment) that was given without following NJP procedures. Extra training must relate directly to the deficiency observed and must be oriented to correct that particular deficiency, although extra training can occur after duty hours. AR 27-10, para. 3-3c.
- B. NJP may be imposed for *minor* offenses. MCM pt. V, para. 1e; AR 27-10, para. 3-9.
 - 1. Whether an offense is minor depends on several factors:
 - a) The nature of the offense and the circumstances surrounding its commission;
 - b) The offender’s age, rank, duty assignment, record and experience;
 - c) The maximum sentence imposable for the offense if tried by a general court-martial.
 - 2. As a rule of thumb, a minor offense is one that does not authorize the imposition of a dishonorable discharge or confinement in excess of one year if tried at a general court-martial. MCM pt. V, para. 1e. However, the maximum punishment

authorized for an offense is not controlling. *United States v. Pate*, 54 M.J. 501, 506 (Army Ct. Crim. App. 2000).

3. Determining what is a minor offense versus a major offense is within the discretion of the imposing commander. MCM pt. V, para. 1e. See *United States v. Gammons*, 51 M.J. 169 (1999); *Turner v. Dep't of Navy*, 325 F.3d 310 (D.C. Cir. 2003).

C. Limitations.

1. Double punishment prohibited.
 - a) Once Article 15 imposed, cannot impose another Article 15 for same offense or substantially same misconduct. MCM pt. V, para. 1f(1); AR 27-10, para. 3-10.
 - b) Commanders need to bring all known offenses that are determined to be appropriate for disposition by NJP and that are ready to be considered at that time. This includes all offenses arising from a single incident or course of conduct. MCM pt. V, para. 1f(3); AR 27-10, para. 3-10.
 - c) What happens if the Soldier commits offense X on day 1, offense Y on day two, and offense Z on day ten, all of which are minor for NJP purposes; the command knows about offense X when it gives an Article 15 for offense Y (putting the Soldier on extra duty and restriction); and later refers charges on offenses X and Z? The defense files a motion to dismiss X under R.C.M. 907(b)(2)(D)(iv), arguing that it should have been brought to an Article 15 at the same time as offense Y, and the accused is therefore facing multiple punishments. Should the military judge grant the motion?
2. Statute of limitations. Except as provided Art. 43(d), UCMJ, NJP may not be used for offenses which were committed more than 2 years before the date of imposition. MCM pt. V, para. 1f(4); AR 27-10, para. 3-12.
3. Civilian courts. NJP may not be used for an offense that has been tried by a federal court. NJP may not be used for an offense that has been tried by a state court unless AR 27-10, ch. 4 has been complied with. MCM pt. V, para. 1f(5).
4. NJP should not be used when it is clear that only a court-martial will meet the needs of justice and discipline. MCM pt. V, para. 1d(1).

D. Preliminary inquiry.

1. Commanders need to conduct a preliminary inquiry under R.C.M. 303.
2. The inquiry can be informal and can be conducted personally or with someone else in the command. The person conducting the inquiry should gather all reasonably available evidence related to guilt or innocence, aggravation, and extenuation and mitigation. R.C.M. 303 discussion.
3. The inquiry should cover whether an offense was committed; whether the Soldier was involved; and the character and military record of the accused. AR 27-10, para. 3-14.

E. Decision to impose NJP.

1. Having conducted an investigation and considering the above, the commander should decide whether to impose NJP by considering:
 - a) The nature of the offense;

- b) The record of the servicemember;
 - c) The needs for good order and discipline;
 - d) The effect of NJP on the servicemember and the servicemember's record. MCM pt. V, para. 1d(1).
2. The commander needs to determine that the Soldier *probably* committed the offense and that NJP procedure is appropriate. AR 27-10, para. 3-14.
 3. NJP should be conducted at the lowest level of command commensurate with the needs of discipline. AR 27-10, para. 3-5a.
 4. If the commander believes that his or her authority is insufficient to impose proper NJP, then he or she should send the case to a superior using DA Form 5109. AR 27-10, para. 3-5.
 5. A superior commander may also return a case to a subordinate commander for appropriate disposition. AR 27-10, para. 3-4c.

VI. TYPES OF ARTICLE 15S AND PUNISHMENTS

- A. Summarized Article 15. AR 27-10, para. 3-16.
 1. Only available for enlisted servicemembers.
 2. Punishment cannot exceed 14 days extra duty, 14 days restriction, oral admonition or reprimand, or any combination thereof.
 3. Can be imposed by company or field grade officers.
 4. Recorded on DA Form 2627-1.
- B. Formal Article 15. AR 27-10, para. 3-17.
 1. Appropriate if:
 - a) Soldier is an officer, or
 - b) Punishment (for any soldier) might exceed 14 days extra duty, 14 days restriction, oral admonition or reprimand, or any combination thereof.
 2. Classified as company grade Article 15s, field grade Article 15s, and general officer Article 15s. Technically, "general officer Article 15s" are only imposed on officers (general officers can impose greater punishments on officers that other commanders can). General officers can impose Article 15s on enlisted personnel, too, but the available punishments are the same as those available to field grade officers.
 3. Recorded on DA Form 2627.
- C. The maximum available punishment is based on rank of imposing commander (company grade, field grade, or for officer offenders, general officer) and the rank of the soldier receiving the punishment. AR 27-10, para. 3-19, tbl. 3-1. Usually, *commanding generals withhold authority over officer misconduct using the local AR 27-10*. Company grade or field grade NJP over another officer is very rare.

ENLISTED PUNISHMENTS

Summarized	Company Grade	Field Grade
14 days extra duty	14 days extra duty	45 days extra duty
14 days restriction	14 days restriction	60 days restriction (45, if with extra duty)
	7 days correctional custody (E1-E3)	30 days correctional custody (E1-E3)
	1 grade reduction (E1-E4)	1 or more grade reduction (E1-E4) 1 grade reduction (E5-E6)
	7 days' forfeiture	Forfeiture of ½ of 1 month's pay for 2 months
Oral reprimand/admonition	Oral reprimand/admonition	Oral/written reprimand/admonition

OFFICER PUNISHMENTS

Company Grade	Field Grade	General Officer
Written reprimand/admonition	Written reprimand/admonition	Written reprimand/admonition
30 days restriction	30 days restriction	60 days restriction, or
		30 days arrest in quarters
		Forfeiture of ½ of 1 month's pay for 2 months

- D. Reduction in grade.
1. In general, a commander who can promote to a certain grade can also reduce from that grade.
 2. Officers and enlisted soldiers above the grade of E-6 cannot be reduced at an Article 15.
- E. Forfeiture of pay.
1. Forfeitures are based on grade to which reduced, whether or not reduction is suspended.
 2. Forfeitures may be applied against a soldier's retired pay. AR 27-10, para. 3-19b(7)(b).

- F. Admonition and reprimand.
 - 1. Officers admonitions and reprimands must be in writing. Enlisted admonitions and reprimands can be oral or in writing. MCM pt. V, para. 5c(1); AR 27-10, para. 3-19b(9)(d).
 - 2. Admonitions and reprimands imposed under NJP should state clearly that they were imposed as punishment under Art. 15. This is to contrast them with admonitions and reprimands given as an administrative matter, which have different procedures. *See* AR 600-37.
 - 3. Written admonitions and reprimands are prepared in memorandum format and attached to the DA Form 2627. AR 27-10, para. 3-19b(9)(d).
- G. Combination of punishments. AR 27-10, para. 3-19b(8)
 - 1. Commanders can combine punishments.
 - 2. No two or more punishments involving the deprivation of liberty may be combined to run either consecutively or concurrently, except that restriction and extra duty may be combined but not to run for a period in excess of the maximum duration allowed for extra duty.
 - 3. For officers, arrest in quarters may not be imposed in combination with restriction. MCM pt. V, para. 5d(1).
- H. Punishment generally begins on the day imposed. AR 27-10, para. 3-21. Unsuspended punishments of reduction and forfeiture take effect on the day imposed. Commanders can delay other punishments for up to 30 days for legitimate reasons (quarters, TDY, brief field problem). However, once commenced, deprivation of liberty punishments will run continuously unless the Soldier is at fault or is incapacitated (cannot pause deprivation of liberty once it has commenced because of a field problem). AR 27-10, para. 3-19b(8).

VII. NOTICE REQUIREMENTS (THE “FIRST READING”)

- A. Soldier must be notified of the following (AR 27-10, paras. 3-16*b* and 3-18):
 - 1. Commander's intention to dispose of the matter under Article 15.
 - 2. Offense suspected of.
 - 3. Maximum punishment that the commander could impose under Article 15.
 - 4. Soldier's rights under Article 15.
- B. Delegating the notice responsibility. AR 27-10, para. 3-18a.
 - 1. Commander may delegate the notice responsibility to any subordinate who is a SFC or above (if senior to soldier being notified). The commander still needs to personally sign the DA Form 2627 or 2627-1.
 - 2. Good way to involve first sergeant or command sergeant major.
- C. For a script that can be used during the first reading, *see* AR 27-10, app. B.

VIII. SOLDIER’S RIGHTS

- A. Formal. AR 27-10, para. 3-18.
 - 1. A copy of DA Form 2627 with items 1 and 2 completed so defense counsel may review and properly advise soldier.
 - 2. Reasonable decision period and to consult with counsel (usually 48 hours).
 - a) Determined by the complexity of the case and the availability of counsel.

- b) Soldier can request a delay, the commander can grant for good cause.
 - 3. Right to remain silent.
 - 4. Demand trial by court-martial (unless attached to or embarked on a vessel).
 - 5. Request an open or closed hearing. AR 27-10, para. 3-18(g)(2).
 - a) Ordinarily, hearings are open. An open hearing usually takes place in the commander's office with the public allowed to attend.
 - b) The commander should consider all facts and circumstances when deciding whether the hearing will be open or closed.
 - 6. Request a spokesperson.
 - a) Need not be a lawyer.
 - b) Soldier may retain a lawyer at own expense.
 - 7. Examine available evidence.
 - 8. Present evidence and call witnesses. AR 27-10, para. 3-18i.
 - a) The commander determines if the witness is reasonably available, considering that witness and transportation fees are not available
 - b) Reasonably available witnesses will ordinarily only be those at the installation concerned.
 - 9. Appeal.
- B. Summarized
 - 1. Reasonable decision period (normally 24 hours).
 - 2. Demand trial by court-martial.
 - 3. Remain silent.
 - 4. Hearing.
 - 5. Present matters in defense, extenuation, and mitigation.
 - 6. Confront witnesses.
 - 7. Appeal.

IX. HEARING

- A. The hearing is non-adversarial. AR 27-10, para. 3-18g(2). Neither the Soldier nor spokesperson (or retained lawyer) may examine or cross-examine witnesses unless allowed by the commander; however, the Soldier or spokesperson or lawyer can indicate to the imposing commander the relevant issues or questions that they would like to be explored or asked.
- B. In the commander's presence unless extraordinary circumstances. AR 27-10, para. 3-18(g)(1).
- C. Rules of evidence. MCM, pt. V, para. 4c(3); AR 27-10, para. 3-18j.
 - 1. Commander is not bound by the formal rules of evidence, except for the rules pertaining to privileges.
 - 2. May consider any matter the commander believes relevant (including, e.g. unsworn statements and hearsay).

3. But beware that if the Soldier turns down the Art. 15, the Military Rules of Evidence will apply at a court-martial.

D. Proof beyond a reasonable doubt required. AR 27-10, para. 3-18l.

X. CLEMENCY

A. The imposing commander, a successor in command, or the next superior authority may grant clemency. AR 27-10, para. 3-23.

B. Suspension. AR 27-10, para. 3-24.

1. The execution of a punishment of reduction or forfeiture may be suspended for no more than four months. Other punishments may be suspended for no more than six months. For summary Art. 15s, suspensions are for no more than three months.

2. Automatically remitted if no misconduct during the suspension period.

3. Vacation.

a) If the Soldier violates a punitive article of the UCMJ (or other stated condition) during the suspension period, the commander may vacate the suspension.

b) If the vacation involves a condition on liberty, reduction in rank, or forfeiture of pay, the commander should hold a hearing as outlined in AR 27-10, para. 3-25. For the vacation of other punishments, the Soldier should be given notice and an opportunity to respond. If the Soldier is absent without leave when the commander proposes vacation, special rules apply.

c) The conduct that led to the vacation can serve as a separate basis for a new NJP action.

d) No appeal is authorized from the vacation of a suspended sentence. AR 27-10, para. 3-29b.

C. Mitigation. The commander can reduce the quantity or quality of the punishment. AR 27-10, para. 3-26.

D. Remission. The commander can cancel any portion of the unexecuted punishment. AR 27-10, para. 3-27.

E. Setting aside and restoration. AR 27-10, para. 3-28

1. Commanders can set aside any part or amount of a punishment, whether executed or unexecuted, and restore whatever rights, privileges or property that was affected are restored.

2. Should only be done when there was "clear injustice," or an unwaived legal or factual error that clearly and affirmatively injured the substantial rights of the Soldier.

3. Should generally occur within four months from the date that punishment was imposed.

XI. FILING

A. Summarized Article 15. AR 27-10, para. 3-16f.

1. DA Form 2627-1 filed locally.

2. Destroyed two years after imposition or upon transfer from the unit.
- B. Formal Article 15. AR 27-10, paras. 3-6, 3-37.
1. Specialist/Corporal (E-4) and below.
 - a) Original DA Form 2627 filed locally in unit nonjudicial punishment or unit personnel files.
 - b) Destroyed two years after imposition or upon transfer to another general court-martial convening authority.
 2. All other soldiers.
 - a) Performance fiche or restricted fiche of OMPF.
 - (1) Performance section is routinely used by career managers and selection boards for the purpose of assignment, promotion, and schooling selection.
 - (2) Restricted section contains information not normally viewed by career managers or selection boards.
 - b) A commander's decision where to file is as important as the decision relating to the imposition of NJP itself. AR 27-10, para. 3-6a. Commanders should consider:
 - (1) Interests of the Soldier's career.
 - (2) Soldier's age, grade, total service, whether Soldier has prior NJP, recent performance.
 - (3) Army's interest in advancing only the most qualified personnel for positions of leadership, trust, and responsibility.
 - (4) Whether the conduct reflects unmitigated moral turpitude or lack of integrity, patterns of misconduct, evidence of serious character deficiency, or substantial breach of military discipline.
 - c) Imposing commander's filing decision is subject to review by superior authority.
 - d) **Records directed for filing in the restricted fiche will be redirected to the performance fiche if the soldier already has an Article 15 received while he was a sergeant (E-5) or above, filed in his restricted fiche.**
 - e) Superior commander cannot withhold subordinate commander's filing determination authority.

XII. APPEALS

- A. Soldier only has right to one appeal under Article 15. AR 27-10, para. 3-29.
- B. Time limits to appeal.
 1. Reasonable time.
 2. After five calendar days, appeal presumed untimely and may be rejected.
- C. Who acts on an appeal? AR 27-10, para. 3-30.
 1. Successor in command or imposing commander can take action on appeal, and if he or she resolves the issue, may not have to forward.
 2. The next superior commander generally handles the appeal.

3. Should act on appeal within five calendar days (three calendar days for summarized proceedings). While the punishment generally runs during the appeals period, if the command takes longer than the designated period, and the Soldier requests, the punishments involving deprivation of liberty will be interrupted until the appeal is completed. AR 27-10, para. 3-21b.
- D. Procedure for submitting appeal.
1. Submission of additional matters optional.
 2. Submitted through imposing commander.
- E. Action by appellate authority.
1. May conduct independent inquiry. May take appellate action even if soldier does not appeal.
 2. Legal review. AR 27-10, para. 3-34.
 - a) Must refer certain appeals to the SJA office for a legal review *before* taking appellate action. UCMJ art. 15(e); DA Form 2627, note 9 (on reverse of form).
 - (1) Reduction in one or more pay grades from E4 or higher, or
 - (2) More than 7 days arrest in quarters, 7 days correctional custody, 7 days forfeiture of pay, or 14 days of either extra duty or restriction
 - b) May refer an Article 15 for legal review in any case, regardless of punishment imposed.
 - c) Review is typically done by the trial counsel.
 - (1) Must review the appropriateness of the punishment and whether the proceedings were conducted under law and regulations.
 - (2) Not limited to the written matters in the record; may make additional inquiries.
 3. Matters considered. May consider the record of the proceedings, any matters submitted by the servicemember, any matters considered during the legal review, and any other appropriate matters. MCM pt. V, para. 7f. The rules do not require that the servicemember be given notice and an opportunity to respond to any additional matters considered.
 4. Options. AR 27-10, paras. 3-23 through 3-33.
 - a) Approve punishment.
 - b) Suspend.
 - c) Mitigate.
 - d) Remit.
 - e) Set Aside. This includes setting aside the earlier NJP in order to refer the case to court-martial. *United States v. Cross*, 2 M.J. 1057 (A.C.M.R. 1976).
- F. Petition to the Department of the Army Suitability Evaluation Board (DASEB). AR 27-10, para. 3-43; AR 600-37.

1. Sergeants (E-5) and above may petition to have DA Form 2627 transferred from the performance to the restricted fiche.
2. Soldier must present evidence that the Article 15 has served its purpose and transfer would be in the best interest of the Army.
3. Soldiers can petition for removal of the Article 15. AR 600-37, ch. 7.
4. Petition normally not considered until at least one year after imposition of punishment.

XIII. PUBLICIZING ARTICLE 15S

- A. Permissible, but must delete social security number of the soldier and relevant privacy information. AR 27-10, para. 3-22.
- B. Timing. At next unit formation after punishment is imposed, or, if appealed, after the decision on appeal. Can post on the unit bulletin board.
- C. Commander considerations. Avoid inconsistent or arbitrary policy. Before publishing the punishments of sergeants and above, consider:
 1. The nature of the offense.
 2. The individual's military record and duty position.
 3. The deterrent effect.
 4. The impact on unit morale or mission.
 5. The impact on the victim.
 6. The impact on the leadership effectiveness of the individual concerned.

XIV. SUPPLEMENTAL ACTIONS

- A. Any action taken by an appropriate authority to suspend, vacate, mitigate, remit, or set aside a punishment under formal Art. 15 proceedings after action has been taken on an appeal or the DA Form 2627 has been distributed to agencies outside the unit (personnel, finance) need to be recorded on a DA Form 2627-2. AR 27-10, para. 3-38.

XV. THE RELATIONSHIP BETWEEN ARTICLE 15S AND COURTS-MARTIAL

- A. Double jeopardy.
 1. Absent bad faith by the government, Soldiers can be court-martialed for a serious offense that has been the subject of NJP. Art. 15(f), UCMJ; *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989). *See also* R.C.M. 907(b)(2)(D)(iv); AR 27-10, para. 3-10.
 2. The defense can move to dismiss specifications for minor offenses if the accused was previously punished under Article 15 for that offense. R.C.M. 907(b)(2)(D)(iv).
 - a) When an Article 15 involves several offenses, if one of the offenses is a major offense, then the whole incident could be considered major offense and it might not be error to fail to dismiss the other minor offenses. If at trial, the court acquits on the major offense and all that is left are minor offenses, then the findings should not be approved. *United States v. Bond*, 69 M.J. 701 (C.G. Ct. Crim. App. 2010).

- B. The defense serves as the gatekeeper for the admission in the presentencing proceeding of evidence of prior Article 15s where the NJP and the court-martial involve the same offense. *Pierce*, 27 M.J. 367.
1. The defense can allow the factfinder to see the Art. 15 as mitigation to show the factfinder that he or she has been previously punished. UCMJ art. 15(f); *United States v. Gammons*, 51 M.J. 169 (1999).
 2. The defense can also ask the military judge to give sentencing credit based on the Art. 15 without having the panel become aware of the article 15. The accused is entitled to “complete credit for any and all nonjudicial punishment suffered: day-for-day, dollar-for-dollar, stripe-for-stripe.” *Pierce*, 27 M.J. at 369; *Gammons*, 51 M.J. 169. See U.S. DEP’T OF ARMY, PAM 27-9, MILITARY JUDGES’ BENCHBOOK para. 2-7-21 (1 Jan. 2010) for the Table of Equivalent Punishments that is used to calculate “day-for-day, dollar-for-dollar, stripe-for stripe.” This is generally the option chosen.
 3. The defense can also ask for the panel members consider the previous Art. 15 for mitigation, and have the military judge instruct on the specific credit that will be applied. U.S. DEP’T OF ARMY, PAM 27-9, MILITARY JUDGES’ BENCHBOOK para. 2-7-21 (1 Jan. 2010).
- C. Admitting nonrelated (other past misconduct) formal Article 15s during the presentencing proceeding.
1. Admissible at trial by court-martial during presentencing as a record from “personnel records.” R.C.M. 1001(b)(2).
 2. The record needs to be properly completed and properly maintained. Possible objections to the admissibility of records of nonjudicial punishment include:
 - a) Record of nonjudicial punishment is incomplete. *E.g.*, *United States v. Rimmer*, 39 M.J. 1083 (A.C.M.R. 1994) (holding that record inadmissible because the form had no indication whether soldier appealed). See also *United States v. Godden*, 44 M.J. 716 (A.F. Ct. Crim. App. 1996) (holding that administrative errors on record did not affect any procedural due process rights of appellant and record admissible).
 - b) Record not maintained in accordance with regulation. *E.g.*, *United States v. Weatherspoon*, 39 M.J. 762 (A.C.M.R. 1994) (finding that record maintained in Investigative Records Repository was not a personnel record maintained in accordance with regulation because regulation specifically stated that records of courts-martial or nonjudicial punishment would not be maintained under its authority).
 - c) Record does not indicate that the accused had the opportunity to consult with counsel and the accused waived his/her right to demand trial by court-martial. *U.S. v. Booker*, 5 M.J. 238 (C.M.A. 1978); *U.S. v. Kelley*, 45 M.J. 259 (1996).
 - d) Record does not have discernible signatures. *United States v. Dyke*, 16 M.J. 426 (C.M.A. 1983).
 - e) Appeal incomplete. *United States v. Yarbough*, 33 M.J. 122 (C.M.A. 1991).
 - f) Irregular procedure. *United States v. Haynes*, 10 M.J. 694 (A.C.M.R. 1981).

3. May be considered in administrative proceedings.
- D. Summarized Article 15 (DA Form 2627-1).
1. Not admissible at trial by court-martial. AR 27-10, para. 5-29b.
 2. May be considered in administrative proceedings.

XVI. ADVOCACY POINTS

- A. NJP is the business of paralegals, trial counsel, and defense counsel. Chiefs of Justice and Staff Judge Advocates rarely get involved other than for general officer Article 15s. Watch for practices that might damage the system like having commanders offer waiver of counsel forms to Soldiers during the first reading.
- B. Trial counsel should review formal Article 15s. For example, look for limited use urinalysis serving as the basis for an Article 15. Remember, if the Soldier turns down the Article 15, you will own the problem. A few minutes up front can save days of trial preparation later.
- C. Soldiers turn down Article 15s for lots of reasons. The key for defense counsel is to communicate with the trial counsel right away. Hold on to the file and call the trial counsel to avoid the natural response by the commander to what might seem like a challenge to his or her authority. A few minutes up front can save days of trial preparation later and prevent the parties from becoming entrenched in their positions.
- D. One of the major reasons that Soldiers turn down Article 15s is that they do not trust this particular commander to fairly hear their case. Often, the Soldier will be facing issues that arose out of a conflict with the commander that now wants to impose an Article 15, and he or she may understandably feel that the commander will not give them a fair shake. If this is the case, the defense counsel should hold the file and call the trial counsel to see if the next higher commander could handle the Article 15 or if the case could go to a summary court referred by the brigade commander to an officer outside of the Soldier's battalion (if the Soldier is an E5 or above).
- E. As a general matter, trial counsel should not charge offenses that were the subject of an earlier NJP – the Soldier gets a huge sentencing credit if you do. Likewise, defense counsel should normally seek *Pierce* credit for previous Art. 15s rather than seeking dismissal under R.C.M. 907(b)(2)(D)(iv).
- F. If trial counsel ensure that the record is properly completed and your office performs proper records maintenance, you should be able to admit the record of a previous Art. 15 (not related to current offenses) under R.C.M. 1001(a)(2). Defense counsel should nit-pick prior Art. 15s – pretty much any mistake in the record or in the maintenance of the record will keep it out of evidence.
- G. If the SJA is present during the Article 15 hearing given by the commanding general, should the Soldier's trial defense counsel be present, too? If the trial defense counsel is not there, could there be a violation of U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 4.2 (1 June 1992)? Or does the attorney-client relationship end after the Article 15 counseling? *See generally, United States v. Kendig*, 36 M.J. 291 (C.M.A. 1993); *United States v. Mack*, 9 M.J. 300 (C.M.A. 1980).

XVII. CONCLUSION

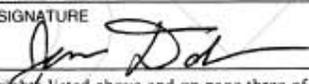
RECORD OF PROCEEDINGS UNDER ARTICLE 15, UCMJ

For use of this form, see AR 27-10; the proponent agency is OTJAG-CL.

NAME Doe, John	GRADE SPC	SSN 000-00-0000	UNIT & LOCATION D. Co., 1-5 INF, Ft. Wainwright, AK	MONTHLY BASE PAY 2,094.00
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1. I am considering whether you should be punished under Article 15, UCMJ, for the following misconduct:
 In that you did on or about 0630, 15 Nov 2010, without authority, fail to go at the time prescribed to your appointed place of duty, to wit; Formation, D Co., 1-5 INF, in front of building 15. This in violation of Article 86, UCMJ.

2. You are not required to make any statements, but if you do, they may be used against you in this proceeding or at a trial by court-martial. You have several rights under this Article 15 proceeding. First I want you to understand I have not yet made a decision whether or not you will be punished. I will not impose any punishment unless I am convinced beyond a reasonable doubt that you committed the offense(s). You may ordinarily have an open hearing before me. You may request a person to speak on your behalf. You may present witnesses or other evidence to show why you shouldn't be punished at all (*matters of defense*) or why punishment should be very light (*matters of extenuation and mitigation*), will consider everything you present before deciding whether I will impose punishment or the type and amount of punishment I will impose. If you do not want me to dispose of this report of misconduct under Article 15, you have the right to demand trial by court-martial instead. In deciding what you want to do you have the right to consult with legal counsel located at Building 1051, Suite 8. You now have 48 hours to decide what you want to do.

NAME, GRADE, AND ORGANIZATION OF COMMANDER Jane Doe, CPT, IN, D. Co., 1-5 INF	SIGNATURE 	DATE 20101215
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3. Having been afforded the opportunity to consult with counsel and understanding my rights listed above and on page three of this form, my decisions are as follows (*Initial appropriate blocks, date, and sign*):

- a. I demand trial by court-martial.
- b. I do not demand trial by court-martial and in the Article 15 proceedings:
- (1) I request the hearing be: Open Closed
 - (2) A person to speak in my behalf: Is requested Is not requested
 - (3) Matters in defense, extenuation, and/or mitigation: Are not presented Are attached Will be presented in person

NAME AND GRADE OF SERVICE MEMBER John Doe, SPC	SIGNATURE 	DATE 20101117
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4a. In a(n) Open Closed hearing, having considered all matters presented, I hereby make the following finding:
 Guilty of All Specifications. Guilty of Some Specifications. Not Guilty of All Specifications.
(line out Not Guilty Specifications). (line out all Specifications and sign below).

Based on my findings, I impose the punishments that are officially recorded in Item 6 of this form.

4b. I direct the original DA Form 2627 be filed in the:
 Performance section of the OMPF Restricted section of the OMPF NA as soldier was an E-4 or below at start of proceedings

4c. You are advised of your right to appeal to the next superior authority: CDR, 1-5 INF within five (5) calendar days.
 An appeal made after that time may be rejected as untimely. Punishment is effective immediately unless otherwise stated in Item 6.

NAME, GRADE, AND ORGANIZATION OF COMMANDER Jane Doe, CPT, IN, D. Co., 1-5 INF	SIGNATURE 	DATE 20101117
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5. (*Initial appropriate block, date, and sign*)
 I do not appeal I appeal and do not submit additional matters I appeal and submit additional matters

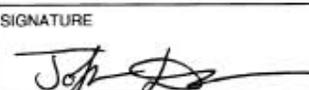
NAME AND RANK OF SERVICE MEMBER John Doe, SPC	SIGNATURE 	DATE 20101117
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Figure 3-2. Sample of completed DA Form 2627

SUMMARIZED RECORD OF PROCEEDINGS UNDER ARTICLE 15, UCMJ

For use of this form, see AR 27-10, Chapter 3; the proponent agency is OTJAG-CL.

A summarized Article 15 may only be used for enlisted personnel. The punishments that may be imposed are limited to: extra duty for 14 days or less, restriction for 14 days or less, an oral reprimand/admonition, or any combination thereof. The imposing commander will ensure that the Soldier understands the rights found on page 2 of this form. An NCO will normally go over these rights with the Soldier.

NAME	GRADE	SSN	UNIT & LOCATION
Doe, John	E-3	000-00-0000	A BTRY, 9/10th FA, 13th, Inf Div, Fort Blank, VA

1. On 15 November, 20 10 the above Soldier was informed that the commander was considering imposition of nonjudicial punishment under the provisions of Article 15, UCMJ, Summarized Proceedings, for the following misconduct:
 On or about 0630, 12 Nov 2010, you did, without authority, fail to go at the time prescribed to your appointed place of duty, to wit: Formation, A BTRY, 9-10 FA, in the Battery Area, in violation of Article 86, UCMJ.

2. The member was advised that no statement was required, but that any statement made could be used against him or her in the proceeding or in a court-martial. The member was also informed of the right to demand trial by court-martial, the right to present matters in defense, extenuation and/or mitigation, that any matters presented would be considered by me before deciding whether to impose punishment, the type or amount of punishment, if imposed, and that no punishment would be imposed unless I was convinced beyond a reasonable doubt that the service member committed the misconduct. The service member was afforded the opportunity to take 24 hours to make a decision regarding these rights. No demand for trial by court-martial was made. After considering all matters presented, the following punishment was imposed:

Guilty of all offenses OR Guilty of the offenses not lined out OR Not guilty of all offenses (*destroy form*)

Based on the findings, I imposed the following punishment (s):

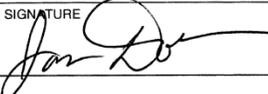
Extra Duty for N/A days (*max of 14*) Restriction for 14 days (*max of 14*) Oral reprimand or admonition

The punishment(s) of reduction to Private First Class (E3)

suspended, to be automatically remitted if not vacated before 20101215 . *(was / were)*
(date)

3. I advised the Soldier of his or her right to appeal to the next superior authority within five(5)calendar days, that an appeal made after that time could be rejected as untimely, and that the punishment was effective immediately unless otherwise stated. The Soldier:

Elected immediately not to appeal Requested a reasonable time to decide whether to appeal.

NAME, RANK, AND ORGANIZATION OF COMMANDER	SIGNATURE	DATE
Jane Doe, CPT, A BTRY, 9-10 FA		20101115

4. (*Initial appropriate block, date, and sign*)

a. I do not appeal. b. I appeal and do not submit matters for consideration. c. I appeal and submit additional matters

NAME AND RANK OF SERVICE MEMBER	SIGNATURE	DATE
John Doe, PFC		02010115

5. After consideration of all matters presented in appeal, the appeal is:

Denied Granted as follows:

NAME, RANK, AND ORGANIZATION OF COMMANDER	SIGNATURE	DATE

6. I have seen the action taken on my appeal.	SIGNATURE OF SERVICE MEMBER	DATE

7. ALLIED DOCUMENTS AND/OR COMMENTS
 DA FORM 2823, Sworn Statement of SSG John Smith, dated 12 Nov 10.

RECORD OF SUPPLEMENTARY ACTION UNDER ARTICLE 15, UCMJ

For use of this form, see AR 27-10, Chapter 3; the proponent agency is OTJAG-CL.

NAME John Doe	GRADE SPC	SSN 000-00-0000	UNIT & LOCATION D Co., 1-5 INF, Fort Wainwright, AK
TYPE OF SUPPLEMENTAL ACTION (OTHER THAN SUPERIOR AUTHORITY ACTING ON APPEAL) (CHECK APPROPRIATE BOX) <input type="checkbox"/> SUSPENSION (Complete Item 1 below) <input type="checkbox"/> MITIGATION (Complete Item 2 below) <input type="checkbox"/> REMISSION (Complete Item 3 below) <input type="checkbox"/> SETTING ASIDE (Complete Item 4 below) <input checked="" type="checkbox"/> VACATION OF SUSPENSION (Complete Item 5 below)			
1. SUSPENSION The punishment(s) of: _____ imposed on the above service member on _____ is / are _____ <small>(date of punishment)</small> suspended and will automatically be remitted if not vacated before _____ <small>(date)</small>			
2. MITIGATION The punishment(s) of: _____ imposed on the above service member on _____ is / are _____ mitigated to _____ <small>(date of punishment)</small>			
3. REMISSION The punishment(s) of: _____ imposed on the above service member on _____ is / are _____ remitted. <small>(date of punishment)</small>			
4. SETTING ASIDE The punishment(s) of: _____ imposed on the above service member on _____ is / are _____ set aside on the basis of _____ <small>(date of punishment)</small> All rights, privileges, and property affected are hereby restored.			
5. VACATION OF SUSPENSION a. The suspension of the punishment(s) of: <u>reduction to the grade of E-3</u> _____ imposed on the above service member on <u>20101117</u> is / are _____ hereby vacated. The unexecuted portion(s) of the punishment(s) will be <small>(date of punishment)</small> duly executed (date of punishment). b. Vacation is based on the following offense(s): <u>In that you did, on or about 0630 hours, 7 Dec 10, without authority, fail to go at the time prescribed to your appointed place of duty, to wit: Formation, D Co., 1-5 INF, in front of Building 15. This is in violation of Article 86, UCMJ.</u> _____ c. The service member _____ was _____ given an opportunity to rebut (see para. 3-25, AR 27-10). <small>(was / was not)</small> d. The service member _____ was _____ present at the vacation proceeding (see para. 3-25, AR 27-10). <small>(was / was not)</small>			
6. THE ORIGINAL DA FORM 2627 WAS FILED AS FOLLOWS: <input type="checkbox"/> Performance section of the OMPF <input type="checkbox"/> Restricted section of the OMPF. <input checked="" type="checkbox"/> NA as soldier was an E-4 or below at start of proceedings			
7. BY MY ORDER: <input checked="" type="checkbox"/> AS THE OFFICER WHO IMPOSED THE PUNISHMENT <input type="checkbox"/> AS THE SUCCESSOR IN COMMAND TO THE IMPOSING OFFICER <input type="checkbox"/> AS THE SUPERIOR AUTHORITY			
NAME, RANK, AND ORGANIZATION OF COMMANDER Jane Doe, CPT, D Co., 1-5 INF		SIGNATURE 	DATE 20101208



SUMMARY COURT-MARTIAL

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**MAJ PHILIP STATEN
SPRING 2012**

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SUMMARY COURT-MARTIAL

Outline of Instruction

I. INTRODUCTION

- A. Summary Court-Martial. A summary court-martial (SCM) is the least formal of the three types of courts-martial and the least protective of a soldier's rights. The SCM is a streamlined trial process involving only one officer who theoretically performs the prosecutorial, defense counsel, judicial, and member (juror) functions. The purpose of this type of court-martial is to dispose promptly of relatively minor offenses. The one officer assigned to perform the various roles incumbent on the SCM must inquire thoroughly and impartially into the matter concerned to ensure that both the United States and the accused receive a fair hearing. Since the SCM is a streamlined procedure providing somewhat less protection for the rights of the parties than other forms of court-martial, the maximum possible punishment is very limited. Furthermore, it may try only enlisted personnel and only those who consent to be tried by SCM.
- B. Key References.
1. Military Justice – Army Regulation 27-10
 2. SCM Officer's Guide – Department of Army (DA) Pamphlet (Pam) 27-7
 3. Manual for Courts-Martial (MCM) Provisions
 - a) Rule for Courts-Martial (R.C.M.) 1301 – 1306.
 - b) Military Rule of Evidence (M.R.E.) 101 – applying the rules of evidence to SCMs.
 - c) Appendix 4 – Charge sheet.
 - d) Appendix 9 – Guide for SCM
 - e) Appendix 15 – Record of Trial by SCM
 4. Military Judges' Benchbook – DA Pam 27-9
- C. Unique to the Military.
1. The SCM has no civilian equivalent. It is strictly a creature of statute within the military system. At first blush, it may appear to be something of a paradox to those unfamiliar with the military justice system.
 2. Although it is a criminal proceeding at which the technical rules of evidence apply, and at which a finding of guilty can result in loss of liberty and property, there is no constitutional right to representation by counsel.
- D. Supreme Court Review. The United States Supreme Court examined the SCM procedure and held that a SCM was not a "criminal prosecution" within the meaning of the Sixth Amendment. As such, there is no right to counsel at a SCM. *Middendorf v. Henry*, 425 U.S. 25 (1976). The Court cited its rationale previously expressed in *Toth v. Quarles*, 350 U.S. 11 (1955).

II. SUMMARY COURT-MARTIAL CONVENING AUTHORITY

- A. Authority to Convene. A SCM is convened (created) by an individual authorized by law to convene SCMs. Article 24, of the Uniform Code of Military Justice (UCMJ) and R.C.M. 1302(a), specify those persons who have the power to convene an SCM. Commanding officers authorized to convene a General Court-Martial (GCM) or Special

Court-Martial (SPCM) are also empowered to convene SCMs. Thus, the commanding officer of an installation and commanding officers of Brigades have this authority. Additionally, most battalion level commanders have this authority. Finally, the MCM states that a commanding officer of a detached company or other detachment of the Army also has the authority to convene a SCM.

1. Court-Martial Convening Authority Generally
 - a) Battalion commander (Lieutenant Colonel): summary court-martial convening authority (SCMCA).
 - b) Brigade commander (Colonel): special court-martial convening authority (SPCMCA).
 - c) Division commander (Major General): general court-martial convening authority (GCMCA).
 2. Withhold and Delegation of Authority
 - a) Withhold: Superior commanders may withhold or withdraw UCMJ authority from subordinate commanders. In particular, many Army GCMCAs withhold authority to convene Bad-Conduct Discharge (BCD)-Special Courts-Martial.
 - b) Delegation: The authority to convene SCMs is vested in the office of the authorized command and not in the person of its commander. Thus, LTC John Smith has SCM convening authority while actually performing his duty as the commanding officer of his battalion, but loses his authority when he goes on leave or is absent from his command for other reasons. The power to convene SCMs is nondelegable and in no event can a subordinate exercise such authority “by direction.” When LTC Smith is on leave from his command, his authority to convene SCMs is ordinarily placed in his temporary successor in command (usually the executive officer) who assumes command by way of assumption of command orders.
 3. Options of SCMCA [Articles 20 and 24 UCMJ]
 - a) Dismiss charges. Dismissal does not bar subsequent action under R.C.M. 306(c) [R.C.M. 403(b)(1)].
 - b) Alternative disposition. The SCMCA could handle the matter with a Field Grade Article 15.
 - c) Return to subordinate commander. The SCMCA may return to a subordinate commander for her independent discretion on how the case should be handled. No recommendation may be made by the SCMCA [R.C.M. 401(c)(2)(B) and 403(b)(2)].
 - d) Forward to superior commander with recommendation [R.C.M. 403(b)(3)]. Recording the receipt of charges on charge sheet, discussed *infra*; tolls statute of limitations [R.C.M. 403(a)].
 - e) Refer to a SCM [R.C.M. 403(b)(4)].
 - f) Direct an Article 32 investigation [R.C.M. 403(b)(5)] (only if also SPCMCA).
- B. Mechanics of convening. Before any case can be brought before a SCM, the court must be properly convened (created). It is created by the order of the convening authority

detailing the SCM officer to the court. R.C.M. 504(d)(2) requires that the convening order specify that it is a SCM and designate the SCM officer. Additionally, the convening order may designate where the court-martial will meet.

- C. SCM officer. A SCM is a one-officer court-martial. As a jurisdictional prerequisite, this officer must be a commissioned officer, on active duty, and of the same armed force as the accused. Where practicable, the officer's grade should not be below a captain (O-3).
1. The SCM should be best qualified by reason of age, education, experience, and judicial temperament as his performance will have a direct impact upon the morale and discipline of the command.
 2. Where more than one commissioned officer is present within the command or unit, the convening authority may not serve as SCM. When the convening authority is the only commissioned officer in the unit, however, she may serve as SCM and this fact should be noted in the convening order attached to the record of trial. In such a situation, the better practice would be to appoint a SCM officer from outside the command, as the SCM officer need not be from the same command as the accused.
 3. The SCM officer assumes the burden of prosecution, defense, judge, and jury as she must thoroughly and impartially inquire into both sides of the matter and ensure that the interests of both the government and the accused are safeguarded and that justice is done. While she may seek advice from her legal advisor on questions of law, she may not seek advice from anyone on questions of fact, since she has an independent duty to make these determinations. R.C.M. 1301(b).
- D. Jurisdictional limitations.
1. Persons. Article 20, UCMJ, and R.C.M. 1301(c) provide that a SCM has the power (jurisdiction) to try only those enlisted persons who consent to trial by SCM. The right of an enlisted accused to refuse trial by SCM is absolute. No commissioned officer, warrant officer, cadet, or person not subject to the UCMJ (Article 2, UCMJ) may be tried by SCM. The accused must be subject to the UCMJ at the time of the offense and at the time of trial; otherwise, the court-martial lacks jurisdiction over the person of the accused.
 2. Offense. A SCM has the power to try all offenses described in the UCMJ except those for which a mandatory punishment beyond the maximum imposable at a SCM is prescribed by the UCMJ. Cases for which the maximum penalty is death are capital offenses and cannot be tried by SCM. *See* R.C.M. 1004 for a discussion of capital offenses.
 - a) Any minor offense can be disposed of by SCM. For a discussion of what constitutes a minor offense, refer to Part V, MCM under Section 1(e).
 - b) In 1977, the United States Court of Military Appeals ruled that the jurisdiction of SCMs is limited to "disciplinary actions concerned solely with minor military offenses unknown in the civilian society." *United States v. Booker*, 3 M.J. 443 (C.M.A. 1977). Read literally, this would have precluded SCMs from trying civilian crimes such as assault, larceny, drug offenses, etc. Following a reconsideration of that decision, the court rescinded that ruling and affirmed that "with the exception of capital crimes, nothing whatever precludes the exercise of summary court-martial jurisdiction over serious offenses in violation of the Uniform Code of Military Justice." *United States v. Booker*, 5 M.J. 246 (C.M.A. 1978).

III. REFERRAL TO A SUMMARY COURT-MARTIAL

A. Introduction.

1. In this section, attention will be focused on the mechanism for properly getting a particular case to trial before a SCM. The basic process by which a case is sent to any court-martial is called “referral for trial.”
2. Preliminary inquiry. Every court-martial case begins with either a complaint by someone that a person subject to the UCMJ has committed an offense or some inquiry that results in the discovery of misconduct. In any event, R.C.M. 303 imposes upon the officer exercising immediate Nonjudicial Punishment (NJP) authority over the accused the duty to make, or cause to be made, an inquiry into the truth of the complaint or apparent wrongdoing. This investigation is impartial and should touch on all pertinent facts of the case, including extenuating and mitigating factors relating to the accused. Either the preliminary investigator or other person having knowledge of the facts may prefer formal charges against the accused if the inquiry indicates such charges are warranted.

B. Preferral of charges. R.C.M. 307. Charges are formally made against an accused when signed and sworn to by a person subject to the UCMJ (known as “the accuser”). This procedure is called “preferral of charges.” Charges are preferred by executing the appropriate portions of the charge sheet. MCM, Appendix 4-1. Implicit in the preferral process are several steps.

- a) Personal data. Block I of page 1 of the charge sheet should be completed first. The information relating to personal data can be found in pertinent portions of the accused’s service record or other administrative records.
- b) The charges. Block II of page 1 of the charge sheet is then completed to indicate the precise misconduct involved in the case. Each punitive article found in Part IV, MCM, contains sample specifications. A detailed treatment of pleading offenses is contained in the Criminal Law Deskbook, Volume II, Crimes and Defenses.
- c) Accuser. The accuser is a person subject to the UCMJ who signs item 11d in block III at the bottom of page 1 of the charge sheet. The accuser should swear to the truth of the charges and have the affidavit executed before an officer authorized to administer oaths.
- d) Oath. The oath must be administered to the accuser and the affidavit so indicating must be executed by a person with proper authority. Article 136, UCMJ, authorizes all judge advocates, summary courts-martial officers, all adjutants, and legal officers to administer oaths for this purpose. No one can be ordered to prefer charges to which she cannot truthfully swear. Often, the trial counsel will administer the oath. When the charges are signed and sworn to, they are “preferred” against the accused. This step also starts the speedy trial clock.
- e) Informing the accused. After formal charges have been signed and sworn to, the preferral process is completed when the charges are submitted to the accused’s immediate commanding officer. The first step which must be taken is to inform the accused of the charges against him. The purpose of this requirement is to provide an accused with reasonable notice of impending criminal prosecution in compliance with criminal due process of law standards. R.C.M. 308 requires the immediate commander of the

accused to have the accused informed as soon as practicable of the charges preferred against him, the name of the person who preferred them, and the person who ordered them to be preferred. The important aspect of this requirement is that notice must be given through official sources. The accused should appear before the immediate commander or other designated person giving notice and should be told of the existence of formal charges, the general nature of the charges, and the name of the person who signed the charges as accuser. A copy of the charges should also be given to the accused. After notice has been given, the person who gave notice to the accused will execute item 12 at the top of page 2 of the charge sheet. If not the immediate commander of the accused, the person signing on the "signature" line should state their rank, component, and authority.

f) Formal receipt of charges. R.C.M. 403(a). Item 13 in block IV on page 2 of the charge sheet records the formal receipt of sworn charges by the officer exercising SCMCA. Often this receipt certification and the notice certification will be executed at the same time, although it is not unusual for the notice certification to be executed prior to the receipt certification. The purpose of the receipt certification is to establish that sworn charges were preferred before the statute of limitations operated to bar prosecution. Article 43, UCMJ, sets forth time limitations for the prosecution of various offenses. If sworn charges are not received by an officer exercising SCM jurisdiction over the accused within the time period applicable to the offense charged, then prosecution for that offense is barred by Article 43, UCMJ. The time period begins on the date the offense was committed and ends on the date appropriate to that offense. Where the accused is absent without leave at the time charges are sworn, it is permissible and proper to execute the receipt certification even though the accused has not been advised of the existence of the charges. In such cases, a statement indicating the reason for the lack of notice should be attached to the case file. When the accused returns to military control, notice should then be given to him. The receipt certification need not be executed personally by the SCM convening authority and is often completed for her by the adjutant.

- C. Referral of Charges. Once the charge sheet and supporting materials are presented to the SCMCA and she makes her decision to refer the case to a SCM the case is referred. The procedure to accomplish referral is by completing item 14 in block V on page 2 of the charge sheet. The referral is executed personally by the SCMCA.
1. The referral should explicitly detail the type of court to which the case is being referred. Thus, the referral might read "referred for trial to the summary court-martial convened by my summary court-martial convening order XX dated 15 January 201X." This language precisely identifies a particular kind of court-martial and the particular SCM to try the case.
 2. In addition, the referral on page 2 of the charge sheet should indicate any particular instructions applicable to the case such as "confinement at hard labor is not an authorized punishment in this case" or other instructions desired by the convening authority. If no instructions are applicable to the case, the referral should so indicate by use of the word "none" in the appropriate blank. Once the referral is properly executed, the case is "referred" to trial and the case file forwarded to the proper SCM officer.

IV. THE SUMMARY COURT-MARTIAL PROCESS

A. Pretrial Preparation.

1. General. After charges have been referred to trial by SCM, all case materials are forwarded to the proper SCM officer, who is responsible for thoroughly preparing the case for trial.
2. Preliminary Preparation. Upon receipt of the charges and accompanying papers, the SCM officer should begin preparation for trial. The charge sheet should be carefully examined, and all obvious administrative, clerical, and typographical errors corrected. *See* R.C.M. 1304. The SCM officer should initial each correction she makes on the charge sheet.
 - a) If the errors are so numerous as to require preparation of a new charge sheet, re-swearing of the charges and re-referral is required. *See generally* R.C.M. 603.
 - b) If the SCM officer changes an existing specification to include any new person, offense, or matter not fairly included in the original specification, R.C.M. 603 requires the new specification to be re-sworn and re-referred. The SCM officer should continue her examination of the charge sheet to determine the correctness and completeness of the information on the charge sheet.
 - c) The SCM, with her legal advisor, should review the charge(s) and specification(s). The SCM officer should check for proper form and determine the elements of the offense. "Elements" are facts which must be proved in order to find the accused guilty of any offense. Part IV, MCM, contains some guidance in this respect, but for more detailed guidance consult the Military Judges' Benchbook, DA Pam. 27-9. The SCM officer should also review the evidence relating to the charges.
3. Pretrial Conference. The SCM officer should meet with the accused in a pretrial conference. The accused's right to counsel is discussed later in this chapter. However, if the accused is represented by counsel, all dealings with the accused should be conducted through his counsel. Thus, the accused's counsel, if any, should be invited to attend the pretrial conference. At the pretrial conference, the SCM officer should follow the suggested guide found in Appendix 9, MCM, and should document the fact that all applicable rights were explained to the accused by completing blocks 1, 2, and 3 of the form for the record of trial by SCM found at Appendix 15, MCM.
4. Advice to the accused. R.C.M. 1304(b) requires the SCM to advise the accused of the following matters:
 - a) That the officer has been detailed by the convening authority to conduct a SCM;
 - b) That the convening authority has referred certain charge(s) and specification(s) to the summary court for trial. The SCM officer should serve a copy of the charge sheet on the accused, and complete the last block on page 2 of the charge sheet noting service on the accused;
 - c) The general nature of the charges and the details of the specifications;

- d) The names of the accuser and the convening authority, and the fact that the charges were sworn to before an officer authorized to administer oaths; and
 - e) The names of any witnesses who may be called to testify against the accused at trial and the description of any real or documentary evidence to be used and the right of the accused to inspect the allied papers and immediately available personnel records.
5. Additional Rights. The accused should then be advised that he has the following legal rights:
- a) The right to refuse trial by SCM;
 - b) The right to plead “not guilty” to any charge and/or specification and thereby place the burden of proving his guilt, beyond reasonable doubt, upon the government;
 - c) The right to cross-examine all witnesses called to testify against him or to have the SCM officer ask a witness questions desired by the accused;
 - d) The right to call witnesses and produce any competent evidence in his own behalf and that the SCM officer will assist the accused in securing defense witnesses or other evidence which the accused wishes presented at trial;
 - e) The right to remain silent, which means that the accused cannot be made to testify against himself nor will the accused’s silence count against him in any way should he elect not to testify;
 - f) Rights concerning representation by counsel (see subparagraph 6 below);
 - g) That, if the accused refuses SCM, the convening authority may take steps to dismiss the case or refer it to trial by special or general court-martial, or dispose of the case at NJP;
 - h) The right, if the accused is found guilty, to call witnesses or produce other evidence in extenuation or mitigation and the right to remain silent or to make a sworn or unsworn statement to the court; and
 - i) The maximum punishment which the SCM could adjudge if the accused is found guilty of the offense(s) charged.
 - (1) E-4 and below. The jurisdictional maximum sentence that a SCM may adjudge in the case of an accused who, at the time of trial, is in pay grade E-4 or below, is the following:
 - (a) Reduction to the lowest pay grade (E-1);
 - (b) Forfeiture of two-thirds of one-month’s pay;
 - (c) Confinement not to exceed one month or hard labor without confinement for forty-five days (in lieu of confinement) or restriction to specified limits for two months. If confinement is adjudged with either hard labor without confinement or restriction in the same case, the rules concerning apportionment found in R.C.M. 1003 (b)(6) and (7) must be followed. Given this requirement, it is unusual for a SCM officer to adjudge a combination of confinement and hard labor or restriction.

- (2) E-5 and above. The jurisdictional maximum that a SCM could impose in the case of an accused who, at the time of trial, is in pay grade E-5 or above is to the following:
- (a) Reduction to the next lower pay grade;
 - (b) Restriction to specified limits for two months (cannot adjudge confinement);
 - (c) Forfeiture of two-thirds of one month's pay.
- (3) The effective date of restriction and/or extra duties is the date the convening authority (CA) approves the sentence and orders it executed. This means that the CA can neither impose nor require immediate service of such punishment on the date it is adjudged by the SCM officer unless the member waives the seven day period to submit clemency matters and the CA takes his/her action immediately. *See R.C.M. 1105(c)(2).* Ordinary confinement, however, begins to run from the date the sentence was adjudged by the SCM officer. However, the accused may request that the CA defer confinement until action or as part of a clemency request. *See R.C.M. 1306(a).*
- (4) Maximum Punishment Chart.

PUNISHMENT	E5 AND ABOVE	E4 AND BELOW
Confinement for 1 month or less.		X
Hard labor without confinement for 45 days or less.		X
Restriction for two months or less.	X	X
Forfeiture of 2/3 pay per month for one month or less.	X	X
Reduction to the lowest enlisted grade.	One grade only	X

6. Rights to Counsel.
- a) In 1972, the Supreme Court held, with respect to “criminal prosecutions,” that “absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at this trial.” *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).
 - b) The Supreme Court, in *Middendorf v. Henry*, 425 U.S. 25 (1976), held that a SCM was not a “criminal prosecution” within the meaning of the

Sixth Amendment, reasoning that the possibility of loss of liberty does not, in and of itself, create a proceeding at which counsel must be afforded. Rather, it reasoned that a SCM was a brief, nonadversary proceeding, the nature of which would be wholly changed by the presence of counsel. It found no factors that were so extraordinarily weighty as to invalidate the balance of expediency that has been struck by Congress.

- c) In *United States v. Booker*, 5 M.J. 238 (C.M.A. 1977), *reconsidered at* 5 M.J. 246 (C.M.A. 1978), the C.M.A. considered the Supreme Court's decision in *Middendorf* and concluded that there existed no right to counsel at a SCM. *See also United States v. Kahmann*, 59 M.J. 309, 315 (C.A.A.F. 2004)
 - d) While the Manual for Courts-Martial created no statutory right to detailed military defense counsel at a SCM, the convening authority may still permit the presence of such counsel if the accused is able to obtain such counsel. The Manual has created a limited right to civilian defense counsel at SCM, however. R.C.M. 1301(e) provides that the accused has a right to hire a civilian lawyer and have that lawyer appear at trial, if such appearance will not unnecessarily delay the proceedings and if military exigencies do not preclude it. The accused must, however, bear the expense involved. If the accused wishes to retain civilian counsel, the SCM officer should allow him a reasonable time to do so.
 - e) *Booker Warnings* - Although holding that an accused had no right to counsel at a SCM, the C.M.A. ruled in *Booker, supra*, that if an accused was not given an opportunity to consult with independent counsel before accepting a SCM, the SCM will be inadmissible at a subsequent trial by court-martial. The term "independent counsel" has been interpreted to mean a lawyer qualified in the sense of Article 27(b), UCMJ, who, in the course of regular duties, does not act as the principal legal advisor to the convening authority. Under the *Booker* Rule, the government needs to show that the accused either exercised his right to confer with counsel or made a voluntary, knowing, and intelligent waiver of this right. Without such a showing, a SCM will not be considered a "criminal conviction" and will not be admissible as a prior conviction under R.C.M. 1001(b)(3), nor for purposes of impeachment under M.R.E. 609, MCM. *See United States v. Booker*, 3 M.J. 443, 448 (C.M.A. 1977). *See also United States v. Kelly*, 45 M.J. 259 (C.A.A.F. 1996). While these cases would seem to allow a prior SCM's use as a "conviction" to trigger the increased punishment provisions of R.C.M. 1003(d) if the accused had been actually represented by counsel or had rejected the services of counsel provided to him, the discussion following R.C.M. 1003(d) opines that convictions by SCM may not be used for this purpose. As the discussion and analysis sections of the MCM, it has no binding effect and represents only the drafters' opinions. Thus, this issue remains unresolved.
7. Final pretrial preparation. At the conclusion of the pretrial interview, the SCM officer should determine whether the accused has decided to accept or refuse trial by SCM. If more time is required for the accused to decide, it should be provided. The SCM officer should obtain from the accused the names of any witnesses or the description of other evidence which the accused wishes presented at the trial if the case is to proceed. She should also arrange for a time and place to hold the open sessions of the trial. These arrangements should be made through the legal

advisor to the SCM officer, and the SCM officer should ensure that the accused and all witnesses are notified of the time and place of the first meeting.

- a) An orderly trial procedure should be planned to include a chronological presentation of the facts. The admissibility and authenticity of all known evidentiary matters should be determined and numbers assigned all exhibits to be offered at trial. These exhibits, when received at trial, should be marked “received in evidence” and numbered (prosecution exhibits) or lettered (defense exhibits).
- b) The evidence reviewed should include not only that contained in the file as originally received, but also any other relevant evidence discovered by other means. The SCM officer has the duty of ensuring that all relevant and competent evidence in the case, both for and against the accused, is presented. It is the responsibility of the SCM officer to ensure that only legal and competent evidence is received and considered at the trial. Only legal and competent evidence received in the presence of the accused at trial can be considered in determining the guilt or innocence of the accused. Additionally, the Military Rules of Evidence apply to the SCM and must be followed. *See* M.R.E. 101.
- c) Subpoena of witnesses. The SCM is authorized by Article 46, UCMJ, and R.C.M. 703(e)(2)(C) and 1301(f) to issue subpoenas to compel the appearance at trial of civilian witnesses. In such a case, the SCM officer will follow the same procedure detailed for a SPCM or GCM trial counsel in R.C.M. 703(c). Appendix 7 of the MCM contains an illustration of a completed subpoena.
- d) Depositions – The SCM officer may also use a deposition to capture testimony if necessary. However, the SCM should seek assistance from her legal advisor to accomplish this task. *See* Article 49, UCMJ; R.C.M. 702.

B. Trial Procedure. *See* Appendix 9, MCM and DA Pam 27-7.

1. Benefits of SCM Process. The main benefit of a SCM proceeding is that it is not considered a federal conviction. Depending upon the offense(s) charged, this fact alone may provide the basis for an accused to consent to trial by SCM.
 - a) Limited punishment. A SCM allows a soldier to limit his exposure to punishment if found guilty. Referral of the case to a higher court-martial may provide an accused with greater rights, but this comes at a price by also opening up the accused to greater punishment and the possibility of a federal conviction.
 - b) Independent Arbiter. A SCM permits someone other than the accused’s commander to hear and decide his case. Often times, an accused will feel his commander has it out for him. This feeling may cause the accused to turn down an Article 15. A SCM, however, gives the accused the ability to address his case to someone other than his commander and presumably someone with no previous history with him.
2. Article 15. In contrast, an Article 15, otherwise known as Nonjudicial Punishment (NJP), is imposed by an accused’s commander. Additionally, any soldier, not just enlisted, may receive NJP.

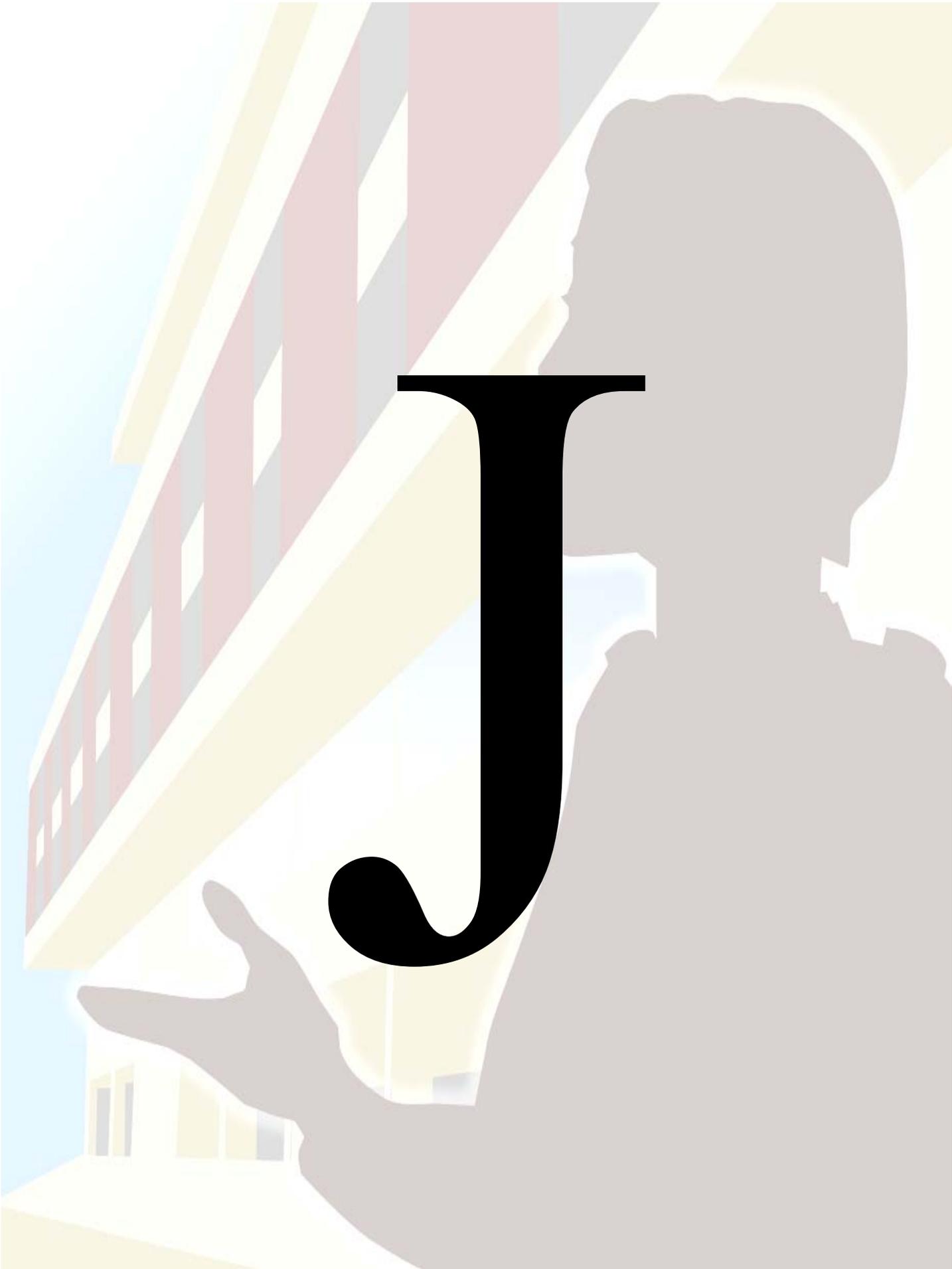
- a) NJP is not a conviction. As its name suggests, it is not a court-martial. Usually, NJP will either remain in a soldier's local file or be placed in the soldier's permanent record. While this may affect future promotions and duty assignments, it will have no impact on the soldier in civilian life should she decide to leave the service.
 - b) Unlike a SCM, the maximum available punishment for NJP is based on the rank of the imposing commander (company grade, field grade, or for officer offenders, general officer) and the rank of the soldier receiving the punishment. AR 27-10, paragraph 3-19, table 3-1. Usually, commanding generals withhold authority over officer misconduct using the local AR 27-10. Consequently, company grade or field grade NJP over an officer is very rare. Another key difference between NJP and a SCM is that regardless of the level of NJP, confinement is not a possible punishment.
 - c) For additional information on NJP see Tab I in the Criminal Law Deskbook, Volume One.
- C. Post-Trial responsibilities of the SCM. After the SCM officer has deliberated and announced findings and, where appropriate, the sentence, she then must fulfill certain post-trial duties. The nature and extent of these post-trial responsibilities depend upon whether the accused was found guilty or innocent of the offenses charged.
1. Accused acquitted on all charges. In cases in which the accused has been found not guilty as to all charges and specifications, the SCM must:
 - a) Announce the findings to the accused in open session [R.C.M. 1304(b)(2)(F)(i)];
 - b) Inform the CA as soon as practicable of the findings [R.C.M. 1304(b)(2)(F)(v)];
 - c) Prepare the record of trial in accordance with R.C.M. 1305, using the record of trial form in Appendix 15, MCM;
 - d) Cause one copy of the record of trial to be served upon the accused [R.C.M. 1305(e)(1)], and secure the accused's receipt; and
 - e) Forward the original and one copy of the record of trial to the CA for her action [R.C.M. 1305(e)(2)].
 2. Accused convicted on some or all of the charges. In cases in which the accused has been found guilty of one or more of the charges and specifications, the SCM must:
 - a) Announce the findings and sentence to the accused in open session [R.C.M. 1304(b)(2)(F)(i) and (ii)];
 - b) Advise the accused of the following appellate rights under R.C.M. 1306:
 - (1) The right to submit in writing to the CA any matters which may tend to affect his decision in taking action (*see* R.C.M. 1105) and the fact that his failure to do so will constitute a waiver of this right (Additionally, the accused may be informed that he may expressly waive, in writing, his right to submit such written matters [R.C.M. 1105(d)].); and
 - (2) The right to request review of any final conviction by SCM by the Judge Advocate General in accordance with R.C.M. 1201(b)(3).

- c) If the sentence includes confinement, inform the accused of his right to apply to the CA for deferment of confinement [R.C.M. 1304(b)(2)(F)(iii)];
 - d) Inform the CA of the results of trial as soon as practicable. Such information should include the findings, sentence, recommendations for suspension of the sentence, and any deferment request [R.C.M. 1304(b)(2)(F)(v)];
 - e) Prepare the record of trial in accordance with R.C.M. 1305, using the form in Appendix 15, MCM;
 - f) Cause one copy of the record of trial to be served upon the accused [R.C.M. 1305(e)(1)], and secure the accused's receipt; and
 - g) Forward the original and one copy of the record of trial to the CA for action [R.C.M. 1305(e)(2)].
- D. After Action Review. Article 64, UCMJ, and R.C.M. 1112 require that all summary courts-martial be reviewed by a judge advocate who has not been disqualified by acting in the same case as an accuser, investigating officer, member of the court-martial, military judge, or counsel, or has otherwise acted on behalf of the prosecution or defense.
1. R.C.M. 1112 states, however, that no review under this section is required if the accused has not been found guilty of an offense or if the convening authority disapproved all findings of guilty.
 2. The judge advocate's review is a written document containing the following:
 - a) A conclusion as to whether the court-martial had jurisdiction over the accused and over each offense for which there is a finding of guilty which has not been disapproved by the convening authority;
 - b) A conclusion as to whether each specification, for which there is a finding of guilty which has not been disapproved by the convening authority, stated an offense;
 - c) A conclusion as to whether the sentence was legal; and
 - d) A response to each allegation of error made in writing by the accused.
 3. After the judge advocate has completed the review, most cases will have reached the end of mandatory review and will be considered final within the meaning of Article 76, UCMJ. If this is the case, the judge advocate review will be attached to the original record of trial and a copy forwarded to the accused.
 4. The review is not final, however, and a further step is required if the judge advocate recommends corrective action. If this is the case, it will require the Staff Judge Advocate (SJA) to forward the record of trial to the GCMCA. With the SJA's review in hand, the GCMCA will take action on the record of trial in a document similar to CA's action. He will promulgate it in a similar fashion as well. He may disapprove or approve the findings or sentence in whole or in part; remit, commute, or suspend the sentence in whole or in part; order a rehearing on the findings or sentence or both; or dismiss the charges.

5. If, in her review, the judge advocate stated that corrective action was required as a matter of law, and the GCMCA did not take action that was at least as favorable to the accused as that recommended by the judge advocate, the record of trial must be sent to the Office of The Judge Advocate General (OTJAG) for resolution. In all other cases, however, the review is now final within the meaning of Article 76, UCMJ.

V. CONCLUSION

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SPEEDY TRIAL

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MAJ Benjamin Grimes
Summer 2012

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SPEEDY TRIAL

Outline of Instruction

I. SPEEDY TRIAL INTRODUCTION.

SOURCES OF THE RIGHT TO A SPEEDY TRIAL IN THE MILITARY INCLUDE:

- A. R.C.M. 707: **120 day** rule.
- B. UCMJ articles 10 & 33.
- C. Sixth Amendment.
- D. Fifth Amendment / Statute of Limitations.

II. R.C.M. 707: THE 120 DAY RULE.

- A. The Rule. “The accused shall be brought to trial within 120 days after the earlier of: (1) Preferral of charges under R.C.M. 307/ 308; or (2) The imposition of restraint under R.C.M. 304(a) (2)-(4) [**restriction, arrest, confinement**]; or (3) Entry on active duty under R.C.M. 204.” R.C.M. 707(a).

- 1. “Conditions on liberty” (a “moral” restraint) is **not** a type of restraint which triggers R.C.M. 707.
- 2. “Specified Limits” - An individual must be required to remain within specified limits to constitute pretrial **restriction**. R.C.M. 304.

United States v. Wilkinson, 27 M.J. 645 (A.C.M.R. 1988), *petition denied*, 28 M.J. 230 (C.M.A. 1989). Denial of off-post pass that left the accused free access to the entire installation with all its support and recreational facilities was at most a condition on liberty that did not affect speedy trial clock. “[The lack of pass privileges] will, in the usual case, have no impact on rules relating to speedy trial.”

But see United States v. Wagner, 39 M.J. 832 (A.C.M.R. 1994). In dicta, court seriously questioned *Wilkinson’s* application to married Soldier living off post, especially in foreign country. Court should consider extent and duration of disruption of spousal and parental responsibilities.

See also United States v. Melvin, 2009 WL 613883 (A.F.Ct.Crim.App.). Maj. Melvin was an Air Force ROTC instructor. He was charged with providing underage cadets in his detachment with alcohol, had sexual intercourse with a female cadet, and encouraged cadets to lie to investigating officers. He was adjudged a dismissal and six months confinement. One issue on appeal was the trial judge’s decision to start the 120 day clock at preferral of charges. Maj. Melvin asserted it should have started when he received a no contact order with the cadets and was sent TDY away from the university area and more significantly, his family that lived there. Maj. Melvin’s contention that since he was forced away from his family and could not return home without taking leave was this equated to restriction in lieu of arrest and pretrial restraint under R.C.M. 304(a)(2)-(4). Alternatively, Maj. Melvin argued that his extension on active duty was a second triggering date before preferral. The appellate court agreed with the trial judge that neither of these positions contained merit.

3. Administrative restraint imposed under R.C.M. 304(h) “for operational or other military purposes independent of military justice, including administrative hold or medical reasons” does not start the speedy trial clock.

“Primary Purpose” Test - If the primary purpose of restraint is administrative and not for military justice, the speedy trial clock is not triggered.

United States v. Bradford, 25 M.J. 181 (C.M.A. 1987). Denial of sailor’s port liberty while sailor was a suspect of offense found to be “administrative restraint” under R.C.M. 304(h). “[We] believe the test is . . . the primary purpose. . . .” “Where the evidence supports a conclusion that the primary purpose of the command . . . is related to an upcoming court-martial, R.C.M. 707 applies.”

4. Starting the count: Include the day of arraignment; do not include the day of preferral or imposition of restraint or entry on active duty. R.C.M. 707(b)(1).
5. Termination: At arraignment under R.C.M. 904. *See United States v. Doty*, 51 M.J. 464 (C.A.A.F. 1999), wherein the CAAF holds that arraignment at day 119 was not a “sham” to toll the speedy trial clock. For sentence rehearings, the clock stops when the accused is first brought to the “bar” for resentencing, typically at the initial UCMJ art. 39(a) session. R.C.M. 707(a) and (b)(1). *United States v. Becker*, 53 M.J. 229, 232 (A.F. Ct. Crim. App. 2000). *See also United States v. Gammon*, NMCCA 200800324 (2009) an unpublished case where, based on the dispersal of trial participants, the appellate court approved of the judge’s decision to delay the arraignment until trial because of the “unjustifiable expense” in bringing everyone together and excluding the period of time from when the delay could have occurred but for the cost factor until when it actually did happen.

B. Restarting the clock at zero. R.C.M. 707(b)(3).

1. First restart. If charges are dismissed or a mistrial is granted, speedy trial clock is reset to begin on; date of dismissal in cases where the accused remains in pretrial restraint; date of mistrial, or; earlier of re-preferral or imposition of restraint for all other cases. R.C.M. 707(b)(3)(A).

Dismissal (R.C.M. 401) or withdrawal (R.C.M. 604)? General Rule: Withdrawal does not toll running of speedy trial clock. *United States v. Weatherspoon*, 39 M.J. 762 (A.C.M.R. 1994). Dismissal of charges does. *United States v. Bolado*, 34 M.J. 732 (N.M.C.M.R. 1991); *aff’d*, 36 M.J. 2 (C.M.A. 1992). A commander can dismiss charges even if there is an intent to re-institute charges at a later date. Convening authority ordered charges dismissed since two NIS witnesses were deployed on Operation Desert Shield/Storm for an uncertain time period. Charges lined through, dismissal document executed, accused informed and allowed to go on leave, although not allowed to work in MOS. Charges were re-preferrred 9 months later following return of the witnesses. *See also United States v. Tippit*, 65 M.J. 69 (C.A.A.F. 2007), Upon the SJA’s advice the Special Court-Martial Convening Authority signed a withdrawal of charges (which were not referred). The Court honored the SPCMCA intent to dismiss the charges despite the misnomer and found no violation of R.C.M. 707.

United States v. Young, ARMY 20000358 (A.C.C.A. 2005). Young deserted his unit after he was found guilty of various offenses but prior to sentencing. The court sentenced him, *in absentia*, to confinement for life. After his initial trial, his command preferred a new charge for desertion in 1995. Young was apprehended six months later and began serving his life sentence. The desertion

charge was not acted upon until the Chief of Staff at the USBD signed a DA form 4833 stating, “the [prior] command and the USBD have declined prosecution of the desertion offense.” The command decided to go forward on the desertion charge when the sentence from Young’s initial trial was set aside on appeal. Believing the initial desertion charge had been dismissed, the command preferred the desertion charge anew in 1999. Young moved the trial court to dismiss the desertion charge because there had been no dismissal of the original desertion charge and therefore the speedy trial clock had run continuously since 1995. The trial court disagreed and found the DA form 4833 equaled a dismissal. ACCA reversed the case finding that the government had violated Young’s right to a speedy trial. The court noted that the DA form 4833 was NOT a dismissal but rather a decision to take “no action”.

United States v. Robison, WL 6135093 (Army Ct. Crim. App. 2011). Dismissal of a DFR charge sheet 93 days after an Accused's return to military control was not a subterfuge and therefore not a violation of the Accused's right to a speedy trial under RCM 707. “A convening authority's dismissal of a charge is only a subterfuge when the sole purpose of the dismissal is to avoid the running of the 120–day speedy trial clock.” The government preferred a new desertion charge with newly acquired information in an additional element.

United States v. Robinson, 47 MJ 506 (N.M.C.C.A. 1997). Dismissal of charges on day 115 and referral of substantially identical charges one week later, without any significant change in A’s status held to be a **subterfuge** to avoid the 120 day speedy trial clock. Distinguishes *Bolado*, which held convening authority need not explain reasons for dismissal. Any other solution would allow CA to routinely violate spirit of RCM 707.

Factors courts will consider to decide if subterfuge: Convening Authority intent, notice and documentation of action, restoration of rights and privileges of accused, prejudice to accused, amended or additional charges. *See also United States v. Anderson*, 50 M.J. 447 (C.A.A.F. 1999), wherein CAAF finds no subterfuge under the facts of the case and declares, contrary to the Government’s concession, that the speedy trial clock was restarted on the date of dismissal.

2. Second restart provision. If the accused is released from pretrial restraint for a significant period, the time under this rule shall run from the earliest date on which charges are preferred, or restraint is re-instituted, or entry on active duty. R.C.M. 707(b)(3)(B).

What is a significant period?

United States v. Hulsey, 21 M.J. 717 (A.F.C.M.R. 1985), *petition denied*, 22 M.J. 353 (C.M.A. 1986). 5 day release from pretrial restraint held a “significant period” and not a “subterfuge designed to circumvent R.C.M. 707,” clock restarted with reinstatement of restraint.

United States v. Miller, 26 M.J. 959 (A.C.M.R. 1988), *petition denied*, 28 M.J. 164 (C.M.A. 1989). 5 day release from pretrial restriction tantamount to confinement held to be a “significant period” even though accused was held in administrative restraint in the hospital for the 5 days. Factors: (1) hospitalization for suicide attempt, (2) hospital, not command, imposed restraint, and (3) no showing of improper gamesmanship.

United States v. Campbell, 32 M.J. 564 (A.C.M.R. 1991). Thirteen day period of restriction imposed as punishment under Article 15 was a “significant period” of “release” from ongoing restriction that restarted the speedy trial clock. Article 15 was for offenses that were unrelated to the court-martial charges and was not a subterfuge to avoid speedy trial issues.

United States v. Reynolds, 36 M.J. 1128 (A.C.M.R. 1993). 19 day period of conditions on liberty between release from 5 weeks of restriction and preferral of charges was a significant period. Speedy trial clock commenced running upon preferral.

Note: Time between release from pretrial restraint and preferral of charges need not be a “significant period” to stop the speedy trial clock. *United States v. Ruffin*, 48 M.J. 211 (C.A.A.F. 1998). Charges preferred one day after two month restriction was lifted. Restriction never reimposed. The requirement to wait a “significant period” of time only applies to cases involving re-imposition of restraint; it does not require the government to wait a “significant period” before preferring charges once released from confinement. Purpose of rule is to avoid sham releases to stop and start the speedy trial clock. Here, because restriction was never reimposed, release was for a “significant period” which restarted the speedy trial clock at preferral.

3. Third restart provision. Government appeal under R.C.M. 908 - begin on date of notice to the parties of final action on the appeal. R.C.M. 707(b)(3)(C).
4. Fourth restart provision. Rehearings--begin on date “responsible convening authority receives record of trial and opinion authorizing or directing a rehearing.” R.C.M. 707(b)(3)(D). See *United States v. Becker*, 53 M.J. 229 (C.A.A.F. 2000) (applying R.C.M. 707 timing requirements to a *sentence* rehearing but finding that remedy of dismissal of charges too severe).
5. Fifth restart provision. Return of accused from the custody of the Attorney General. R.C.M. 707 (b)(3)(E).
6. Multiple charges: When charges are preferred at different times each charge may have a separate starting date based on date of preferral, restraint, or entry on active duty related to particular charge. R.C.M. 707(b)(2). *United State v. Bray*, 52 M.J. 659 (A.F. Ct. Crim. App. 2000). Speedy trial clock begins to run when accused is placed into pretrial confinement for all offenses the government knows (or reasonably should know) are part of the misconduct (rape charge was dismissed with prejudice).

See *United States v. Robinson*, 26 M.J. 954 (A.C.M.R. 1988) *aff’d*, 28 M.J. 481 (C.M.A. 1989). “We hold that, in order to commence the speedy trial clock, the imposition of restraint . . . must be ‘in connection with’ the specification being challenged.”

7. Post-trial Speedy Trial Clock: *United States v. Collazo*, 53 M.J. 721 (Army Ct. Crim. App. 2000). “Every soldier (sic) deserves a fair, impartial, and timely trial, to include the post-trial processing of his case.” The court reduced appellant’s sentence to confinement by four months after finding ten month delay in processing too long for 519-page record of trial.

United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006). The *Moreno* decision demonstrated that while the CAAF was not willing to return to an inflexible

Dunlap-style 90-day rule, it was willing to apply heightened scrutiny and find due process violations in cases where post-trial processing crossed certain defined boundaries. In *Moreno*, the CAAF announced that it would apply a presumption of unreasonable delay to any case completed after 11 June 2006 that: (1) did not have initial action taken within 120 days of the completion of the trial; (2) was not docketed within 30 days of the convening authority's action; or, (3) did not have appellate review completed by the Court of Criminal Appeals within 18 months of docketing. Once the post-trial delay in a case is determined to be unreasonable, the court must balance: (1) the length of the delay against; (2) the reason for the delay; (3) the appellant's assertion of the right to timely review and appeal; and, (4) prejudice. This test represented an adaptation of the *Barker v. Wingo*, 407 U.S. 514 (1972), test that had previously only been used to review speedy trial issues in a Sixth Amendment context. While failure to meet the *Moreno* timelines triggers the *Barker v. Wingo* analysis, the government can still rebut the presumption of prejudice by showing that the delay was not unreasonable.

C. Excludable Delays. R.C.M. 707(c). "All periods of time during which appellate courts have issued stays in the proceedings, or the accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney General, shall be excluded when determining whether the period in subsection (a) of this rule has run. All other pretrial delays approved by a military judge or the convening authority shall be similarly excluded."

1. Independent determination as to whether there is in fact good cause for a delay, and for only so long as is necessary.
2. Approval Authority: Convening Authority and the Military Judge (after referral). Discussion following R.C.M. 707(c)(1) indicates the CA's authority can be delegated to the 32b Investigating Officer (IO).

United States v. Lazauskas, 62 M.J. 39 (C.A.A.F. 2005). Lazauskas made a motion to dismiss the charges at his arraignment on the basis that the government had not brought him to trial within 120 days IAW RCM 707. The military judge denied the motion at trial. The AFCCA affirmed. CAAF affirmed as well. At issue were two delays in the proceedings totaling 11 days. The first delay was six days in order to secure witnesses for the Article 32. The CAAF held this time was excludable because the IO may grant reasonable delay requests (excludable IAW RCM 707(c)) if the convening authority had properly delegated delay authority. Furthermore, the delays are excludable unless there was an abuse of discretion by the person who granted the delay. The second delay was the five day statutory waiting period IAW Article 35, UCMJ. The CAAF held that Article 35 provides a shield so that the accused is not brought to trial too quickly. Therefore, Article 35 may not be used as a sword for the accused to attack the government for not bringing him to trial sooner.

3. Pretrial delays should not be granted *ex parte*. Discussion to R.C.M. 707(c)(1).
4. Approved delays subject to review on 2 grounds:
 - a. Abuse of discretion. "Granting a continuance is within the sound discretion of the military judge, and a denial will be reversed only for an abuse of discretion." *United States v. Sharp*, 38 M.J. 33, 37 (C.M.A. 1993).

- b. Reasonableness of the period of delay: “Reasons to grant a delay might, for example, include the need for: time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the reserve component to active duty for disciplinary action; time to complete other proceedings related to the case; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances for access to classified information or time to declassify evidence; or additional time for other good cause.” R.C.M. 707 discussion.
5. Attribution of delay period.
- a. *United States v. McKnight*, 30 M.J. 205 (C.M.A. 1990). Defense is not entitled to request a delay until a day certain and then insist the government proceed on that very day. Defense must accommodate government’s scheduling needs and remains accountable for reasonable delays occasioned by initial request.
6. Exceptions to the Rule requiring pre-approved delay:
- a. *United States v. Dies*, 45 M.J. 376 (C.A.A.F. 1996). Accused’s unauthorized absence is automatically excluded from government accountability even though government never secured a delay from competent authority to cover time. By his voluntary absence, an accused “waives” his speedy trial right as to that interim period. Further, R.C.M. 707 does not require that the government be held accountable for all periods of time not covered by stays or delays.
 - b. *United States v. Thompson*, 46 M.J. 472 (C.A.A.F. 1997). After the fact approval of defense requested delay by the SPCMCA held excludable delay. Although purpose of revised rule was to obtain delays as you go, CAAF focused on fact the specific text of RCM 707(c) “does not require specifically that the delay be approved in advance for it to be excluded.” But government runs risk that such post hoc determinations will be viewed with skepticism. CAAF avoided certified issue of whether quasi-judicial 32b IO has power to exclude delays.
 - c. *United States v. Melvin*, 2009 WL 613883 (A.F.Ct.Crim.App.). Maj. Melvin was an Air Force ROTC instructor. He was charged with providing underage cadets in his detachment with alcohol, had sexual intercourse with a female cadet, and encouraged cadets to lie to investigating officers. He was adjudged a dismissal and six months confinement. One issue on appeal was the trial judge’s decision to exclude the time (158 days) it took to process the servicemember’s request for resignation in lieu of trial, determining that only seventy “countable” days had passed between preferral and arraignment. The Air Force appellate court held that exclusion of this time was proper even though he had submitted a speedy trial request because there was no evidence he wanted to proceed to trial while the resignation request was pending. The lesson to take away from this aspect of the case is understanding that calculating the 120 day clock is more than counting days on a calendar. The TC needs to know what time will be excluded and then make a clear appellate record.

- d. Request for delay need not originate from either party; convening authority may initiate *sua sponte*. *United States v. Anderson*, 46 M.J. 540 (N.M.C.C.A. 1997).
- D. Remedy for violation is dismissal of charges upon timely motion. R.C.M. 707(d).
1. In dismissing with or without prejudice, the military judge considers these factors: “[s]eriousness of the offense . . . facts and circumstances that lead to dismissal . . . impact of re-prosecution . . . and any prejudice to the accused . . .” R.C.M. 707(d). *United States v. Bray*, 52 M.J. 659, 663 (A.F. Ct. Crim. App. 2000).
 - a. *United States v. Edmond*, 41 M.J. 419 (C.A.A.F. 1995). Dismissal without prejudice appropriate for 41 day violation of R.C.M. 707. Sex crimes against inebriated victim were serious offenses; no government bad faith involved; dismissal with prejudice would not lead to better administration of justice; no indication accused suffered prejudice.
 - b. *United States v. Bolado*, 34 M.J. 732, 739 n.6 (N.M.C.M.R. 1991); *aff’d*, 36 M.J. 2 (C.M.A. 1992). “A commander’s decision to reassign an accused to another duty assignment is not the kind of prejudice envisioned in R.C.M. 707(d).” Court also states “backwater of suspicion” following dismissal is no different than that existing pre-preferred and constitutes minimal prejudice.
 - c. *United States v. Dooley*, 61 M.J. 258 (C.A.A.F. 2005). In 1998, Dooley was convicted of various child pornography related offenses. In 2004, his conviction was set aside. The convening authority decided to retry Dooley on the charges but did not bring him off appellate leave and onto active duty and arraign him until 125 days after the convening authority received the record of trial. The military judge dismissed the case with prejudice. The N-MCCA reversed the judge based on the fact the he had abused his discretion when ordering dismissal with prejudice. CAAF reversed the N-MCCA and reinstated the trial court’s dismissal with prejudice. Under the abuse of discretion standard, mere disagreement with the conclusion of the trial judge is not enough to warrant reversal. Here the N-MCCA did not find that the trial judge’s decisions were “clearly erroneous” but rather that it “did not concur” with the trial judge.
 - d. *United States v. McClain*, 65 M.J. 894 (A. Ct. Crim. App. 2008). Mistrial is not an appropriate remedy for a violation of R.C.M. 707.

III. UCMJ ART. 10: PRETRIAL CONFINEMENT AND ARREST.

A. UCMJ Art. 10:

“When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.”

B. Historical Development.

1. The rule of *United States v. Burton*, 44 C.M.R. 166 (C.M.A. 1971):

Pretrial confinement over 90 days created a presumptive speedy trial violation under UCMJ, art. 10. The government could overcome the presumption by demonstrating due diligence.

2. R.C.M. 707(d) - contained 90 day rule for accused in pretrial confinement.
3. *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993). The death of *Burton*. THERE IS NO LONGER A 90 DAY RULE!
 - a. “Reasonable diligence” is the standard for measuring compliance with UCMJ, art. 10.
 - b. Article 10 may be violated where accused is tried in less than 120 days, or even in less than 90 days. Many circumstances, however, may justify delays beyond these traditional periods. “The touch stone . . . is not constant motion, but reasonable diligence in bringing the charges to trial. Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive.” *Kossman*, at 262 (citing *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965)).
 - c. Article 10 motion will lie when government “could readily have gone to trial . . . but negligently or spitefully chose not to.” *Kossman*, at 261.

C. Analysis for application of Article 10.

1. Compliance with R.C.M. 707 does NOT equal compliance with Article 10.
 - a. *United States v. Hatfield*, 44 M.J. 22 (C.A.A.F 1996). Overall lack of forward motion toward resolving relatively simple case. CAAF particularly concerned with 2-month delay in appointing defense counsel due to incomplete paperwork.
 - b. *United States v. Collins*, 39 M.J. 739 (N.M.C.M.R. 1994). 6 to 8 phone calls by non-JAG attempting to obtain evidence of forged checks from an exchange on another installation is not proceeding with due diligence. Delays in requesting copy of service record and requesting legal services do not reflect due diligence.
 - c. *United States v. Laminman*, 41 M.J. 518 (C.G.Ct. Crim. App. 1994). Government failed to proceed with reasonable diligence when it brought the accused to trial 134 days after initial restraint. (21 days attributed to defense delay.) Case provides detailed analysis of Article 10 and the government’s burden of proof when confronted with motion to dismiss based on Article 10. Court found government’s failure to provide evidence explaining several delays supported military judge’s finding of lack of diligence. (In footnote, court suggested that the best way for the military judge to proceed would be to have parties enter a stipulation of fact as to the undisputed portions of chronology and then to present evidence on those relevant matters upon which there is disagreement.)

- d. *United States v. Calloway*, 47 M.J. 782 (N.M.Ct.Crim.App. 1998). Accused placed in pretrial confinement for 20 days before government took any action on his case. Another 7 days passed before magistrate review. The government took another 34 days to prefer charges, another 22 days to serve charges on the accused after referral, and another 18 days to arraign the accused. TDS counsel was not provided until 66 days of pretrial confinement. Several other cases without pretrial confinement were tried before the accused. Military judge failed to make specific findings of fact and explanation for the delays, especially regarding (1) overall lack of forward motion, (2) delay in appointing DC. Judge also criticized for relying too much on RCM 707 type analysis.
- e. *United States v. Mizgala*, 61 M.J. 217 (C.A.A.F. 2005). Mizgala was placed in pretrial confinement (PTC) for 117 days. His initial PTC began on 28 February. Based on various factors (i.e., waiting on a police report, moving the SJA office because of a fire) the government did not prefer charges until 14 May. On 16 April, Mizgala made a demand for a speedy trial. After the Article 32 on 22 May, the charges were referred on 20 June. At the arraignment, the military judge denied Mizgala's motion to dismiss for violating Article 10, UCMJ. The military judge used a "gross negligence" standard when deciding that the government had not violated Article 10, UCMJ. The CAAF affirmed the trial court decision that the government did not violate Mizgala's speedy trial rights but pointed out several errors that the military judge made when deciding the motion. First, the RCM 707 120 day requirement is irrelevant when determining whether there was an Article 10 violation. Second, reasonable diligence, not gross negligence, is the proper standard when analyzing Article 10 claims. Finally, Article 10 is more exacting than the Sixth Amendment so the military judge should not have limited his consideration to the *Barko v. Wingo* factors (see *infra*). The CAAF also held that an unconditional guilty plea does NOT waive consideration of an Article 10 claim on appeal.
- f. *United States v. Simmons*, Army 20070486 (A.C.C.A 2009). Simmons pled guilty at a general court-martial to AWOL, failure to be at his place of duty or follow orders, and, disorderly conduct. While he was also arraigned on charges of rape, kidnapping, and multiple assaults, those charges were dismissed. The issue on appeal in this case was whether the judge erred by failing to dismiss the charges for Art. 10 violations. While this is an unpublished opinion and, as such, does not serve as precedent, it provides multiple teaching points for counsel dealing with an accused in PTC. Simmons was placed into PTC following the alleged rape of his wife while he was AWOL. He remained in PTC for 133 days before his trial, although was arraigned on day 107. The events of this case took place in South Korea, where Simmons was assigned. The first delay of this case resulted from the government's errant belief that the SOFA gave primary jurisdiction to the Koreans and the U.S. military was barred from going forward with the case. In addition to identifying the SOFA from allowing them to move forward, the government also cited a brigade training exercise in hindering their forward movement. The court noted that, "[w]hile operational considerations are relevant, they are not an absolute excuse." Particularly so when, it was just an annual exercise as

in this case. The government also pointed to a plodding CID investigation that caused further delay due to a couple of follow up interviews that took an extended time to conduct. When the SOFA confusion was resolved, first one, then a second replacement investigating officer (IO) was appointed to the case on day 46 of Simmons' PTC. Despite the IO's appointing memorandum authorizing him seven calendar days to conduct the investigation, he took forty-one days to forward his report from the time he was appointed, day eighty-six of the PTC. This was due in part to the IO's refusal to move forward with the investigation due to his prior plans to visit friends over a four day weekend. Eleven days after receiving the IO's report, the convening authority referred the case to a general court-martial. When Simmons was arraigned, the judge docketed the case forty days later "because there was nothing else available on the docket." Ultimately, Simmons spent 134 days in PTC before being sentenced to 120 days of confinement, a BCD and reduction to E-1. **Holding:** Due to the extent of the delay, ACCA did not believe the government exhibited reasonable diligence in processing the case. Consequently, the court dismissed the case with prejudice, the remedy for a violation of Art.10. **Analysis:** First, inexperienced trial counsel should be closely monitored or assigned a second chair from the outset when the accused is placed into PTC since the lack of experience will not provide the government an excuse for the case not moving forward in a timely manner. Secondly, if there is a delay involved due to a SOFA or some other international agreement or regulation, contact the subject matter expert and make sure that your interpretation requiring a delay in the case moving forward is one they share. When operational realities do arise, consider if another trial counsel can still move the case forward and if the "operation reality" is really a training event, and if so, which should have priority. Similarly, if a lengthy CID investigation is causing a delay, determine if the information they are still tracking down is case-changing or whether the case can go forward while CID ties up loose ends, especially as in this case where there were no complex evidentiary issues, no physical evidence and as such no need for time-consuming forensic evaluation, and no co-accused, thereby eliminating any need for the procedurally complex witness immunity burden. Also keep in mind that the prosecution may request that the Convening Authority exclude the time it takes for certain actions from counting against the government "clock" under the provisions of R.C.M. 707(c). Another factor to consider, while obvious, is to identify a "good" Art. 32 officer before charges are preferred at the GCM level or as soon as a servicemember is placed into PTC, for if overlooked, it can cause lengthy delay. A "good" Art. 32 officer is one who is not about to go on leave or TDY and is not so burdened with normal responsibilities that they will prioritize completion of the Art. 32 process. If, despite one's best efforts in selecting a "good" Art. 32 officer, the IO does not move forward in a timely manner and prodding from the TC is unable to achieve the desired results, involve the commander to direct the investigating officer to comply with the suspense he or she received in their appointment letter. To avoid UCI, a reminder to the commander not to discuss the merits of the case, with the Art. 32 officer, may be appropriate. Another tool to help keep the case moving along is Art. 98, UCMJ, that subjects "any

person . . . who is responsible for unnecessary delay in the disposition of any case of a person accused of an offense” under the UCMJ to criminal prosecution. Another issue highlighted by *Simmons* is to have a plan for rapid action by the convening authority. Depending on the timing of the next scheduled appointment, perhaps a specially scheduled appointment to address a pending case is appropriate. A final lesson drawn from this case is that when a servicemember is in confinement, the speedy trial clock does not stop at arraignment. While the judge assumes greater responsibility for the case at this stage of the trial, the government still has an obligation to move the case forward as expeditiously as possible. Options for the government include requesting that another case be moved back on the docket that does not have an accused in PTC and replace it with one where there is an Art. 10 issue, or alternatively requesting the assistance of an alternate judge who is available. Finally, the government must establish a proper record for the appellate court so that their efforts remain known.

- g. *United States v. Roberts II*, 2009 WL 613877 (A.F.Ct.Crim.App.). The prosecution took 270 days from the time Roberts was placed into PTC until he was brought to trial. Based on the Record of Trial, the appellate court opined that the government “exercised reasonable diligence in accomplishing those tasks necessary to try him.” As such, Roberts did not receive any credit for speedy trial violations despite the amount of time it took to get the case to trial.
- h. *United States v. Thompson*, 68 MJ 308 (C.A.A.F. 2010). Accused spent 145 days in PTC. Much of the delay centered around the handover of the off-post offenses from the civilian authorities to the military. Additional delay came from the TC attending a weeklong, out-of-town sexual assault course and then taking 4 days of leave, before being snowed in for an additional day. Further exacerbating the problem was a deployment that ultimately resulted in 3 different TC handling the case. The trial judge found that there was a 37 day period where the government failed to act with reasonable diligence and dismissed all charges with prejudice for violating Thompson’s Art. 10 right to a speedy trial. Unlike the judge, ACCA found it reasonable that the TC resolve all of the jurisdictional issues with the civilian authorities before proceeding, as well as taking what ACCA termed “mandatory job-related training” and taking a short leave in conjunction with that duty. ACCA was also influenced by defense not making a speedy trial demand until Thompson had been in confinement for over 140 days, which was not during the 37 day period. ACCA was further impacted by a 39 day defense delay to prepare for the Art. 32 hearing, which came after the 37 day period the judge determined the defense did not proceed with reasonable diligence. ACCA returned the case to the judge for action not inconsistent with their opinion, after writing, “appellee does not allege, nor do we find, that she suffered any hindrance to the preparation of her case because of any delay.” CAAF upheld ACCA based on the 37 days needed to determine who was going to prosecute the case. *See also United States v. Labout*, NMCCA 201000383 January 2011 where 146 days of PTC was not a violation.

- i. *United States v. Schuber*, 70 M.J. 181 (C.A.A.F. 2011). Schuber was subject to restriction not tantamount to arrest during the period following his 71 days in pretrial confinement, where he was restricted to base rather than to quarters, and although he was required to provide weekly urine samples, he was permitted to use all usual base activities, was given a three-day pass upon the death of his grandfather, was not placed under guard or escort during his base restriction or travel, and was not suspended from performing normal military duties. The court held, “there are gradations of restriction. Whether a particular restriction amounts to arrest for the purposes of Article 10, UCMJ, will depend on a contextual analysis . . . including consideration of such factors as the geographic limits of constraint, the extent of sign-in requirements, whether restriction is performed with or without escort, and whether regular military duties are performed.” In doing so, the court made it easier for defense counsel to argue that an accused is under arrest and thus protected by Article 10. The accused could be performing military duties but still be under arrest because of narrow geographic limits of constraint, sign-in requirements, and escort requirements.
2. Factors from *Barker v. Wingo*, 407 U.S. 514 (S.Ct. 1972). An appropriate analysis of Article 10 includes consideration of these factors. See *United States v. Birge*, 52 M.J. 209 (C.A.A.F. 1999), *United States v. Cooper*, 58 MJ 54 (C.A.A.F. 2003).
 3. Arraignment does not necessarily terminate government’s Article 10 speedy trial obligations. *United States v. Cooper*, 58 MJ 54 (C.A.A.F. 2003): “We therefore hold that the Article 10 duty imposed on the Government immediately to try an accused who is placed in pretrial confinement does not terminate simply because the accused is arraigned.” The court goes on to say that post arraignment, the MJ has much more control of the course of the trial, but the “affirmative obligation of reasonable diligence upon the government does not change.”
- D. Remedy for an Article 10 violation remains dismissal **with prejudice**.

IV. THE SIXTH AMENDMENT RIGHT TO SPEEDY TRIAL. BARKER V. WINGO, 407 U.S. 514 (U.S. S.Ct. 1972).

- A. The Trigger: Preferral of charges. *United States v. Grom*, 21 M.J. 53 (C.M.A. 1985).
- B. A Balancing Test: The *Barker* Factors.
 1. Length of delay.
 2. Reason for delay.
 3. Assertion of the right.
 4. Prejudice to accused.
- C. Applying *Barker v. Wingo*.
 1. *United States v. Edmond*, 41 M.J. 419 (C.A.A.F. 1995). No Sixth Amendment violation under *Barker* test. Length of delay: 176 days from preferral to trial.

Reason for delay: witnesses unavailable due to homeport change and necessity of trying co-accused shipmates before granting immunity. Assertion of right: Accused did demand speedy trial. Prejudice: only slight prejudice; accused's defense was not impaired; he was not restrained; he had not suffered abnormal anxiety because of charges. Accused had been paid and had been allowed to work in his rating, albeit only duties not requiring a security clearance. Held: balance weighed in favor of government.

- D. Constitutional right to a speedy trial does not arise until after an indictment is filed or charges are preferred. *United States v. McGraner*, 13 M.J. 408 (C.M.A. 1982).
1. *United States v. Vogan*, 35 M.J. 32 (C.M.A. 1992). Accused committed mail fraud while serving a prior court-martial sentence. He was placed in administrative segregation pending year-long investigation. Held: Sixth Amendment right to a speedy trial did not apply because of accused's post-trial restraint.

V. FIFTH AMENDMENT RIGHT TO DUE PROCESS.

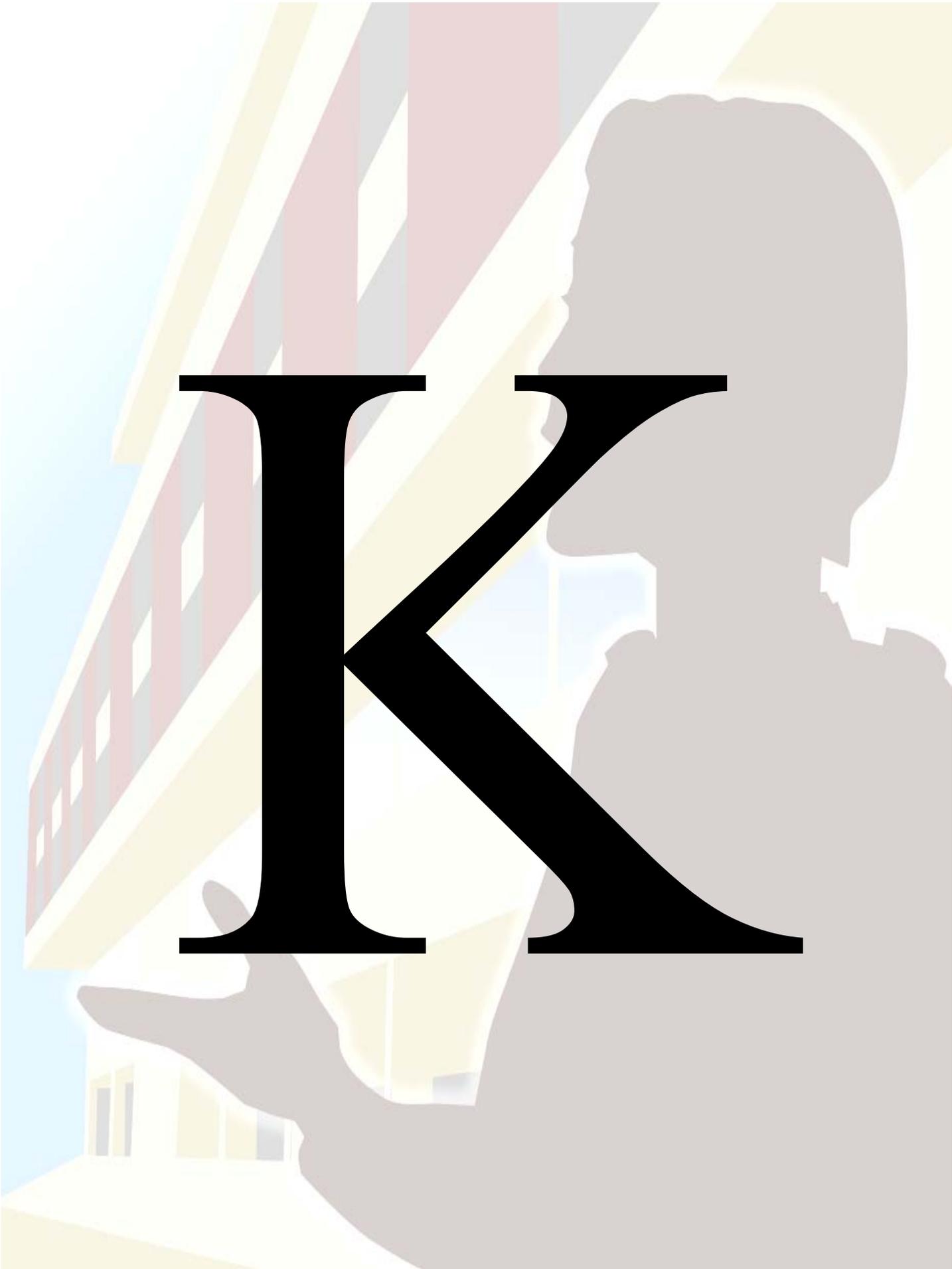
- A. Applies during investigatory stage, prior to preferral.
- B. Requires a showing of:
1. Egregious or intentional tactical delay by the Government and
 2. Actual prejudice to the accused or his case.
- C. *United States v. Reed*, 41 M.J. 449 (C.A.A.F. 1995). Seventeen month delay between identification of accused as a suspect and preferral of charges did not violate due process. Appellant failed to meet his burden of proof to show an egregious or intentional tactical delay *and* actual prejudice. (The Court also noted that when the accused is not confined, the statute of limitations is the "primary protection" against pre-accusation delay.)

VI. LITIGATING SPEEDY TRIAL ISSUES.

- A. Accused raises issue at trial by a motion to dismiss. R.C.M. 907.
- B. Speedy trial issue is waived if not raised before final adjournment. R.C.M. 907(b)(2). *But see United States v. Britton*, 26 M.J. 24 (C.M.A. 1988). "While it is the general rule that failure to make a timely motion at trial may estop one from raising the issue on appeal, failure to raise the issue does not preclude the Court of Military Review in the exercise of its powers from granting relief."
- C. Waiver by guilty plea. "Except as provided in (conditional pleas), a plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense." R.C.M. 707(e).
- D. Once defense raises issue, government has burden of persuasion to show no denial of speedy trial. R.C.M. 905(c)(2)(B).
- E. The government's burden of proof on any factual issue is by a preponderance of the evidence. R.C.M. 905(c)(1). *United States v. Cummings*, 21 M.J. 987 (N.M.C.M.R. 1986).
- F. Parties must put on evidence or agree to stipulation of fact. *See United States v. Cummings, supra; United States v. Thompson*, 29 C.M.R. 68 (C.M.A. 1960). The court is not permitted to consider matters in an offer of proof. A proffer is not evidence.

- G. Pretrial agreement provisions. *See United States v. McLaughlin*, 50 M.J. 217 (C.A.A.F. 1999). Arising in the context of a pretrial agreement provision, the accused challenged a provision in the PTA that **required** a waiver of a speedy trial motion. Finding that such a provision is impermissible, the CAAF said the Military Judge should have set aside that provision and held the Government to the balance of the PTA, giving the defense the chance to raise or waive the motion at trial. Absent this "cleaner" waiver process, the CAAF says that the accused must make a colorable or *prima facie* claim that he would have been entitled to relief on his speedy trial motion. The CAAF said the defense failed in this case, when the accused had been in PTC for 95 days, no prejudice was claimed by the defense and no demand for immediate trial was made.

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PRETRIAL RESTRAINT

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MAJ Benjamin Grimes
Summer 2012

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PRETRIAL RESTRAINT AND SPEEDY TRIAL

Outline of Instruction

I. PRETRIAL RESTRAINT. UCMJ ART. 9(A); R.C.M. 304.

- A. Types of Pretrial Restraint. R.C.M. 304(a).
1. **Conditions on liberty.** “[O]rders directing a person to do or refrain from doing specified acts.”
 2. **Restriction in lieu of arrest.** “[O]rders directing the person to remain within specified limits.” Restricted person normally performs full military duties.
United States v. Blye, 37 M.J. 92 (C.M.A. 1993). Servicemember may be lawfully ordered to abstain from alcohol as a condition of pretrial restriction
 3. **Arrest.** “[R]estraint ... directing the person to remain within specified limits.... [P]erson in status of arrest may not be required to perform full military duties....”
 4. **Pretrial Confinement.** “Pretrial confinement is physical restraint . . . ”
- B. When A Person May Be Restrained
1. A Soldier may be placed under pretrial restraint when there is a reasonable belief that:
 - a. An offense triable by court-martial has been committed;
 - b. The person to be restrained committed it; and
 - c. The restraint ordered is “required by the circumstances.” R.C.M. 304(c); Article 9(d) (probable cause); Article 10 (“as circumstances may require”). Note that the person ordering restraint should consider the provisions of R.C.M. 305(h)(2)(B), before ordering restraint. These provisions further elaborate on when restraint is “required by the circumstances” because it is foreseeable that:
 - (1) The Soldier will not appear at trial, pretrial hearing, or investigation, **or**;
 - (2) The Soldier will engage in serious criminal misconduct, **and**;
 - d. Lesser forms of restraint are inadequate.
 2. **BUT:** “An accused pending charges should ordinarily continue the performance of normal duties within the accused’s organization while awaiting trial.” AR 27-10, para. 5-15a (16 Nov 05).
U.S. v. Doane, 54 M.J. 978 (A.F.Ct.Crim.App., 2001). While an accused's mental condition is an appropriate consideration in deciding whether to place or maintain an accused in pretrial confinement (PTC), SM should not be placed in PTC solely to protect against the risk that an accused might kill himself.
- C. Who May Order Pretrial Restraint? Article 9(b) and; R.C.M. 304(b).
1. Of officers. “Only a commander to whose authority” they are subject. This authority may not be delegated.

2. Of enlisted personnel. “Any commissioned officer.” Authority may be delegated by a commanding officer to warrant, petty, and noncommissioned officers of his/her command.
 3. Authority for subordinates to order restraint may be withheld by a superior competent authority.
- D. Procedures for Ordering Pretrial Restraint. Article 9(b) and (c); R.C.M. 304(d).
1. Confinement is “imposed pursuant to orders by a competent authority by the delivery of a person to a place of confinement.”
 2. Other types of pretrial restraint are “imposed by notifying the person orally or in writing of the restraint, including its terms or limits.”
- E. Notice. A person placed under restraint “shall be informed of the nature of the offense which is the basis for such restraint.” R.C.M. 304(e).
- F. **Restraint is Not Punishment.** Article 13; R.C.M. 304(f). Persons restrained pending trial may not be punished for the offense that is the basis of the restraint. Prohibitions include “punitive duty hours or training,” “punitive labor,” or “special uniforms prescribed only for post-trial prisoners.”

II. PRETRIAL CONFINEMENT. UCMJ ART. 9-13; R.C.M. 305.

- A. Basis for Pretrial Confinement. R.C.M. 305(d). Probable cause (reasonable belief) that:
1. An offense triable by a court-martial has been committed;
 2. The person confined committed it; and
 3. Confinement is *required by the circumstances*. Again, consider R.C.M. 305(h)(2)(B), that it is reasonably foreseeable that the Soldier:
 - a. Will not appear at trial, pretrial hearing, or investigation, **or**
 - b. Will engage in serious criminal misconduct, **and**
 4. Lesser forms of restraint are inadequate.
- B. Regulatory Requirements. “In any case of pretrial confinement, the **SJA** concerned, or that officer’s designee, **will be notified** prior to the accused’s entry into confinement or as soon as practicable afterwards.” AR 27-10, paragraph 5-15a. Also consider requirements of local policies / regulations (for example, no PTC without the concurrence of the SJA).
- C. Advice to Accused Upon Confinement. Article 10; R.C.M. 305(e).
 “Each person confined shall be promptly informed of:
- (1) The nature of the offenses for which held;
 - (2) The right to remain silent and that any statement may be used against the person;
 - (3) The right to retain civilian counsel at no expense to the United States, and the right to request assignment of military counsel; and
 - (4) The procedures by which pretrial confinement will be reviewed.”
- D. Military Counsel. R.C.M. 305(f); AR 27-10, para. 5-15.

1. Prisoner must request military counsel and request must be known to military authorities. Counsel is to be made available prior to R.C.M. 305(i) review, or within 72 hours of request, whichever occurs earlier. R.C.M. 305. **BUT:** AR 27-10, para. 5-15 imposes duty on SJA to request TDS appointment of counsel. If no TDS counsel available within 72 hours the SJA may appoint government counsel for this limited purpose.
 2. “Consultation between the accused and counsel *preferably* will be accomplished *before the accused’s entry into confinement.*” If not possible, every effort will be made to have consultation within 72 hours of accused’s entry into confinement. AR 27-10.
 3. No right to military counsel of the prisoner’s own selection. Counsel “may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred.” R.C.M. 305(f).
- E. R.C.M. 305(i)(1) 48-hour Review:
1. Embodiment of the Constitutional review from *County of Riverside v. McLaughlin*, 111 S.Ct. 1661 (1991) and *United States v. Rexroat*, 38 M.J. 292 (C.M.A. 1993), *cert. denied*, 127 L. Ed. 2d 648, 114 S. Ct. 1296 (1994).
 2. History:
 - a. *Gerstein v. Pugh*, 420 U.S. 103 (1975). Fourth Amendment (“right of the people to be secure in their persons . . . against unreasonable . . . seizures”) requires a “**prompt**” judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. *Gerstein* is binding upon the military. *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976).
 - b. What is "prompt?" *County of Riverside v. McLaughlin*, 111 S.Ct. 1661 (1991). “Taking into account the competing interests articulated in *Gerstein*, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein.*”
 - c. *County of Riverside v. McLaughlin* applies to the military. *United States v. Rexroat*, 38 M.J. 292 (C.M.A. 1993), *cert. denied*, 127 L. Ed. 2d 648, 114 S. Ct. 1296 (1994).
 3. Review must be by a "neutral and detached officer," e.g. an “independent” commander/officer, a military magistrate, or a military judge. The accused’s commander may do the review under either R.C.M. 305(d) or R.C.M. 305(h) **if truly neutral and detached.**
 - a. *United States v. McLeod*, 39 M.J. 278 (C.M.A. 1994). Both the brigade commander’s and SJA’s review of company commander’s initial decision to impose pretrial confinement were neutral and detached. Neither was directly or particularly involved in command’s law enforcement function.
 - b. *United States v. Bell*, 44 M.J. 677 (N.M. Ct. Crim. App. 1996). A ship’s command duty officer can be neutral and detached, and constitutionally qualified to make a judicial probable cause determination which satisfies *United States v. Rexroat.*

4. Substance of the review. Probable cause review by a neutral and detached officer. Is there a reasonable belief that:
 - a. An offense triable by a court-martial has been committed;
 - b. The prisoner committed it; and
 - c. Confinement is necessary because it is foreseeable that:
 - (1) The prisoner will not appear at a trial, pretrial hearing, or investigation, **or**
 - (2) The prisoner will engage in serious criminal misconduct; **and**
 - d. Less severe forms of restraint are inadequate.
- F. Commander's 72-hour Review. Article 11; R.C.M. 305(h).
1. Report of confinement to prisoner's commander within 24 hours, if ordered by someone other than the commander.
 2. Commander shall review confinement not later than 72 hours after ordering confinement, or receiving notice of confinement, and shall order release "unless the commander believes upon ... reasonable grounds, that:
 - (i) An offense triable by a court-martial has been committed;
 - (ii) The prisoner committed it; and
 - (iii) Confinement is necessary because it is foreseeable that:
 - (a) The prisoner will not appear at a trial, pretrial hearing, or investigation, or
 - (b) The prisoner will engage in serious criminal misconduct; and
 - (iv) Less severe forms of restraint are inadequate."
 3. Can be completed immediately after ordering PTC. R.C.M. 305(h)(2)(A).
 4. *What Constitutes Serious Criminal Misconduct?*
 Serious criminal misconduct: "includes intimidation of witnesses or other obstruction of justice, seriously injuring others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command...." R.C.M. 305(h)(2)(B)(iv).
 "[T]he **'quitter'** who disobeys orders and refuses to perform duties" can have an "immensely adverse effect on morale and discipline." "[A]lthough the 'pain in the neck' [Soldier]... may not be confined ... solely on that basis, the accused whose behavior is not merely an irritant to the commander, but is ... an **infection in the unit** may be ... confined." Analysis of Rules for Courts-Martial, MCM, p. A21-18.
United States v. Rosato, 29 M.J. 1052 (A.F.C.M.R. 1990), *rev'd in part*, 32 M.J. 93 (C.M.A. 1991). Accused who was willfully disobedient and disrespectful to superiors in the presence of 10-15 members of a student squadron was properly placed in pretrial confinement "to protect the unit's discipline and morale from the accused's disruptive behavior." Unit consisted of new, junior personnel, accused had a history of disciplinary problems, student representatives complained about him, and the accused ignored first sergeant's admonitions.

United States v. Savoy, 65 M.J. 854 (A.F. Ct. Crim. App. 2008) While suicide prevention is an improper basis for continued pretrial confinement, a detainee's status as a suicide risk may be considered in evaluating the detainees likelihood to be a flight risk or commit other serious misconduct.

5. Commander shall prepare written memorandum stating the reasons for conclusion that requirements for confinement have been met. (Need not be done if such a memo written PRIOR to ordering PTC). Memorandum is forwarded to reviewing officer (military magistrate). (See AR 27-10, para. 9-5b(2): DA Form 5112-R, Checklist for Pretrial Confinement, will be completed and serves as "memorandum.")

United States v. Shelton, 27 M.J. 540 (A.C.M.R. 1988). The only timeliness requirement attached to this memorandum is that it must be available for the military magistrate's review.

G. R.C.M. 305(i)(2) 7-day Review. AR 27-10, chapter 9 (Military Magistrate Program).

1. Review of "probable cause determination and necessity for continued pretrial confinement" by a "neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned" within 7 days of imposition of confinement. (Time can be extended by the reviewing officer to 10 days for good cause).
2. Reviewing officer reviews commander's memorandum and any additional written matters, including any submitted by accused. Prisoner and counsel "shall be allowed to appear before the reviewing officer and make a statement, if practicable." Representative of command may appear to make a statement.
 - a. *United States v. Bell*, 25 M.J. 676 (A.C.M.R. 1987), *petition denied*, 27 M.J. 161 (C.M.A. 1988). Ex parte discussion by magistrate with prisoner's commander and trial counsel held not prohibited, at least when defense counsel was given access to all the information and an opportunity to respond.
 - b. *United States v. Fisher*, 37 M.J. 812 (N.M.C.M.R. 1993). Magistrate (and commander) should utilize a "totality-of-the-circumstances" test in determining whether pretrial confinement is warranted.
3. Military Rules of Evidence do not apply. Requirements for confinement must be shown by preponderance.
4. Reviewing officer "shall approve continued confinement or order immediate release." Magistrate must decide within 7 days of imposition of confinement. *United States v. McCants*, 39 M.J. 91 (C.M.A. 1994). Method for calculating total number of days of pretrial confinement: count both the initial date of confinement and date of magistrate review. R.C.M. 305(i)(1).
5. Reviewing officer shall make written memorandum of factual findings and conclusions. Memorandum, and all documents considered must be available to parties on request. R.C.M. 305(i)(6). **Note** that AR 27-10, para. 9-5b(1), requires the magistrate to serve a copy of the memorandum upon the SJA and the accused.
 - a. Failure to serve copy of reviewing officer's memo after defense request violates RCM 305(i). See *United States v. McCants*, 39 M.J. 91 (C.M.A. 1994).

Once release from confinement is directed by a commander, a reviewing officer, or a military judge, the accused may not be confined again before completion of trial except upon discovery, after release, of evidence or misconduct which either alone or in conjunction with all other evidence, justifies confinement.

III. SENTENCE CREDIT FOR PRETRIAL CONFINEMENT.

- A. Allen Credit. *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). Day for day credit for any military pretrial confinement. “[A]ny part of a day in pretrial confinement must be calculated as a full day for purposes of pretrial confinement credit . . . except where a day of pretrial confinement is also the day the sentence is imposed.” *United States v. DeLeon*, 53 M.J. 658, 660 (Army Ct. Crim. App. 2000) (abrogating the court’s decision in *United States v. New*, 23 M.J. 889 (A.C.M.R. 1987)).
1. What about civilian confinement? The CAAF has never squarely addressed the issue of *Allen* credit for time spent in civilian confinement. While the Army Court intimated that such credit “must be given ... for time spent in pretrial confinement in state or federal civilian confinement facilities,” *United States v. Ballesteros*, 25 M.J. 891 (A.C.M.R. 1988), *aff’d*, 29 M.J. 14 (C.M.A. 1989), the Court of Military Appeals decided the case on other grounds.
 2. *United States v. Chaney*, 53 M.J. 621 (N.M. Ct. Crim. App. 2000). Appellant was apprehended by civilian police based on information that he was a deserter from the Marine Corps. Marijuana was found on him during the apprehension. The appellant was placed in confinement based on offenses for which he later received a sentence at a court-martial (marijuana possession and unauthorized absence). The pending state charges against him were dismissed and he was then transferred to military authorities. He was not given credit under *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984) at trial for the 40 days he spent in pretrial confinement imposed by civilian authorities. Ultimately, the accused never received any credit for the 40 days (civilian or military credit). The appellate court concluded that he was entitled to 40 days credit because “[h]e was placed in official detention prior to the date his court-martial sentence commenced as a result of the offense for which the sentence was imposed and due to another charge for which he was arrested after the commission of the offense for which the sentence was imposed.”
 3. *United States v. Murray*, 43 M.J. 507 (A.F. Ct. Crim App. 1995). Relying on a DoDD 1325.4 and 18 U.S.C. Section 3585(b), the Air Force Court determined that an accused who had been arrested and held by civilian authorities prior to his court-martial was entitled to administrative credit for the time spent in civilian confinement.

NOTE: Clearly, additional R.C.M. 305(k) credit does not apply to a Soldier in civilian confinement unless the Soldier is in that confinement solely for a military offense and with notice and approval of military authorities. *United States v. Lamb*, 47 M.J. 384 (1998). *But see: United States v. Yanger*, 68 M.J. 540, (C.G.C.C.A. 2009) where a Coast Guard sailor received credit for an unrelated civilian confinement because he was arrested by the state and temporarily imprisoned after the commission of the offense for which the sentence was imposed by the military and had not received credit against another sentence for the temporary imprisonment.

- B. Mason Credit - *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985) (summary disposition). Day for day credit given for “pretrial restriction equivalent to confinement.” The calculation for Mason credit includes any partial day of restriction tantamount to confinement. *United States v. Chapa*, 53 M.J. 769 (Army Ct. Crim. App. 2000).
1. The test: *United States v. Smith*, 20 M.J. 528 (A.C.M.R. 1985), *petition denied*, 21 M.J. 169 (C.M.A. 1985). “The determination whether the conditions of restriction are tantamount to confinement must be based on the totality of the conditions imposed.”

Some factors: limits of the restricted area; physical restraints; escort requirements (occasional v. constant and armed v. unarmed); sign-in requirements; circumstances of duty; assigned duties; degree of privacy enjoyed; location of sleeping accommodations; access to visitors, telephones, recreational, religious, medical, and educational facilities, entertainment, civilian clothing, personal property, etc. *See also King infra.*, 58 M.J. 110.
 2. Restriction tantamount to confinement.

United States v. Smith, supra. 56 days of “restriction” found tantamount to confinement and credit given; accused was restricted to barracks building and was prohibited, among other things, from performing normal duties and leaving the building without permission and an escort; required to *sign in every 30 minutes* during non-duty hours and to remain in room after 2200 hours.

United States v. Regan, 62 M.J. 299 (C.A.A.F. 2006). Officer who repeatedly tested positive for cocaine was offered inpatient drug treatment or pretrial confinement. She opted for inpatient treatment. The court awarded 21 days of Mason credit because the conditions of inpatient treatment constituted significant restriction and it was suffered upon threat of being confined.
 3. Restriction **not** tantamount to confinement.

Washington v. Greenwald, 20 M.J. 699 (A.C.M.R. 1985) *pet. denied* 20 M.J. 324 (C.M.A. 1985). 88 days of pretrial restriction found not tantamount to confinement; credit denied. Washington was restricted to company area, place of duty, dining facility, and chaplain’s office; he performed normal duties; was restricted to room after 2200 hours; *signed in every hour* at CQ’s office when not at work; could travel to any place on post he needed to go during duty hours without an escort if he obtained permission and during non-duty hours with an escort.

United States v. Delano, 2008 WL 5333565 (A.F.Ct.Crim.App.). Servicemember’s pretrial restriction was not tantamount to confinement but was implemented to maintain good order and discipline and not imposed as punishment for the Airmen in the Transition Flight. The court held that, “while strict, the restrictions were not equivalent to confinement and were not punishment under *Article 13, UCMJ.*”
 4. Waiver.

United States v. King, 58 MJ 110 (C.A.A.F. 2003). If the issue is not raised at trial, it is waived and cannot be raised at the appellate level. Note particularly Judge Baker’s concurrence in which he advises MJs to ask on the record whether the accused seeks any pretrial confinement credit beyond simple *Allen* credit.

United States v. Barrett, 2009 WL 295012 (A.F.Ct.Crim.App.). Barrett explicitly waived his right to raise the issue that his treatment was tantamount to confinement at trial and on appeal as part of his plea agreement. Thus, the appellate court held the issue is waived.

- C. R.C.M. 305(k) Credit. Remedy for noncompliance with subsection (f), (h), (i) or (j), is administrative credit (day-for-day) against the sentence adjudged. Military judge may also award additional credit (not limited to day-for-day) if the pretrial confinement involves abuse of discretion or unusually harsh circumstances. Applies in addition to *Allen* or *Mason* credit. R.C.M. 305(k), analysis. However, when simultaneous non-compliance with multiple provisions of R.C.M. 305 occurs, only day-for-day credit will be applied. *United States v. Plowman*, 53 M.J. 511, 514 (N.M. Ct. Crim. App. 2000).
1. Restriction tantamount to confinement.
 - a. *United States v. Gregory*, 21 M.J. 952 (A.C.M.R. 1986), *aff'd*, 23 M.J. 246 (C.M.A. 1986) (summary disposition). When restriction is tantamount to confinement, the procedures for pretrial confinement in R.C.M. 305 apply, and when they are not complied with, day-for-day credit under 305(k) is required in addition to *Allen-Mason* credit.
 - b. *United States v. Rendon*, 58 M.J. 221 (C.A.A.F. 2003). CAAF “clarified” *Gregory* in that RCM 305 is only implicated by restriction tantamount to confinement in which actual physical restraint is imposed. The court did not offer a definition or give many useful examples.
 - c. But: 48-hour review does not apply to simple restriction. *United States v. Perez*, 45 M.J. 323 (1996) (Court refuses to “[e]xtend the requirement for a probable cause hearing to pretrial restriction,” noting a “world of difference between restriction and confinement”). However, if restriction is tantamount to confinement it **would** trigger *Rexroat* and R.C.M. 305 review requirements.
 2. *Rexroat* Violations. *United States v. Stuart*, 36 M.J. 747 (A.C.M.R. 1993). Accused entitled to day-for-day credit under R.C.M. 305(k) for lack of 48-hour probable cause review.
 3. Civilian Confinement.
 - a. “If the prisoner was apprehended by civilian authorities and remains in civilian custody at the request of military authorities, reasonable efforts will be made to bring the prisoner under military control in a timely fashion” R.C.M. 305(i)(1).
 - b. R.C.M. 305(k) credit provisions only apply to a Soldier in civilian confinement if the Soldier is in confinement a) solely for a military offense and b) his confinement is with notice and approval of military authorities. Burden is on the accused to allege that R.C.M. 305 applies and that the civilian authorities did not conduct the required 48-hour probable cause review. *United States v. Lamb*, 47 M.J. 384 (C.A.A.F. 1998).

- c. *United States v. Durbin*, 2008 WL 5192441 (A.F.Ct.Crim.App.). “[C]onfinement in violation of AFI 31-205 (Air Force Instruction on confinement requiring pretrial detainees in civilian confinement be treated in a manner consistent with a presumption of innocence standard) does not create for the appellant a per se right to sentencing credit; it only provides the military judge with the discretion to award additional sentencing credit for abuse of discretion by pretrial confinement authorities.”
- 4. Reconfinement after release. *United States v. Williams*, 47 M.J. 621 (Army Ct. Crim. App. 1997). Even though a violation of R.C.M. 305(l) is not listed as a basis for awarding R.C.M. 305(k) credit, a violation of R.C.M. 305(l) and *Keaton v. Marsh*, 43 M.J. 757 (A.C.C.A. 1996), results in additional credit under R.C.M. 305(k).
- 5. Waiver.
 - a. *United States v. Chapa III*, 57 M.J. 140 (C.A.A.F. 2002). At trial, was awarded 136 days sentence credit in violation of Article 13, UCMJ. On appeal, appellant alleged for the first time an entitlement to additional credit for the Government’s failure to comply with R.C.M. 305(h) and (i) (i.e., the 72-hour and 48-hour pretrial confinement review requirements respectively). The ACCA held that the appellant failed to properly raise the issue at trial and therefore waived any entitlement to credit. 53 M.J. 769 (Army Ct. Crim. App. 2000). The CAAF held that appellant waived any issue regarding credit and no plain error by the MJ for failing, sua sponte, to award R.C.M. 305(k) credit.
- D. Credit for Violations of Article 13. Two parts: "Unduly harsh circumstances" and pretrial punishment.
 - 1. Unduly harsh circumstances of pretrial confinement (was under *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983), but is now incorporated into R.C.M. 305(k)).
 - 2. *United States v. Avila*, 53 M.J. 99 (C.A.A.F. 2000). By brig policy, based solely on the serious nature of his pending charges, appellant was housed in windowless cell; not allowed to communicate with other pretrial confinees; given only one hour of daily recreation; made to wear shackles outside of his cell, and; only allowed to see visitors separated by a window. The court agreed with the lower court’s holding that the brig policy of assigning all pretrial confinees facing a possible sentence of 5 or more years to maximum (solitary) confinement was unreasonable. Appellant was given an additional 140 days credit for the period of pretrial confinement he already served. However, the court found that these conditions did not amount to cruel and unusual punishment under the Eighth Amendment. *But see United States v. James*, 28 M.J. 214 (C.M.A. 1989) (finding no Article 13 violation for accused who was confined with sentenced prisoners, wore an orange jumpsuit instead of uniform and rank, enjoyed limited recreational facilities, and had visitation privileges narrower than those required by AR 190-47).

United States v. Gilchrist, ARMY20020342 (ACCA 2005). Gilchrist was placed in pretrial confinement (PTC) prior to his plea of guilty for various offenses. The government transported Gilchrist from Fort Knox where he was in PTC to his Article 32 at Fort Bliss. The detention cell was full at Fort Bliss so the command shackled him to a cot in “The Ice House” overnight to prevent him from fleeing. Article 13 credit was denied at trial for the cot incident. ACCA determined the shackling of Gilchrist was not per se unduly harsh. However, they awarded Article 13 credit because other methods could have been used to insure Gilchrist’s presence at trial.

United States v. Yunk, 53 M.J. 145 (C.A.A.F. 2000). Reviewing the same unreasonable brig policy in *Avila*, the court commented that the appropriate time to raise matters of illegal pretrial confinement is with the magistrate considering the imposition of pretrial confinement. However, the court refused to find waiver of the issue when it is raised for the first time on appeal. Citing *United States v. Huffman*, 40 M.J. 225 (C.M.A. 1994).

United States v. King, 61 M.J. 225 (C.A.A.F. 2005). King was placed in pretrial confinement and classified as a “maximum security” prisoner. He was placed in a double occupancy cell with another pretrial confinee. The following conditions governed King’s pretrial confinement: remain in the cell with the exception of appointments or emergencies; eat all meals in the cell (meals were delivered to the cell); no library or gym privileges (books & gym equipment were delivered to the cell); no sleeping during duty hours; must wear a yellow jumpsuit and shackles when released for appointments; must have two escorts, one of whom was armed, when King was moved to appointments; and may only watch a TV placed outside the cell. King’s cellmate was subsequently convicted at a court-martial and for some time, the two continued to reside in the same cell. For administration purposes (overcrowding and prohibition on mixing pre- and post-trial confinees), King spent fifteen days by himself in a windowless segregation cell. At trial, the military judge denied Article 13 relief, finding that “[t]he conditions were based on legitimate non-punitive reasons. The conditions of [King’s] confinement were not more rigorous than necessary.” The CAAF awarded Article 13 credit for his time spent in the segregated cell. However, no credit was given for the conditions of his pretrial confinement prior to being segregated. The CAAF stated it was “reluctant to second-guess the security determinations of confinement officials.”

United States v. Crawford, 62 M.J. 411 (C.A.A.F. 2006). Marine officer accused was segregated for a week of observation and then retained as a “maximum custody” prisoner for almost nine months, the entire time he was in pretrial confinement. This did not establish that he was confined in conditions more rigorous than those required to assure his presence at trial in violation of pretrial confinement regulations. The court considered that there were serious charges pending against the accused, there was a potential for lengthy confinement, the accused had made threats and had an apparent ability to execute those threats, his access to unknown quantities of weapons and explosives, and his professed willingness to resort to violent means against what he viewed as government oppression provided sufficient reason to classify the accused as a high-risk inmate.

United States v. Adcock, 65 M.J. 18 (C.A.A.F. 2007). 1LT Adcock received credit under R.C.M. 305(k) for “abuse of discretion” when she was housed in a civilian confinement facility that did not conform to USAF Regulations (AFI 31-205 forbids pretrial detainees from being commingled with post-trial inmates and mandates that detainees retain rank insignia, conditions violated by the Solano County, CA jail.)

United States v. Gomez, 66 M.J. 663 (C.G. Ct. Crim. App. 2008). The Coast Guard court declined to give relief to an accused who wasn’t visited regularly by his chain of command, despite Coast Guard regulation requiring regular visits.

United States v. Williams, 68 MJ 252 (C.A.A.F. 2010). Accused, who was placed on suicide watch when he was confined prior to trial, received sentencing credit for the entire period, but did not receive additional credit based on conditions of confinement. (He was denied books, radio, and CD player, subjected to 24 hour lighting, and required to wear a suicide gown.) This is because there was a non-punitive objective—suicide watch status.

3. Pretrial punishment.

- a. Does NOT depend upon the Soldier being in pretrial confinement. *United States v. Combs*, 47 M.J. 330 (C.A.A.F. 1997). Air Force E-6, whose conviction for homicide was overturned on appeal, was required to serve 20 months on active duty as an E-1. CAAF held that reduction is a punishment and rejected the Government argument that Article 13 only applies in pretrial confinement situations.
- b. *United States v. Smith*, 53 M.J. 168 (C.A.A.F. 2000) (citing Francis A. Gilligan & Fredric I. Lederer, *Court-Martial Procedure* sect. 4-900.00 at 6-37 (2d ed. 1999)). Reviewing previous cases dealing with pretrial punishment, the court identified the following factors to assist in determining whether pretrial restraint amounts to pretrial punishment:
 - (1) Similarities between sentenced persons and those awaiting disciplinary disposition in daily routine, work assignments, clothing attire, and other restraints and control conditions;
 - (2) relevance of those similarities to customary and traditional military command and control measures;
 - (3) the relation of requirements and procedures to command and control needs, and;
 - (4) if there was an intent to punish or stigmatize the person pending disciplinary action.
- c. *United States v. Mosby*, 56 M.J. 309 (C.A.A.F. 2002). Appellant was convicted of involuntary manslaughter of his five-week old son and sentenced to reduction to E-1, nine years confinement and a BCD. Prior to trial, the appellant was placed in solitary confinement at the Marine Corps Base Brig at Camp Lejeune, North Carolina. At trial, the Military Judge denied a Defense Article 13 motion for additional sentence credit based on illegal pretrial punishment finding that: there was no intent to punish appellant by placing him in solitary confinement; the conditions

were not “unduly rigorous” or “so excessive as to constitute punishment”; and the conditions were “reasonably related to legitimate governmental objectives.” Held – The military judge’s findings of no intent to punish were not clearly erroneous; appellant was NOT entitled to additional sentence credit. See also *United States v. Fulton*, 55 M.J. 88 (C.A.A.F. 2001) and *United States v. Coreteguera, Jr.*, 56 M.J. 330 (C.A.A.F. 2002).

- d. *United States v. Fischer*, 61 M.J. 415 (C.A.A.F. 2005). Fischer was placed in pretrial confinement on 4 May 2001. On 29 June 2001 his pay and benefits were terminated based on him reaching his end of obligated service (ETS or EAS). The defense counsel tried unsuccessfully to have his pay continued past his ETS date. This attempt was unsuccessful. On appeal, Fischer argued that the government violated Article 13, UCMJ, when it refused to pay him past his ETS. The CAAF disagreed. In refusing to award Article 13 credit, the CAAF stated there was a neutral non-punitive policy that allowed for refusing to pay a pretrial confine that has reached his ETS and is not performing duties.
4. Public humiliation or degradation.
 - a. *United States v. Starr*, 53 M.J. 380 (C.A.A.F. 2000). While under investigation, appellant, a member of the Security Forces (SF) Squadron, was ordered by his First Sergeant to surrender his SF beret. The First Sergeant also assigned appellant to “X Flight,” a group of other SF personnel who, for a variety of reasons, were not authorized to bear arms or to perform other normal SF duties. Members of X Flight could not wear berets but those members assigned there for medical reasons could wear their berets to other squadron functions. According to the First Sergeant, custom in the SF career field prohibits one unable to perform SF work from wearing the beret. For 275 days the appellant wore no beret and remained in X Flight. The court found no intent to punish or stigmatize him while disciplinary action was pending and that the limitations were imposed for legitimate, operational and military purposes.
 - b. *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987). Cruz and about 40 other Soldiers suspected of drug offenses were called out of a mass formation, escorted before the DIVARTY commander who did not return their salute, called “criminals” by the commander, searched and handcuffed, billeted separately pending trial, and assembled into what become known as the “Peyote Platoon.” Held: the “public denunciation by the commander and subsequent military degradation before the troops prior to courts-martial constitute[d] unlawful pretrial punishment prohibited by Article 13.”
 - c. *United States v. Stamper*, 39 M.J. 1097 (A.C.M.R. 1994). Company commander’s disparaging remarks to accused such as “don’t go out stealing car stereos this weekend” and “getting any five-finger discounts lately, Stamper?” constituted pretrial punishment.

- d. *United States v. McLean*, 70 M.J. 573 (A.F.C.C.A. 2011). Air Force NCO was convicted of aggravated assault on his child. Prior to trial, he was ordered to live in enlisted quarters and share their latrine and laundry facilities. The court found the issue was waived because not raised at trial, but even if not waived, it was not analogous to the “shaming ritual” in *Cruz*.
5. Other examples.
 - a. "Incorrecive" training.
United States v. Hoover, 24 M.J. 874 (A.C.M.R. 1987), *petition denied*, 25 M.J. 437 (C.M.A. 1987). After damaging his barracks room, Hoover was required to sleep in a pup tent for 3 weeks between 2200 and 0400 hours. Held: Art 13 violation; “corrective or extra training” must be “directly related to the deficiency” and “oriented to improve . . . performance in the problem area.” See also *United States v. Fitzsimmons*, 33 M.J. 710 (A.C.M.R. 1991). Court set aside BCD as a consequence of “pup tent” pretrial punishment.
 - b. Violating the Order of the Military Judge.
United States v. Tilghman, 44 M.J. 493 (C.A.A.F. 1996). Accused convicted at end of day; government desires to put him in confinement until sentencing hearing next day. MJ determines insufficient basis for confinement. Commander nevertheless orders accused into pretrial confinement. MJ orders additional 10 day credit for each day of illegal pretrial confinement. At post-trial 39a session Chief Judge awards additional 18 months credit.
 - c. Constitutional Deprivation.
United States v. Mack, 65 M.J. 108 (C.A.A.F. 2007). While the appellate case does not address this issue directly and faulted the trial judge in other areas, CAAF seemed to support the trial judge’s decision to award credit for Constitutional violations. These included the accused’s commanding officer ordering him to have no unsupervised visits with his wife, even though she had no involvement with the case, something the judge found “not directly linked to a valid, governmental purpose and intruded on the sanctity of his marriage, a right which is often protected under a number of rights in the Constitution of the United States.” The judge also took exception that the accused’s telephone conversations to his counsel were monitored which “chilled his ability and freedom to speak in a protected environment under the attorney/client relationship, intruding upon [Appellant's] ... Fifth and Sixth Amendment rights to counsel.” Accordingly, the trial judge found these restrictions were violations of his constitutional rights and warranted day for day credit.
 6. Waiver
 - a. In *United States v. Inong*, 58 M.J. 460 (2003), CAAF held that an accused must raise illegal pretrial punishment at trial, or the issue will be waived for appellate purposes, absent plain error. In doing so it specifically overruled *United States v. Huffman*, 40 M.J. 11 (C.M.A. 1994, as well as the “tantamount to affirmative waiver” rule established by *United States*

v. Tanksley, 54 M.J. 169 (2000) and *United States v. Southwick*, 53 M.J. 412 (2000).

E. Applying credits.

1. Adjudged v. Approved sentence. Pretrial confinement credit applies to the approved sentence.
 - a. *United States v. Rock*, 52 M.J. 154 (C.A.A.F. 1999). CAAF held that pretrial confinement credit applies to adjudged sentence, unless there is a PTA that provides for lesser sentence, in which case it applies to lesser sentence. In *United States v. Spaustat*, 57 M.J. 256 (C.A.A.F. 2002), the court confirmed its ruling in *Rock* and clarified it by stating: “this court will require the convening authority to direct application of all confinement credits for violation of Article 13 or RCM 305 and all Allen credit against the approved sentence; i.e., the lesser of the adjudged sentence or the sentence that may be approved under the pretrial agreement.” See also *United States v. King*, 58 M.J. 110 (C.A.A.F. 2003), Judge Baker’s concurrence, for a succinct discussion of the state of this issue.
2. When a SM is tried after receiving NJP for the same offense, the SM must get complete credit for any prior punishment, “day-for-day, dollar-for-dollar, stripe-for-stripe,” according to *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989, which in footnote 5 lays out a method to reconcile punishments that do not directly convert. “Extra duty for 45 days is equivalent to 60 days' restriction (1 1/2 for 2); add the 45 days' restriction also imposed = 105 days' restriction. Confinement for 1 day is equivalent to 2 days' restriction, so 105 days' restriction = 52 1/2 days' confinement.”
3. When Receiving More Credit that Imposed Punishment
 - a. *United States v. Zarbatany*, 70 MJ 169 (C.A.A.F. 2011). Zarbatany received 119 days for PTC credit plus an additional 476 days for unusually harsh PTC conditions. With adjudged confinement of only six months, Zarbatany was released at the conclusion of the trial. CAAF held that illegal Art. 13 confinement credit can be applied toward a punitive discharge. While the court noted that “conversion of confinement credit to forms of punishment other than those found in R.C.M. 305(k) is generally inapt,” it can be done, potentially allowing the conversion of a discharge. It also noted, however, that while “meaningful relief” is required, it must not come where it would be “disproportionate to the harm suffered.”

F. Litigating Issues Related to Pretrial Restraint.

1. Pretrial.
 - a. Violation of Article 13:
United States v. McFayden, 51 M.J. 289 (C.A.A.F. 1999). Court of Appeals for the Armed Forces specified the issue of whether a pretrial agreement requiring the accused to waive his right to challenge a violation of Article 13 violates public policy. The court held that R.C.M. 705(c)(1)(B) does not specifically prohibit an accused from waiving his right to make such a deal. However, as this can be done only with the accused’s full knowledge of the implications of the waiver, the military

judge should inquire into the facts and circumstances of the pretrial confinement as well as the voluntariness and understanding of the accused of the waiver before accepting the plea.

b. Judicial Review:

Whenever reviewing the legality of confinement *already served*, the military judge should apply an abuse of discretion standard & limit the examination to the evidence previously considered by the magistrate at the R.C.M. 305(i) hearing. R.C.M. 305(j)(1)(A). When determining whether to release the prisoner, the military judge should hold a *de novo* hearing. R.C.M. 305(j)(1)(B). *See United States v. Gaither*, 45 M.J. 349 (C.A.A.F. 1996).

c. Other Violations:

Article 12 (which forbids American Soldiers from being confined in “immediate association” with Enemy prisoners or other foreign nationals) should be interpreted to forbid placement of EPW’s, as well as illegal aliens commonly held in local confinement facilities waiting for deportation, and Americans in the same cell. *United States v. Wise*, 64 M.J. 468 (C.A.A.F. 2007).

2. At Trial.

“Trial counsel shall inform the court-martial of the data on the charge sheet relating to . . . the duration and nature of any pretrial restraint. . . . If the defense objects to the data as being materially inaccurate or incomplete . . . the military judge shall determine the issue. Objections not asserted are **waived**.” R.C.M. 1001(b)(1).

a. *Mason* credit:

United States v. Ecoffey, 23 M.J. 629 (A.C.M.R. 1986). Failure by defense counsel to raise the issue of administrative credit for restriction tantamount to confinement by timely and specific objection to the presentation of data at trial concerning the nature of such restraint will waive consideration of the issue on appeal. *But see United States v. Guerrero*, 28 M.J. 223 (C.M.A. 1989). Court considered request for *Mason* credit made for first time on appeal, but rejected claim.

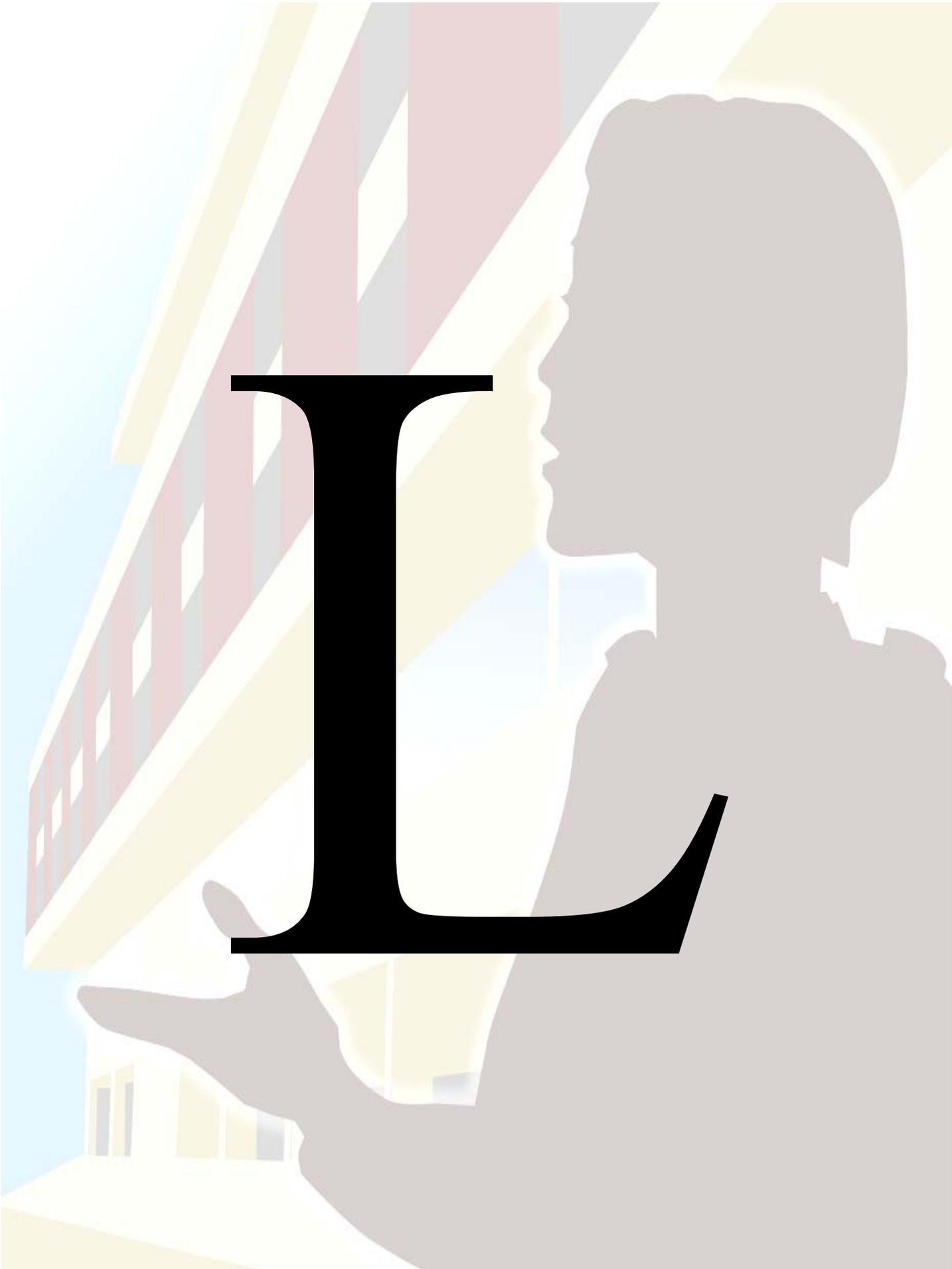
b. R.C.M. 305(k)/*Rexroat* credit.

United States v. Rollins, 36 M.J. 795 (A.C.M.R. 1993). Failure to raise *Rexroat*/48 hour review issue at trial constitutes waiver. *Accord, United States v. Sanders*, 36 M.J. 1013 (A.C.M.R. 1993).

3. Informing the Panel.

When the defense opts to introduce evidence of pretrial government action that resulted in administrative credit, the military judge has an obligation to instruct the members of the administrative credit awarded for them to consider during sentence deliberation. The instruction, however, should be general in nature and not “expressly or by inference invite the members to award extra confinement time to compensate for the administrative confinement credit awarded by the military judge. *United States v. Barnett*, 70 M.J. 568 (A.F.C.C.A. 2011).

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SELF-INCRIMINATION

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SELF-INCRIMINATION

Outline of Instruction

Open confession is good for the soul.

- Old Scottish Proverb

I. BACKGROUND

A. Introduction.

In the military, the law of self-incrimination embraces Article 31, UCMJ; the Fifth Amendment; the Sixth Amendment; and, the voluntariness doctrine. Each source of law provides unique protections, triggered by distinct events. When analyzing a self-incrimination issue, therefore, it is imperative to categorize the analysis. First, determine the relevant source or sources of law in issue. Next, evaluate the situation and decide if the protections afforded under each particular source of law have been triggered. If protections have been triggered, determine if there has been a violation of those protections. Typically, a challenge to a confession involves more than one source of self-incrimination law, and several steps of analysis. The confession or admission is admissible when the rights afforded under each source of applicable law have been observed.

B. Sources of law.

1. The Fifth Amendment.

“No person . . . shall be compelled in any criminal case to be a witness against himself”

2. Article 31(a), UCMJ.

“No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.”

3. The Sixth Amendment.

“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”

4. The Voluntariness Doctrine.

Looking at the totality of the circumstances, was the confession the product of an essentially free and unconstrained choice by its maker, or was the accused’s will overborne and his capacity for self-determination critically impaired. *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961).

5. The collected law of *Privilege Against Self-Incrimination* (PASI) principles, statutes, and decisions is embodied in the MCM at Mil. R. Evid. 301, 304-305.

C. Definitions. Mil. R. Evid. 304(c).

1. Confession: “A ‘confession’ is an acknowledgement of guilt.”

2. Admission: “An ‘admission’ is a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory.”

D. Scope of the protection.

1. Standard for protection.

Mil. R. Evid. 301(a): “. . . evidence of a testimonial or communicative nature.”
“Article 31, like the Fifth Amendment, focuses on testimonial compulsion.”
United States v. Williams, 23 M.J. 362, 366 (C.M.A. 1987).

2. Applying the standard.

a. Oral or written statements are generally protected.

Pennsylvania v. Muniz, 496 U.S. 582 (1990). Drunk driving suspect’s slurred speech and other evidence showing his lack of muscular coordination constituted nontestimonial and, therefore, admissible aspects of his unwarned responses to police questioning. In contrast, the suspect’s answer to police questioning about the date of his sixth birthday was testimonial and should have been suppressed. “Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the ‘trilemma’ of truth, falsity, or silence and hence the response (whether based on truth or falsity) contains a testimonial component.” *Id.* at 597.

b. Verbal acts (physical act which is the equivalent of speaking) are generally protected.

- (1) *United States v. Whipple*, 4 M.J. 773 (C.G.C.M.R. 1978). The accused’s verbal act of handing over drugs in response to officer’s request was found to be a protected “statement.”
- (2) *Fisher v. United States*, 425 U.S. 391 (1976). Accounting documents used to prepare tax returns were not protected because they were prepared voluntarily, long before any prosecution was being considered. Additionally, the act of turning over the documents was not testimonial because it conveyed no factual information that the government did not already have.
- (3) *United States v. Hubbell*, 530 U.S. 27 (2000). The Supreme Court held that the act of turning over documents in response to a subpoena *duces tecum* and a grant of immunity was a testimonial act because the prosecutor did not know of the location or even existence of the documents. The defendant had to use mental and physical steps to inventory the documents, and his production of the documents communicated their existence, possession, and authenticity.
- (4) *United States v. Swift*, 53 M.J. 439 (C.A.A.F. 2000). A divorce decree turned over by the accused was not testimonial evidence because it was voluntarily prepared before he was ordered to produce it by his command. Additionally, the act of turning over the decree was not testimonial because the existence and location of the document was a “foregone conclusion” and added “little or nothing to the sum total of the Government’s information.” Finally, the Court stated that even if the act was testimonial, it fell under the “required records exception,” since the decree was maintained for “legitimate administrative purposes.”

c. Physical characteristics are not protected.

- (1) Dental Impressions for bite mark comparisons not protected. *United States v. Martin*, 9 M.J. 731 (N.M.C.M.R. 1979), *aff'd on other grounds*, 13 M.J. 66 (C.M.A. 1982).
 - (2) Handwriting sample not protected; dicta on voice sample. *United States v. Harden*, 18 M.J. 81 (C.M.A. 1984).
 - (3) Voice samples not protected. *United States v. Akgun*, 24 M.J. 434 (C.M.A. 1987).
 - (4) Body fluids not protected.
 - (a) Blood sample is not testimonial. *United States v. Armstrong*, 9 M.J. 374 (C.M.A. 1980).
 - (b) Urine specimen not protected. *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983).
 - (c) Note however, that under Mil. R. Evid. 304(h)(4), if an accused refuses a lawful order to submit for chemical analysis a sample of his or her blood, breath, urine, or other body substance, evidence of such refusal may be admitted into evidence on:
 - (i) A charge of violating an order to submit such a sample; or,
 - (ii) Any other charge on which the results of the chemical analysis would have been admissible.
- d. Identification is generally not protected by PASI. *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County*, 542 U.S. 177 (2004). A request for identification during a *Terry* stop did not fall within the scope of protection afforded by the Fifth Amendment and *Miranda*. The Court held that to qualify as incriminating, the individual must reasonably believe that his communication could be used in a criminal prosecution against him or could provide a link to other evidence that might be so used. Providing personal identification is normally insignificant, and would be incriminating in only the most unusual circumstances. In this case, the defendant failed to show that his refusal to comply with the officer's requests was based on a real fear that his identity would incriminate him or lead to evidence that could be used against him. However, the Court left open the possibility that there may be a circumstance where furnishing identification might lead to evidence needed to convict the witness of a separate offense, and therefore be protected by the Fifth Amendment. *See also Pennsylvania v. Muniz*, 496 U.S. 582 (1990); *United States v. Tubbs*, 34 M.J. 654 (A.C.M.R. 1992) (questioning to identify a suspect during "booking" process does not require a testimonial response).
- e. Duty to report — partially protected. PASI is violated if a regulatory duty to report misconduct will directly lead to, or is, evidence of one's own misconduct.

- (1) *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986). Regulation requiring Airmen to report drug abuse of other Airmen is valid, but the PASI protects against conviction for dereliction of duty where “at the time the duty to report arises, the witness to drug abuse is already an accessory or principal to the illegal activity that he fails to report”
- (2) *United States v. Sanchez*, 51 M.J. 165 (C.A.A.F. 1999). Conviction for misprision of a serious offense upheld where accused failed to report an aggravated assault. Court said if accused had immediately reported the offense, he would not have committed misprision.
- (3) *United States v. Medley*, 33 M.J. 75 (C.M.A. 1991). Court declined to extend *Heyward* exception to cases where a social relationship between drug users is so interrelated that it would be impossible to reveal one incident without potentially incriminating the accused on a separate incident. *See also United States v. Bland*, 39 M.J. 921 (N.M.C.M.R. 1994).
- (4) *United States v. Hammond*, 60 M.J. 512 (A. Ct. Crim. App. 2004). The Army court held that a conviction of fleeing the scene of an intentional collision does not violate the Fifth Amendment or Article 31, UCMJ. Balancing “the important governmental purpose in securing . . . information against the right of the servicemember to be protected from compulsory self-incrimination,” the service court found that “although staying at the scene may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent evidence.”

II. FIFTH AMENDMENT & *MIRANDA*

“No person . . . shall be compelled in any criminal case to be a witness against himself . . .” U.S. Const. amend. V.

In 1966, with the case *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that prior to any custodial interrogation, a subject must be warned that he has a right: (1) to remain silent, (2) to be informed that any statement made may be used as evidence against him, and (3) to the presence of an attorney. The goal of *Miranda* was to put in place a procedural safeguard that would counter the inherently coercive environment of a police-dominated, incommunicado interrogation. In 1967, the Court of Military Appeals applied *Miranda* to military interrogations in *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967). In *Dickerson v. United States*, 530 U.S. 428 (2000), the Supreme Court reaffirmed that *Miranda* is a constitutional decision that the Congress is not permitted to “overrule.” The Supreme Court also implicitly reaffirmed all of the exceptions to *Miranda*.

The trigger for *Miranda* warnings is “custodial interrogation.” The test for custody is an objective examination, from the perspective of the subject, into whether there was a formal arrest or restraint or other deprivation of freedom of action in any significant way. The test for an interrogation is also an objective test, but from the perspective of the person asking the questions, i.e., the police officer. The test is whether the comments made are those reasonably likely to elicit an incriminating response. For both, the subjective views harbored by either the interrogating officer or the person being questioned are irrelevant.

A. The *Miranda* Warnings.

Miranda v. Arizona, 384 U.S. 436 (1966). Prior to any custodial interrogation, a subject must be warned:

1. That he/she has a right to remain silent;
2. That any statement made may be used as evidence against him/her; and,
3. That he/she has a right to the presence of an attorney, either retained or appointed.

Florida v. Powell, 130 S.Ct. 1195 (2010). *Miranda* did not require specific language to be used. As long as the warnings reasonably convey the three warnings above, then the warnings will be held to comply with *Miranda*.

B. Application to the Military.

1. Mil. R. Evid. 305(d)(1). “When evidence of a testimonial or communicative nature . . . is sought or is a reasonable consequence of an interrogation, an accused or a person suspected of an offense is entitled to consult with counsel”
2. *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967). *Miranda* applies to military interrogations.

C. The *Miranda* Trigger.

The requirement for *Miranda* warnings is triggered by initiation of custodial interrogation.

1. What is the test for custody?
 - a. A person is in custody if he is taken into custody, could reasonably believe himself to be in custody, or otherwise deprived of his freedom of action in any significant way. See Mil. R. Evid. 305(d)(1)(A).
 - b. Custody is evaluated based on an objective test from the perspective of a “reasonable” subject.
 - c. *Stansbury v. California*, 511 U.S. 318 (1994). In 1994, the Supreme Court reaffirmed that the test for custody under *Miranda* is an objective examination of whether there was formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. The subjective views harbored by either the interrogating officer or the person being questioned are irrelevant.

Why? It was the coercive aspect of custodial interrogation, and not the strength or content of the government’s suspicions at the time of the questioning, which led to imposition of the *Miranda* requirements.
 - d. *United States v. Miller*, 46 M.J. 80 (C.A.A.F. 1997). The CAAF applied the following “mixed question of law and fact” analysis in determining custody: 1) what were the circumstances surrounding the interrogation (question of fact); and, 2) given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave (question of law). Applying this objective standard, the court found no custody where the accused (1) was not under formal arrest; (2) voluntarily accepted an invitation to talk with an officer about the alleged misconduct; (3) voluntarily participated in the interview; (4) was treated cordially by the officer; and, (5) was left alone in the station house for a short period of time.

- e. *United States v. Miller*, 48 M.J. 49 (C.A.A.F. 1998). After receiving a report about a gang robbery, an MP detained the accused to ascertain his identity and whereabouts during the evening. The CAAF determined that *Miranda* warnings were not required because the accused was not in custody. [Note: This is a different *Miller* than the case above, 46 M.J. 80.]
 - f. *United States v. Chatfield*, 67 M.J. 432 (C.A.A.F. 2009). The CAAF cited *Thompson v. Keohane*, 516 U.S. 99 (1995), for the proposition that two inquiries are necessary to determine custody: 1) what are the circumstances surrounding the interrogation; and, 2) would a reasonable person in those circumstances have felt that he or she was not at liberty to terminate the interrogation. Despite the fact that questioning occurred in the station house, the CAAF held that appellant appeared there voluntarily, that the interrogation occurred in the detective's office instead of an interrogation room, and the duration of the interrogation all point to the fact that a reasonable person would not find that the appellant was in custody. No *Miranda* warnings were required.
2. Situation and location factors for determining custody.
- a. Roadside stops.

Berkemer v. McCarty, 468 U.S. 420 (1984). Highway patrol stopped a car that was weaving and, without giving *Miranda* warnings, asked the driver if he had used intoxicants. Court found no custody for *Miranda* purposes because: (1) motorist expects detention will be brief; and, (2) stop is in "public" and less "police dominated." "[T]he safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" The initially uncommunicated decision by the police to arrest the driver does not bear on whether the defendant is "in custody." See also *United States v. Rodriguez*, 44 M.J. 766 (N-M. Ct. Crim. App. 1996) (questioning of suspect about illegal gun sales during roadside stop was noncustodial), *aff'd*, 60 M.J. 239 (C.A.A.F. 2004).
 - b. In the bedroom.

Orozco v. Texas, 394 U.S. 324 (1969). Suspect was "in custody" for *Miranda* purposes where he was questioned in his bedroom and an officer testified the suspect was not free to go, but was "under arrest."
 - c. Age is not a factor.

Yarborough v. Alvarado, 541 U.S. 652 (2004). The Supreme Court overruled the 9th Circuit's determination that *Miranda* required courts to consider a defendant's age and his lack of a prior criminal history in determining custody. The Court noted that *Miranda* established an objective test for custody. Age and prior criminal experience are individual characteristics of a suspect, which if required for a custody determination, would create a subjective test.
 - d. Military status as a factor in custody evaluation.

United States v. Jordan, 44 C.M.R. 44 (C.M.A. 1971). Questioning by a superior is not *per se* custodial, but "questioning by a commanding officer

or military police or investigators at which the accused is given an Article 31 warning, strongly suggests that an accused is also entitled to a right to counsel warning under *Miranda* and *Tempia*.”

e. Coercive environment.

Illinois v. Perkins, 496 U.S. 292 (1990). “[A]n undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response” about an uncharged offense. “*Miranda* forbids coercion, not strategic deception by taking advantage of a suspect’s misplaced trust in one he supposes to be a fellow prisoner.”

3. Interrogation.

Mil. R. Evid. 305(b)(2). “‘Interrogation’ includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning.” Note: the term “interrogation” has the same meaning under the Fifth Amendment as it does for Article 31(b) (*see infra* Sec. IV. G. 3. [When must warnings be given?] of this outline).

D. The “Public Safety” Exception.

New York v. Quarles, 467 U.S. 649 (1984). After apprehending a suspect with an empty shoulder holster in a grocery store, officer did not read rights warnings, but asked where the gun was. The Court held that “overriding considerations of public safety justify the officer’s failure to provide *Miranda* warnings before he asked questions devoted to locating the abandoned weapon.”

E. Who can invoke the Fifth Amendment Privilege?

1. *Ohio v. Reiner*, 532 U.S. 17 (2001). The Supreme Court held that an individual could invoke his Fifth Amendment rights even if he believed he was innocent. All that is necessary for a valid invocation of the privilege against self-incrimination is that it be “evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.” The Court further recognized “that truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker’s own mouth.”
2. *Hoffman v. United States*, 341 U.S. 479 (1951). Privilege not only extends to answers that would in themselves support a conviction, but also apply to those responses which “would furnish a link in the chain of evidence needed to prosecute the claimant.”

3. *McKune v. Lile*, 536 U.S. 24 (2002). As part of a sexual abuse treatment program, qualifying inmates can be required to complete and sign an “Admission of Responsibility” form, in which they accept responsibility for the crimes for which they have been sentenced, and complete a sexual history form detailing all prior sexual activities, or face a reduction of their prison privileges for noncompliance. The Supreme Court held that the state had a legitimate penological interest in rehabilitating inmates, and the *de minimus* adjustment of prison restrictions served this proper prison goal. *See also United States v. McDowell*, 59 M.J. 662 (A.F. Ct. Crim. App. 2003) (holding that a naval brig’s policy of encouraging participation in its sex offender treatment program and conditioning relatively minor privileges on such participation does not violate a prisoner’s Fifth Amendment privilege against self-incrimination).

III. SIXTH AMENDMENT

“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI.

The *Miranda* counsel warning requirement must be distinguished from the Sixth Amendment counsel warning.¹ Whereas *Miranda* concerns assistance of counsel in determining whether to exercise the PASI, under the Sixth Amendment an individual has the right to assistance of counsel for his defense in all criminal prosecutions. Although an individual’s exercise of his Sixth Amendment right may have the ancillary effect of invoking the PASI, the trigger and scope of the rights are different. Under the Sixth Amendment, a right to counsel is triggered by initiation of the adversarial criminal justice process. In the civilian sector, the trigger point is reached upon indictment. In the military, it is triggered by the preferral of charges.

- A. Under Mil. R. Evid. 305(d)(1)(B), the Sixth Amendment right to counsel warning is required for interrogations by a person subject to the code acting in a law enforcement capacity, conducted subsequent to preferral of charges (not the imposition of pretrial restraint under RCM 304), where the interrogation concerns the offenses or matters that were the subject of the preferral.²

- B. Sixth Amendment provisions are limited to law enforcement activity.

There was no violation of the Sixth Amendment where, following preferral, a state social services worker who had an independent duty under state law to investigate child abuse interviewed the accused. The social worker never contacted the government before or after the interview until subpoenaed. If a non-law enforcement official is not serving the “prosecution team,” he is not a member of the “prosecutorial forces of organized society,” and thus is not barred from contacting an accused based on a prior Sixth Amendment invocation. *United States v. Moreno*, 36 M.J. 107 (C.M.A. 1992).

¹ Issuing *Miranda* warnings has been found sufficient to satisfy the Sixth Amendment right to counsel warning requirement. *Patterson v. Illinois*, 487 U.S. 285 (1988). *See also Montejo v. Louisiana*, 556 U.S. 778 (2009).

² The Analysis to Mil. R. Evid. 305(d) notes it may be possible under unusual circumstances for the courts to find the Sixth Amendment right attaches prior to preferral. *See United States v. Wattenbarger*, 21 M.J. 41 (C.M.A. 1985) (pretrial confinement and clear movement toward prosecution found to trigger Sixth Amendment counsel right – note: court could not discern actual date of preferral of charges).

That being said, mere confinement is not enough to trigger Sixth Amendment protections. A request for counsel at an RCM 305(i) hearing (hearing to review pretrial restraint) before charges have been preferred neither invokes a Sixth Amendment right to counsel, because the hearing is not an adversarial proceeding, nor invokes a Fifth Amendment right to counsel, because the hearing is not the functional equivalent of a custodial interrogation. *United States v. Hanes*, 34 M.J. 1168 (N.M.C.M.R. 1992).

- C. Neither custody nor “coercive influences” are required to trigger Sixth Amendment protections.
1. Once formal proceedings begin, police may not “deliberately elicit” statements from an accused without an express waiver of the right to counsel. Mil. R. Evid. 305(g). This is true whether the questioning is in a custodial setting by persons known by the accused to be police, *Brewer v. Williams*, 430 U.S. 387 (1977); surreptitiously by a co-accused, *Maine v. Moulton*, 474 U.S. 159 (1985); through police monitored radio transmissions, *Massiah v. United States*, 377 U.S. 201 (1964); or, when police ask questions of an indictee about his drug use and affiliations, *Fellers v. United States*, 540 U.S. 519 (2004).
 2. Mere presence as a listening post does not violate Sixth Amendment rights. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (defendant’s cellmate instructed only to listen and report). However, if an informant initiates contact and conversation after indictment for express purpose of gathering information about charged activities, statements made by defendant are obtained in violation of accused’s Sixth Amendment right to counsel and may not be used in government’s case-in-chief. *United States v. Henry*, 447 U.S. 264 (1980); *Kansas v. Ventris*, 556 U.S. 586 (2009); *United States v. Langer*, 41 M.J. 780 (A.F. Ct. Crim. App. 1995).
- D. Questioning must relate to the charged offense.

Texas v. Cobb, 532 U.S. 162 (2001). Appellant’s Sixth Amendment right to counsel was not violated when police questioned him, without his counsel being present, about a murder that occurred during a burglary, after he had previously been arraigned for the underlying burglary offense. The Supreme Court stated that the Sixth Amendment right to counsel attaches only to charged offenses and to those offenses that would be “considered the same offense under the *Blockburger*³ test,” even if not formally charged.

IV. ARTICLE 31, UCMJ

*While the plain meaning of the statute would appear to answer these questions, 25 years of litigation and judicial interpretation have made it clear that virtually nothing involving Article 31 has a “plain meaning.”*⁴

Fredric Lederer, 1976

A. Introduction.

In 1950, Congress enacted Article 31(b) to dispel a service member’s inherent compulsion to respond to questioning from a superior in either rank or position. As a result, the protections under Article 31(b) are triggered when a suspect or an accused is questioned (for law enforcement or disciplinary purposes) by a person subject to the UCMJ who is acting in an official capacity, and perceived as such by the suspect or accused. Questioning refers to any words or actions by the questioner that he should know are reasonably likely to elicit an incriminating response. A suspect is a person who the questioner believes, or reasonably should believe, committed an offense. An accused is a person against whom a charge has been preferred.

B. Content of the warning. *See also* Mil. R. Evid. 305(c).

³ *Blockburger v. United States*, 284 U.S. 299 (1932). “[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”

⁴ Captain Fredric I. Lederer, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1, 11 (1976).

A person subject to the code who is required to give warnings under Article 31(b) may not interrogate or request any statement from an accused or suspect without first informing him/her:

1. of the nature of the accusation;
2. that he/she has the right to remain silent; and,
3. that any statement he/she does make may be used as evidence against him/her.

(Note: Unlike *Miranda* warnings, there is no right to counsel.)

C. General notice requirement.

Article 31(b) may be satisfied by a general recitation of the three elements described above. For example, Article 31(b) was satisfied when state child protective services social worker advised the accused: he was suspected of sexually abusing his daughter; he did not have to speak with her or answer any questions; and, anything he said could be repeated by her in court if subpoenaed. *United States v. Kline*, 35 M.J. 329 (C.M.A. 1992).

D. Nature of the accusation.

1. An individual must be provided a frame of reference for the impending interrogation by being told generally about all known offenses. "It is not necessary to spell out the details . . . with technical nicety." Informing the accused that he was suspected of larceny of ship's store funds was held sufficient to cover wrongful appropriation of store funds during an earlier period. *United States v. Quintana*, 5 M.J. 484 (C.M.A. 1978). See also *United States v. Rogers*, 47 M.J. 135 (C.A.A.F. 1997) (informing of "sexual assault" of one victim held sufficient to orient the accused to the offense of rape of a separate victim that occurred 4 years earlier).
2. *United States v. Kelley*, 48 M.J. 677 (A. Ct. Crim. App. 1998). Advising the accused that he was going to be questioned about rape implicitly included the offense of burglary. The ACCA determined that the burglary was a part of the accused's plan to commit the rape. Therefore, by informing the accused that he was suspected of rape, he was sufficiently oriented to the particular incident, even though it involved several offenses.
3. Whether the stated warning sufficiently provided notice of the accusation is tested on the basis of the totality of the circumstances. For example, in *United States v. Erie*, 29 M.J. 1008 (A.C.M.R. 1990), a rights warning for suspected use of hashish was judged sufficient to cover distribution of hashish and cocaine. The court found that the rights warning oriented accused to that fact that the investigation was focused on controlled substances. See also *United States v. Pipkin*, 58 M.J. 358 (C.A.A.F. 2003) (warning covering distribution of a controlled substance was sufficient to cover conspiracy to distribute).

4. The requirement to advise a suspect/accused concerning the nature of the accusation is a continuing responsibility. If, during the course of an interrogation, the questions will address offenses not described in the initial warning, an additional warning must be provided. For example, in *United States v. Huelsman*, 27 M.J. 511 (A.C.M.R. 1988), an initial warning that the accused was suspected of “larceny by uttering worthless checks” was not sufficient to cover offenses involving possession and distribution of marijuana. When the agent learned that the reason for writing the checks related to drugs, the accused became a suspect for drug offenses and was entitled to an additional Article 31(b) warning. *But see United States v. Kelley*, 48 M.J. 677 (A. Ct. Crim. App. 1998) (investigators did not have to halt the interrogation and renew rights warnings when the accused stated that he had provided false information. The questioning centered on the rape and the burglary, and not the false statements).
 5. *United States v. Simpson*, 54 M.J. 281 (C.A.A.F. 2000). Advising the appellant that he was suspected of indecent acts or liberties with a child was held sufficient to focus him toward the circumstances surrounding the event and to inform him of the general nature of the allegations, to include rape, indecent assault, and sodomy of the same child. When determining whether the nature of the accusation requirement has been met, the court will examine: whether the conduct is part of a continuous sequence of events; whether the conduct was within the frame of reference supplied by the warnings; and, whether the interrogator had previous knowledge of an unwarned offense.
- E. Right to remain silent.
1. The main PASI aspect of the Article 31(b) warning is practically the same as its *Miranda* warning counterpart.
 2. The most significant area of concern regarding this prong of the warning is the occasional improper qualification of the PASI when the investigator recites the warning. In *United States v. Allen*, 48 C.M.R. 474 (A.C.M.R. 1974), the accused was advised he could remain silent only if he was in fact involved in the suspected misconduct. He was also told that if he knew who was involved in the robbery under investigation and remained silent, he could be found guilty. Both of these statements were held improper. A suspect has an “absolute right to silence.”
- F. Statements may be used as evidence.
1. The “use” aspect of the Article 31 warning is identical to its *Miranda* warning counterpart.
 2. As with the right to silence provision described above, problems with the “use” provision generally arise when interrogators accompany the warning with provisos or disclaimers concerning the prospective use of the subject’s statements. It is well settled that such comments may negate the validity of the entire warning. *United States v. Hanna*, 2 M.J. 69 (C.M.A. 1976) (subsequent assurance of confidentiality negates the effectiveness of otherwise proper Article 31 warning; “[B]etween you and me, did you do it?”).
- G. Triggering the warning requirement.
1. Statutory requirement.
 - a. “No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing . . .” Article 31(b).

- b. The phrasing of Article 31(b) supplies a framework for analyzing situations which may trigger the Article 31 warning requirement.⁵ Beyond consideration of the content of the warning, the following questions must be considered:
- (1) Who must warn?
 - (2) When must the warning be provided?
 - (3) Who must be warned?
2. Who must warn?
- a. The literal language of Article 31(b) seems to require warnings during any criminal interrogation of a suspect/accused by a person subject to the UCMJ. However, judicial interpretations have both expanded and contracted the scope of the statute's literal language to conform to the practicalities of the military as well as the courts' various views of the drafter's intent.
 - b. In the years following the enactment of the UCMJ, military courts applied both an "official questioning" test and a "position of authority" test to narrow the broad "[p]erson subject to this chapter" language of Article 31. Key elements of these tests were merged by the CMA in *United States v. Duga*, 10 M.J. 206 (C.M.A. 1981).⁶
 - c. Failure to provide warnings when required could result in a violation of Article 98, Noncompliance with Procedural Rules.
 - d. The current standard:
 - (1) In *Duga*, the CMA held Article 31(b) applies only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry. Accordingly, the court set forth a two-pronged test to determine whether a person is "a person subject to this chapter" for the purposes of Article 31. The points of analysis are:
 - (a) Was the questioner subject to the Code acting in an official capacity in the inquiry or was the questioning based on personal motivation?; and,
 - (b) Did the person questioned perceive the inquiry as involving more than a casual conversation?

⁵ This type of analysis was first suggested by Professor Maguire in 1958. Major Robert F. Maguire, *The Warning Requirement of Article 31(b): Who Must do What to Whom and When?*, 2 MIL. L. REV. 1 (1958). The analysis was examined and explained in light of *Miranda* and ten years of its progeny by Professor (then Captain) Lederer in 1976. Captain Fredric I. Lederer, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1 (1976).

⁶ The foundation for what we now know as "the *Duga* test" was laid twenty-seven years earlier in *United States v. Gibson*, 14 C.M.R. 164 (C.M.A. 1954). In *Gibson*, the court also provided a review of Article 31's purpose and the legislative history.

(2) The *Duga* version of the official questioning standard was further defined by the court in *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990). The *Loukas* court held that Article 31(b) warnings were not required prior to an aircraft crew chief's questioning of a crew member about drug use, where the questions were limited to those needed to "fulfill operational responsibilities, and there was no evidence suggesting his inquiries were designed to evade constitutional or codal rights." Now Article 31 "requires warnings only when questioning is done during an official law-enforcement investigation or disciplinary inquiry."⁷

e. Law enforcement or disciplinary inquiry: the Primary Purpose Test.

- (1) *United States v. Cohen*, 63 M.J. 45 (C.A.A.F. 2006). Air Force IG's conversations with a servicemember filing a complaint extended beyond the boundaries necessary to fulfill his administrative duties and should have been preceded by an Article 31 rights warning. While the IG's responsibilities were primarily administrative, they were not exclusively so under the applicable Air Force Instructions. Under the circumstances of the case the IG had disciplinary responsibilities and should have suspected the complainant of an offense and advised him of his Article 31 rights prior eliciting incriminating statements from him.
- (2) *United States v. Pittman*, 36 M.J. 404 (C.M.A. 1993). Accused's section leader, and friend, was required to escort him off-post. Unaware of the child abuse allegations, the escort asked the accused what was going on. Accused admitted hitting his stepson. Trial court held this questioning was motivated out of personal curiosity and not interrogation or a request for a statement within the meaning of Article 31(b). The CMA affirmed, citing *Duga*. See also *United States v. Jones*, 24 M.J. 367 (C.M.A. 1987); *United States v. Williams*, 39 M.J. 758 (A.C.M.R. 1994).
- (3) *United States v. Guron*, 37 M.J. 942 (A.F.C.M.R. 1993). Interviews by accounting and finance personnel to determine eligibility for pay and allowances, but not for purposes of disciplinary action or criminal prosecution, do not require Article 31 warnings be given.

⁷ Analysis of whether questioning is part of an official law enforcement investigation or disciplinary inquiry is governed by an objective test. An investigation is law enforcement or disciplinary when, based on all the facts and circumstances at the time of the interview, "the military questioner was acting or could reasonably be considered as acting in an official law enforcement or disciplinary capacity." *United States v. Good*, 32 M.J. 105 (C.M.A. 1991).

Dicta in both *Loukas* and *Good* indicate that when a military supervisor in the subject's chain of command conducts the questioning, there is a rebuttable presumption that the questioning was done for disciplinary purposes.

- (4) *United States v. Bowerman*, 39 M.J. 219 (C.M.A. 1994). Army doctor was not required to inform accused of Article 31 rights when questioning him about child's injuries even though doctor thought child abuse was a distinct possibility.⁸
- (5) *United States v. Dudley*, 42 M.J. 528 (N-M. Ct. Crim. App. 1995). Statement by accused to psychiatrist was admissible, even though psychiatrist had not given accused Article 31 warnings and knew of charges against accused. Accused was brought to psychiatrist by investigator who feared that accused might be suicidal and the psychiatrist asked questions for diagnostic purposes in order to determine whether accused was a suicide risk.
- (6) *United States v. Bell*, 44 M.J. 403 (C.A.A.F. 1996). Article 31 requirement for warnings does not apply at trial or Article 32 investigations because they are "judicial proceeding[s]; not disciplinary or law enforcement tools within the context of Article 31." However, RCM 405(f)(7) requires that warnings be given to the accused at an Article 32 hearing. *See also* Mil. R. Evid. 301(b)(2) regarding the military judge obligation to provide witnesses warnings.
- (7) *United States v. Moses*, 45 M.J. 132 (C.A.A.F. 1996). Naval Criminal Investigative Service (NCIS) agents engaged in an armed standoff with the accused were not engaged in a law enforcement or disciplinary inquiry when they asked the accused what weapons he had inside the house. Rather, the questioning was considered negotiations designed to bring criminal conduct to an end peacefully.
- (8) *United States v. Payne*, 47 M.J. 37 (C.A.A.F. 1997). Defense Investigative Service (DIS) agents conducting background investigation were not engaged in law enforcement activities, therefore, they did not have to warn the accused of his rights under Article 31. *See also United States v. Tanksley*, 50 M.J. 609 (N-M. Ct. Crim. App. 1999) (NCIS agents conducting background investigation).
- (9) *United States v. Bradley*, 51 M.J. 437 (C.A.A.F. 1999). A commander, questioning his Soldier about whether the Soldier had been charged with criminal conduct in order to determine whether the accused's security clearance should be terminated, was not required to give Article 31(b) warnings, since the purpose of the questioning was not for law enforcement of disciplinary purposes. The CAAF recognized an "administrative and operational exception" that may overcome the presumption that "a superior in the immediate chain of command is acting in an investigatory or disciplinary role" when questioning a subordinate about misconduct.

⁸ *See also United States v. Brown*, 38 M.J. 696 (A.F.C.M.R. 1993); *United States v. Baker*, 29 C.M.R. 129 (C.M.A. 1960) (doctor not required to read rights before questioning appellant during a physical about needle marks on his arms).

- (10) *United States v. Norris*, 55 M.J. 209 (C.A.A.F. 2001). The appellant was friends with the family of the victim. When the father (E-7) of the victim asked the appellant (E-4) about the relationship, he admitted that he had kissed and performed oral sex on her. The conversation lasted two hours, during which neither man referred to each other by rank. The court concluded that the victim's father was not asking questions for a disciplinary or law enforcement purpose, but rather sought out the appellant to clarify the matter.
- (11) *United States v. Guyton-Bhatt*, 56 M.J. 484 (C.A.A.F. 2002). A legal assistance attorney was required to give Article 31 warnings to a debtor of his client, where the attorney suspected the debtor of committing forgery, planned to pursue criminal action against the debtor as a way to help his client, and used the authority of his position when he called the debtor to gather information. The CAAF concluded that the legal assistance attorney was "acting as an investigator in pursuing this criminal action."
- (12) *United States v. Benner*, 57 M.J. 210 (C.A.A.F. 2002). A chaplain was required to give warnings when he abandoned his clerical role and was acting solely as an Army officer. He did this when he breached the "communications to clergy" privilege by informing the appellant that he would have to report the appellant's child sexual abuse incident to authorities if the appellant did not.
- (13) *United States v. Smith*, 56 M.J. 653 (A. Ct. Crim. App. 2001). President of prison's Unscheduled Reclassification Board was not required to read Article 31 rights to an inmate prior to asking him if he would like to make a statement about his recent escape, since the purpose of the board was to determine if the inmate's custody classification should be tightened.
- (14) Defense counsel are not required to read Article 31 rights when conducting interviews of a witness on behalf of their clients, even if he suspects the witness committed a criminal offense. TJAG's PRC Opinion 90-2; *United States v. Howard*, 17 C.M.R. 186 (C.M.A. 1954); *United States v. Marshall*, 45 C.M.R. 802 (N.M.C.M.R. 1972); *but see United States v. Milburn*, 8 M.J. 110 (C.M.R. 1979).

f. Civilian interrogations.

- (1) General Rule. The plain language of the statute seems to limit the class of people who must provide Article 31(b) warnings to those who are subject to the UCMJ themselves. Mil. R. Evid. 305(b)(1) provides, however, that a "[p]erson subject to the code . . . includes a person acting as a knowing agent" Additionally, the courts have rejected literal application of the statute and provide instead that in those cases where military and civilian agents are working in close cooperation with each other for law enforcement or disciplinary purposes, civilian interrogators are "persons subject to the chapter" for the purposes of Article 31.

- (2) Tests. Civilian agents may have to provide Article 31 warnings when, under the “totality of the circumstances” they are either acting as “instruments” of military investigators, or where the military and civilian investigations have “merged.”
- (a) The merger test: (1) Are there different purposes or objectives to the investigations?; and (2) Are the investigations conducted separately? Additionally, the test to determine the second prong is: (a) Was the activity coordinated between military and civilian authorities?; (b) Did the military give guidance or advice?; and, (c) Did the military influence the civilian investigation?
- (b) The instrumentality test: (1) Is the civilian agent employed by, or otherwise subordinate to, military authority?; (2) Is the civilian under the control, direction, or supervision of military authority?; and, (3) Did the civilian acted at the behest of military authority or, instead, had an independent duty to investigate?⁹
- (3) *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992). Civilian intelligence agents were not required to read Article 31 warnings to Marine suspected of espionage because (1) their investigation had not merged into an “indivisible entity” with the military investigation, and (2) the civilian investigators were not acting in furtherance of any military investigation or as an instrument of the military.¹⁰
- (4) *United States v. Quillen*, 27 M.J. 312 (C.M.A. 1988). A civilian PX detective was required to advise a Soldier suspected of shoplifting of his Article 31 rights before questioning him. The detective was an “instrument of the military” whose conduct in questioning the suspect was “at the behest of military authorities and in furtherance of their duty to investigate crime.” Furthermore, the suspect perceived the detective’s questioning to be more than casual conversation. *See also United States v. Ruiz*, 54 M.J. 138 (C.A.A.F. 2000).
- (5) *United States v. Moreno*, 36 M.J. 107 (C.M.A. 1992). State social services worker who had an independent duty under state law to investigate child abuse was not required to provide Article 31 or *Miranda* warnings prior to interviewing the accused. The court found no investigative merger or agency relationship. “[O]ne of the prime elements of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent.”

⁹ *United States v. Grisham*, 16 C.M.R. 268 (C.M.A. 1954).

¹⁰ *United States v. Oakley, Jr.*, 33 M.J. 27 (C.M.A. 1991). A military policeman was present when civilian police questioned appellant regarding civilian fraud charges. The military policeman, acting as a military liaison, advised the appellant that he should cooperate with the civilian police and even asked a few questions of appellant during the interrogation. The CMA denied appellant’s motion to suppress, holding that the civilian police investigation had not merged with a military investigation.

- (6) *United States v. Raymond*, 38 M.J. 136 (C.M.A. 1993). Social worker, subject to AR 608-18's reporting requirements, was not acting as an investigative agent of law enforcement when he counseled the accused with full knowledge that the accused was pending charges for child sexual abuse. The CMA also ruled that health professionals engaged in treatment do not have a duty to provide Article 31(b) warnings.¹¹
- (7) *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006). Family Advocacy representative was acting as an "investigative agent of law enforcement" and should have provided the accused an Article 31 warning when she questioned him after a Family Advocacy committee meeting which included a legal officer and a military investigator. The CAAF found that the Family Advocacy representative worked in close coordination with law enforcement before and after her questioning of the accused, that she suspected the accused of an offense at their first meeting, and that evidence of her investigatory purpose could be seen in her first question ("Did you do it?").¹²
- (8) *United States v. Payne*, 47 M.J. 37 (C.A.A.F. 1997). The CAAF held that Defense Investigative Service (DIS) agents conducting a background investigation per the request of the accused were not acting under the direction of military authorities and were not, therefore, subject to the UCMJ. Accordingly, the DIS agents did not have to warn the accused of his rights under Article 31.
- (9) *United States v. Redd*, 67 M.J. 581 (A. Ct. Crim. App. 2008). The ACCA held that where a CID agent actively participates in civilian law enforcement interview, Article 31 rights must be read to the accused. However, *Miranda* warnings given in this case, combined with notification that accused was under investigation for child sex offenses was sufficient to meet Article 31 requirements.
- (10) *United States v. Garcia*, 69 M.J. 658 (C.G. Ct. Crim. App. 2010). The CGCCA held that where CGIS and civilian investigations did not coordinate their activities and that the civilian investigators did not seek military guidance, Article 31, UCMJ rights were not required by the civilian investigators when questioning the appellant. The court did note that there were several coordinated joint witness interviews, but there was "no significant basis for questioning the independence of the two investigations."

g. Foreign police interrogations.

¹¹ Diagnostic questioning had been previously placed outside the scope of Article 31 in *United States v. Fisher*, 44 C.M.R. 277 (C.M.A. 1972). *Raymond* is significant in that it upheld the concept of diagnostic questioning in spite of the regulatory reporting requirement.

¹² The CAAF noted that the "cooperative effort" between law enforcement and other members of the military community required by Air Force Regulations "does not render every member of the military community a criminal investigator or investigative agent," but that this particular Family Advocacy representative's actions were more akin to an investigative agent than a social worker. *Brisbane*, 63 M.J. at 112.

- (1) The rule for interrogations by foreign police agents is similar to that set forth for U.S. civilian police agents. Mil. R. Evid. 305(h)(2) provides that no warnings are required unless the foreign police interrogation is “conducted, instigated, or participated in by military personnel or their agents” An interrogation is not “participated in” merely because U.S. agents were “present,” “acted as interpreter,” or took steps to mitigate harm.¹³
- (2) *United States v. Coleman*, 25 M.J. 679 (A.C.M.R. 1987), *aff’d*, 26 M.J. 451 (C.M.A. 1988). “Cooperative assistance” between CID and German police investigating a murder did not turn the German interrogation into a U.S. interrogation, since the German interrogation “was, in no way ‘conducted, instigated, or participated in’ by the CID” nor was there “subterfuge” or any violation of due process voluntariness.
- (3) *United States v. French*, 38 M.J. 420 (C.M.A. 1993). Accused was questioned by British police in presence of his First Sergeant and an OSI agent. Despite OSI’s knowledge of the investigation, their presence during the interview, an agent’s comment during interview that it would be better for accused to remain silent than to continue lying, and brief use of OSI agent’s handcuffs during arrest, “participation” of military agents did not reach level which would require Article 31 and *Miranda* rights.
- (4) *United States v. Pinson III*, 56 M.J. 489 (C.A.A.F. 2002). Icelandic police were not required to give appellant Article 31 warnings prior to questioning him as part of an investigation, where the Icelandic police did not ask NCIS agents for information or leads, NCIS did not ask Icelandic police to ask certain questions, and the two governments conducted separate investigations. The CAAF found that the interrogation was “purely for the benefit of the Icelandic” authorities.

3. When must warnings be given?

- a. Under Mil. R. Evid. 305(b)(2), action that triggers the requirement for Article 31 (or *Miranda*) warnings includes “any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning.” This includes direct questioning or action that amounts to the functional equivalent of questioning, and is evaluated based on an objective test from the perspective of a reasonable police officer/investigator.
- b. Words or actions reasonably likely to elicit an incriminating response.

¹³ See *United States v. Plante*, 32 C.M.R. 266 (C.M.A. 1962) (holding that no Article 31(b) warnings required where MP accompanied service member to French police headquarters, but where MP did not take part in the interrogation); *United States v. Jones*, 6 M.J. 226 (C.M.A. 1979) (holding no Article 31(b) warnings required when German police interrogated accused in U.S. CID headquarters building solely for the benefit of the German authorities where no U.S. personnel were present).

- (1) *Brewer v. Williams*, 430 U.S. 387 (1977). “Christian burial speech” was intended to elicit incriminating information and was tantamount to interrogation where police knew accused was “deeply religious,” and the speech was directed to him.
- (2) *Rhode Island v. Innis*, 446 U.S. 291 (1980). “‘Interrogation’ under *Miranda* refers . . . to express questioning, . . . [and] also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response” Conversation between police while transporting suspect to station that children from nearby school for handicapped might find the shotgun and hurt themselves was held *not* an interrogation, since it was not directed to suspect and no reason to believe he was susceptible to such remarks.
- (3) *United States v. Byers*, 26 M.J. 132 (C.M.A. 1988). “Interrogate” for purposes of Article 31(b) corresponds with Supreme Court interpretation of “interrogation” in applying *Miranda* warning requirement. An OSI agent’s 20-40 minute pre-warning commentary was interrogation. The agent could tell the suspect that “the suspicion results from a positive drug test. To go further violates Article 31(b).” Taint attenuated, however, and statement admitted.
- (4) *United States v. Guron*, 37 M.J. 942 (A.F.C.M.R. 1993). A 9-minute pre-warning conversation about a variety of subjects having nothing to do with the BAQ fraud investigation, the purpose of which was to relax the subject and get acquainted, was not the functional equivalent of interrogation.
- (5) *United States v. Young*, 49 M.J. 265 (C.A.A.F. 1998). Investigator’s comment: “I want you to remember me, and I want you to remember my face, and I want you to remember that I gave you a chance,” directed to the accused after the accused invoked his right to counsel may have been an interrogation. Judge Sullivan, in a concurring opinion, firmly believes that it was. The court affirmed the admissibility of the subsequent confession on other grounds.
- (6) *United States v. Muldoon*, 10 M.J. 254 (C.M.A 1981). The “time-honored technique to elicit a statement -- namely, informing the suspect that he has been implicated by someone else,” is interrogation.

c. Not “interrogation.”

- (1) Subjects who begin a statement in a spontaneous fashion do not need to be stopped and warned. The appropriate rights warning, however, must precede any follow-up interrogation. *See* Analysis to Mil. R. Evid. 305(c).

- (2) *United States v. Warren*, 47 M.J. 649 (A. Ct. Crim. App. 1997). Asking the accused to put his spontaneous statement in writing was not an interrogation. An interrogation began, however, when the investigator asked the accused to elaborate and explain portions of the statement.
- (3) *United States v. Turner*, 48 M.J. 513 (A. Ct. Crim. App. 1998). Telling the accused that he was AWOL and would be turned over to a particular military law enforcement authority did not constitute an interrogation. The ACCA viewed these comments as statements regarding the nature of evidence against the accused and not an interrogation.
- (4) *United States v. Vitale*, 34 M.J. 210 (C.M.A. 1992). First Sergeant warned accused not to discuss the matter and to let OSI handle it because she did not want to get involved. Accused was previously interviewed by another NCO following an improper rights advice. Held: First Sergeant's conduct was not the "functional equivalent of interrogation," and accused's subsequent unsolicited statements were uttered spontaneously, voluntarily, and without coercion.
- (5) *United States v. Lichtenhan*, 40 M.J. 466 (C.M.A. 1994). An investigator (Inv.) considered the accused a suspect in a series of thefts, and intended to question him regarding a related matter. The investigator approached the accused and initiated the following interchange:
- Inv.: " [Y]ou got a minute to talk?"
- Accused: "Sure, chief, but there's something I need to talk to you about first."
- Inv.: "Go ahead."
- The accused proceeded to make a series of incriminating remarks. The CMA ruled the investigator's approach and comments did not amount to questioning such that Article 31 requirements were triggered.
- (6) *United States v. Watkins*, 34 M.J. 344 (C.M.A. 1992). Suspect invoked right to silence. Several hours later, suspect was re-approached by same CID agent and asked for a re-interview, whereupon the suspect made some incriminating statements. Held: Simply asking for a re-interview of an individual not in custody was not questioning designed "to elicit an incriminating" statement.

- (7) *United States v. Ruiz*, 54 M.J. 138 (C.A.A.F. 2000). A civilian store detective employed by AAFES, upon suspecting that the appellant had stolen store merchandise, stated to him, “[t]here seems to be some AAFES merchandise that hasn’t [sic] been paid for.” The appellant replied, “yes,” produced the merchandise from under his coat, and said “you got me.” The CAAF ruled that Article 31(b) warnings were not required because the detective did not “interrogate” the accused, but rather informed him of why he was stopped and why he was asked to accompany the detective back to the store’s office.
- (8) *United States v. Allen*, 54 M.J. 854 (A.F. Ct. Crim. App. 2001). During the reading of his charges by his commander, the appellant appeared pale and shocked, and near the end of the reading stated, “the fourth one is true, or partially true.” The court concluded that the reading of the charges in this case was not the functional equivalent of an interrogation. The court placed special emphasis on the circumstances surrounding the reading of the charges. Specifically, that the appellant was not asked any questions before being read his charges, the accused was not in confinement, and he was a lieutenant colonel.
- (9) Consent to search.
 - (a) *United States v. Burns*, 33 M.J. 316 (C.M.A. 1991). Requesting consent to search and also conducting a urine test did not violate the Fifth Amendment even though the accused previously requested counsel. Asking the accused questions during the search of his residence did violate the Fifth Amendment, but were non-prejudicial errors.
 - (b) *United States v. Vassar*, 52 M.J. 9 (C.A.A.F. 1999). While in the hospital, the accused signed a written consent form and gave a urine sample, which tested positive for drugs. The CAAF held that the consent was voluntary and that there is no requirement to give Article 31(b) warnings before asking for consent to search.

d. Continuous or successive interrogations.

- (1) The general rule is that if the warnings were given properly at the first interrogation session and that the time elapsed between the first and subsequent sessions is sufficiently short as to constitute one entire continuous interrogation, separate warnings need not be given. On the other hand, if the time interval is long enough to contain separate and distinct interrogation sessions, then each session must be prefaced by Article 31(b) warnings. No firm guidance can be given as to what the minimum time interval will result in a determination that the sessions constituted continuing interrogation.

- (2) Military courts have decided these matters on an ad hoc basis. *United States v. Schultz*, 41 C.M.R. 311 (C.M.A. 1970) (second interrogation by same agents about six hours after initial warnings does not require new warnings). *Accord United States v. Thompson*, 31 M.J. 781 (A.C.M.R. 1990) (seven hours between interrogations).
 - (3) *United States v. Jefferson*, 44 M.J. 312 (C.A.A.F. 1996). Re-interrogation of accused four days after initial interrogation was not preceded by rights warning, but rather with question if he remembered his previous rights warning. Reminder was held to be sufficient warning under the facts of the case.
- e. Perception of the person questioned; was it more than casual conversation?
- (1) *United States v. Parrillo*, 31 M.J. 886 (A.F.C.M.R. 1990), *aff'd on other grounds*, 34 M.J. 112 (C.M.A. 1992). Air Force sergeant acting as agent of OSI was not required to read Article 31 warnings before questioning lieutenant about drugs. Although questioning was official, lieutenant perceived it as casual conversation because of prior sexual relationship with the sergeant.
 - (2) *United States v. Harvey*, 37 M.J. 140 (C.M.A. 1993). Accused, after invoking her rights, arranged 3 meetings with co-accused to discuss pending government investigation. The meetings were taped by the co-accused with OSI assistance. The CMA found no Article 31(b) violation because the accused could not have perceived it as an inquiry by a person acting in an official capacity.
 - (3) *United States v. Price*, 44 M.J. 430 (C.A.A.F. 1996). A subordinate of the accused questioned the accused several times about suspected drug use without advising the accused of his Article 31 rights. The court found that even if one assumes that the subordinate was acting as an OSI agent, the second prong of the *Duga* test was not present. The court focused on the following facts: 1) the accused was senior; 2) the environment where the conversations took place was non-coercive; and, 3) the accused was not aware that the subordinate had contacted OSI.
 - (4) *United States v. Rios*, 48 M.J. 261 (C.A.A.F. 1998). The accused's commander directed him to telephone his daughter whom he was suspected of sexually abusing. The call was being recorded. Although the accused testified that he thought the call was being recorded, Article 31(b) warnings were not required because the accused perceived the call to be a casual conversation. *See also United States v. White*, 48 M.J. 251 (C.A.A.F. 1998) (telephone call between the accused and his accomplice, which was arranged and monitored by government investigators, was viewed as a casual conversation).

(5) *United States v. Aaron*, 54 M.J. 538 (A.F. Ct. Crim. App. 2000). Rights warnings were not required to be given to the suspect prior to a conversation between him and his daughter, whom he was suspected of having a sexual relationship with, in a hotel room that was arranged and taped by OSI agents. Concluding that the meeting between the appellant and his daughter was not a custodial interrogation nor could appellant perceive it as “official questioning,” the court held that neither the Fifth Amendment, nor Article 31 were violated.

4. Who must be warned?

- a. Article 31 warning requirements apply only to members of the armed forces. Within this subset, warnings must be provided only to accused or persons suspected of an offense. Mere witnesses are not entitled to Article 31 protections.
- b. An accused is a person against whom a charge has been preferred.
- c. A person is a suspect if, considering all facts and circumstances at the time of the interview, the government interrogator believed, or reasonably should have believed, that the one being interrogated committed an offense. *United States v. Morris*, 13 M.J. 297 (C.M.A. 1982). Note that this test has both a subjective and objective prong. The interrogator’s subjective belief that the subject has committed an offense will trigger the warning requirement. Even if there is not subjective belief, however, if the totality of the circumstances would cause a reasonable person to believe that the subject had committed an offense, the warnings will be required. *United States v. Leiffer*, 13 M.J. 337 (C.M.A. 1982).
- d. *United States v. Swift*, 53 M.J. 439 (C.A.A.F. 2000). The accused was a suspect where his wife called the command and alleged that she was contacted by a woman also claiming to married to the accused, and the command then consulted the chief of military justice and the MCM about possible bigamy charges before questioning the accused.
- e. *United States v. Murphy*, 33 M.J. 323 (C.M.A. 1991). Accused became a suspect once commander received a specific report that she had illegally used cocaine and the commander then prepared to ask specific questions suggested by law-enforcement agents.
- f. *United States v. Davis*, 36 M.J. 337 (C.M.A. 1993), *aff’d on other grounds*, 512 U.S. 452 (1994). The CMA holds that the accused was not a suspect and no Article 31(b) warnings were required prior to the initial interview, despite several facts narrowing the investigation’s focus onto him and several others.
- g. *United States v. Brown*, 40 M.J. 152 (C.M.A. 1994). Unknown and unknowable future criminal proclivities of the accused cannot transform leadership counseling into a criminal interrogation such that Article 31(b) requirements were triggered. Accused’s commander neither suspected, nor reasonably should have suspected, accused of criminal misconduct at time of formal counseling regarding dishonored checks.

- b. *United States v. Shepard*, 34 M.J. 583 (A.C.M.R. 1992). The accused told his platoon sergeant that he had killed his wife. Platoon sergeant questioned accused, absent rights warnings, about his wife's condition and location. Trial court admitted statements under "Public Safety" exception because the platoon sergeant was motivated by concerns for the wife's health and safety. The ACMR found no abuse of discretion. *Aff'd*, 38 M.J. 408 (C.M.A. 1993) (court affirms on other grounds but indicates in dicta that there might be a public safety exception to Article 31).
- c. *United States v. Jones*, 19 M.J. 961 (A.C.M.R. 1985). Applying a "rescue doctrine," the court held that the questioning of a suspect, who had not had right warnings, was not error where the purpose of the questions was to locate a possibly critically injured victim.

V. RIGHTS WARNINGS CHART

	Article 31(b)	<i>Miranda</i> (Fifth Amendment)	Sixth Amendment
Purpose	To dispel a service member's inherent compulsion to respond to questioning from a superior in rank or position	To provide protection against an inherently intimidating and coercive interrogation environment	To provide accused the assistance of counsel during critical stages of the criminal process.
Who must warn?	1) Person subject to the code 2) Acting in official capacity 3) For law enforcement or disciplinary purposes	Law enforcement officer	Government agent acting in law enforcement capacity
Test:	1) Was the military questioner acting, or could reasonably be considered as acting, in an official law enforcement or disciplinary capacity, and 2) Did the person questioned perceive it as official questioning?		
Who must be warned?	Accused or suspect	Person subject to custodial interrogation	Accused
Test:	Did the questioner believe, or reasonably should have believed, that the person committed an offense?		
When are warnings required?	Questioning where an incriminating response is either sought or is a reasonable consequence	Custodial interrogation	Questioning after the preferral of charges on matters related to the charged offense(s)
Test:	Would a reasonable interrogator see the questions as ones likely to elicit an incriminating response?	<u>Custodial</u> – Would a reasonable person in the subject’s position feel that they were under arrest or significant restraint? <u>Interrogation</u> – Would a reasonable interrogator see the questions as ones likely to elicit an incriminating response?	Right to counsel attaches only to charged offenses and to those offenses that would be “considered the same offense under the <i>Blockburger</i> test,” even if not formally charged
Content of warnings	1) Nature of offense 2) Right to silence 3) Use of statement	1) Right to silence 2) Use of statement 3) Right to counsel	Right to counsel Note: <i>Miranda</i> warnings satisfy the Sixth Amendment
Effect of invocation:			
Right to silence	Temporary respite from interrogation	Temporary respite from interrogation	Not applicable
Right to counsel	Not applicable	Questioning ceases until: 1) Counsel made available (for continuous custody, counsel must be present; if break in custody, real opportunity to seek legal advice required), or 2) Subject re-initiates and valid waiver obtained	Questioning about charged offense ceases until: 1) Counsel present, or 2) Subject re-initiates and valid waiver obtained

VI. EFFECT OF IMPLEMENTING THE RIGHTS

Whenever a subject invokes a right in response to an Article 31(b) or Fifth or Sixth Amendment warning, the first thing that must happen is the same: the interrogation must stop immediately. What may happen next is dependent on what source of self-incrimination law applies and what right has been invoked.

If the subject invokes the right to remain silent under Article 31(b) or *Miranda*, he or she is entitled to a temporary respite from questioning that the government must scrupulously honor. Once honored, the government may re-approach the subject for further questioning.

If the subject invokes the right to counsel under the Fifth Amendment, the subject cannot be questioned further unless: (1) counsel is made available; or (2) the subject re-initiates questioning. In a continuous custody setting, counsel is made available when counsel is present. When there is a break in custody, counsel is made available when the subject has had a real opportunity to seek legal advice. If the subject has not had a real opportunity to seek legal advice, then counsel must be present. If the subject re-initiates the questioning, the investigator must obtain a valid waiver of rights before continuing the interrogation.

If the subject invokes the right to counsel under the Sixth Amendment, the subject cannot be questioned further unless: (1) counsel is present; or (2) the subject re-initiates questioning. For purposes of the Sixth Amendment, continuous custody or a break in custody is irrelevant.

The questioner must clarify any ambiguous invocation of rights before questioning may begin. However, if the subject initially waives his rights and begins making a statement, any subsequent invocation of his rights must be unambiguous. Ambiguous requests do not have to be clarified by the questioner and the interrogation may proceed.

- A. The right to remain silent (*Miranda* or Article 31(b)).
 1. A subject may invoke any or all of his/her rights either prior to or during an interrogation. Whether invoked in response to an Article 31(b) or *Miranda* warnings, the right to remain silent entitles a subject to a temporary respite from interrogation. There is no *per se* prohibition against re-approaching a suspect following invocation of the right to remain silent.
 2. Factors to consider in determining if the PASI has been violated include: which right was invoked, who initiated communication, subject matter of the communication, when the communication took place, where the communication took place, and the time between invocation of the right and the second interview. *See generally Michigan v. Mosley*, 423 U.S. 96 (1975) (suspect's "right to cut off questioning" and remain silent was "scrupulously honored" when first officer stopped questioning on robbery after suspect invoked *Miranda* right to silence and second officer, after a lapse of over two hours, re-advised the suspect of his rights and questioned him on unrelated murder).
 3. *United States v. Watkins*, 34 M.J. 344 (C.M.A. 1992). CID "scrupulously honored" the accused's Fifth Amendment "right to cut off questioning," (*i.e.*, right to silence) when the agent immediately ended the interview, permitted the accused to leave the CID office, and waited more than two hours before attempting to re-interview him.

4. *United States v. Doucet*, 43 M.J. 656 (N-M. Ct. Crim. App. 1995). Under the circumstances of the case, appellant's request to go home and refusal to sign a prepared written statement constituted an invocation of his right to remain silent, even though he had made prior oral admissions and had agreed to work on a written statement.
 5. *United States v. Rittenhouse*, 62 M.J. 509 (A. Ct. Crim. App. 2005). Once a suspect waives the right to silence, interrogators may continue questioning unless and until the suspect unequivocally invokes the right to silence. If a suspect makes an ambiguous or equivocal invocation of his right to remain silent, law enforcement agents have no duty to clarify the suspect's intent and may continue with questioning. *See also Davis v. United States*, 512 U.S. 452 (1994).
- B. The Fifth Amendment (*Miranda*) Right to Counsel.
1. Mil. R. Evid. 305(e)(1); 305(g)(2)(B).
 2. The *per se* rule of *Edwards*.
 - a. When a subject has invoked his right to counsel in response to a *Miranda* warning, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation, even if he has been advised of his rights. "Having expressed his desire to deal with the police only through counsel, the subject is not subject to further interrogation . . . until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477 (1981); *see also United States v. Harris*, 19 M.J. 331 (C.M.A. 1985) (*Edwards* applies to military interrogations).
 - b. There is no exception to *Edwards* for police-initiated, custodial interrogations relating to a separate investigation once a suspect has invoked his right to counsel under the Fifth Amendment. "As a matter of law, the presumption raised by a suspect's request for counsel - that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance - does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation." Additionally, the fact that the officer conducting the second interrogation does not know of the request for counsel is of "no significance." Knowledge of the suspect's invocation is imputed to other officers. *Arizona v. Roberson*, 486 U.S. 675 (1988).
 - c. The *Edwards* requirement that counsel be "made available" means more than an opportunity to consult with an attorney outside the interrogation room. In *Minnick v. Mississippi*, 498 U.S. 146 (1990), the Supreme Court held "that when counsel is requested, interrogation must cease, and officials may not reinstate interrogation without counsel present, whether or not the accused has consulted with his attorney."¹⁴ *But see McNeil v. Wisconsin*, 501 U.S. 171 (1991) (limiting *Minnick* holding regarding *Edwards* rule to periods of continuous custody).

¹⁴ *See* Mil. R. Evid. 305(e)(1). In 1994, this subdivision was amended to conform military practice with the Supreme Court's decision in *Minnick*.

- d. *United States v. Mitchell*, 51 M.J. 234 (C.A.A.F. 1999). After a clear invocation of his Fifth Amendment right to counsel, the accused was asked by his work supervisor during a brig visit if it was worth committing the alleged misconduct. Even though the accused's supervisor was not a law enforcement official, the CAAF held that the questioning of the accused in custody, after invocation of his Fifth Amendment right to counsel, violated the protections of *Edwards v. Arizona*, 451 U.S. 477 (1981).
 - e. *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999). At trial, the prosecutor introduced the accused's statements that were made as part of a separate state plea agreement. Prior to making the statements, the accused unambiguously invoked his right to counsel, however, since counsel was present during the interview, the CAAF held that there was no violation of the Fifth Amendment.
 - f. *United States v. Thompson*, 67 M.J. 106 (C.A.A.F. 2009). After accused was placed in pretrial confinement and given defense counsel, a CID agent questioned accused without defense counsel notified or present, but after a rights waiver was signed. The CAAF presumed that the confession was obtained in violation of his Fifth Amendment right to counsel, but found the error harmless beyond a reasonable doubt. The confession was not ultimately admitted, except in redacted form by the defense. The confession only contained statements regarding the offenses for which he was acquitted or pled guilty.
3. Limits of the *Edwards* rule.
- a. Counsel "made available."
 - (1) *United States v. Schake*, 30 M.J. 314 (C.M.A. 1990). Accused who requested counsel during police interrogation could be re-interrogated following a six-day break in continuous custody and a complete rights advisement where accused had a "real opportunity to seek legal advice" during his release. *See also United States v. Vaughters*, 44 M.J. 377 (C.A.A.F. 1996) (re-interrogating accused who had been released from custody for nineteen days provided meaningful opportunity to consult with counsel).
 - (2) *United States v. Faisca*, 46 M.J. 276 (C.A.A.F. 1997). During a CID custodial interrogation concerning the theft of government property, the accused invoked his right to counsel. The CID agents conducting the interrogation immediately ceased their questioning. Six months later, a CID agent initiated contact with the accused and arranged for another interrogation. During the later interrogation, the accused affirmatively waived his self-incrimination rights and made a statement. The court found no *Edwards* violation.

- (3) *United States v. Young*, 49 M.J. 265 (C.A.A.F. 1998). A two-day release from custody after the accused invoked his right to counsel was a sufficient break to overcome the *Edwards* barrier. As such, it was not improper for the government investigator to re-interrogate the accused. The court stated that the two-day break afforded the accused the opportunity “to speak to his family and friends.”
- (4) *United States v. Mosley*, 52 M.J. 679 (A. Ct. Crim. App. 2000). A twenty-hour release from custody after the accused invoked his right to counsel was a sufficient break to overcome the *Edwards* barrier. Once the government demonstrates by a preponderance of the evidence that the accused had a reasonable break in custody, a presumption exists that during the break the accused had a meaningful opportunity to consult with counsel. The defense then has the burden to overcome the presumption.
- (5) *Maryland v. Shatzer*, 130 S.Ct. 1213 (2010). The Supreme Court held that a fourteen-day period of time is sufficient to overcome the *Edwards* barrier, regardless of the availability of counsel. The Court also held that post-trial incarceration for an unrelated offense does not trigger “custody” for *Miranda/Edwards* purposes.

b. Re-initiation by the accused.

- (1) *Edwards* does not foreclose finding a waiver of Fifth Amendment protection after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities. *Minnick v. Mississippi*, 498 U.S. 146 (1990).
- (2) *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). Accused reinitiated communication with police “relating generally to the investigation” by asking, “What is going to happen to me now?” But routine requests for a drink of water or to use a telephone “cannot be fairly said to represent a desire [for] a more generalized discussion relating directly or indirectly to the investigation.”
- (3) *United States v. Bonilla*, 66 M.J. 654 (C.G. Ct. Crim. App. 2008) (en banc). While in custody the accused invoked his Fifth Amendment right to counsel and to remain silent. Coast Guard Investigative Service (CGIS) agents later entered the interview room and discussed the case between themselves hoping that the accused would re-initiate conversations about the case. This tactic was successful. The CGCCA ruled this was not an interrogation or functional equivalent of an interrogation. No threats were made, there were no compelling pressure put on the appellant beyond custody, pleas to conscience, or other ploys the agents knew or were reasonably likely to elicit an incriminating response. [Note: Opinion was a 3-1-2 decision with the three dissenting judges finding that the accused did not re-initiate further communications. The majority opinion plus one dissenting judge agree that the agents’ actions were not an interrogation.]

- (4) *United States v. Watkins*, 32 M.J. 1054 (A.C.M.R. 1991), *aff'd*, 34 M.J. 344 (C.M.A. 1992). Accused reinitiated conversation by asking CID if he should get a civilian attorney and how much time the agent thought the accused might get.
 - (5) *United States v. McDavid*, 37 M.J. 861 (A.F.C.M.R. 1993). Despite previous invocation of his right to counsel, accused initiated the conversation with OSI agents by asking if he could explain something.
- c. Waiver after re-initiation by the accused.
- (1) *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). If initiation by the accused is found, then a separate inquiry must be made whether, on the totality of the circumstances, the accused voluntarily waived his rights.
 - (2) *United States v. McLaren*, 38 M.J. 112 (C.M.A. 1993). In reinitiating conversation with interrogators by answering a question asked before his rights invocation, accused impliedly waived previously invoked Fifth Amendment right to counsel.
- d. Foreign Police Exception.
- (1) *Edwards* protections are not triggered by request for counsel to a foreign official because there is an overseas exception to *Edwards* rule. In review of cases in this area, the CAAF has focused on the suspect's state of mind, just as the Supreme Court did in *Roberson*. A suspect may be willing to cooperate without counsel during a U.S. interview, while added intimidation in a foreign interview may make him unwilling to do so.
 - (2) *United States v. Coleman*, 26 M.J. 451 (C.M.A. 1988). U.S. investigators had actual knowledge that Coleman had requested counsel during questioning by the German police, but *Edwards* bar did not apply to initial interrogation by U.S. authorities. However, there must be a complete rights advisement and waiver before the U.S. interrogation.¹⁵
4. When are requests for counsel effective?
- a. Premature invocations.
- (1) The right to counsel arises upon initiation of custodial interrogation.

¹⁵ See also *United States v. Dock*, 40 M.J. 112 (C.M.A. 1994) (accused's pretrial statements to U.S. military investigators were admissible after he requested U.S. counsel while under German custody even though U.S. investigators were present when accused requested counsel during German interrogations); *United States v. Hinojosa*, 33 M.J. 353 (C.M.A. 1991).

- (2) But, where a suspect is in custody and requests counsel from a person in apparent authority shortly before initiation of the interrogation, “it is artificial to draw a distinction between the formal interview . . . and these events which led up to it.”¹⁶
 - (3) *McNeil v. Wisconsin*, 501 U.S. 171 (1991). In dicta, Justice Scalia opines that preemptory counsel elections are invalid. “We have never held that a person can invoke his *Miranda* rights ‘anticipatorily’ in a context other than custodial interrogation.”
 - (4) *United States v. Schroeder*, 39 M.J. 471 (C.M.A. 1994). Even though under arrest (civilian law enforcement agents), accused’s request to speak to an attorney before non-consensual urinalysis was “too little and too early” to qualify as invocation of his *Miranda* right to counsel. Accused had not been read his *Miranda* warnings or subjected to custodial interrogation.
 - (5) *United States v. Kendig*, 36 M.J. 291 (C.M.A. 1993). Electing to consult counsel during Article 15 proceeding: 1) does not constitute invoking Fifth Amendment right to counsel; 2) does not invoke a Sixth Amendment right to counsel; and, 3) does not require notice to counsel under Mil. R. Evid. 305(e), since subsequent interview concerned unrelated offenses. *See also United States v. Thomas*, 39 M.J. 1094 (A.C.M.R. 1994) (advising interrogator of representation by civilian attorney on unrelated matter does not trigger *Edwards* requirements).
 - (6) *Montejo v. Louisiana*, 556 U.S. 778 (2009). The majority, written by Justice Scalia, again asserts that “[w]e have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than ‘custodial interrogation.’” *McNeil*, 501 U.S. at 182, n.3.
- b. Ambiguous request = equivocal request = no *Edwards* protection.
- (1) Once a suspect initially waives his *Miranda* rights and agrees to submit to custodial interrogation without the assistance of counsel, only an unambiguous request for counsel will trigger the *Edwards* requirements.

¹⁶ *United States v. Goodson*, 18 M.J. 243 (C.M.A. 1984), *vacated*, 471 U.S. 1063 (1985) (remanded “for further consideration in light of *Smith v. Illinois*, 469 U.S. 91 (1984)”), *rev’d per curiam*, 22 M.J. 22 (C.M.A. 1986), *modified*, 22 M.J. 247 (C.M.A. 1986), *on remand*, 22 M.J. 947 (A.C.M.R. 1986).

- (2) *United States v. Davis*, 36 M.J. 337 (C.M.A. 1993), *aff'd*, 512 U.S. 452 (1994). Following an initial waiver, Davis stated to Naval Investigative Service (NIS) agents: “Maybe I should talk to a lawyer.” The CMA ruled this ambiguous comment failed to invoke Fifth Amendment right to counsel, and NIS agent properly clarified ambiguous comment before continuing. The Supreme Court ruled that clarification of ambiguous counsel requests is not legally required. The invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed as an expression of a desire for the assistance of an attorney. If a suspect makes a reference to an attorney that is ambiguous or equivocal, questioning need not be terminated. A request is ambiguous if a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel.¹⁷
- (3) *United States v. Morgan*, 40 M.J. 389 (C.M.A. 1994). Following initial waiver of Article 31 and counsel rights, accused made statement, but then asked “[c]an I still have a lawyer or is it too late for that?” The CMA rules that the accused’s statement was an equivocal or ambiguous request for counsel.
- (4) *United States v. Vandewoestyne*, 41 M.J. 587 (A.F. Ct. Crim. App. 1994). Evidence established under a totality of the circumstances, that accused made a knowing and intelligent waiver of his right to counsel and the right to remain silent at the initiation of the interview. Accused asking investigators if they thought he needed a lawyer was not a sufficiently clear statement that could have been understood as a request for counsel. Investigators nevertheless clarified the request, and accused then waived his right to counsel.

¹⁷ A statement either is an assertion of the right to counsel, or it is not. In *Smith v. Illinois*, 469 U.S. 91 (1984), the Court found that the following interchange contained a request for counsel, stating that “[a]n accused’s post-request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself.”

Q: You have a right to a lawyer.

A: Uh, yeah, I’d like to do that.

Q: If unable to pay, one will be appointed. Do you want a lawyer?

A: Yeah and no, uh, I don’t know what’s, really.

- (5) *United States v. Nadel*, 46 M.J. 682 (N-M. Ct. Crim. App. 1997). CID interrogated the accused about indecent acts he allegedly committed. After an initial valid waiver of Article 31(b) and *Miranda* counsel rights, the accused told CID agents that he would not like to discuss oral sodomy without first receiving advice from a lawyer, but would be willing to answer questions concerning anything else without assistance of counsel. CID did not question Nadel about sodomy but did question him about indecent assault. Thereafter, Nadel made a written confession of the indecent assault. The NMCCA found that the request for a lawyer was “not a clear assertion of the right to have counsel present during the interview.” The court, *citing Davis v. United States*, 512 U.S. 452 (1994), held that because it was an ambiguous request for counsel, the CID agent had no duty to stop the interrogation or clarify Nadel’s equivocal request.
- (6) *United States v. Henderson*, 52 M.J. 14 (C.A.A.F. 1999). German police apprehended the accused as a suspect in a stabbing incident. While in custody, the German police advised the accused of his rights (under both German law and Article 31(b)), obtained a waiver, and interrogated the accused. The accused denied involvement in the stabbing and eventually asked to continue the interview in the morning. The German police immediately stopped the questioning. Shortly thereafter, while the accused remained in custody, the CID observer, who was present during the initial interview, spoke to the accused in private. He emphasized the importance of telling the truth and that the accused had “nothing to worry about.” The accused indicated he wanted to “tell the truth,” but wanted to talk to a lawyer. Eventually, the accused agreed to make a statement and talk to a lawyer the morning. During the interview, the accused admitted to stabbing one of the victims. Citing *Davis*, the CAAF held that the accused’s request to talk to a lawyer in the morning was an ambiguous request for counsel and did not invoke the protections of *Miranda* and *Edwards*.

- (7) *United States v. Ford*, 51 M.J. 445 (C.A.A.F. 1999). An explosive device was found in the accused's barracks room during an inspection. Without giving warnings, an investigator questioned the accused at the barracks. When the accused "asked to have a lawyer present, or to talk to a lawyer," the investigator stopped the questioning. The investigator transported the accused to the CID office and, after obtaining a waiver of rights, questioned the accused again. The accused eventually gave a written confession. During the interview, however, the accused said that he didn't want to talk and thought he should get a lawyer. The investigator sought clarification and the accused responded that he wanted a lawyer if the investigator continued accusing him of lying. After further clarification, the accused agreed to continue with the questioning. The CAAF found that the accused did not invoke his Fifth Amendment right to counsel during the barracks' questioning. Further, the court held that accused's comment about a lawyer during the CID office interrogation was an ambiguous request for a lawyer and did not invoke the *Miranda* or *Edwards* protections.
- (8) *United States v. Delarosa*, 67 M.J. 318 (C.A.A.F. 2009). Accused was questioned by civilian law enforcement for homicide charges related to the death of his infant son. After repeatedly telling investigators that he wanted to talk to them, he signed "no" on the form next to the block that read, "I further state that I waive these rights and desire to make a statement." After investigators attempted to clarify, accused asked for a command representative. Investigators denied this request and left accused alone. Several hours later, accused asked to talk. He was re-advised of his rights and waived them. The CAAF found the first invocation to be ambiguous, but held that officers could continue to attempt clarify his initial ambiguous invocation and resume questioning at any time.
- (9) Practice tip: Clarification of ambiguous requests is probably still a good idea. Clarification will preclude later disputes over whether request was ambiguous as a matter of law.

C. Sixth Amendment Counsel Rights. *Montejo v. Louisiana*, 556 U.S. 778 (2009). The Court ruled that *Edwards* applies to the Sixth Amendment right to counsel.

1. Mil. R. Evid. 305(e)(2); 305(g)(2)(C).
2. *McNeil v. Wisconsin*, 501 U.S. 171 (1991). Sixth Amendment right to counsel is offense specific. Therefore, police may approach a suspect, who has counsel for a charged offense, about a different uncharged offense. Invocation of the Fifth Amendment right to counsel cannot be inferred from the invocation of the Sixth Amendment right in light of the differing purposes and effects of the two rights.
3. *United States v. Sager*, 36 M.J. 137 (C.M.A. 1992). Representation by civilian counsel on child sex abuse charges pending in civilian court did not constitute invocation of right to counsel with respect to later questioning by CID concerning unrelated child sex abuse offenses on a military installation.

4. *United States v. Kendig*, 36 M.J. 291 (C.M.A. 1993). Court held that exercising option to consult counsel during Article 15 proceeding: 1) did not constitute invoking Fifth Amendment right to counsel; 2) did not create a Sixth Amendment right to counsel; and, 3) did not require notice to counsel under Mil. R. Evid. 305(e) since subsequent interview concerned unrelated offenses.
5. *United States v. Hanes*, 34 M.J. 1168 (N.M.C.M.R. 1992). “[A] request for counsel at an RCM 305(i) hearing before charges have been preferred neither invokes a Sixth Amendment right to counsel because the hearing is not an adversarial proceeding nor invokes a Fifth Amendment right to counsel because the hearing is not the functional equivalent of a custodial interrogation.”

VII. WAIVER OF RIGHTS

Before the government can introduce statements of the accused in its case in chief, it must prove a knowing, intelligent, and voluntary waiver of the accused’s applicable rights.

- A. Mil. R. Evid. 305(g).
- B. Implied Waiver.
 1. Although an express waiver is not required, courts generally will not presume a waiver from a subject’s silence or subsequent confession alone. Implied waiver scenarios are rare and limited to the facts of the case.
 2. If the right to counsel is not declined affirmatively, the “prosecution must demonstrate by a preponderance . . . that the individual waived the right to counsel.” Mil. R. Evid. 305(g)(2).
 3. *North Carolina v. Butler*, 441 U.S. 369 (1979). An express statement of waiver of the *Miranda* right to counsel is not invariably necessary. Waiver was established where accused was advised of rights, said he understood them, refused to sign waiver, but agreed to talk.¹⁸
 4. *United States v. Vangelisti*, 30 M.J. 234 (C.M.A. 1990). “Mil. R. Evid. 305(g)(2) does not create an exception to the requirement that an accused must intentionally relinquish his right to counsel, rather it permits proof of the waiver by evidence other than the accused’s own expression that he knows of his right to counsel, understands his right, and intentionally elects to relinquish that right.” *Id.* at 241 (Cox. J., concurring).
 5. *Berghuis v. Thompkins*, 130 S.Ct. 2250 (2010). The Supreme Court held that “a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police.”
- C. “Intelligent” and “knowing” waiver.
 1. *Moran v. Burbine*, 475 U.S. 412 (1986). Neither the police failure to inform a suspect of an attorney’s efforts to reach him, nor the police misinforming the attorney of their plans to interrogate the suspect undercuts an otherwise valid waiver by the suspect of his *Miranda* rights.

¹⁸ In *Butler*, the Court made a distinction between an express written or oral statement of waiver and a waiver clearly inferred from the actions and words of the person interrogated. However, both types of waiver were deemed sufficient for purposes of waiver of the right to counsel after appropriate advice.

2. *Colorado v. Spring*, 479 U.S. 564 (1987). Accused was arrested for selling stolen firearms, was advised of his rights, which he waived, and questioned on the sales and also about a prior murder the police had not previously mentioned. “We hold that a suspect’s awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege.” “Spring’s decision to waive his . . . privilege was voluntary. He alleges no ‘coercion . . . by physical violence or other deliberate means calculated to break [his] will.’” His waiver was “knowingly and intelligently made: that is, that Spring understood that he had the right to remain silent and that anything he said could be used as evidence against him.”
3. *Connecticut v. Barrett*, 479 U.S. 523 (1987). In response to rights warnings, accused stated he would not give a written statement unless his attorney was present, but he would give an oral statement. Held: waiver was effective; “[t]he fact that some might find Barrett’s decision illogical is irrelevant, for we have never ‘embraced the theory that a defendant’s ignorance of the full consequences of his decisions vitiates their voluntariness.’”
4. *United States v. Thornton*, 22 M.J. 574 (A.C.M.R. 1986). Accused’s consumption of 6 to 18 beers prior to interrogation did not invalidate otherwise proper rights waiver.

D. Voluntariness of waiver.

1. The government must prove by a preponderance of the evidence that a suspect waived his applicable rights. In order to prove a valid waiver, the government must show:
 - a. that the relinquishment of the defendant’s rights was voluntary; and
 - b. that the defendant had a full awareness of the right being waived and of the consequences of waiving that right. *See Moran v. Burbine*, 475 U.S. 412 (1986).

E. Presence of Counsel as a Predicate to Waiver.

1. Custodial Interrogation [Mil. R. Evid. 305(e)(1)].¹⁹ Absent a valid waiver of counsel under Mil. R. Evid. 305(g)(2)(B),²⁰ when an accused or person suspected of an offense is subjected to custodial interrogation under circumstances described under Mil. R. Evid. 305(d)(1)(A)²¹ of this rule, and the accused or suspect requests counsel, counsel must be present before any subsequent custodial interrogation may proceed.

¹⁹ The current version of Mil. R. Evid. 305 essentially replaced the old notice to counsel provisions that originated with *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976). Under *McOmber* (as implemented by the former version of Mil. R. Evid. 305(e)), when an investigator intended to question an accused regarding an offense and knew or reasonably should have known the accused had counsel with respect to that offense, counsel had to be notified and given a reasonable time in which to attend. This notice to counsel provision was viewed as totally non-waivable until the decision in *United States v. LeMasters*, 39 M.J. 490 (C.M.A. 1994).

In *LeMasters*, the court held that the *McOmber* rule was designed to protect the right to counsel when the police initiate the interrogation. Accordingly, if the suspect initiates discourse and prosecution can show the suspect was aware of his right to have his counsel notified and present, but that he affirmatively waived those rights, then a valid waiver can be found. This case left open the question of whether police initiated questioning was permitted in light of the Supreme Court decisions in *Minnick v. Mississippi*, 498 U.S. 146 (1990), *McNeil v. Wisconsin*, 501 U.S. 171

United States v. Finch, 64 M.J. 118 (C.A.A.F. 2006). The *McOmber* rule requiring notification of counsel prior to questioning a suspect who has previously asserted his right to counsel under the Fifth Amendment is overruled. Mil. R. Evid. 305(e) provides for only two situations where counsel must be present, absent waiver: (1) custodial interrogations (e.g., *Edwards* rule); and (2) post-preferral interrogation (where the suspect's Sixth Amendment right to counsel has been invoked and the questions concern the offense(s) charged).

2. Post-preferral interrogation. Mil. R. Evid. 305(g)(2)(c) provides that if a person makes a valid request for counsel subsequent to the preferral of charges (e.g., Sixth Amendment request for counsel), any subsequent waiver of that right is invalid unless the prosecution can show that the accused initiated the communication leading to the waiver. *But see Montejo v. Louisiana*, 556 U.S. 778 (2009).
 - a. The rules concerning invocation of the Sixth Amendment right to counsel set limits on subsequent interrogation concerning the charged offense or offenses.
 - b. However, the Sixth Amendment right to counsel is "offense specific." Law enforcement may question a suspect on an offense that has not been preferred/indicted. The test to determine whether there are two different offenses is whether each provision requires proof of a fact that the other does not (i.e., the *Blockburger* test). *Texas v. Cobb*, 532 U.S. 162 (2001).

F. Waiver of PASI at trial.

1. "When an accused testifies voluntarily as a witness, the accused thereby waives the privilege against self-incrimination with respect to the matters concerning which he or she so testifies." Mil. R. Evid. 301(e).
2. By testifying on direct examination about an offense for which he is being tried, an accused does not, however, waive his privilege against self-incrimination with respect to uncharged misconduct at an entirely different time and place. *United States v. Castillo*, 29 M.J. 145 (C.M.A. 1989).
3. Claiming the privilege during cross-examination.

(1991), and the 1994 amendment of Mil. R. Evid. 305 that removed the language requiring notification of counsel whenever a represented suspect was questioned.

Finch put the *McOmber* notification rule to rest, presumably once and for all. Neither *McOmber*, *LeMasters*, nor the current Mil. R. Evid. 305(e) addresses the ethical implications of dealing with "represented" parties.

²⁰ If an accused or suspect is interrogated by a person required to give Article 31 warnings and the accused or suspect is in custody, or reasonably believes himself to be in custody, or is otherwise deprived of his freedom of action in any way, and requests counsel, any subsequent waiver of the right to counsel obtained during custodial interrogation concerning the same or different offense is invalid unless the prosecution can demonstrate by a preponderance of the evidence that: (1) the accused or suspect initiated the communication leading to waiver; or (2) the accused or suspect has not continuously had his or her freedom restricted by confinement, or other means, during the period between the request for counsel and the subsequent waiver.

²¹ *Id.*

- a. Mil. R. Evid. 301(f)(2): “If a witness asserts the privilege against self-incrimination on cross-examination, the military judge, upon motion, may strike the direct . . . , in whole or in part, unless the matters to which the witness refuses to testify are purely collateral.”²²
 - b. If matters to which the witness refuses to testify during cross-examination are purely collateral, there is no right to have the witness’s direct testimony stricken. *United States v. Evans*, 33 M.J. 309 (C.M.A. 1991).
 - c. *United States v. Moore*, 36 M.J. 329 (C.M.A. 1993). Military judge was within his discretion to strike the entire direct testimony of a defense witness following assertion of right against self-incrimination on cross-examination.
 - d. *United States v. Lawless*, 13 M.J. 943 (A.F.C.M.R. 1982). A government witness testified he had assisted accused in weighing and packing marijuana but refused to testify about who had supplied the baggies and other packaging equipment. The military judge properly refused to strike the direct testimony since the information about the source of the equipment was collateral to the core of the direct.
4. Confessional stipulations. *United States v. Craig*, 48 M.J. 77 (C.A.A.F. 1998). Entering into a confessional stipulation does not waive the accused’s constitutional rights against self-incrimination, to a trial of the facts, and to confront and cross-examine the witnesses against her.
 5. The impact of a guilty plea on PASI.
 - a. Trial counsel are permitted to use a guilty plea to a lesser-included offense to establish elements common to both the greater and lesser crimes of a single specification. *United States v. Rivera*, 23 M.J. 89 (C.M.A. 1986); *see also* RCM 920(e). They may not, however, reach back to the providency inquiry to find evidence to condemn the accused from his own mouth on a separate offense. *United States v. Craig*, 63 M.J. 611 (A.F. Ct. Crim. App. 2006).
 - b. *Mitchell v. United States*, 526 U.S. 314 (1999). The Supreme Court held that in the federal criminal system, a guilty plea does not waive the self-incrimination privilege at sentencing. The Court found that the protection of the Fifth Amendment privilege applies equally to the sentencing phase of trial as it does to the guilt phase, and that negative inferences cannot be drawn by the accused’s election to remain silent during the sentencing phase.

VIII. VOLUNTARINESS

The concept of voluntariness entails elements of the voluntariness doctrine, due process, and compliance with Article 31(d).²³ Whether or not *Miranda* is implicated, a confession must be voluntary to

²² The Analysis to the rule describes collateral matters as “evidence of minimal importance” (“usually dealing with a rather distant fact solicited for impeachment”).

²³ *See generally* Captain Fredric I. Lederer, *The Law of Confessions — the Voluntariness Doctrine*, 74 Mil. L. Rev. 67 (1976).

Article 31(d) provides:

be valid. Thus, a confession deemed coerced must be suppressed despite a validly obtained waiver in the first instance. In determining whether a confession is voluntary, it is necessary to look at the totality of the circumstances concerning whether the accused's will was overborne and whether the confession was the product of an essentially free and unconstrained choice by its maker. Some factors to consider in assessing the totality of the circumstances include the age, education, and intelligence of the accused, whether the accused has been informed of his constitutional rights, the repeated and prolonged nature of the questioning, and the use of physical punishment, such as the deprivation of food or sleep.

A. The Test.

1. "The principles for determining whether a pretrial statement was [involuntary] is essentially the same whether the challenge is based on the Constitution, Article 31(d), or Mil. R. Evid. 304." *United States v. Bubonics*, 45 M.J. 93 (C.A.A.F. 1996).
2. "The necessary inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker. If, instead, the maker's will was overborne and his capacity for self-determination critically impaired, use of the confession would offend due process."²⁴
3. In applying a totality of the circumstances test to determine if the government has shown by a preponderance of the evidence that the accused will was not overborne in the making of a confession, the court will consider: (1) the characteristics of the accused, (2) conditions of the interrogation, and (3) conduct of the law enforcement officials.²⁵
4. *United States v. Freeman*, 65 M.J. 451 (C.A.A.F. 2008). Despite AFOSI agent conduct that included a ten-hour interview, two polygraphs, lies about the existence of the suspect's fingerprints at the crime scene and threats to turn the suspect over to civilian law enforcement if he did not confess, the subsequent confession was not involuntary under the totality of the circumstances.

No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

The Analysis to Mil. R. Evid. 304(c)(2) lists examples of involuntary statements as those resulting from: coercion, unlawful influence, and unlawful inducement, to include infliction of bodily harm, deprivation of food, sleep, or adequate clothing; threats of bodily harm; confinement or deprivation of privileges because a statement was not made, or threats thereof; promises of immunity or clemency; promises of reward or benefit, or threats of disadvantage.

²⁴ *Bubonics*, 45 M.J. at 95. In *Bubonics*, the court found that while "Mutt and Jeff" techniques and threat of civilian prosecution interrogation techniques do not amount to *per se* coercion, based on the facts of the case, the interrogators improperly coerced Bubonics' statement. See also *Ledbetter v. Edwards*, 35 F.3d 1062 (6th Cir. 1994) (finding that the accused's confession was voluntary, the court considered the following factors: 1) no physical punishment or threats had been used; 2) no deprivation of physical necessities, such as food and drink or bathroom privileges; 3) short interrogation (3 hours); 4) informed of his *Miranda* warnings three different times; 5) clear indication Ledbetter understood his rights and did not appear under the influence of drugs or alcohol or otherwise unable to comprehend those rights; 6) did not express a reluctance to talk; and, 7) no request for the presence of an attorney).

²⁵ *United States v. Vandewoestyne*, 41 M.J. 587 (A.F. Ct. Crim. App. 1994) (totality of the circumstances established accused's confession was knowing and voluntary, even though he was ultimately persuaded to confess because of fear that a failure to cooperate might lead to deportation of his wife if her complicity in offenses was ever known to the INS); see also *United States v. Wheeler*, 22 M.J. 76 (C.M.A. 1986); *United States v. Norfleet*, 36 M.J. 129 (C.M.A. 1992); *United States v. Doucet*, 43 M.J. 656 (N-M. Ct. Crim. App. 1995); *United States v. Briggs*, 39 M.J. 600 (A.C.M.R. 1994); *United States v. Gill*, 37 M.J. 501 (A.F.C.M.R. 1993).

5. *United States v. Lichtenhan*, 40 M.J. 466 (C.M.A. 1994). While a cleansing warning is not a requirement for admissibility, an earlier unwarned statement coupled with the lack of a cleansing warning before a subsequent statement are all part of the “totality of the circumstances” in determining if the subsequent statement was made voluntarily.
6. *United States v. Griffin*, 50 M.J. 278 (C.A.A.F. 1999). At trial, the prosecutor introduced a confession the accused made to Defense Investigative Service (DIS) agents during a security clearance update interview. The CAAF upheld the military judge’s decision to admit the confession. In doing so, the court stated that “the voluntariness of a confession is determined by examining the totality of the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.” The court also determined that the military judge’s decision to exclude defense expert testimony about false confessions was proper.
7. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). In determining whether a confession has been elicited by means that are unconstitutional, it is necessary to look at the totality of the circumstances concerning “whether the defendant’s will was overborne in a particular case.” Factors to consider in assessing the totality of the circumstances include the age, education, and intelligence of the accused; whether the accused has been informed of his constitutional rights; the length of the questioning; the repeated and prolonged nature of the questioning; and the use of physical punishment, such as the deprivation of food or sleep.
8. *United States v. Henderson*, 52 M.J. 14 (C.A.A.F. 1999). In deciding that the confession was voluntary, the court gave significant weight to the fact that the accused couched his admissions in an exculpatory manner in the hopes of avoiding trouble.
9. *United States v. Ford*, 51 M.J. 445 (C.A.A.F. 1999). Based on the totality of the circumstances, the CAAF held that the accused’s written confession was voluntary, and was not tainted by an earlier unwarned, yet not coerced, interrogation.

B. Use of Deception.

1. *Miranda v. Arizona*, 384 U.S. 436 (1966). Any evidence that the accused was threatened, tricked, or cajoled into a waiver will show that the defendant did not voluntarily waive his privilege.
2. *United States v. Davis*, 6 M.J. 874 (A.C.M.R. 1979). After a proper waiver, deception is permissible in the interrogation process as long as the artifice is not likely to produce an untrue confession.
3. *United States v. Jones*, 34 M.J. 899 (N.M.C.M.R. 1992). NIS agent falsely stated that co-accused had “fingered” the accused as the sole perpetrator. This misrepresentation, though relevant to a determination of voluntariness, does not render an otherwise voluntary statement involuntary.
4. *United States v. Thrower*, 36 M.J. 613 (A.F.C.M.R. 1992). When accused continued to deny involvement in ATM card theft, another OSI agent was introduced as “Dr. Paul,” a psychologist/psychic with a special power to know when he was being told a lie by looking into his crystal ball. Accused eventually made admissions to “Dr. Paul.” The court considered the “cornball ruse” as nothing more than an adjuration to the accused to tell the truth and did not render confession involuntary.

5. *United States v. Sojfer*, 47 M.J. 425 (C.A.A.F. 1998). During an interrogation, the NCIS agent stated a proposition that he knew was false. In response, the accused corrected the agent with incriminating information. Applying a totality of the circumstance analysis, the CAAF denied the accused's claim that the statement was involuntary, i.e., the product of "fraud and trickery."

C. Due process/unlawful inducements.

1. *Colorado v. Connelly*, 479 U.S. 157 (1986). Official coercion is a necessary element in showing a violation of due process. In *Connelly*, the defendant, who was later diagnosed as mentally ill, approached a police officer and confessed to a murder. Despite testimony that his mental illness interfered with his free will, the Court found the confession was voluntary because there was no evidence of coercion by the police. The Court noted that the defendant's mental condition would be an important consideration when police use subtle psychological methods of coercion, but rejected the idea "that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional 'voluntariness.'"
2. *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992). To render an inducement unlawful under Article 31(d), "[the] inducement must be made by someone acting in a law enforcement capacity or in a position superior to the person making the confession." A promise of confidentiality from U.S. Intelligence agent (non-police agent) did not constitute unlawful inducement; therefore, the accused's confession was voluntary.
3. *United States v. Campos*, 48 M.J. 203 (C.A.A.F. 1998). Five weeks after a serious car accident, while the accused was medicated and in the hospital recovering from injuries, NCIS agents questioned him about wrongful use and distribution of methamphetamine. Prior to the questioning, the accused was advised of his rights under Article 31(b) and *Miranda*. The court held that the actions of the NCIS agents did not rise to "government overreaching," and that the accused's mental state was not such as to render the confessions involuntary. The court stated that the accused's mental state is just a factor in determining the voluntariness of a confession and is only considered if there is a governmental due process violation due to overreaching.
4. *United States v. Morris*, 49 M.J. 227 (C.A.A.F. 1998). An investigator telling the accused during an interrogation that "[i]f you help us, we will help you," did not amount to unlawful inducement.
5. *United States v. Oakley*, 33 M.J. 27 (C.M.A. 1991). Senior law enforcement noncommissioned officer's admonishments to cooperate did not overbear the suspect's freely drawn conclusion that it was in his own best interest to cooperate.
6. *United States v. Murphy*, 18 M.J. 220 (C.M.A. 1984). Trial counsel's advice that cooperation with Japanese police could result in a more lenient sentence merely provided the accused information with which to make an informed, tactical judgment as to his making a statement.

D. Coercion/Threats.

1. Mil. R. Evid. 304(c)(3) defines inadmissible involuntary statements as those obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment or Article 31 or through use of coercion, unlawful influence, or unlawful inducement. The drafters' analysis for this provision states:

The language governing statements obtained through the use of “coercion, unlawful influence, and unlawful inducement,” found in Article 31(d) makes it clear that a statement obtained by any person, regardless of status, that is the product of such conduct is involuntary. Although it is unlikely that a private citizen may run afoul of the prohibition of unlawful influence or inducement, such a person clearly may coerce a statement and such coercion will yield an involuntary statement.²⁶

2. *United States v. Ellis*, 57 M.J. 375 (C.A.A.F. 2002). The appellant was subjected to several hours of interrogation during which he was accused of killing his two-year-old child. During the interrogation, the appellant was told that there was enough evidence to arrest him and his wife (who was also being subjected to interrogation). He was also told that his children would be taken away and put in foster care if he and his wife were arrested. The appellant and his wife met for fifteen minutes; after the meeting the appellant confessed to slamming his son’s head on the ground on two different occasions. The court concluded that although the detective’s statement regarding the possible removal of appellant’s children may have contributed to his confession, the statement was still the product of an essentially free and unconstrained choice by the appellant, and thus was voluntary. *See also United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005).
3. *Arizona v. Fulminante*, 499 U.S. 279 (1991). The accused was befriended by another inmate, an FBI informant, who promised to protect the accused from other inmates if he would tell what happened concerning the murder of the accused’s 11-year-old daughter. Under “totality of the circumstances” the subsequent confession was involuntary. The Court found that a credible threat of physical violence existed unless the accused confessed. “Coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition.” Other factors that may have been relevant in determining whether the accused’s will has been overborne include: accused’s intelligence, physical stature, prior prison experiences, and relationship with the informant.
4. *United States v. Martinez*, 38 M.J. 82 (C.M.A. 1993). Confession during polygraph examination could be found involuntary as result of psychological coercion, even though accused had waived his rights and was free to leave motel room. Accused testified that his will was overborne. Coercive factors considered included duration of interrogation, the nature of the interrogation techniques, and the accused’s frustrated attempts to obtain assistance of counsel during the investigation.

²⁶ Although written well before *Connelly*, the drafters’ analysis is probably still a correct interpretation of the law. From the perspective of a due process analysis, statements are excluded as the result of governmental misconduct. The Supreme Court observed in *Connelly*, however, that even if a confession is constitutionally voluntary, due to the absence of government misconduct, it might still be proved unreliable as a matter of law. In this regard, the admissibility of a statement is governed by the evidentiary laws of the forum, and not by the Due Process Clause. As implemented by Mil. R. Evid. 304, the statutory protection of servicemembers under Article 31 clearly contemplates not only an analysis of due process voluntariness, but also consideration of voluntariness as a matter of fundamental reliability. Accordingly, statements coerced by private citizens may still be held inadmissible under Mil. R. Evid. 304.

5. *United States v. Benner*, 57 M.J. 210 (C.A.A.F. 2002). Appellant's confession to CID was involuntary, since the appellant was faced with the "Hobson's choice" of either confessing on his own, or having the chaplain inform CID of his earlier admissions to child sexual abuse while seeking counseling from the chaplain.
6. *Haynes v. Washington*, 373 U.S. 503 (1963). Petitioner's written confession violated due process because it was obtained through the use of threats and isolation techniques by police. Failure to inform petitioner of his rights was another relevant factor in determining whether the confession was voluntary. The court further observed that the refusal to allow petitioner to communicate with his attorney or his wife was a misdemeanor under state law.
7. *United States v. O'Such*, 37 C.M.R. 157 (C.M.A. 1967). The fact that appellant was deprived of sleep, had threats made against his family during the interrogation, and was threatened with being charged with misprision of a felony if he continued to remain silent led to his coerced oral admissions.
8. *Ashcraft v. Tennessee*, 322 U.S. 143 (1944). A thirty-six hour interrogation was determined to be so "inherently coercive" as to render a resulting confession automatically involuntary. The Court seems to further indicate that the longer the interrogation, the less important the other factors become when evaluating the totality of the circumstances.

IX. ADMITTING CONFESSIONS MADE AFTER IMPROPER POLICE CONDUCT

Generally, a confession obtained after an illegal search, arrest, or prior confession is inadmissible, unless the government can show sufficient attenuation of the taint. If the prior illegality is a result of procedural defects, it will be easier for the government to show attenuation of the taint. If, however, the prior illegality resulted from a constitutional violation (i.e., coercion) then it is unlikely the government will prevail.

- A. After an illegal arrest or search.
 1. *Brown v. Illinois*, 422 U.S. 590 (1975). *Miranda* warnings alone are insufficient to cure taint of arrest made without probable cause or warrant. Factors to consider on attenuation of the taint: (1) *Miranda* warnings; (2) "temporal proximity" of the illegal arrest and the confession; (3) "intervening circumstances"; and, (4) "purpose and flagrancy of the official misconduct".
 2. *Wong Sun v. United States*, 371 U.S. 471 (1963). Statements made by appellant in his bedroom at the time of his unlawful arrest were the fruits of the agents' unlawful action, and they should have been excluded from evidence. However, since the appellant was later lawfully arraigned and released on his own recognizance and had returned voluntarily several days later when he made his unsigned statement, the connection between his unlawful arrest and the making of this later statement was so attenuated that the unsigned statement was not the fruit of the unlawful arrest and, therefore, it was properly admitted in evidence.

3. *United States v. Washington*, 39 M.J. 1014 (A.C.M.R. 1994). Unlawful search tainted statements made by accused where first statement was taken immediately after search and discussed items found during search. While a rights warning is a relevant factor in attenuating a statement from prior official misconduct, a warning alone cannot always break the casual connection. *See also New York v. Harris*, 495 U.S. 14 (1990) (where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the use of a statement made by the defendant outside of his home, even though the statement is taken after an illegal warrantless arrest made in the home); *United States v. Khamsovuk*, 57 M.J. 282 (C.A.A.F. 2002) (although appellant was seized during an illegal search, his continued custody at the police station was based on probable cause, therefore, his subsequent warned statement to police was properly admitted).
4. *United States v. Mitchell*, 31 M.J. 914 (A.F.C.M.R. 1990). *Harris* applied. Statement made to police who entered accused's motel room based on probable cause, but without a warrant or his consent should have been suppressed, but written statement given three days later was admissible.
5. *United States v. Campbell*, 41 M.J. 177 (C.M.A. 1994). Illegality of urinalysis precluded admission of accused's statements, where urinalysis results were delivered to accused on day he made his initial confession, accused was directed to bring form notifying him of positive results to the criminal investigative division office, and positive results of the challenged urinalysis were the sole basis for the accused's questioning by the military police. However, no cleansing warning was given.

B. After an inadmissible confession.

1. Question first tactic. *Missouri v. Seibert*, 542 U.S. 600 (2004). Police engaged in a common interrogation tactic of questioning the suspect. Once they obtained the confession, they would read the suspect her rights, get a waiver, and then obtain a second confession. The Supreme Court held that the warned confession was inadmissible, since the police's deliberate tactic of withholding *Miranda* warnings elicited an initial confession that was used to undermine the "comprehensibility and efficacy" of the subsequent *Miranda* warnings. Under the circumstances of the case, the Court concluded that it would have been reasonable for the suspect to regard the two phases of the interrogation as a continuum, especially since the officer referred back to the earlier admissions. The mere recital of *Miranda* warnings in the middle of this continuous interrogation was not sufficient to separate the two phases in suspect's mind. Therefore, she would have concluded that it would be unnatural for her not to repeat the same information she had just given. She would not have understood that she had a choice about continuing to talk.
2. *Oregon v. Elstad*, 470 U.S. 298 (1985). "A suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." "Administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible." However, no cleansing warning required. *See also United States v. Lichtenhan*, 40 M.J. 466 (C.M.A. 1994).

3. *United States v. Phillips*, 32 M.J. 76 (C.M.A. 1991). An unwarned statement obtained without actual coercion does not presumptively taint a subsequent, warned statement. Government must prove by a preponderance of the evidence, however, that the warned statement was voluntary and was not obtained by using the earlier statement. If the initial statement is the product of actual coercion, duress, or inducement, it presumptively taints subsequent warned statements. Cleansing warnings, although not legally required, will help show voluntariness. *Cf. United States v. Torres*, 60 M.J. 559 (A.F. Ct. Crim. App. 2004).
4. *United States v. Steward*, 31 M.J. 259 (C.M.A. 1990). Mere “technical violations of Article 31(b)” do not presumptively taint subsequent warned statements. The appropriate legal inquiry in these types of cases is whether his subsequent confession was voluntary considering all the facts and circumstances of the case, including the earlier technical violation of Article 31(b).
5. *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006). Where an earlier statement is “involuntary” only because the accused has not been properly warned of his Article 31(b) rights, the voluntariness of the second statement is determined by the totality of the circumstances. The earlier unwarned statement is a factor in this total picture, but it does not presumptively taint the subsequent statement. If a “cleansing warning” has been given — where the accused is advised that a previous statement cannot be used against him — that statement should be taken into consideration. If a cleansing statement is not given, however, its absence is not fatal to a finding of voluntariness.
6. *United States v. Gardinier*, 65 M.J. 60 (C.A.A.F. 2007), *rev’d on other grounds*, 67 M.J. 304 (C.A.A.F. 2009). Suspect provided two incriminating statements to civilian investigators following a proper *Miranda* rights warning. Immediately after making these statements, a CID agent entered the interview room, identified himself, and obtain a third incriminating statement without advising the suspect of his Article 31 rights. Four days later, the suspect was called to the CID office and advised that his prior statement was given with what “may not have been a proper rights advisement.” The suspect was then asked whether he would be willing to make another statement. He did. While the court suppressed the first (unwarned) statement to CID, the second statement was found to be voluntary under the totality of the circumstances despite the fact the accused had not been specifically informed that his first statement to CID might be inadmissible.
7. *United States v. Young*, 49 M.J. 265 (C.A.A.F. 1998). A two-day period was enough to purge the taint from the previous inadmissible confession. *See also United States v. Ford*, 51 M.J. 445 (C.A.A.F. 1999); *United States v. Allen*, 59 M.J. 478 (C.A.A.F. 2004); *United States v. Cuento*, 60 M.J. 106 (C.A.A.F. 2004).
8. *Michigan v. Tucker*, 417 U.S. 433 (1974). Police failure to advise appellant of his right to appointed counsel did not require that the testimony of a witness identified in appellant’s statement be suppressed.

X. THE EXCLUSIONARY RULE

No statement obtained in violation of Article 31,²⁷ *Miranda*,²⁸ Sixth Amendment,²⁹ or due process may be received in evidence in the case in chief in a trial by court-martial against the subject of the

²⁷ Mil. R. Evid. 304(b)(1): “Where the statement is involuntary only in terms of noncompliance with the requirements of Mil. R. Evid. 305(c) or (f), or the requirements concerning counsel under Mil. R. Evid. 305(d),

violation. Evidence resulting from “mere” procedural violations may be allowed to impeach the testimony of the accused. Rationale for allowing impeachment use is that in an impeachment situation, the search for the truth in a criminal case outweighs the deterrence value of the exclusionary rule. Coerced statements are inadmissible for all purposes, to include impeachment of the accused. Otherwise inadmissible statements may also be admissible in a later prosecution against the accused for perjury, false swearing, or making of a false official statement.

A. The general rule: Mil. R. Evid. 304(a).

“[A]n involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule.”

B. The inevitable discovery exception.

1. Mil. R. Evid. 304(b)(2) and (3) provide that:

a. Evidence that was obtained as a result of an involuntary statement may be used when the evidence would have been obtained even if the involuntary statement had not been made.

b. Evidence challenged as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the statement was made voluntarily, that the evidence was not obtained by use of the statement, or that the evidence would have been obtained even if the statement had not been made.

2. *United States v. Kline*, 35 M.J. 329 (C.M.A. 1992). Accused, on his own initiative, contacted his commander and stated, “I have just turned myself in for sexually molesting my daughter.” The court found admission was not inadmissible involuntary derivative evidence, despite suppression of a similar admission made to a military social worker hours earlier.

C. Statements incriminating others.

1. Exclusionary rule does not apply to coerced or unadvised witness statements that incriminate someone else. Instead, evidence of coercive or illegal investigatory tactics employed by the government to secure such evidence or subsequent testimony based thereon may be presented to the fact-finder for purposes of determining the weight to be afforded this evidence.

305(e), or 305(g), this rule does not prohibit use of the statement to impeach by contradiction the in-court testimony of the accused”

²⁸ *Harris v. New York*, 401 U.S. 222 (1971); accord *Oregon v. Hass*, 420 U.S. 714 (1975).

²⁹ *Kansas v. Ventris*, 556 U.S. 586 (2009) (statement to informant, admittedly elicited in violation of the Sixth Amendment, was admissible to impeach defendant’s inconsistent testimony at trial); *Michigan v. Harvey*, 494 U.S. 344 (1990) (statement given in response to police-initiated interrogation following attachment of accused’s Sixth Amendment right to counsel, although not admissible in the prosecution’s case-in-chief, may be used to impeach the defendant’s testimony, at least when the defendant gives a knowing and voluntary waiver of his right to counsel); *United States v. Langer*, 41 M.J. 780 (A.F. Ct. Crim. App. 1995) (statements made by accused after preferral of drug charges against him to person recruited as drug informant by government agents were obtained in violation of accused’s Sixth Amendment right to counsel and could not be used in government’s case-on-chief. Although informant may have been intended to act as a passive listening post, person in fact initiated contact and conversations with accused for the express purpose of gathering information about illegal drug activity. Statements could be used in rebuttal if such information became relevant to impeach accused’s testimony).

2. *United States v. McCoy*, 31 M.J. 323 (C.M.A. 1990). No due process violation where trial counsel deliberately advised CID agents not to advise suspects of their Article 31 rights, suspects later gave immunized testimony against accused, and accused had a full opportunity to present this improper conduct to the members through cross-examination, witnesses, and argument.

D. False Official Statement charge.

United States v. Swift, 53 M.J. 439 (C.A.A.F. 2000). The government may only use a statement taken in violation of Article 31 in a later prosecution for false official statement, where the accused has taken the stand in an earlier prosecution, thereby “open[ing] the door to consideration of the unwarned statement by his or her in-court testimony.”

E. Derivative physical evidence (difference between Military Rules of Evidence and Supreme Court jurisprudence).

1. Mil. R. Evid. 304(a) states that “[A]n involuntary statement or any derivative evidence therefrom may not be received in evidence” Therefore, in the military, the fruit of the poisonous tree doctrine applies to evidence derived from inadmissible statements.
2. *But see United States v. Patane*, 542 U.S. 630 (2004). After arresting the defendant at his house and before completely giving him *Miranda* warnings, the police asked him where his pistol was. The defendant told the officers the location of the pistol, and then, per their request, gave the officers permission to enter and seize it. The Supreme Court held that the pistol was admissible. A plurality of the Court concluded that the Self-Incrimination Clause of the Fifth Amendment protects individuals from being compelled to testify against themselves in a criminal proceeding. Thus, the Clause cannot be violated by admitting nontestimonial evidence obtained through the use of unwarned, yet voluntary statements. Creating a blanket suppression rule for such evidence does not serve the Fifth Amendment’s goals of “assuring trustworthy evidence” or deterring police misconduct. Additionally, the protections of *Miranda* are not violated when officers fail to give warnings, regardless of whether the failure is negligent or intentional. Instead, *Miranda’s* protections are violated when unwarned statements are admitted against the declarant at trial. Suppression of unwarned statements is a complete remedy to protect this fundamental “trial right.” Therefore, the “fruit of the poisonous tree” doctrine does not apply to evidence derived from *Miranda* violations.

XI. MENTION OF INVOCATION AT TRIAL

A. Silence at trial.³⁰

³⁰ Mil. R. Evid. 301(f) sets forth the general rule:

(1) “fact that a witness has asserted the privilege against self-incrimination in refusing to answer a question cannot be considered as raising any inference unfavorable to either the accused or the government.”

* * *

(3) “fact that the accused during official questioning and in exercise of rights . . . remained silent, refused to answer . . . , requested counsel, or requested that the questioning be terminated is inadmissible against the accused.”

1. *Griffin v. California*, 380 U.S. 609 (1965). Comment by the prosecutor on the accused not testifying violates the Fifth Amendment and due process.
2. *Portuondo v. Agard*, 529 U.S. 61 (2000). A prosecutor's comments about the defendant's opportunity to watch other witnesses testify before he took the stand and to tailor his testimony accordingly, did not amount to a constitutional violation, but were instead a fair comment on factors effecting the defendant's credibility. The Supreme Court held that "when [a defendant] assumes the role of a witness, the rules that generally apply to other witness — rules that serve the truth-seeking function of the trial — are generally applicable to him as well."
3. *United States v. Robinson*, 485 U.S. 25 (1988). Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, *Griffin*, holds that the privilege against compulsory self-incrimination is violated. But where the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, there is no violation of the privilege.
4. *United States v. Cook*, 48 M.J. 64 (C.A.A.F. 1998). During closing argument, trial counsel asked the members to consider the accused's yawning during trial as being indicative of his guilt. The CAAF held that it was improper for the trial counsel to comment about the courtroom demeanor of the accused, but found the error to be harmless. The Court determined that the accused's acts were non-testimonial and therefore not protected by the Fifth Amendment. Regardless, the acts were not relevant to the issue of guilt or innocence. *See also United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999).
5. *United States v. Mobley*, 34 M.J. 527 (A.F.C.M.R. 1991), *aff'd*, 36 M.J. 34 (C.M.A. 1992) (summary disposition). Trial counsel asked rhetorical questions directed to accused during argument on findings, and then answered them himself in manner calculated to bring the accused's silence to the members' attention. "[A] trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense." Harmless error despite legally inappropriate comments.
6. *United States v. Kirks*, 34 M.J. 646 (A.C.M.R. 1992). Trial counsel improperly described non-testifying accused's demeanor as "[t]he iceman." Comments on a non-testifying accused's demeanor are objectionable on three grounds: 1) argues facts not in evidence; 2) violates Mil. R. Evid. 404(a) by using character evidence solely to prove guilt; and, 3) violates the Fifth Amendment. Defense counsel only objected on third ground, which was cured by an instruction. Other grounds were waived and not plain error. *See also United States v. Jackson*, 40 M.J. 820 (N.M.C.M.R. 1994) (trial counsel's argument on findings that accused's tears in court were tears of remorse and guilt was harmless error even though the accused's courtroom behavior off of the witness stand was legally irrelevant to the question of guilt).

7. *United States v. Carter*, 61 M.J. 30 (C.A.A.F. 2005). The CAAF held that the trial counsel's repeated comments about the "uncontroverted" and "uncontradicted" evidence during findings argument constituted an impermissible reference to the accused's exercise of his Fifth Amendment right not to testify. The trial counsel's comments on the defense's failure to present contradicting evidence were not tailored to address any weaknesses in the defense's cross-examination of the victim or the defense's efforts to impeach her; rather, since only the accused could controvert the victim, the trial counsel's comments in effect repeatedly drew the members' attention to the accused's failure to testify.
8. *United States v. Paige*, 67 M.J. 442 (C.A.A.F. 2009). The trial counsel, during closing arguments, argued that the evidence of the victim's condition was "uncontradicted." The trial counsel also incorrectly argued that Paige had to assert that his mistake was honest in order to qualify for the mistake of fact as to consent defense. The CAAF held that as to the uncontradicted comment, this was neither plain nor obvious error. Paige was not the only one with the information that could contradict the victim's condition because other witnesses saw her immediately before and during the rape. As to the mistake of fact defense comment, the error was plain and obvious, but it was harmless beyond a reasonable doubt.
9. *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009). During opening statements, the trial counsel told the members that Ashby never told anyone about the videotape of the incident. The trial counsel also told the members that when Ashby met with the Italian prosecutor, he was told that he had a right to remain silent, similar to American law, and that he invoked that right. The defense moved for a mistrial, which was denied. The trial counsel was required to redact her statement to the members. The defense was allowed to voir dire the members, which was declined. A curative instruction was given by the military judge. The CAAF found the comments made by the trial counsel were error, but that they were harmless beyond a reasonable doubt due to the curative efforts made by the military judge.

B. Silence after warnings.

1. *Doyle v. Ohio*, 426 U.S. 610 (1976). Use of accused's silence after *Miranda* warning to impeach later trial testimony as a fabrication violates due process.
2. *United States v. Riley*, 47 M.J. 276 (C.A.A.F. 1997). Under the circumstances of the case (no defense objection, no instruction to members regarding improper introduction of evidence, and weak evidence), admission of testimony by an investigator regarding the accused's invocation of the privilege against self-incrimination during questioning constituted plain error.
3. *United States v. Sidwell*, 51 M.J. 262 (C.A.A.F. 1999). When asked by the trial counsel what statements the accused made, the witness testified that the accused invoked "his rights." Defense counsel immediately objected and moved for a mistrial. Although the military judge denied the defense motion, he did strike the witnesses testimony, gave several curative instructions, and questioned the members to ensure they understood the instructions. The CAAF determined that error occurred, but considering the corrective action taken by the military judge and the facts of the case, the error was harmless. *Cf. United States v. Riley*, 47 M.J. 276 (C.A.A.F. 1997).

4. *United States v. Miller*, 48 M.J. 811 (N-M. Ct. Crim. App. 1998). Relying on *Riley*, the NMCCA held that the admission of the investigator's testimony that the accused terminated the interrogation materially prejudiced the substantial rights of the accused. The court also noted that the military judge failed to take the necessary steps to remedy the prejudice.

C. Silence before warnings.

1. Mil. R. Evid. 304(h)(3).
"Certain admissions by silence. A person's failure to deny an accusation of wrongdoing [while] . . . under official investigation . . . does not support an inference of an admission of the truth of the accusation."
2. *United States v. Cook*, 48 M.J. 236 (C.A.A.F. 1998). After being arrested and questioned by OSI investigators about a rape allegation, the accused went to a friend's house. The friend asked the accused if he committed the rape. The accused did not respond. At trial, the prosecution introduced this evidence and argued that the accused's failure to deny the allegation indicated guilt. The CAAF held that this evidence was irrelevant under Mil. R. Evid. 304(h)(3), even when the one asking the questions was a friend who was inquiring out of personal curiosity. The CAAF also held that the start of the OSI investigation was the triggering event for the Mil. R. Evid. 304(h)(3) protections.
3. *United States v. Alameda*, 57 M.J. 190 (C.A.A.F. 2002). Appellant's silence upon being informed that he was being apprehended for an "alleged assault" was not relevant since appellant had a history of domestic violence, including an incident two weeks prior to the attempted murder incident, therefore his failure to deny one or more of the "alleged assaults" to the arresting officer does not support an inference of guilt and is therefore not relevant. Since the military judge's admission into evidence of the appellant's silence was error, trial counsel's use of it in his closing argument was also error. Additionally, the military judge's instructions to the panel were "off the mark," since they only dealt with the appellant's silence at trial, and may have actually exacerbated the problem by indicating to panel members, by omission, that they could draw an adverse inference from appellant's silence during his apprehension.
4. *United States v. Ruiz*, 50 M.J. 518 (A.F. Ct. Crim. App. 1999), *aff'd*, 54 M.J. 138 (C.A.A.F. 2000). During cross-examination of the accused, the trial counsel questioned him about his failure to proclaim his innocence when confronted by investigators. The AFCCA held that under the circumstances, the questioning by trial counsel did not violate Mil. R. Evid. 304(h), because it was designed to highlight the differences between the testimonies of the prosecution witnesses and of the accused.
5. Use of accused's pre-arrest, pre-*Miranda* warning silence to impeach later trial testimony on self-defense is permissible.³¹

³¹ *Jenkins v. Anderson*, 447 U.S. 231 (1980) (accused failed to inform police about his self-defense claim for at least two weeks after murder. Prosecutor used this silence in his cross-examination of the defendant and in his closing argument); *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (defendant failed to tell anyone that the victim's shooting was an accident prior to receipt of the warnings). See also *State v. Easter*, 922 P.2d 1285 (Wash. 1996) (finding that the accused's pre-arrest silence cannot be used against him). In *Easter*, the accused was questioned at the accident scene, but he refused to answer any questions (not a custodial interrogation). During trial, the prosecutor argued that the accused's silence indicated he was being evasive to avoid alcohol detection. The Washington Supreme Court held

6. Use of accused's post-arrest, pre-*Miranda* warning silence to impeach trial testimony on self-defense is permissible; rules of evidence may address. *See Fletcher v. Weir*, 455 U.S. 603 (1982).

D. Invoking the right to counsel.

United States v. Gilley, 56 M.J. 113 (C.A.A.F. 2001). The standard for determining whether mentioning an accused's invocation of his right to counsel is improper is the same standard used for mentioning an accused's invocation of his right to remain silent. Here, no reversible error where: 1) defense counsel first elicited evidence of his client's invocation on cross-examination and did not object to the witness's response; 2) defense's theory "invited response" from trial counsel about accused's invocation; and, 3) invocation was not used as substantive evidence against accused.

E. Remedy for impermissible comments at trial.

1. *United States v. Garrett*, 24 M.J. 413 (C.M.A. 1987). Trial counsel erred by eliciting testimony from CID agent that accused had terminated their interview and asked for an attorney, but a mistrial was properly denied and the error cured by the judge's instructions.³²
2. *United States v. Palumbo*, 27 M.J. 565 (A.C.M.R. 1988). CID agent revealed to the court that accused asserted rights and declined to be interviewed. The military judge properly denied a mistrial and corrected the error by (1) immediately instructing members to disregard evidence and that accused had properly invoked rights; (2) obtaining affirmative response from court members that they understood and could follow instructions; (3) having defense counsel participate in drafting curative instruction; and, (4) finding trial counsel inadvertently introduced evidence.³³

F. The right extends through sentencing.

1. *Estelle v. Smith*, 451 U.S. 454 (1981). "We can discern no basis to distinguish between the guilt and penalty phases . . . so far as the protection of the Fifth Amendment privilege is concerned."
2. *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992). "We must emphasize that trial counsel can only argue that an accused lacks remorse when that inference can be fairly derived from evidence before the court-martial. It cannot arise solely from an accused's exercise of his or her rights."

XII. PROCEDURE

A. Discovery.

Mil. R. Evid. 304(d)(1): "*Disclosure*. Prior to arraignment, the prosecution shall disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel, and within the control of the armed forces."

that an accused's pre-arrest silence cannot be used against him/her. The court found that the right to silence is derived from the Fifth Amendment and not *Miranda*, and applies before an accused is in custody or is the subject of an investigation.

³² A good example of a curative instruction is contained in *United States v. Mobley*, 34 M.J. 527 (A.F.C.M.R. 1991).

³³ When defense does not request it, there is no need to reiterate instruction during final instructions. *See also United States v. Zaccheus*, 31 M.J. 766 (A.C.M.R. 1990).

Mil. R. Evid. 304(d)(2)(B): If not disclosed, judge may make such orders as required in the “interests of justice.”

B. Litigating the issues.

1. General Procedure.

- a.* Motions and objections. Defense must raise the motion prior to the plea or the motion is waived; good cause must be shown for an exception. Mil. R. Evid. 304(d)(2)(A).
- b.* Specificity. Judge may require defense to specify the grounds. Mil. R. Evid. 304(d)(3)
- c.* Evidence. The defense may present evidence to support its motion, including the testimony of the accused for the limited purpose of the motion. The accused may be cross-examined only on the matter to which he testified. Nothing said by the accused, either in direct or cross-examination, may be used against him for any purpose other than in a prosecution for perjury, false swearing, or false official statement. Mil. R. Evid. 304(f).
- d.* Burden. Once a motion or objection is raised by the defense, the prosecution has the burden of proving that the statement was voluntary by a preponderance of the evidence. Mil. R. Evid. 304(e).
- e.* If a statement is admitted into evidence, the defense shall be allowed to present evidence as to the voluntariness of the statement in an attempt to reduce the weight that the fact finder will give to it. Mil. R. Evid. 304(e)(2).
- f.* Rulings. Shall be ruled on prior to plea, unless good cause. Judge shall state essential findings of fact.³⁴
- g.* Guilty plea waives all objections to the admission of the statements.

2. Standing to challenge self-incrimination issues. *United States v. Jones*, 52 M.J. 60 (C.A.A.F. 1999). To perfect its case against the accused, the government negotiated with three “minor offenders” to testify against the accused. These witnesses did not have a formal grant of immunity. The unwritten agreement was that the government would not prosecute them if they accepted Article 15 punishment, paid restitution, and testified against the accused. On appeal, the accused argued that the government violated the witness’s self-incrimination rights, and therefore, their testimony should not have been admissible. The CAAF held that the accused did not have standing to challenge procedural violations of the self-incrimination rights of the witnesses, but may challenge statements that are involuntary due to “coercion and unlawful influence.” The court further determined that the even though the government’s actions “smelled bad” and resulted in *de facto* immunity, they did not constitute the requisite showing of prejudice.

3. Warnings and waivers at trial.

³⁴ Although the timing of essential findings is not specified by the MCM, they “should be” entered contemporaneously with a ruling on a suppression motion. *United States v. Doucet*, 43 M.J. 656 (N-M. Ct. Crim. App. 1995).

- a. Mil. R. Evid. 301(b)(2): The military judge should advise a witness of the right to decline to make an answer if the witness appears likely to incriminate himself.
 - b. Right against self-incrimination is a “fundamental constitutionally-mandated procedural right that can be waived only by an accused on the record.” Waiver will not be presumed by a silent or inadequate record.³⁵
- 4. Burden of proof.

Mil. R. Evid. 304(e): The burden of proof is on the prosecution by a preponderance of the evidence. It extends only to grounds raised.
- 5. Defense evidence on motions.

Mil. R. Evid. 304(f): Accused may testify for limited purpose.
- 6. Corroboration.
 - a. Mil. R. Evid. 304(g): “An admission or a confession . . . may be considered as evidence . . . only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted sufficiently to justify an inference of their truth. . . .” “If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence . . . only with respect to those essential facts . . . that are corroborated”
 - b. Procedure.

Corroborating evidence is usually introduced before the confession or admission is introduced, but the military judge may admit evidence subject to later corroboration.
 - c. *United States v. Rounds*, 30 M.J. 76 (C.M.A. 1990). Independent evidence of each and every element of the confessed offense is not required as a matter of military law. Generally speaking, it must “establish the trustworthiness of the” confession. Confession was sufficiently corroborated without independent evidence of ingestion of drugs when independent evidence showed accused had access and opportunity to ingest drugs at time and place where he confessed to using drugs.³⁶
 - d. *United States v. Duvall*, 47 M.J. 189 (C.A.A.F. 1997). A conviction cannot be based solely on a confession. Rather, some corroborative evidence must be introduced to the trier of fact pursuant to Mil. R. Evid. 304(g).

³⁵ *United States v. Adams*, 28 M.J. 576 (A.C.M.R. 1989) (judge’s failure to advise accused of his constitutional rights rendered guilty plea improvident).

³⁶ See also *United States v. Lawrence*, 43 M.J. 677 (A.F. Ct. Crim. App. 1995) (confession to cocaine use of four occasions sufficiently corroborated by recent urinalysis); *United States v. Maio*, 34 M.J. 215 (C.M.A. 1992); *United States v. Williams*, 36 M.J. 785 (A.C.M.R. 1993).

- e. *United States v. Hall*, 50 M.J. 247 (C.A.A.F. 1999). In a military judge alone trial, the trial counsel did not offer the same corroborating evidence on the merits that he did during proceedings on a defense motion to suppress the accused's confession. In affirming its holding in *Duvall* (corroborating evidence must be submitted to the trier-of-fact), the CAAF found that the government satisfied Mil. R. Evid. 304(g) and the confession was sufficiently corroborated, since the judge acknowledged that he considered the corroborating evidence for both the motion and the merits.
- f. *United States v. Swenson*, 51 M.J. 522 (A.F. Ct. Crim. App. 1999). Members convicted the accused of attempting to use LSD. The conviction was based upon a confession that was corroborated by a previous admission of LSD use. The AFCCA held that corroborating the accused's confession with a prior admission was proper so long as the prior admission was a statement of anticipated future conduct and not an admission of past criminal conduct. A statement of future criminal misconduct does not need to be corroborated; it can be used to corroborate a confession.
- g. *United States v. Cottrill*, 45 M.J. 485 (C.A.A.F. 1997). The corroborating evidence must raise only an inference of truth as to the essential facts admitted, which must be shown by a preponderance of the evidence. In *Cottrill*, there was sufficient independent physical evidence to corroborate the accused's pretrial admissions that he sexually assaulted his daughter. See also *United States v. O'Rourke*, 57 M.J. 636 (A. Ct. Crim. App. 2002)
- h. *United States v. Howe*, 37 M.J. 1062 (N.M.C.M.R. 1993), *overruled on other grounds*, *United States v. Driver*, 57 M.J. 760 (N-M. Ct. Crim. App. 2002). Trial counsel has a duty to withdraw charge based on uncorroborated admission or else inform military judge there is insufficient evidence to support it.
- i. *United States v. McCastle*, 40 M.J. 763 (A.F.C.M.R. 1994), *aff'd*, 43 M.J. 438 (C.A.A.F. 1996), *as modified on reconsideration*, 44 M.J. 77 (C.A.A.F. 1996). Corroboration was enough where the place the accused admitted to purchasing drugs was a well-known trafficking location, accused's description of the dealer matched the description of a known dealer at that location, and the dealer was frequently observed by authorities using the described vehicle to conduct drug sales.

1. Transactional. Immunity from trial by court-martial for one or more offenses under the code.
 2. Testimonial. “Use immunity” for testimony and any derivative evidence. Mil. R. Evid. 301(c)(1) and *Kastigar v. United States*, 406 U.S. 441 (1972).
 3. RCM 704 & Mil. R. Evid. 301.
- B. Authority to grant immunity.
1. General rule: only the GCMCA can grant immunity.
 2. To whom:
 - a. Persons subject to the UCMJ.
 - (1) Must relate to court-martial, not federal district court prosecution. RCM 704(c)(1).
 - (2) Insure DOJ has no interest in the case. AR 27-10, para. 2-4.
 - b. Persons not subject to the UCMJ.
 - (1) GCMCA can grant only with approval of U.S. Attorney General. RCM 704(c)(2).
 - (2) Procedures. AR 27-10, para. 2-4.
 - c. Delegation of authority not permitted. RCM 704(c)(3).
- C. Procedure.
1. Decision to grant immunity.
 - a. Unless limited by superior competent authority, the decision to grant immunity is a matter within the sole discretion of the GCMCA.
 - b. If a defense request to grant immunity has been improperly denied, the military judge may, upon motion by the defense, grant appropriate relief by directing that the proceedings against the accused be abated.
 - c. RCM 704(e): The military judge may grant such a motion upon findings that:
 - (1) The witness intends to invoke the right against self-incrimination . . . if called to testify; and
 - (2) The government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the government through its own overreaching, has forced the witness to invoke the privilege . . .; and,
 - (3) The witness’ testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source, and does more than merely affect the credibility of other witnesses.

- (2) Government can use neither the immunized testimony nor its fruits, to include any investigatory leads. It is a question of fact whether the government has a legitimate, independent source for its evidence. In *United States v. Boyd*, 27 M.J. 82 (C.M.A. 1988), the findings and sentence were set aside and charges dismissed because testimony of a witness (Wills) against the accused was derived from the prior immunized testimony of the accused against Wills. government did not meet its burden of showing that the accused's testimony did not contribute to Wills' decision to make a statement against the accused. See also *United States v. Mapes*, 59 M.J. 60 (C.A.A.F. 2003); but see *United States v. McGeeney*, 44 M.J. 418 (C.A.A.F. 1996).

b. Non-evidentiary use of immunized statements.

- (1) *United States v. Kastigar*, 406 U.S. 441 (1972). The Supreme Court held that prosecutorial authorities are prohibited from using testimony that is compelled by grants of immunity. In *United States v. Kimble*, 33 M.J. 284 (C.M.A. 1991), the CMA held that immunity protection described in *Kastigar* also extend to "non-evidentiary uses" of immunized statements, such as the decision to prosecute. See also *United States v. Mapes*, 59 M.J. 60 (C.A.A.F. 2003).
- (2) Accordingly, the impact of testimonial immunity goes beyond the admissibility of certain statements. The government must show by preponderance of the evidence that the decision to prosecute was untainted by evidence received as a result of immunity grant. See *United States v. McGeeney*, 41 M.J. 544 (N-M. Ct. Crim. App. 1994); see also *Cunningham v. Gilevich*, 36 M.J. 94 (C.M.A. 1992).
- (3) If the government cannot show that the decision to prosecute the accused was made before immunized statements were provided by accused, the government may not prosecute unless it can show, by a preponderance of the evidence, that the prosecutorial decision was untainted by the immunized testimony. See *United States v. Olivero*, 39 M.J. 264 (C.M.A. 1994).
- (4) *United States v. Olivero*, 39 M.J. 246 (C.M.A. 1994). The convening authority gave appellant testimonial immunity regarding his knowledge of other airman's (TSgt S) drug use. Government did not certify, seal, or memorialize any evidence of appellant's own drug use prior to this grant. Contrary to his oral, unsworn statement initially provided after immunity grant, the appellant testified at TSgt S's Article 32 hearing that he had never used drugs with TSgt S. Four days later, Olivero was charged with drug use and perjury. At trial, Olivero moved to dismiss claiming the decision to prosecute was wrongly based on his immunized statements. The CMA agreed. Conviction set aside.

Two practice points should be taken from *Olivero*:

- (a) If possible, prior to providing a grant of immunity, any evidence that will be used in a subsequent prosecution of the grantee should be segregated and sealed to foreclose later issues regarding improper non-evidentiary use of immunized statements; and,
 - (b) Trial and defense counsel and military judges should make distinctions in their arguments, motions, and rulings between evidentiary and non-evidentiary uses of disputed immunized statements.
 - (5) *Olivero* is consistent with *Cunningham v. Gilevich*, 36 M.J. 94 (C.M.A. 1992), where the CMA ruled that prosecutions may not “result from” statements taken in violation of Article 31(d).
 - (6) *United States v. Youngman*, 48 M.J. 123 (C.A.A.F. 1998). In response to a defense motion, the military judge dismissed only those charges derived directly from the accused’s immunized statement. The CAAF held that the military judge abused his discretion by not determining if the accused’s immunized statement and evidence derived therefrom played “any role” in the decision to prosecute all of the offenses.
- 2. Immunity does not supplant the attorney-client privilege. A witness, testifying under a grant of immunity can still assert an attorney-client privilege. Further, disclosure of attorney-client confidences while testifying under a grant of immunity does not constitute a voluntary waiver of the attorney-client privilege. See *United States v. Romano*, 46 M.J. 269 (C.A.A.F. 1997).

F. Use of immunized testimony “against” the witness.

- 1. Impeachment. Immunized testimony from prior court-martial cannot be used to impeach an accused in later court-martial. *United States v. Daley*, 3 M.J. 541 (A.C.M.R. 1977).
- 2. Post-Trial Matters. Immunized testimony can be used by an SJA to refute claims in a clemency petition that the terms of the immunity agreement were breached. The CMA termed these “matters . . . collateral to a criminal trial.” *United States v. Vith*, 34 M.J. 277 (C.M.A. 1992) (Judge Gierke, concurring in the result, disagreed, finding this limited use violated the Fifth Amendment).
- 3. Subsequent Prosecutions. Neither type of immunity bars prosecution for perjury, false swearing, false official statement, or failure to comply with an order to testify. RCM 704(b); Mil. R. Evid. 301(c)(1).

G. Standing to object to immunity grants.

United States v. Martinez, 19 M.J. 744 (A.C.M.R. 1984). Unless the accused is denied due process or a fair trial, he is without standing to challenge a grant of immunity to those who testify against him.

H. Inadvertent immunity.

- 1. *De facto* immunity.
 - a. A person other than GCMCA may create a situation of *de facto* immunity when he or she:
 - (1) manifests apparent authority to grant immunity;

- (2) makes a representation that causes the accused to honestly and reasonably believe that he will not be prosecuted if he fulfills a certain condition;
- (3) has at least the tacit approval of the GCMCA; and,
- (4) the accused relies to his or her detriment on the representations. An accused may complete the creation of a *de facto* grant of immunity when he relies on the representation to his detriment by actually fulfilling the condition suggested by the government.

b. Analysis.

- (1) Where an accused honestly and reasonably believes that an official has promised him transactional immunity and that official has the lawful authority to do so, then the promise is the functional equivalent of a grant of immunity.³⁷
- (2) However, statements by an official will not provide a foundation for a claim of *de facto* immunity absent some measure of detrimental reliance by the accused.³⁸
- (3) Despite a showing of detrimental reliance, remedial measures by the military judge at trial may still permit prosecution.³⁹

³⁷ *Samples v. Vest*, 38 M.J. 482, 487 (C.M.A. 1994); see also *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982) (SJA oral promise of immunity to officer suspected of espionage enforced on grounds of due process); *United States v. Wagner*, 35 M.J. 721 (A.F.C.M.R. 1992) (unit commander's agreement not to prosecute accused if he refrained from further child sex abuse and got treatment created *de facto* immunity that was not breached even though accused discontinued counseling after 15 months); *United States v. Jones*, 52 M.J. 60 (C.A.A.F. 1999) (*de facto* transactional immunity resulted when the Chief of Military Justice and DSJA entered into an unwritten agreement with three co-accused that the government would not court-martial them if they accepted Article 15 punishment, paid restitution, and testified against the accused.)

An early discussion of *de facto* immunity was set forth in *United States v. Churnovic*, 22 M.J. 401 (C.M.A. 1986). Representations by a ship's senior NCO that ship's XO had promised no adverse action would be taken against person who gave information about or turned in drugs was an unlawful inducement that rendered the accused's statements and all derivative evidence inadmissible under Article 31(d). In dicta, Chief Judge Everett's lead opinion stated that "No reason exists why a promise of immunity cannot be enforced if it was made with express or tacit authorization from the ship's captain, who would convene special court-martial to try members of his crew." The defense in *Churnovic* failed to meet burden of showing immunity was in fact promised. Note: RCM 704(c) discussion indicates "equitable immunity" is possible.

³⁸ *United States v. Conklan*, 41 M.J. 800 (A. Ct. Crim. App. 1995). Representations by a battalion commander, indicating that the Army would not prosecute accused for carnal knowledge offense, did not constitute offer of *de facto* transactional immunity, in light of commander's failure to call upon accused to fulfill any condition in exchange for whatever benefit was conferred. Representation was merely gratuitous statement of present intent subject to change in sole discretion of the convening authority. The accused's reenlistment after commander's statement was not sufficient detrimental reliance to give rise to *de facto* immunity; reenlistment was not bargained for or otherwise contemplated as a condition of government's initial decision not to prosecute.

³⁹ *United States v. McKeel*, 63 M.J. 81 (C.A.A.F. 2006). Accused admitted to a military investigator that he engaged in sexual intercourse with a female shipmate when she was too intoxicated to consent. When the investigative report was forwarded to the chief petty officer who served as the ship's senior enlisted person responsible for military justice matters he promised the accused that if he accepted nonjudicial punishment and waived his right to an administrative discharge board there would no court-martial and the accused would be administratively separated from the military. The accused agreed and pled guilty to various charges, including rape, during a nonjudicial punishment proceeding. He was then processed for administrative separation and he waived his right to a separation

2. Unlawful inducement - Article 31(d).
 - a. A situation akin to equitable testimonial immunity arises following violations of Article 31(d).
 - b. To be an unlawful inducement under Article 31(d), the improper action must be undertaken by someone acting in a law enforcement capacity or in a position superior to the person making the confession.⁴⁰
3. Regulatory Immunity. DoD and DA Family advocacy regulations generally do not create a bar to prosecution against self-referred child abusers. Further, consideration and adherence to regulatory policies and criteria set out in these regulations are not conditions precedent to disposition by courts-martial. Although DoD and DA policy may be internally inconsistent in that they both encourage and deter self-referral, they do not infringe on any rights recognized by the Constitution, the UCMJ, or the CAAF decision.⁴¹

XIV. CONCLUSION

board. When the administrative separation packet was received by the GCMCA, who had no prior knowledge of the charges against the accused, the GCMCA declined to approve the separation, and initiated proceedings that resulted in the accused's GCM.

At trial, the defense moved to dismiss the charges based upon a promise of immunity. The trial judge denied the motion, but ruled that (1) the statements made by the accused during the NJP proceeding could not be admitted, (2) the prosecution could not introduce evidence of the accused's decision to waive his right to a board or other matters related to his administrative separation, and (3) that the accused would receive full sentence credit under *Pierce* for punishment received as a result of the earlier NJP proceedings. The CAAF upheld the conviction because the accused had not demonstrated detrimental reliance in the face of the remedial actions taken at trial.

⁴⁰ *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992) (civilian U.S. government intelligence agents interviewed the accused. Their interviews were not subject to an unlawful inducement analysis under Article 31(d)).

On the other hand, a USMC Commander's (O-6) assurances to two accused that "they had done nothing wrong and should provide testimony before an investigative board" did amount to unlawful inducement in *Cunningham v. Gilevich*, 36 M.J. 94 (C.M.A. 1992). The accused's subsequent waivers were found to be without effect. The action by the Colonel rendered the accused's statements, and all evidence derived therefrom, inadmissible.

⁴¹ *United States v. Corcoran*, 40 M.J. 478 (C.M.A. 1994); *see also United States v. Martindale*, 40 M.J. 348 (C.M.A. 1994) (evidence of accused incriminating statements not barred by SecNavInst 1752.3, The Family Advocacy Program); *but see United States v. Bell*, 30 M.J. 168 (C.M.A. 1990) (directive language of USMC policy regarding rehabilitation and retention of sexual offenders necessitated documented pretrial diversion consideration).



RIGHT TO COUNSEL AND IAC



TAB M
Is Currently Under Construction



SEARCH AND SEIZURE

TAB N

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**MAJ Jeremy W. Steward
Summer 2012**

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I. INTRODUCTION.

A. The Fourth Amendment protects against unreasonable searches and seizures and requires warrants to be supported by probable cause. Although there is debate as to whether it applies to military members, military courts act as if it does. The Fourth Amendment, its requirements, and exceptions, are codified in military rules of evidence 311-317.

B. Text: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

C. The Fourth Amendment in the Military.

1. The Fourth Amendment applies to soldiers. *United States v. Stuckey*, 10 M.J. 347, 349 (C.M.A. 1981). *But see* Lederer and Borch, *Does the Fourth Amendment Apply to the Armed Forces?* 144 Mil. L. Rev. 110 (1994) (this article points out that the Supreme Court has never expressly applied the Fourth Amendment to the military).

2. The balancing of competing interests is different in military society. A soldier’s reasonable expectation of privacy must be balanced against:

- a) National security;
- b) Military necessity (commander’s inherent authority to ensure the safety, security, fitness for duty, good order and discipline of his command);
- c) Effective law enforcement

3. The Military Rules of Evidence (Mil. R. Evid.) codify constitutional law.

a) Military Rules of Evidence that codify Fourth Amendment principles:

- (1) Mil. R. Evid. 311, Evidence Obtained From Unlawful Searches and Seizures.
- (2) Mil. R. Evid. 312, Body Views and Intrusions.
- (3) Mil. R. Evid. 313, Inspections and Inventories in the Armed Forces.
- (4) Mil. R. Evid. 314, Searches Not Requiring Probable Cause.
- (5) Mil. R. Evid. 315, Probable Cause Searches.
- (6) Mil. R. Evid. 316, Seizures.
- (7) Mil. R. Evid. 317, Interception of Wire and Oral Communications.

b) Which law applies -- recent constitutional decisions or the Military Rules of Evidence?

- (1) General rule: the law more advantageous to the accused will apply. Mil. R. Evid. 103(a) Drafters’ Analysis. MCM, App. 22.
- (2) Minority view: “These ‘constitutional rules’ of the Military Rules of Evidence were intended to keep pace with, and apply to the military, the burgeoning body of interpretive constitutional law . . . not to cast in legal or evidentiary concrete the Constitution as it was known in 1980.” *United States v. Postle*, 20 M.J. 632, 643 (N.M.C.M.R. 1985).

(3) Some Military Rules of Evidence provide exceptions that permit application of recent constitutional decisions to the military. *See* Mil. R. Evid. 314(k) (searches of a type valid under the Constitution are valid in military practice, even if not covered by the Military Rules of Evidence).

II. LITIGATING FOURTH AMENDMENT VIOLATIONS.

A. A person must claim that his own expectation of privacy was violated to assert a Fourth Amendment claim. The prosecution is required to disclose evidence seized from an accused prior to arraignment. The prosecution generally has the evidentiary burden (by a preponderance of evidence) that the search/seizure was proper.

B. Standing or “Adequate Interest.”

1. General rule. To raise a violation of the Fourth Amendment, the accused’s own constitutional rights must have been violated; he cannot vicariously claim Fourth Amendment violations of the rights of others.

a) *Rakas v. Illinois*, 439 U.S. 128, 134 (1978). Police seized sawed-off shotgun and ammunition in illegal search of car. Only owner was allowed to challenge admissibility of evidence seized. Defendant passenger lacked standing to make same challenge.

b) *United States v. Padilla*, 508 U.S. 77 (1993). Accused lacked standing to challenge search of auto containing drugs driven by a conspirator in furtherance of the conspiracy, despite accused’s supervisory control over auto.

c) *But see Brendlin v. California*, 551 U.S. 249 (U.S. 2007). When police make a traffic stop, a passenger in the car, like the driver, is seized for Fourth Amendment purposes and may challenge the stop’s constitutionality.

2. Lack of standing is often analyzed as lack of a reasonable expectation of privacy. *See United States v. Padilla*, 508 U.S. 77 (1993) and *United States v. Salazar*, 44 M.J. 464 (C.A.A.F. 1996).

C. Motions, Burdens of Proof, and Standards of Review.

1. Disclosure by prosecution. Prior to arraignment, the prosecution must disclose to the defense all evidence seized from the person or property of the accused that it intends to offer at trial. Mil. R. Evid. 311(d)(1). See Appendix A for sample disclosure.

2. Motion by the defense. The defense must raise any motion to suppress evidence based on an improper search or seizure prior to entering a plea. Absent such a motion, the defense may not raise the issue later, unless permitted to do so by the military judge for good cause. Mil. R. Evid. 311(d)(2).

3. Burden of proof. When a motion has been made by the defense, the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure or that some other exception applies. Mil. R. Evid. 311(e)(1).

a) Exception: Consent. Government must show by clear and convincing evidence that the consent to search was voluntary. Mil. R. Evid. 314(e)(5).

b) Exception: “Subterfuge” Rule. If the rule is triggered, the prosecution must show by clear and convincing evidence that the primary purpose of the government’s intrusion was administrative and not a criminal search for evidence. Mil. R. Evid. 313(b).

- c) Exception: Eyewitness Identification. If military judge determines identification is result of lineup conducted w/o presence of counsel, or appropriate waiver, subsequent identification is unlawful unless Gov't can establish by clear and convincing evidence that eyewitness identification is not tainted. Mil. R. Evid. 321(d)(1).
4. Effect of guilty plea.
- a) A plea of guilty waives all issues under the Fourth Amendment, whether or not raised prior to the plea. Mil. R. Evid. 311(i).
 - b) Exception: conditional guilty plea approved by military judge with prior consent from the convening authority. R.C.M. 910(a)(2).
5. Appellate Standard of Review. For Fourth Amendment issues, the standard of review for a military judge's evidentiary ruling is an abuse of discretion standard. *United States v. Owens*, 51 M.J. 204, 209 (C.A.A.F. 1999). Within this context, the abuse of discretion standard becomes a mixed question of fact and law. A military judge's "[f]indings of fact will not be overturned unless they are clearly erroneous or unsupported by the record." *Id.* A military judge's conclusions of law are reviewed under the *de novo* standard. The appellate courts will reverse for an abuse of discretion only if "the military judge's findings of fact are clearly erroneous or if his [or her] decision is influenced by an erroneous view of the law." *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995).

III. REASONABLE EXPECTATION OF PRIVACY.

A. Government Action.

1. The Fourth Amendment does not apply unless there is a *governmental* invasion of privacy. *Rakas v. Illinois*, 439 U.S. 128, 140-49 (1978).
2. Private searches are not covered by the Fourth Amendment.
 - a) Searches by persons unrelated to the government are not covered by the Fourth Amendment.
 - (1) *United States v. Jacobsen*, 466 U.S. 109 (1984). No government search occurred where Federal Express employees opened damaged package.
 - (2) *United States v. Hodges*, 27 M.J. 754 (A.F.C.M.R. 1988). United Parcel Service employee opened package addressed to accused as part of random inspection. Held: this was not a government search.
 - b) Searches by government officials not acting in official capacity are not covered by the Fourth Amendment.
 - (1) *United States v. Portt*, 21 M.J. 333 (C.M.A. 1986). Search by military policeman acting in non-law enforcement role is not covered by the Fourth Amendment.
 - (2) *United States v. Daniels*, 60 M.J. 69 (C.A.A.F. 2004). Whether a private actor serves as an agent of the gov't hinges not on the motivation of the individual, but on the degree of the government's participation/involvement.

c) Searches by informants are covered by the Fourth Amendment. *But see United States v. Aponte*, 11 M.J. 917 (A.C.M.R. 1981). Soldier “checked” accused’s canvas bag and found drugs after commander asked soldier to keep his “eyes open.” Held: this was not a government search because soldier was not acting as agent of the commander.

d) Searches by AAFES detectives are covered by Fourth Amendment. *United States v. Baker*, 30 M.J. 262 (C.M.A. 1990). Fourth Amendment extends to searches by AAFES store detectives; *Baker* overruled earlier case law that likened AAFES personnel to private security guards.

3. Foreign searches are not covered by Fourth Amendment.

a) Searches by U.S. agents abroad. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Fourth Amendment does not apply to search by U.S. agents of foreigner’s property located in a foreign country.

b) Searches by foreign officials.

(1) The Fourth Amendment is inapplicable to searches by foreign officials unless U.S. agents “participated in” the search. Mil. R. Evid. 311(c) and 315(h)(3).

(a) “Participation” by U.S. agents does not include:

(i) Mere presence.

(ii) Acting as interpreter.

(b) *United States v. Morrison*, 12 M.J. 272 (C.M.A. 1982). Fourth Amendment did not apply to German search of off-post apartment, even though military police provided German police with information that led to search.

(c) *United States v. Porter*, 36 M.J. 812 (A.C.M.R. 1993). Military police officer participated in Panamanian search by driving accused to Army hospital, requesting blood alcohol test, signing required forms and assisting in administering test.

(2) A search by foreign officials is unlawful if the accused was subjected to “gross and brutal maltreatment.” Mil. R. Evid. 311(c)(3).

B. Reasonable Expectation of Privacy (REP).

1. The Fourth Amendment only applies if there is a reasonable expectation of privacy. In *United States v. Jones*, 2012 WL 171117 at 7 (U.S. Dist. Col.), the Court said there is not one “exclusive” test for reasonable expectation of privacy. The Court specifically acknowledged the historical trespass doctrine and the *Katz* expectation of privacy test.

a) Traditional trespass doctrine. “[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas (‘persons, houses, papers, and effects’) it enumerates.” *United States v. Jones*, 2012 WL 171117 at 4 (U.S. Dist. Col.). In *Jones*, the Court found an unlawful search when police placed a GPS device on a car without a proper warrant. “The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.” *Jones* at 3.

b) The *Katz* test

(1) In *Katz*, the Court added to the trespass doctrine by finding an expectation of privacy in a conversation in a phone booth. Even though the warrantless eavesdropping of the phone call did involve a physical trespass, Justice Brennan's concurring opinion said the "Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). In *United States v. Jones*, 2012 WL 171117 at 5 (U.S. Dist. Col.), the Court said "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test."

(2) *Katz* created a two-part test to determine if an expectation of privacy is reasonable :

(a) The person must have an actual subjective expectation of privacy; and,

(b) Society must recognize the expectation as objectively reasonable.

2. Deployed environment.

(a) The Fourth Amendment applies in a combat zone. "[T]here is no general exception for locations or living quarters in a combat zone." *See US v. Huntzinger*, 69 M.J. 1, 5 (C.A.A.F. 2010).

3. Examples of areas with no REP

a) "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967).

(1) Open fields. The Fourth Amendment does not apply to open fields. Mil. R. Evid. 314(j).

(a) *Hester v. United States*, 265 U.S. 57 (1924). Open fields are not "persons, houses, papers, and effects" and thus are not protected by the Fourth Amendment.

(b) *United States v. Dunn*, 480 U.S. 294 (1987). Police intrusion into open barn on 198-acre ranch was not covered by the Fourth Amendment; barn was not within "curtilage." *Dunn* articulates a 4-part test to define "curtilage."

(i) The proximity of the area to be curtilage to the home;

(ii) Whether the area is included within an enclosure surrounding the home;

(iii) The nature of the uses to which the area is put;
AND

(iv) The steps taken by the resident to protect the area from observation by people passing by.

(2) Abandoned property. Mil. R. Evid. 316(d)(1).

- (a) Garbage. *California v. Greenwood*, 486 U.S. 35 (1988). There was no expectation of privacy in sealed trash bags left for collection at curbside.
 - (b) Clearing quarters. *United States v. Ayala*, 26 M.J. 190 (C.M.A. 1988). There was no reasonable expectation of privacy in blood stains found in quarters accused was clearing when accused removed majority of belongings, lived elsewhere, surrendered keys to cleaning team, and took no action to protect remnants left behind.
 - (c) Voluntarily abandoned property. *United States v. Flores*, 64 M.J. 451 (C.A.A.F. 2007). An accused has no privacy interest in voluntarily abandoning his property prior to a search, and subsequently lacks standing to complain of the search or seizure of such property.
 - (d) Lost computer. *United States v. Michael*, 66 M.J. 78 (C.A.A.F. 2008). A government interest in safeguarding property outweighs reduced expectation of privacy in laptop computer left in restroom by a student at an entry-level school.
- (3) Aerial observation.
- (a) *California v. Ciraolo*, 476 U.S. 207 (1986). Observation of a fenced-in marijuana plot from an airplane was not a search.
 - (b) *Florida v. Riley*, 488 U.S. 445 (1989). Observation of a fenced-in marijuana greenhouse from a hovering helicopter was not a search.
- (4) Peering into Automobiles. *United States v. Owens*, 51 M.J. 204 (C.A.A.F. 1999). Peering into an open door or through a window of an automobile is not a search. *See also United States v. Richter*, 51 M.J. 213 (C.A.A.F. 1999). If the car is stopped by a law enforcement official and then peered into, the investigative stop must be lawful.
- (5) The “passerby.”
- (a) *United States v. Wisniewski*, 21 M.J. 370 (C.M.A. 1986). Peeking through a 1/8 inch by 3/8 inch crack in the venetian blinds from a walkway was not a search.
 - (b) *United States v. Kaliski*, 37 M.J. 105 (C.M.A. 1993). Security police’s view through eight to ten inch gap in curtains in back patio door was unlawful search because patio was not open to public.
- (6) Private dwellings. *Minnesota v. Carter*, 525 U.S. 83 (1998). Cocaine distributors were utilizing another person’s apartment to bag cocaine. The distributors were in the apartment for two and a half hours and had no other purpose there than to bag the cocaine. Supreme Court held that even though the drug distributors were in private residence at consent of owner, they had no expectation of privacy in the apartment, and police discovery of their activity was not a Fourth Amendment search.
- b) Plain view. Mil. R. Evid. 316(d)(4)(c).

(1) General rule. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *United States v. Fogg*, 52 M.J. 144 (C.A.A.F. 1999). Property may be seized when:

- (a) The property is in plain view;
- (b) The person observing the property is lawfully present; and,
- (c) The person observing the property has probable cause to seize it.

(2) “Inadvertence” is not required for plain view seizure. *Horton v. California*, 496 U.S. 128 (1990).

(3) The contraband character of the property must be readily apparent. *Arizona v. Hicks*, 480 U.S. 321 (1987). Policeman lawfully in accused’s home moved stereo turntable to check serial number to identify whether it was stolen; seizure was unlawful because the serial number was not in plain view and the lifting of the turntable was illegal search.

(4) Plain feel. Police may seize contraband detected through the sense of touch during a stop and frisk if its contraband nature is readily apparent. *Minnesota v. Dickerson*, 508 U.S. 366 (1993). Police officer felt lump of cocaine in accused’s pocket during pat down search and seized it. Seizure was held unconstitutional because the contraband nature of the lump was not “readily apparent.” *See also United States v. Bond*, 529 U.S. 334 (2000) (finding border agent’s squeeze of bus passenger’s bag unreasonable absent individualized suspicion).

c) Plain view and electronic evidence. The Fourth Amendment’s application to the digital world is not always as simple as applying existing “brick and mortar” precedent to the digital world. For all areas involving digital evidence (REP, plain view, child pornography probable cause, etc.) be sure to check recent case law and the Department of Justice’s current electronic Search and Seizure Manual, located at www.cybercrime.gov/ssmanual/index.html.

(1) *United States v. Comprehensive Drug Testing (CDT), Inc.*, 621 F.3d 1162 (9th Cir. 2010). In this opinion, the court revised its previous CDT opinion that said the government had to waive plain view in all digital evidence cases, as well use a taint team to segregate all non-responsive data in digital searches. This revised opinion moved those two major new requirements into a five judge concurring opinion. The 9th Circuit’s original restrictive position on plain view was not a majority view, but the concerns of the court about plain view turning digital searches into “general warrants” with no particularity requirement is shared by nearly all courts to address the issue.

- (2) For the current majority, and less restrictive, position on applying the plain view doctrine in electronic evidence cases, *see U.S. v. Mann*, 592 F.3d 779 (7th Cir. 2010)(advocating an incremental, common law approach to adapting plain view to electronic evidence); *U.S. v. Williams*, 592 F.3d 511, 522 (4th Cir. 2010) (“ Once it is accepted that a computer search must, by implication, authorize at least a cursory review of each file on the computer, then the criteria for applying the plain-view exception are readily satisfied.”). The only military case directly on point follows the *Mann* and *Williams* logic, but it is unpublished. *See U.S. v. Washington*, 2011 WL 498325 (A. Ct. Crim. App.).
- d) Bank records.
- (1) *United States v. Wooten*, 34 M.J. 141 (C.M.A. 1992). No reasonable expectation of privacy exists in bank records. Even though records were obtained in violation of financial privacy statute, exclusion of evidence was inappropriate, because statute did not create Fourth Amendment protection.
- (2) *United States v. Dowty*, 48 M.J. 102 (C.A.A.F. 1998). Servicemember may avail himself of the Right to Financial Privacy Act (RFPA), to include seeking federal district court judge to quash subpoena for bank records. However, Article 43, UCMJ, statute of limitations is tolled during such litigation.
- e) Enhanced senses. Use of “low-tech” devices to enhance senses during otherwise lawful search is permissible.
- (1) Dogs.
- (a) *United States v. Place*, 462 U.S. 696 (1983). There is no expectation of privacy to odors emanating from luggage in a public place. “Low-tech” dog sniff is not a search (no Fourth Amendment violation).
- (b) *United States v. Alexander*, 34 M.J. 121 (C.M.A. 1992). Dog sniff in common area does not trigger Fourth Amendment.
- (c) *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981). Use of drug dogs at health and welfare inspection is permissible. Dog is merely an extension of human sense of smell.
- (d) *See* AR 190-12 (4 Jun. 2007), Military Working Dog Program. Drug detector dogs are not to be used to inspect people. See AR 190-12 at para 4-9.c.
- (2) Flashlights. *Texas v. Brown*, 460 U.S. 730 (1983). Shining flashlight to illuminate interior of auto is not a search.
- (3) Binoculars. *United States v. Lee*, 274 U.S. 559 (1927). Use of field glasses or binoculars is not a search.
- (4) Cameras. *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986). Aerial photography with “commercially available” camera was not a search, but use of satellite photos or parabolic microphones or other “high-tech devices” would be a search.

(5) Thermal Imaging Devices. *Kyllo v. United States*, 533 U.S. 27 (2001). Supreme Court ruled that police use of thermal imaging device without a warrant was unreasonable. The thermal imaging device detected higher than normal heat radiating from house. Heat source was lamps used for growing marijuana in private dwelling. The Court found use of thermal imaging device during surveillance was a “search” and, absent a warrant, presumptively unreasonable.

f) Interception of wire and oral communications. Communications are protected by the Fourth Amendment. *Katz v. United States*, 389 U.S. 347 (1967).

(1) One party may consent to monitoring a phone conversation.

(a) *United States v. Caceras*, 440 U.S. 741 (1979). A person has no reasonable expectation that a person with whom she is conversing will not later reveal that conversation to police.

(b) *United States v. Parrillo*, 34 M.J. 112 (C.M.A. 1992). There is no reasonable expectation of privacy as to contents of telephone conversation after it has reached other end of telephone line.

(c) *United States v. Guzman*, 52 M.J. 218 (C.A.A.F. 2000). There are still regulatory requirements for (one-party) consensual wiretapping but exclusion of evidence is not proper remedy except in cases where violation of regulation implicates constitutional or statutory rights.

(2) The “bugged” informant. *United States v. Samora*, 6 M.J. 360 (C.M.A. 1979). There is no reasonable expectation of privacy where a “wired” informant recorded conversations during drug transaction.

(3) Special rules exist for the use of wiretaps, electronic and video surveillance, and pen registers/trap & trace devices. Rules for video surveillance apply if “communications” are recorded.

(a) Federal statutes provide greater protections than the Fourth Amendment. See 18 U.S.C. §§ 2510-22, 2701-11, and 3121-27 (2000). The statutory scheme is referred to as the Electronic Communications Privacy Act (ECPA).

(i) The ECPA prohibits the unauthorized interception of wire and oral communications. 18 U.S.C. § 2511 (2000).

(ii) The ECPA contains its own exclusionary rule in the event of violation. 18 U.S.C. § 2515 (2000).

(iii) The ECPA applies to private searches, even though such searches are not covered by the Fourth Amendment. *People v. Otto*, 831 P.2d 1178 (Cal. 1992).

(b) Approval process requires coordination with HQ, USACIDC and final approval from DA Office of General Counsel. *See* Mil. R. Evid. 317; AR 190-53, Interception of Wire and Oral Communications for Law Enforcement Purposes (3 Nov. 1986).

(c) An overheard telephone conversation is not an “interception” under the statute. *United States v. Parillo*, 34 M.J. 112 (C.M.A. 1992).

(d) See Clark, *Electronic Surveillance and Related Investigative Techniques*, 128 MIL. L. REV. 155 (1990).

(4) The USA PATRIOT ACT has enlarged the government’s ability to access electronic communications and stored information. For details on the Act, see www.cybercrime.gov/cclaws.html.

4. REP and government property

a) MRE baseline on government property generally

(1) Mil. R. Evid. 314(d) and Mil. R. Evid. 316(d)(3) – Probable cause and warrants are not required to search government property that has no expectation of privacy.

(2) Mil. R. Evid. 314(d) and analysis - There is a rebuttable presumption of no expectation of privacy in government property not issued for personal use. Wall and floor lockers are normally issued for personal use and have a rebuttable presumption of an expectation of privacy. Whether or not government property was issued for personal use “depends on the facts and circumstances at the time of the search.”

(3) Normally a person does not have a reasonable expectation of privacy in government property that is not issued for personal use. *United States v. Weshenfelder*, 43 C.M.R. 256 (1971).

b) Federal case law on expectation of privacy in government workplace

(1) *O’Connor v. Ortega*, 480 U.S. 709 (1987) (plurality opinion). Seminal case on balancing the role of government as employer and as law enforcement. A reasonable expectation of privacy in government workplace depends on the “operational realities” of the workplace. If there is an expectation of privacy, and the reason for the search is “for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, [the search] should be judged by the standard of reasonableness under all the circumstances.” This standard of reasonableness does not require probable cause or a warrant, but the search must be reasonable in its inception and scope.

(2) *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010). Court’s first case on reasonable expectation of privacy (REP) and electronic evidence/digital devices. Issue was a civilian police department search of an officer’s department issued pager transcripts. The 9th Circuit found a REP under the *Ortega* test because a supervisor’s actions changed the “operational realities” of the department’s policies. The Supreme Court cautioned “[a] broad holding concerning employees’ privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted. It is preferable to dispose of this case on narrower grounds.” The Court reviewed the 9th Circuit’s REP analysis, but did not decide that issue, but assumed there was a REP. The Court then found the search reasonable under the *Ortega* “non-investigatory, work-related purpose” test).

(3) *United States v. Muniz*, 23 M.J. 201 (C.M.A. 1987). No expectation of privacy existed in locked government credenza when commander performed search for an administrative purpose.

(4) *United States v. Craig*, 32 M.J. 614 (A.C.M.R. 1991). No expectation of privacy existed in government desk at installation museum where search was conducted by sergeant major.

c) Barracks rooms.

(1) There generally is a reasonable expectation of privacy in items in a barracks room. *See* Mil. R. Evid. 314(d).

(2) *United States v. McCarthy*, 38 M.J. 398 (C.M.A. 1993). Warrantless intrusion and apprehension in barracks upheld. Court rules there is no reasonable expectation of privacy in barracks. *But see United States v. Curry*, 46 M.J. 733 (N-M. Ct. Crim. App. 1997) *aff'd* 48 M.J. 115 (C.A.A.F. 1998) (per curiam). No need to read *McCarthy* so broadly: according to Navy Court, there is, instead, a *reduced* expectation of privacy in a barracks room.

(3) *United States v. Battles*, 25 M.J. 58 (C.M.A. 1987). Drugs discovered during 0300 hours “inspection” in ship’s berthing area and box near a common maintenance locker were admissible because there was no reasonable expectation of privacy in these areas.

5. Electronic Evidence

a) The Fourth Amendment’s application to the digital world is not always as simple as applying existing “brick and mortar” precedent to the digital world. For all areas involving digital evidence (REP, plain view, child pornography probable cause) be sure to check recent case and the Department of Justice’s current electronic Search and Seizure Manual, located at www.cybercrime.gov/ssmanual/index.html.

b) E-mail and servers

(1) *United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996). Accused had reasonable expectation of privacy in electronic mail transmissions sent, received and stored on the AOL computer server. Like a letter or phone conversation, a person sending e-mail enjoys a reasonable expectation of privacy that police will not intercept the transmission without probable cause and a warrant.

(2) *United States v. Monroe*, 52 M.J. 326 (C.A.A.F. 2000). Accused did not have a reasonable expectation of privacy in e-mail mailbox on government server which was the e-mail host for all “personal” mailboxes and where users were notified that system was subject to monitoring.

(3) *United States v. Long*, 64 M.J. 57 (C.A.A.F. 2006). Reasonable expectation of privacy found in e-mail communications regarding drug use on a government computer, over a government network, when investigation was conducted and ordered by law enforcement instead of originating with computer network administrator. (This is a narrow holding as USMC log-on banner described access to “monitor” the computer system –not to engage in law enforcement intrusions by examining the contents of particular e-mails in a manner unrelated to maintenance of the e-mail system).

(4) *United States v. Larson*, 66 M.J. 212 (C.A.A.F. 2008). Accused had no Fourth Amendment expectation of privacy in his government computer (distinguishing *Long* based on facts of case). He failed to rebut presumption that he had no reasonable expectation of privacy in the government computer provided to him for official use. *See* Mil. R. Evid. 314(d).

(5) *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010). *See infra*, section on REP and government property.

c) Subscriber Information

(1) *United States v. Ohnesorge*, 60 M.J. 946 (N-M. Ct. Crim. App. 2005). There is no reasonable expectation of privacy in subscriber information provided to a commercial internet service provider.

(2) *United States v. Allen*, 53 M.J. 402 (C.A.A.F. 2000). No warrant/authorization required for stored transactional records (distinguished from private communications). Inevitable discovery exception also applied to information sought by government investigators.

d) Digital device

(1) *United States v. Conklin*, 63 M.J. 333 (C.A.A.F. 2006). While recognizing the limited expectation of privacy in a barracks room, CAAF acknowledges that a service member sharing a two-person dormitory room on a military base has a reasonable expectation of privacy in the files kept on a personally owned computer.

(2) *United States v. Tanksley*, 54 M.J. 169 (C.A.A.F. 2000). No (or at least reduced) reasonable expectation of privacy in office and computer routinely designated for official government use. Seizure was lawful based on plain view.

IV. AUTHORIZATION AND PROBABLE CAUSE.

A. A search is valid if based upon probable cause and a proper search warrant. Probable cause is evaluated by looking at the “totality of the circumstances” to determine whether evidence is located at a particular place. In the military, the equivalent to a search warrant is called a search authorization, and may be issued by an appropriate neutral and detached commander, military judge, or military magistrate. Even if a search is based upon probable cause and is conducted pursuant to a proper search warrant/ authorization, it must be conducted in a reasonable manner.

B. General Rule. A search is proper if conducted pursuant to a search warrant or authorization based on probable cause. Mil. R. Evid. 315.

1. A search *warrant* is issued by a civilian judge; it must be in writing, under oath, and based on probable cause.

2. A search *authorization* is granted by a military commander; it may be oral or written, need not be under oath, but must be based on probable cause.

C. Probable Cause.

1. Probable cause is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. Mil. R. Evid. 315(f). It is a “fluid concept---turning on the assessment of probabilities in particular factual contexts---not readily, or even usefully, reduced to a neat set of legal rules.” *Illinois v. Gates*, 462 U.S. 213, 232 (1982).

2. Probable cause is evaluated under the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213 (1982). The Court rejected a lower court's attempt to "overlay a categorical scheme" on the *Gates* TOC analysis, see *United States v. Banks*, 540 U.S. 31 (2003). See also, *United States v. Leedy*, 65 M.J. 208 (C.A.A.F. 2007) where CAAF emphasizes TOC as the key in any probable cause analysis.

a) Probable cause will clearly be established if informant is reliable (*i.e.* believable) and has a factual basis for his or her information under the two-pronged test of *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969).

b) Probable cause may also be established even if the *Aguilar-Spinelli* test is not satisfied. *Illinois v. Gates*, 462 U.S. 213 (1982). *But see United States v. Washington*, 39 M.J. 1014 (A.C.M.R. 1994). No probable cause existed to search accused's barracks room because commander who authorized search lacked information concerning informant's basis of knowledge and reliability. The *Gates* TOC test was re-articulated in *United States v. Bethea*, 61 M.J. 184 (C.A.A.F. 2005) in which the CAAF held that there was sufficient probable cause to authorize a seizure of a hair sample to establish wrongful use of cocaine based on a prior positive urinalysis despite fact that hair sample would not necessarily indicate a prior one-time use of cocaine. Hair sample revealed that the accused had used cocaine multiple occasions.

c) *United States v. Evans*, 35 M.J. 306 (C.M.A. 1992). Evidence that accused manufactured crack cocaine in his house gave probable cause to search accused's vehicle. *Devenpeck v. Alford*, 543 U.S. 146 (2004), the probable cause upon which investigation and arrest are based need not be the same or even closely related to the probable cause for the ultimate criminal conviction, so long as both are legitimate.

d) *United States v. Figueroa*, 35 M.J. 54 (C.M.A. 1992). Probable cause existed to search accused's quarters where commander was informed that contraband handguns had been delivered to the accused and the most logical place for him to store them was his quarters.

e) *Maryland v. Pringle*, 540 U.S. 366 (2003). A police officer suspected that one, or all three, of a group in a vehicle possessed drugs and arrested them. The Court found it reasonable for the officer to infer a common enterprise, and ruled the arrest constitutional as to Pringle, even though the officer had no individualized PC regarding Pringle.

f) *United States v. Rogers*, 67 M.J. 162 (C.A.A.F. 2009). Probable cause existed to test appellant's hair for cocaine, even though his urinalysis was negative.

g) Probable Cause and Child Pornography

(1) *United States v. Macomber*, 67 M.J. 214 (C.A.A.F. 2009). Probable cause existed to search airman's barracks room for child pornography under the totality of circumstances, even though there was no evidence the airman ever actually possessed child pornography, and the evidence that he registered with a child pornography website was fourteen months old.

- (2) *United States v. Clayton*, 68 M.J. 419 (C.A.A.F. 2010). Probable cause existed to search for child porn on computer in appellant's quarters, based largely on appellant's membership in a Google user group known to contain child pornography, even though there was no evidence appellant actually possessed child pornography. Strong two-judge dissent worries about a "*de minimis*" approach to Fourth Amendment requirements in child pornography cases.
3. Staleness. Probable cause will exist only if information establishes that evidence is currently located in area to be searched. PC may evaporate with passage of time.
- a) *United States v. Henley*, 53 M.J. 488 (C.A.A.F. 2000). Magistrate's unknowing use of information over five years old was not dispositive. In addition, good faith exception applied to agents executing warrant.
- b) *United States v. Queen*, 26 M.J. 136 (C.M.A. 1988). Probable cause existed despite delay of two to six weeks between informant's observation of evidence of crime (firearm) in accused's car and commander's search authorization; accused was living on ship and had not turned in firearm to ship's armory.
- c) *United States v. Agosto*, 43 M.J. 745 (A.F. Ct. Crim. App. 1995). Probable cause existed for search of accused's dormitory room even though 3 1/2 months elapsed between offense and search. Items sought (photos) were not consumable and were of a nature to be kept indefinitely.
4. See Appendix B for a guide to articulating probable cause.
- D. Persons Who Can Authorize a Search. Mil. R. Evid. 315(d).
1. Any commander of the person or place to be searched ("king-of-the-turf" standard).
- a) The unit commander can authorize searches of:
- (1) Barracks under his control;
 - (2) Vehicles within the unit area; and
 - (3) Off-post quarters of soldiers in the unit if the unit is overseas.
- b) The installation commander can authorize searches of:
- (1) All of the above;
 - (2) Installation areas such as:
 - (a) On-post quarters;
 - (b) Post Exchange (PX); and,
 - (c) On-post recreation centers.
- c) Delegation prohibited. Power to authorize searches is a function of command and may not be delegated to an executive officer. *United States v. Kalscheur*, 11 M.J. 378 (C.M.A. 1981)
- d) Devolution authorized. *United States v. Law*, 17 M.J. 229 (C.M.A. 1983). An "acting commander" may authorize a search when commander is absent. See also *United States v. Hall*, 50 M.J. 247 (C.A.A.F. 1999). Commander may resume command at his discretion; no need not have written revocation of appointment of acting commander.

- e) More than one commander may have control over the area to be searched. *United States v. Mix*, 35 M.J. 283 (C.M.A. 1992). Three commanders whose battalions used common dining facility each had sufficient control over the parking lot surrounding facility to authorize search there.
 2. A military magistrate or military judge may authorize searches of all areas where a commander may authorize searches. *See* chapter 8, AR 27-10, Military Justice (3 Oct 2011), for information on the military magistrate program.
 3. In the United States a state civilian judge may issue search warrants for off-post areas.
 4. In the United States a federal civilian magistrate or judge may issue search warrants for:
 - a) Off-post areas for evidence related to federal crimes; and,
 - b) On-post areas.
 5. Overseas a civilian judge may authorize a search of off-post areas.
- E. Neutral and Detached Requirement. The official issuing a search authorization must be neutral and detached. *See* Mil. R. Evid. 315(d). *See also United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979) (discusses four separate cases where commanders' neutrality was attacked).
1. A commander is not neutral and detached when he or she:
 - a) Initiates or orchestrates the investigation (has personal involvement with informants, dogs, and controlled buys); or,
 - b) Conducts the search.
 2. A commander may be neutral and detached even though he or she:
 - a) Is present at the search;
 - b) Has personal knowledge of the suspect's reputation;
 - c) Makes public comments about crime in his or her command; or,
 - d) Is aware of an on-going investigation.
 3. "The participation of a commander in investigative activities in furtherance of command responsibilities, without more, does not require a per se disqualification of a commander from authorizing a search under M.R.E. 315." *See U.S. v. Huntzinger*, 69 M.J. 1, 6 (C.A.A.F. 2010).
 4. Alternatives: Avoid any potential "neutral and detached" problems by seeking search authorization from:
 - a) A military magistrate; or,
 - b) The next higher commander.
- F. Reasonableness. Even if based upon a warrant or authorization and probable cause, *a search must be conducted in a reasonable manner.*
1. *Wilson v. Arkansas*, 514 U.S. 927 (1995). The common law requirement that police officers "knock and announce" their presence is part of the reasonableness clause of the Fourth Amendment.

2. *United States v. Banks*, 540 U.S. 31 (2003). In a case involving easily disposable illegal drugs, police were justified in breaking through an apartment door after waiting 15-20 seconds following knocking and announcing their presence. This time was sufficient for the situation to ripen into an exigency.
 3. *Richards v. Wisconsin*, 520 U.S. 385 (1997). Every no-knock warrant request by police must be evaluated on a case-by-case basis. Test for no-knock warrant is whether there is reasonable suspicion that evidence will be destroyed or there is danger to police by knocking. *United States v. Ramirez*, 523 U.S. 65 (1998). Whether or not property is damaged during warrant execution, the same test applies -- reasonable suspicion.
 4. *Hudson v. Michigan*, 547 U.S. 586 (2006). Violation of the Fourth Amendment “knock and announce” rule, without more, will not result in suppression of evidence at trial.
 5. Depending on the circumstances, law enforcement officials may “seize” and handcuff occupants of a residence while they execute a search warrant of that residence. *Muehler v. Mena*, 544 U.S. 93, 125 S.Ct. 1465 (2005).
 6. *L.A. County v. Rettele*, 127 S.Ct. 1989 (2007). When officers execute a valid warrant and act in a reasonable manner to protect themselves from harm, however, the Fourth Amendment is not violated.
 7. *United States v. Osorio*, 66 M.J. 632 (A.F. Ct. Crim. App. 2008). Forensic examination of a computer based on a search warrant must not exceed the scope of the warrant. Examiners must carefully analyze the terms of the warrant and adjust their examination methodology accordingly. Inevitable discovery did not apply to facts of this case.
- G. Reasonableness and Media “Ride-Alongs.” Violation of Fourth Amendment rights of homeowners for police to bring members of media or other third parties into homes during execution of warrants. *Wilson v. Layne*, 526 U.S. 603 (1999).
- H. Seizure of Property.
1. Probable cause to seize. Probable cause to seize property or evidence exists when there is a reasonable belief that the property or evidence is an unlawful weapon, contraband, evidence of crime, or might be used to resist apprehension or to escape. Mil. R. Evid. 316(b). *United States v. Mons*, 14 M.J. 575 (N.M.C.M.R. 1982). Probable cause existed to seize bloody clothing cut from accused’s body during emergency room treatment.
 2. Effects of unlawful seizure. If there is no probable cause the seizure is illegal and the evidence seized is suppressed under Mil. R. Evid. 311.
- I. External Impoundment. Reasonable to secure a room (“freeze the scene”) pending an authorized search to prevent the removal or destruction of evidence. *United States v. Hall*, 50 M.J. 247 (C.A.A.F. 1999). But freezing the scene does not mean that investigators have unrestricted authorization to search crime scene without a proper warrant/authorization. See *Flippo v. West Virginia*, 528 U.S. 11 (1999) (holding that no general crime scene exception exists).
- J. Seizure (Apprehension) of Persons.
1. Probable cause to apprehend. Probable cause to apprehend exists when there are reasonable grounds to believe that an offense has been or is being committed and the person to be apprehended committed or is committing it. RCM 302(c). See also Mil. R. Evid. 316(c).

2. Effects of unlawful apprehension. If there is no probable cause the apprehension is illegal and evidence obtained as a result of the apprehension is suppressed under Mil. R. Evid. 311. See *United States v. Dunaway*, 442 U.S. 200 (1979) (holding that fruits of illegal apprehension are inadmissible).
3. Situations amounting to apprehension.
 - a) There is a seizure or apprehension of a person when a reasonable person, in view of all the circumstances, would not believe he or she was free to leave.
 - b) In “cramped” settings (e.g. on a bus, in a room), there is an apprehension when a reasonable person, in view of all the circumstances, would not feel “free to decline to answer questions.” *Florida v. Bostick*, 501 U.S. 429 (1991). But see *United States v. Drayton*, 536 U.S. 194 (2002) (finding that there was no requirement to inform bus passengers that they could refuse to cooperate with police).
 - c) Armed Texas police rousting a 17-year old murder suspect from his bed at 0300, transporting him handcuffed, barefoot and in his underwear to the police station was an apprehension, despite suspect’s answer of “Okay”, in response to police saying “We have to talk.” *Kaupp v. Texas*, 536 U.S. 626 (2003).
 - d) Asking for identification is not an apprehension. *United States v. Mendenhall*, 446 U.S. 544 (1980).
 - (1) Asking for identification and consent to search on a bus is not apprehension. *Florida v. Bostick*, 501 U.S. 429 (1991). See also *United States v. Drayton*, 536 U.S. 194 (2002) (finding no requirement to inform bus passengers they could refuse to cooperate with police); *Muehler v. Mena*, 544 U.S. 93 (2005) (asking person who had been handcuffed about immigration status did not constitute seizure).
 - (2) State may prosecute for failure to answer if the ‘stop and ID’ statute is properly drawn. Thus, there was no Fourth Amendment violation in *Hibel v. Sixth Judicial District Court*, 542 U.S. 177 (2004).
 - e) A police chase is not an apprehension.
 - (1) *Michigan v. Chestnut*, 486 U.S. 567 (1988). Following a running accused in patrol car was not a seizure where police did not turn on lights or otherwise tell accused to stop. Consequently, drugs accused dropped were not illegally seized.
 - (2) *California v. Hodari D.*, 499 U.S. 621 (1991). Police officer needs neither probable cause nor reasonable suspicion to chase a person who flees after seeing him. A suspect who fails to obey an order to stop is not seized within meaning of the Fourth Amendment.
 - f) Traffic Stops.
 - (1) *Brendlin v. California*, 551 U.S. 249 (U.S. 2007). When police make a traffic stop, a passenger in the car, like the driver, is seized for Fourth Amendment purposes and so may challenge the stop’s constitutionality.
 - g) An order to report to military police.
 - (1) An order to report for non-custodial questioning is not apprehension.

(2) An order to report for fingerprints is not apprehension. *United States v. Fagan*, 28 M.J. 64 (C.M.A. 1989). Accused, who was ordered to report to military police for fingerprinting was not apprehended. Fingerprinting is a much less serious intrusion than interrogation, and may comply with the Fourth Amendment even if there is less than probable cause.

(3) Transporting an accused to the military police station under guard is apprehension. *United States v. Schneider*, 14 M.J. 189 (C.M.A. 1982). When accused is ordered to go to military police station under guard, probable cause must exist or subsequent voluntary confession is inadmissible.

4. Apprehension at home or in quarters: a military magistrate, military judge, or the commander who controls that dwelling (usually the installation commander) must authorize apprehension in private dwelling. R.C.M. 302(e); *Payton v. New York*, 445 U.S. 573 (1980).

a) A private dwelling includes:

- (1) BOQ/BEQ rooms;
- (2) Guest quarters;
- (3) On-post quarters; or,
- (4) Off-post apartment or house.

b) A private dwelling does not include:

- (1) Tents.
- (2) Barracks rooms; *see United States v. McCarthy*, 38 M.J. 398 (C.M.A. 1993). Warrantless apprehension in barracks room was proper.
- (3) Vehicles.

c) Exigent circumstances may justify entering dwelling without warrant or authorization. *See Mil. R. Evid. 315(g). United States v. Ayala*, 26 M.J. 190 (C.M.A. 1988). Accused was properly apprehended, without authorization, in transient billets. Exigent circumstances justified apprehension. *See also Kirk v. Louisiana*, 536 U.S. 635 (2002) (absent exigent circumstances, police may not enter a private dwelling without a warrant supported by probable cause to search the premises or apprehend an individual); *United States v. Khamsouk*, 57 M.J. 282 (C.A.A.F. 2002) (finding that the DD Form 553 is not the equivalent of an arrest warrant issued by a civilian magistrate judge).

d) Consent may justify entering dwelling without proper warrant or authorization. *See Mil. R. Evid. 316(d)(2). United States v. Sager*, 30 M.J. 777 (A.C.M.R. 1990), *aff'd on other grounds*, 36 M.J. 137 (C.M.A. 1992). Accused, awakened by military police at on-post quarters, in his underwear, and escorted to police station was not illegally apprehended, despite lack of proper authorization, where his wife “consented” to police entry.

e) Probable cause may cure lack of proper authorization. *New York v. Harris*, 495 U.S. 14 (1990). Where police had probable cause but did not get a warrant before arresting accused at home, statement accused made at home was suppressed as violation of *Payton v. New York*, but statement made at police station was held to be admissible. The statement at the police station was not the “fruit” of the illegal arrest at home.

f) Exigent circumstances may also allow warrantless seizure of dwelling and/or occupants while waiting for search warrant to be issued. *Illinois v. McArthur*, 531 U.S. 326 (2001).

V. EXCEPTIONS TO AUTHORIZATION REQUIREMENT.

A. Not all searches require warrants or search authorizations, if there is probable cause that evidence is at a certain location. If there is probable cause that evidence will be destroyed, a law enforcement official may dispense with the warrant/authorization requirement. Searches of automobiles generally do not require warrants/authorizations.

B. Exigent Circumstances.

1. General rule. A search warrant or authorization is not required when there is probable cause but insufficient time to obtain the authorization because the delay to obtain authorization would result in the removal, destruction, or concealment of evidence. Mil.

R. Evid. 315(g).

a) Law enforcement created exigency – Warrantless search is lawful as long as “police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment.” *Kentucky v. King*, 131 S. Ct. 1849 (2011). In *King*, the search was lawful when after a controlled buy, police knocked on a door they suspected target was in and heard movement that made them think evidence was being destroyed. The Court did not rule on the actual “exigency,” but assumed it existed, and held the police action of knocking on the door, which led to the suspicious movement and noises, did not invalidate the exigency.

2. Burning marijuana. *United States v. Lawless*, 13 M.J. 943 (A.F.C.M.R. 1982). Police smelled marijuana coming from house, looked into a window and spotted drug activity. Police then entered and apprehended everyone in the house, and later obtained authorization to search. *Held*: this was a valid exigency. *See also United States v. Dufour*, 43 M.J. 772 (N.M.Ct.Crim.App. 1995) (Observed use of drugs in home allowed search and seizure without obtaining warrant.)

3. Following a controlled buy.

a) *United States v. Murray*, 12 M.J. 139 (C.M.A. 1981). Commander and police entered accused’s barracks room and searched it immediately after a controlled buy. *Held*: Search was valid based on exigent circumstances.

b) *But see United States v. Baker*, 14 M.J. 602 (A.F.C.M.R. 1982). OSI agents and civilian police entered accused’s off-post apartment immediately after a controlled buy. Search was improper because there were no real exigencies, and there was time to seek authorization.

4. Traffic Stops (Pretextual):

- a) *Whren v. United States*, 517 U.S. 806 (1996). A stop of a motorist, supported by probable cause to believe he committed a traffic violation, is reasonable under the Fourth Amendment regardless of the actual motivations of the officers making the stop. Officers who lack probable cause to stop a suspect for a serious crime may use the traffic offense as a pretext for making a stop, during which they may pursue their more serious suspicions by utilizing plain view or consent. *See also Arkansas v. Sullivan*, 532 U.S. 769 (2001) (holding state supreme court erred by considering subjective intent of arresting officer when there was a valid basis for a traffic stop and probable cause to subsequently arrest motorist for a speeding violation), and *United States v. Moore*, 128 U.S. (2008) (holding the police did not violate the Fourth Amendment when they made an arrest that was based on probable cause, but prohibited by state law, or when they performed a search incident to arrest).
 - b) *United States v. Rodriguez*, 44 M.J. 766 (N.M.Ct.Crim.App. 1996). State Trooper had probable cause to believe that accused had violated Maryland traffic law by following too closely. Even though the violation was a pretext to investigate more serious charges, applying *Whren*, the stop was lawful.
 - c) Seizure of drivers and passengers.
 - (1) *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). The police may, as a matter of course, order the driver of a lawfully stopped car to exit. *See Maryland v. Wilson*, 519 U.S. 407 (1997) (holding that *Mimms* rule is extended to passengers). *But cf. Wilson v. Florida*, 734 So. 2d 1107, 1113 (Fla. Dist. Ct. App. 1999) applying *Mimms* and *Wilson* in holding that a police officer conducting a lawful traffic stop may not order a passenger back in the stopped vehicle.
 - (2) *Brendlin v. California*, 551 U.S. 249 (U.S. 2007). When police make a traffic stop, a passenger in the car, like the driver, is seized for Fourth Amendment purposes and so may challenge the stop's constitutionality.
 - (3) *Arizona v. Johnson*, 129 US 781 (2009). Reads *Mimms*, *Wilson*, and *Brendlin* read together to hold that officers who conduct routine traffic stop[s] may perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous. They do not have to have a Terry-like reasonable suspicion that the driver or passengers have committed, or are committing, a crime.
5. Hot pursuit. *Warden v. Hayden*, 387 U.S. 294 (1967). Police, who chased armed robber into house, properly searched house.
 6. Drugs or alcohol in the body.
 - a) *Schmerber v. California*, 384 U.S. 757 (1966). Warrantless blood alcohol test was justified by exigent circumstances.
 - b) *United States v. Porter*, 36 M.J. 812 (A.C.M.R. 1993). Warrantless blood alcohol test was not justified by exigent circumstances where there was no evidence that time was of the essence or that commander could not be contacted.
 - c) *United States v. Pond*, 36 M.J. 1050 (A.F.C.M.R. 1993). Warrantless seizure of urine to determine methamphetamine use was not justified by exigent circumstances because methamphetamine does not dissipate quickly from the body.

d) Nonconsensual extraction of body fluids without a warrant requires more than probable cause; there must be a “clear indication” that evidence of a crime will be found and that delay could lead to destruction of evidence. Mil. R. Evid. 312(d). See *United States v. Carter*, 54 M.J. 414 (C.A.A.F. 2001).

C. Automobile Exception.

1. General rule. Movable vehicles may be searched based on probable cause alone; no warrant is required. Mil. R. Evid. 315(g)(3).

a) *Chambers v. Maroney*, 399 U.S. 42 (1970). The word “automobile” is not a talisman, in whose presence the Fourth Amendment warrant requirement fades away. See also *Pennsylvania v. Labron*, 518 U.S. 938 (1996). The auto exception is not concerned with whether police have time to obtain a warrant. It is concerned solely with whether the vehicle is “readily mobile.”

b) Ability to Obtain a Warrant Irrelevant. *Maryland v. Dyson*, 527 U.S. 465 (1999) (per curiam). Police in Maryland waited for 13 hours for suspect to return to state and did not attempt to obtain a warrant. Supreme Court reaffirmed that automobile exception does not require a “separate finding of exigency precluding the police from obtaining a warrant.”

c) Rationale:

(1) Automobiles are mobile; evidence could disappear by the time a warrant is obtained; and,

(2) There is a lesser expectation of privacy in a car than in a home.

2. Scope of the search: any part of the car, including the trunk, and any containers in the car may be searched.

a) *United States v. Ross*, 456 U.S. 798 (1982). Police may search any part of the car and any containers in car if police have probable cause to believe they contain evidence of a crime.

b) *United States v. Evans*, 35 M.J. 306 (C.M.A. 1992). Military police who had probable cause to search auto for drugs properly searched accused’s wallet found within vehicle.

3. Automobile is broadly defined. *California v. Carney*, 471 U.S. 386 (1985). Recreational vehicle falls within auto exception unless it is clearly used solely as a residence.

4. Timing of the search. *United States v. Johns*, 469 U.S. 478 (1985). Police had probable cause to seize truck but did not search it for three days. There is no requirement that search be contemporaneous with lawful seizure.

5. Closed containers in vehicles may also be searched. *California v. Acevedo*, 500 U.S. 565 (1991). Probable cause to believe closed container located in vehicle contains evidence of crime allows warrantless search of container. This case overruled *United States v. Chadwick*, 433 U.S. 1 (1977), which required police to have warrant where probable cause relates solely to container within vehicle. Accord *United States v. Schmitt*, 33 M.J. 24 (C.M.A. 1991).

6. No distinction between containers owned by suspect and passengers: both sorts of containers may be searched. *Wyoming v. Houghton*, 526 U.S. 295 (1999).

7. Applies to Seizure of Automobiles Themselves. *Florida v. White*, 526 U.S. 559 (1999). Automobile exception applies to seizure of vehicle for purposes of forfeiture and police do not need to get a warrant if they have probable cause to believe that car is subject to seizure. If seized, police are then allowed to conduct a warrantless inventory of the seized vehicle.

VI. EXCEPTIONS TO PROBABLE CAUSE REQUIREMENT.

A. Many searches require neither probable cause nor a search warrant/authorization. If a person voluntarily consents to a search, no probable cause or warrant is needed. Searches incident to apprehension/arrest need no other probable cause than the underlying PC for the arrest/apprehension. Certain brief detentions—called “stops”—require only “reasonable suspicion,” and pat-down searches—called “frisks”—require only reasonable suspicion that the person is armed and dangerous. Inspections are technically not searches at all, but are rather administrative in nature, not criminal searches for evidence. A variety of inspections are not affected by Fourth Amendment requirements. Finally, emergency searches are also not affected by Fourth Amendment requirements.

B. Consent Searches.

1. General rule. If a person voluntarily consents to a search of his person or property under his control, no probable cause or warrant is required. Mil. R. Evid. 314(e).

2. Persons Who Can Give Consent.

a) Anyone who exercises actual control over property may grant consent to search that property. Mil. R. Evid. 314(e)(2). *United States v. Reister*, 44 M.J. 409 (C.A.A.F. 1996). House sitter had actual authority to consent to search apartment, books and nightstand. *United States v. Clow*, 26 M.J. 176 (C.M.A. 1988). When police requested consent to search family dwelling, wife consented to search, but husband who was also present refused consent.

b) The Supreme Court held that consent is not constitutionally valid if one *physically* present co-tenant grants consent, but another *physically* present co-tenant refuses consent. *Georgia v. Randolph*, 547 U.S. 103 (2006). See *United States v. Weston*, 67 M.J. 390 (C.A.A.F. 2009), where CID removed husband and wife from their home by bringing them to the CID office. Because they were no longer “physically present” at the home, the wife’s consent was valid over her husband’s lack of consent.

(1) *But see United States v. King*, 604 F.3d 125 (3rd Cir. 2010) *cert. denied* (holding the *Georgia v. Randolph* rule applies only to realty, and not personalty). In *King*, a physically present co-tenant’s consent refusal was not valid against a consenting co-tenant.

c) Anyone with apparent authority may grant consent.

(1) *Illinois v. Rodriguez*, 497 U.S. 177 (1990). Girlfriend with key let police into boyfriend’s apartment where drugs were found in plain view. Police may enter private premises without a warrant if they are relying on the consent of a third party that they reasonably, but mistakenly, believe has a common authority over the premises.

(2) *United States v. White*, 40 M.J. 257 (C.M.A. 1994). Airman who shared off-base apartment with accused had apparent authority to consent to search of accused’s bedroom. The Airman told police that the apartment occupants frequently borrowed personal property from each other and went into each other’s rooms without asking permission.

(3) See also, *United States v. Rader*, 65 M.J. 30 (C.A.A.F. 2007). Accused's roommate had sufficient access to and control over accused's computer to give valid consent to its search, where the computer was located in roommate's bedroom, it was not password protected, accused never told roommate not to access his computer or any of its files, accused's roommates used the computer to play computer games with accused's consent, and the consenting roommate accessed the computer approximately every two weeks to perform maintenance.

3. Voluntariness. Consent must be voluntary under the totality of the circumstances. Mil. R. Evid. 314(e)(4); *United States v. Frazier*, 34 M.J. 135 (C.M.A. 1992); see *United States v. Wallace*, 66 M.J. 5 (C.A.A.F. 2008) (adopting the six-factor *Murphy* test from an Air Force court to determine voluntariness).

a) Traffic stop. *Ohio v. Robinette*, 519 U.S. 33 (1996). A request to search a detained motorist's car following a lawful traffic stop does not require a bright line "you are free to go" warning for subsequent consent to be voluntary. Consent depends on the totality of the circumstances.

b) Coerced consent is involuntary. But see *United States v. Goudy*, 32 M.J. 88 (C.M.A. 1991). Accused's consent was voluntary despite fact that he allegedly took commander's request to be an implied order.

c) c. It's OK to Trick. *United States v. Vassar*, 52 M.J. 9 (1999). Accused taken to hospital for head injury and told that a urinalysis was needed for treatment. CAAF held it is permissible to use trickery to obtain consent as long as it does not amount to coercion. Urinalysis was admissible, despite military judge applying wrong standard for resolving questions of fact.

d) Right to counsel. Reading Article 31 rights is recommended but not required. *United States v. Roa*, 24 M.J. 297 (C.M.A. 1987). Request for consent after accused asked for lawyer was permissible. *United States v. Burns*, 33 M.J. 316 (C.M.A. 1991). Commander's failure to give Article 31 warnings did not affect voluntariness of consent to urinalysis test.

4. Scope. Consent may be limited to certain places, property and times. Mil. R. Evid. 314(e)(3). Consent to search computer necessarily implicated consent to seize and remove computer even though standard consent form did not explicitly state that computer could be seized and removed. *United States v. Rittenhouse*, 62 M.J. 504 (A. Ct.Crim.App. 2005). See *United States v. Gallagher*, 65 M.J. 601 (N-M. Ct. Crim. App. 2007) affirmed, 66 M.J. 250 (C.A.A.F. 2008) where the issue is whether the search of the accused's closed briefcase, located in the garage of accused's home, did not exceed the scope of his wife's consent to search the areas of the home over which she had actual or apparent authority.

5. Withdrawal. Consent may be withdrawn at any time. Mil. R. Evid. 314(e)(3). But see *United States v. Roberts*, 32 M.J. 681 (A.F.C.M.R. 1991). Search was lawful where accused initially consented, then withdrew consent, and then consented again.

6. Burden of proof. Consent must be shown by clear and convincing evidence. Mil. R. Evid. 314(e)(5).

7. Consent and closed containers. *Florida v. Jimeno*, 500 U.S. 248 (1991). General consent to search allows police to open closed containers.

C. Searches Incident to Apprehension.

1. General rule. A person who has been apprehended may be searched for weapons or evidence within his "immediate control." Mil. R. Evid. 314(g).

- a) Scope of search. A person’s immediate control includes his person, clothing, and the area within his wingspan (sometimes expansively defined to include “lunging distance”).
 - b) Purpose of search: to protect police from nearby weapons and prevent destruction of evidence. *Chimel v. California*, 395 U.S. 752 (1969).
 - c) Substantial delay between apprehension and seizure will not invalidate the search “incident.” *United States v. Curtis*, 44 M.J. 106 (C.A.A.F. 1996) (citing *United States v. Edwards*, 415 U.S. 800 (1974) (10 hours)). *Curtis* was later reversed on other grounds and the sentence was subsequently reduced by the Navy-Marine Corps Court of Criminal Appeals; this reduction to life imprisonment was upheld by the CAAF. *United States v. Curtis*, 52 M.J. 166 (C.A.A.F. 1999).
2. Search of automobiles incident to arrest.
- a) When a policeman has made a lawful arrest of an occupant of an automobile he may search the entire passenger compartment and any closed containers in passenger compartment, *but not the trunk*. Mil. R. Evid. 314(g)(2).
 - b) Search may be conducted after the occupant has been removed from the automobile, as long as the search is “contemporaneous” with the apprehension. Mil. R. Evid. 314(g)(2); *New York v. Belton*, 453 U.S. 454 (1981) (search of zipped jacket pocket in back seat of car following removal and arrest of occupants upheld; new bright line rule established).
 - c) *Belton* rule extended in *Thornton v. United States*, 541 U.S. 615 (2004), to include search of a vehicle if the arrestee was a “recent occupant” of the vehicle.
 - d) *Belton* rule distinguished and substantially limited in *Arizona v. Gant*, 129 S. Ct. 1710, 1723 (2009). “Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.”
 - e) Arrest means arrest. A search incident to a traffic citation, as opposed to an arrest, is not constitutional. *Knowles v. Iowa*, 525 U.S. 113 (1999). *But cf. Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (Petitioner was arrested for not wearing a seatbelt and then handcuffed, searched at the police station, and held in jail for an hour. The Court found that the arrest for this minor infraction was reasonable).
- D. Stop and Frisk.
- 1. General rule. Fourth Amendment allows a limited government intrusion (“stop and frisk”) based on less than probable cause (“reasonable suspicion”) where important government interests outweigh the limited invasion of a suspect’s privacy. *Terry v. Ohio*, 392 U.S. 1 (1968); Mil. R. Evid. 314(f).
 - 2. Reasonable suspicion.
 - a) Reasonable suspicion is specific and articulable facts, together with rational inferences drawn from those facts, which reasonably suggest criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *United States v. Bair*, 32 M.J. 404 (C.M.A. 1991). *See United States v. Robinson*, 58 M.J. 429 (C.A.A.F. 2003), for an excellent framework for a reasonable suspicion analysis.

- (1) Reasonable suspicion is measured under the totality of the circumstances; and,
 - (2) Reasonable suspicion is less than probable cause.
 - b) Reasonable suspicion may be based on police officer's own observations. *United States v. Peterson*, 30 M.J. 946 (A.C.M.R. 1990). Reasonable suspicion existed to stop soldier seated with companion in car parked in dead end alley in area known for drug activity at night; car license plate was from out-of-state.
 - c) Reasonable suspicion may be based on collective knowledge of all police involved in investigation. *United States v. Hensley*, 469 U.S. 221, 229 (1985). Information in police department bulletin was sufficient reasonable suspicion to stop car driven by robbery suspect.
 - d) Reasonable suspicion may be based on an anonymous tip. *Alabama v. White*, 496 U.S. 325 (1990). Detailed anonymous tip was sufficient reasonable suspicion to stop automobile for investigative purposes. *But see Florida v. J.L.*, 529 U.S. 266 (2000) (stating that anonymous tip needs to be reliable in "its assertion of illegality").
 - e) Reasonable suspicion may be based on drug courier "profile." *United States v. Sokolow*, 490 U.S. 1 (1988). "Innocent" non-criminal conduct amounted to reasonable suspicion to stop air traveler who paid \$2,100.00 cash for two tickets, had about \$4,000.00 in cash; was traveling to a source city (Miami); was taking 20 hour flight to stay only 2 days; was checking no luggage (only carry-on luggage); was wearing same black jumpsuit and gold jewelry on both flights; appeared nervous; and, was traveling under alias. Cocaine found in carry-on bag after dog alerted was admissible.
 - f) Reasonable suspicion may be based on "headlong flight" coupled with other circumstances (like nervous and evasive behavior and high-crime area). *Illinois v. Wardlow*, 528 U.S. 119 (2000).
3. Nature of detention. A stop is a brief, warrantless investigatory detention based on reasonable suspicion accompanied by a limited search.
- a) Frisk for weapons.
 - (1) The police may frisk the suspect for weapons when he or she is reasonably believed to be armed and dangerous. Mil. R. Evid. 314(f)(2).
 - (2) Plain feel. Police may seize contraband items felt during frisk if its contraband nature of items is readily apparent. *Minnesota v. Dickerson*, 508 U.S. 366 (1993) (seizure of cocaine during frisk held unconstitutional because the contraband nature of cocaine was not readily apparent). But looking down the front of a suspect's pants to determine if "bulges" were weapons was reasonable. *United States v. Jackson*, No. ACM 33178, 2000 CCA LEXIS 57 (A.F. Ct. Crim. App. Feb. 28, 2000) (unpublished opinion).
 - b) Length of the detention.
 - (1) 15 minutes in small room is too long. *Florida v. Royer*, 460 U.S. 491 (1983). Suspect was questioned in a large storage closet by two DEA agents was unreasonable: "investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."

- (2) 20 minutes may be sufficiently brief if police are hustling. *United States v. Sharpe*, 470 U.S. 675 (1985). 20-minute detention by highway patrolman waiting for DEA agent to arrive was not unreasonable.
- c) Use of firearms.
- (1) *United States v. Merritt*, 695 F.2d 1263 (10th Cir. 1982). Pointing shotgun at murder suspect did not turn legitimate investigative stop into arrest requiring probable cause.
- (2) *United States v. Sharpe*, 470 U.S. 695 (1985); *United States v. Hensley*, 469 U.S. 221 (1985). Merely displaying handgun did not turn an investigative detention into a seizure requiring probable cause.
- d) Use of dogs. *Illinois v. Caballes*, 543 U.S. 405 (2005) (holding that otherwise lawful traffic stop was not expanded into an illegal search or seizure for contraband when officer walked a drug detection dog around vehicle during a routine traffic stop).
- (1) *United States v. Alexander*, 901 F.2d 272 (2d Cir. 1990). Approaching car with drawn guns and ordering driver out of car to frisk for possible weapons did not convert *Terry* stop into full-blown arrest requiring probable cause.
4. Important government interests.
- a) Police officer safety. *Terry v. Ohio*, 392 U.S. 1 (1968). Frisk was justified when officer reasonably believed suspect was about to commit robbery and likely to have weapon.
- b) Illegal immigrants. *I.N.S. v. Delgado*, 466 U.S. 210 (1984); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). But Border Patrol Agent’s squeezing of a canvas bag during a routine stop of bus at checkpoint violated Fourth Amendment. *Bond v. United States*, 529 U.S. 334 (2000).
- c) Illegal drugs. *United States v. De Hernandez*, 473 U.S. 531 (1985). “[T]he veritable national crisis in law enforcement caused by smuggling of illicit narcotics . . . represents an important government interest.” *United States v. Sharpe*, 470 U.S. 675 (1985); *United States v. Place*, 462 U.S. 696 (1983); *United States v. Mendenhall*, 446 U.S. 544 (1980). *But see Indianapolis v. Edmond*, 531 U.S. 32 (2000) (finding that use of roadblock for general search of drugs violated the Fourth Amendment).
- d) Solving crimes and seeking justice. *United States v. Hensley*, 469 U.S. 221 (1985). There is an important government interest “in solving crime and bringing offenders to justice.”
5. House frisk (“Protective Sweep”). *Maryland v. Buie*, 494 U.S. 325 (1990). Police may make protective sweep of home during lawful arrest if they have “reasonable belief based on specific and articulable facts” that a dangerous person may be hiding in area to be swept; evidence discovered during protective sweep is admissible.
- a) *United States v. Billings*, 58 M.J. 861 (A. Ct. Crim. App. 2003). Police may conduct a protective sweep of a house, even though the arrest takes place outside the house.
- E. Administrative Inspections.
1. The military’s two-part test. Mil. R. Evid. 313(b).

- a) Primary purpose test.
 - (1) Inspection. The primary purpose of an inspection must be to ensure the security, military fitness, or good order and discipline of the unit (administrative purpose).
 - (2) Criminal search. An examination made for the primary purpose of obtaining evidence for use in a court-martial or in other disciplinary proceedings (criminal purpose) is not an inspection.
 - b) Subterfuge rule. **If** a purpose of an examination is to locate weapons and contraband and if the examination:
 - (1) Was directed immediately following the report of a crime and not previously scheduled; or,
 - (2) Specific persons were selected or targeted for examination; or,
 - (3) Persons were subjected to substantially different intrusions; **then**, the prosecution must prove by clear and convincing evidence that the purpose of the examination was administrative, not a subterfuge for an illegal criminal search.
2. The Supreme Court's test. *New York v. Burger*, 482 U.S. 691 (1987) (warrantless "administrative" inspection of junkyard pursuant to state statute was proper).
- a) There are three requirements for a lawful administrative inspection:
 - (1) There must be a substantial government interest in regulating the activity;
 - (2) The regulation must be necessary to achieve this interest; and,
 - (3) The statute must provide an adequate substitute for a warrant.
 - (a) The statute must give notice that inspections will be held;
 - (b) The statute must set out who has authority to inspect; and,
 - (c) The statute must limit the scope and discretion of the inspection.
 - b) A dual purpose is permissible. A state can address a major social problem both by way of an administrative scheme and through penal sanctions.
3. Health and welfare inspections. *United States v. Tena*, 15 M.J. 728 (A.C.M.R. 1983). Commander's unit inspection for substandard conditions is permissible. *United States v. Thatcher*, 28 M.J. 20 (C.M.A. 1989). Stolen toolbox was discovered in short-timer's room. Government failed to show by clear and convincing evidence that examination was an "inspection" and not an "illegal search."
4. Unit urinalysis.
- a) Invalid inspection.

(1) *United States v. Campbell*, 41 M.J. 177 (C.M.A. 1994). Urinalysis inspection test results were improperly admitted where inspection was conducted because the first sergeant heard rumors of drug use in unit and prepared list of suspects, including accused, to be tested. The military judge erred in ruling the government proved by clear and convincing evidence that the inspection was not a subterfuge for an illegal criminal search.

(2) Commander must have jurisdiction and authority over accused to order urinalysis. *See United States v. DiMuccio*, 61 M.J. 588 (A.F. Ct. Crim. App. 2005) (Commander of 162nd FW, a national guard unit, had no authority to order accused to submit to urinalysis because accused was at the time in "Title 10" status vice "Title 32" status even though accused was still part of 162nd FW).

b) Valid inspection.

(1) Knowledge of "Reports." *United States v. Brown*, 52 M.J. 565 (A. Ct. Crim. App. 1999). Commander directed random urinalysis after report that several soldiers were using drugs in the command. The court found that the urinalysis was a valid inspection with the primary purpose to protect the morale, safety and welfare of the unit, despite the recent report. In *United States v. Taylor*, 41 M.J. 168 (C.M.A. 1994), the accused's urinalysis results were properly admitted, despite the fact that the test followed report to commander's subordinate that accused had used drugs. Knowledge of a subordinate will not be imputed to the commander.

(2) Primary Purpose.

(a) *United States v. Shover*, 44 M.J. 119 (1996). The primary purpose for the inspection was to end "finger pointing, hard feelings," and "tension." The commander "wanted to get people either cleared or not cleared." The primary purpose was to "resolve the questions raised by the incident, not to prosecute someone." This was a proper administrative purpose.

(b) *United States v. Jackson*, 48 M.J. 292 (1998). Commander stated primary purpose of inspection of barracks rooms, less than 2 hours of receiving anonymous tip about drugs in a soldier's barracks room, was unit readiness. Court held inspection was proper.

(c) *United States v. Ayala*, 69 M.J. 63 (C.A.A.F. 2010). Based on reasons stating in implementation memorandum, which cited Mil. R. Evid. 313(b), an inspection program that required a second follow-up inspection for all positive urinalysis results was found lawful. The court found the primary purpose of the program was administrative, despite the SJA's proposal memorandum, which was clearly criminal in nature.

5. Gate inspections.

a) Procedures. *See* AR 210-10, Installations, Administration (12 Sep. 1977), para. 2-23c (summarizes the legal requirements for gate inspections) (the regulation has been rescinded but is being revised for future promulgation).

- (1) A gate search should be authorized by written memorandum or regulation signed by the installation commander defining the purpose, scope and means (time, locations, methods) of the search.
 - (2) Notice. All persons must receive notice in advance that they are subject to inspection upon entry, while within the confines, and upon departure, either by a sign or a visitor's pass.
 - (3) Technological aids. Metal detectors and drug dogs may be used. *See* AR 190-12, Military Working Dog Program (4 Jun. 2007).
 - (4) Civilian employees. Check labor agreement for impact on overtime and late arrivals.
 - (5) Female pat-downs. Use female inspectors if possible.
 - (6) Entry inspections.
 - (a) Civilians: must consent to inspection or their entry is denied; may not be inspected over their objection.
 - (b) Military: may be ordered to comply with an inspection and may be inspected over their objection, using reasonable force, if necessary.
 - (7) Exit inspections.
 - (a) Civilians: may be inspected over objection, using reasonable force, if necessary.
 - (b) Military: may be ordered to comply with an inspection and may be inspected over their objection, using reasonable force, if necessary.
- b) Discretion of inspectors. *United States v. Jones*, 24 M.J. 294 (C.M.A. 1987). Police may use some discretion, per written command guidance, to select which cars are stopped and searched.
- c) Scope of search. *United States v. Burney*, 66 M.J. 701 (A.F. Ct. Crim. App. 2008), AFCCA found that it was reasonable for security forces personnel conducting a lawful inspection of vehicles entering an Air Force base to look inside the closed glasses pouch found in the accused's vehicle for contraband, considering that the intrusion was very minimal, the purpose of the inspection was to protect the base from contraband, and the search was conducted at a practical and completely logical location.

F. Border Searches.

1. Customs inspections.

- a) Customs inspections are constitutional border searches. *United States v. Ramsey*, 431 U.S. 606 (1977) (finding a longstanding right of sovereign to protect itself).
- b) Customs inspections in the military. Border searches for customs or immigration purposes may be conducted when authorized by Congress. Mil. R. Evid. 314(b); *United States v. Williamson*, 28 M.J. 511 (A.C.M.R. 1989). Military police customs inspector's warrantless search of household goods was reasonable since inspection was conducted pursuant to DOD Customs Regulations.

2. Gate searches overseas.
 - a) General rule. Installation commanders overseas may authorize searches of persons and property entering and exiting the installation to ensure security, military fitness, good order and discipline. Mil. R. Evid. 314(c).
 - (1) Primary purpose test is applicable.
 - (2) Subterfuge rule is inapplicable.
 - b) *United States v. Stringer*, 37 M.J. 310 (C.M.A. 1993). Gate searches overseas are border searches; they need not be based on written authorization and broad discretion can be given to officials conducting the search.

G. Inventories.

1. General rule. Inventories conducted for an administrative purpose are constitutional; contraband and evidence of a crime discovered during an inventory may be seized. Mil. R. Evid. 313(c).
 - a) Primary purpose test is applicable.
 - b) Subterfuge rule is inapplicable.
2. Purpose. *Illinois v. Lafayette*, 462 U.S. 640 (1983). Inventories of incarcerated persons or impounded property are justified for three main reasons:
 - a) To protect the owner from loss;
 - b) To protect the government from false claims; and,
 - c) To protect the police and public from dangerous contents.
3. Military inventories. Military inventories that are required by regulations serve lawful administrative purposes. Evidence obtained during an inventory is admissible. Inventories are required when soldiers are:
 - a) Absent without leave (AWOL), AR 700-84, Issue and Sale of Personal Clothing (18 Nov. 2004), para 12-14;
 - b) Admitted to the hospital, AR 700-84, Issue and Sale of Personal Clothing (18 Nov. 2004), para 12-15; and,
 - c) Placed in pretrial or post-trial confinement, AR 190-47, The Army Corrections System (15 Jun. 2006).
4. Discretion and Automobile Inventories. *Florida v. Wells*, 495 U.S. 1 (1990). When defendant was arrested for DWI and his car impounded and inventoried, the police improperly searched a locked suitcase in the trunk of car despite fact that there was no written inventory regulation. This search was insufficiently regulated to satisfy the Fourth Amendment.
5. See Anderson, *Inventory Searches*, 110 Mil. L. Rev. 95 (1985) (examples and analysis of military inventories).
6. Sobriety Checkpoints.
 - a) General rule. The Fourth Amendment does not prohibit the brief stop and detention of all motorists passing through a highway roadblock set up to detect drunk driving; neither probable cause nor reasonable suspicion are required as the stop is constitutionally reasonable. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

7. Crime Prevention Roadblocks. *Indianapolis v. Edmond*, 531 U.S. 32 (2000). Public checkpoints/roadblocks for the purpose of drug interdiction violate the Fourth Amendment. Stops for the purpose of general crime control are only justified when there is some quantum of individualized suspicion.

8. Information Gathering Roadblocks. *Lidster v. Illinois*, 540 U.S. 419 (2004). A roadblock conducted in order to gather information regarding a crime committed one week earlier did not violate the *Edmond* rule, and was not unconstitutional.

H. Emergency Searches.

1. General rule. In emergencies, a search may be conducted to render medical aid or prevent personal injury. Mil. R. Evid. 314(i). See *Brigham City, Utah v. Stuart et al.*, 547 U.S. 398 (2006). Police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously threatened with such injury.

a) *Michigan v. Fisher*, 130 S. Ct. 546, 549 (2009). Officers “do not need ironclad proof of a ‘likely serious, life-threatening’ injury to invoke the emergency aid exception.”

b) *Michigan v. Taylor*, 436 U.S. 499 (1978). Entry into burning or recently burnt building is permissible.

c) *United States v. Jacobs*, 31 M.J. 138 (C.M.A. 1990). Warrantless entry into accused’s apartment by landlord was permissible because apartment was producing offensive odor because of spoiled food.

d) *United States v. Korda*, 36 M.J. 578 (A.F.C.M.R. 1992). Warrantless entry into accused’s apartment was justified by emergency when supervisor thought accused had or was about to commit suicide.

I. Searches for Medical Purposes.

1. General rule. Evidence obtained from a search of an accused’s body for a valid medical purpose may be seized. Mil. R. Evid. 312(f). See *United States v. Stevenson*, 53 M.J. 257 (C.A.A.F. 2000) (holding that the medical purpose exception applies to members of the Temporary Disability Retired List), *cert. denied*, 532 U.S. 919 (2001).

2. *United States v. Maxwell*, 38 M.J. 148 (C.M.A. 1993). Blood alcohol test of accused involved in fatal traffic accident was medically necessary, despite the fact that the test result did not actually affect accused’s treatment. Test result was admissible.

3. Drug Treatment Programs. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). The Court rejected “special needs” exception for warrantless (urinalysis) searches of pregnant women involved in a hospital drug treatment program. The ultimate purpose of the program was for law enforcement and not to get women in the program into substance abuse treatment.

J. School Searches. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). School officials may conduct searches of students based upon “reasonable grounds” as long as the search is not “excessively intrusive.” See also *Board of Education v. Earls*, 536 U.S. 822 (2002) (holding that a policy adopted by the school district to require all students to consent to urinalysis testing in order to compete in extracurricular activities did not violate the Fourth Amendment, but was reasonable).

VII. EXCLUSIONARY RULE AND EXCEPTIONS.

A. The exclusionary rule is the remedy for illegal searches and/or illegally seized evidence: such evidence is excluded from trial. However, there are exceptions to this rule. If evidence was obtained in good faith by law enforcement officials; was discovered independent of a “tainted” source; or, would have been inevitably discovered, despite a “tainted” source, the evidence may be admitted. Illegally obtained evidence may also be introduced for impeachment purposes by the government.

B. The Exclusionary Rule.

1. Judicially created rule. Evidence obtained directly or indirectly through illegal government conduct is inadmissible. *Weeks v. United States*, 232 U.S. 383 (1914); *Nardone v. United States*, 308 U.S. 338 (1939); *Mapp v. Ohio*, 376 U.S. 643 (1961) (the exclusionary rule is a procedural rule that has no bearing on guilt, only on respect for “dignity” or “fairness”).

2. Mil. R. Evid. 311(a). Evidence obtained as a result of an unlawful search or seizure made by a person acting in a government capacity is inadmissible against the accused.

3. Violation of regulations does not mandate exclusion.

a) Urinalysis regulations.

(1) *United States v. Pollard*, 27 M.J. 376 (C.M.A. 1989). Deviation from Coast Guard urinalysis regulation did not make urine sample inadmissible.

(2) *But see United States v. Strozier*, 31 M.J. 283 (C.M.A. 1990). Gross deviations from urinalysis regulation allow exclusion of positive test results.

b) Financial privacy regulations. *United States v. Wooten*, 34 M.J. 141 (C.M.A. 1992). Failure to comply with federal statute and regulation requiring notice before obtaining bank records did not mandate exclusion of records.

C. Exception: Good Faith.

1. General rule. Evidence is admissible when obtained by police relying in good faith on facially valid warrant that later is found to lacking probable cause or otherwise defective.

a) *United States v. Leon*, 468 U.S. 897 (1984). Exclusionary rule was inapplicable even though magistrate erred and issued warrant based on anonymous tipster’s information which amounted to less than probable cause.

b) Rationale. Primary purpose of exclusionary rule is to deter police misconduct; rule should not apply where there has been no police misconduct. There is no need to deter a magistrate’s conduct.

2. Limitations. *United States v. Leon*, 468 U.S. 897 (1984). Good faith exception does not apply, even if there is a search warrant, where:

a) Police or affiant provide deliberately or recklessly false information to the magistrate (bad faith by police);

b) Magistrate abandons his judicial role and is not neutral and detached (rubber-stamp magistrate);

c) Probable cause is so obviously lacking to make police belief in the warrant unreasonable (straight face test); or,

- d) The place or things to be searched are so clearly misidentified that police cannot presume them to be valid (glaring technical deficiencies).
3. Mil. R. Evid. 311(b)(3): Evidence obtained from an unlawful search or seizure may be used if:
 - a) “competent individual” authorized search or seizure;
 - b) individual issuing authorization had “a substantial basis” to find probable cause;
 - c) official executing authorization objectively relied in “good faith” on the authorization.
 4. What is a “substantial basis” under Mil. R. Evid. 311(b)(3)(B)? *United States v. Carter*, 54 M.J. 414 (C.A.A.F. 2001). The rule is satisfied if the law enforcement officer has a reasonable belief that the magistrate had a “substantial basis” for determining probable cause.
 5. Good faith exception applies to searches authorized by a commander. *United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992). Good faith exception applied to allow admission of ration cards discovered during search authorized by accused’s commander.
 6. Good faith exception applies to searches authorized by military magistrate. *United States v. Carter*, 54 M.J. 414 (C.A.A.F. 2001). Regardless of whether the military magistrate had a substantial basis to issue an authorization for a blood sample, the CID SA acted in good faith in collecting the sample, and it was admissible.
 7. The good faith exception applies to more than just “probable cause” determinations; it may also save a search authorization where the commander who authorized the search did not have control over the area searched.
 - a) On-post searches. *United States v. Mix*, 35 M.J. 283 (C.M.A. 1992). The good faith exception applied where a commander had a good faith reasonable belief that he could authorize a search of an auto in a dining facility parking lot, even though the commander may not have had authority over the parking lot.
 - b) Off-post searches overseas. *United States v. Chapple*, 36 M.J. 410 (C.M.A. 1993). The good faith exception applied to search of accused’s off-post apartment overseas even though commander did not have authority to authorize search because accused was not in his unit.
 8. The good faith exception may apply even when a warrant has been quashed. *Arizona v. Evans*, 514 U.S. 1 (1995). The exclusionary rule does not require suppression of evidence seized incident to an arrest based on an outstanding arrest warrant in a police computer, despite the fact the warrant was quashed 17 days earlier. Court personnel were responsible for the inaccurate computer record, because they failed to report that the warrant had been quashed.
 - a) *Arizona v. Evans* rule expanded in *Herring v. United States*, 129 S. Ct 695 (2009). Exclusionary rule does not apply when police officers rely on arrest warrant from a different county that had been recalled, but never removed from a shared computer database due to negligence by other county’s police officers. Exclusionary rule has no deterrent value when police mistakes are the result of negligence, rather than deliberate violations or “systemic error or disregard of constitutional requirements.”

9. *But cf. United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996). Anticipatory search of e-mail by online company, at behest of government and prior to service of warrant shows “no reliance on the language of the warrant for the scope of the search.” Thus, good faith exception was not applicable. Evidence suppressed.

D. Exception: Independent Source.

1. General rule. Evidence discovered through a source independent of the illegality is admissible.

a) *Murray v. United States*, 487 U.S. 533 (1988). Police illegally entered warehouse without warrant and saw marijuana. Police left warehouse without disturbing evidence and obtained warrant without telling judge about earlier illegal entry. Evidence was admissible because it was obtained with warrant untainted by initial illegality.

b) Rationale. Police should not be put in worse position than they would have been in absent their improper conduct.

2. Evidence obtained through independent and voluntary acts of third parties will render evidence admissible under independent-source doctrine. See *United States v. Fogg*, 52 M.J. 144, 151 (C.A.A.F. 1999) (discussing independent-source doctrine as alternative basis for not invoking the exclusionary rule).

3. Search based on both legally and illegally obtained evidence. *United States v. Camanga*, 38 M.J. 249 (C.M.A. 1993). Independent source doctrine applied where affidavit supporting search authorization contained both legally and illegally obtained evidence. After excising illegal information, court found remaining information sufficient to establish probable cause.

4. Mil. R. Evid. 311(e)(2). Evidence challenged as derived from an illegal search or seizure may be admitted if the military judge finds by a preponderance of evidence that it was not obtained as a result of the unlawful search or seizure.

E. Exception: Inevitable Discovery.

1. General rule. Illegally obtained evidence is admissible if it inevitably would have been discovered through independent, lawful means. See Mil. R. Evid. 311(b)(2).

a) *Nix v. Williams*, 467 U.S. 431 (1984). Accused directed police to murder victim’s body after illegal interrogation. Body was admissible because it would have inevitably been discovered; a systematic search of the area where the body was found was being conducted by 200 volunteers.

b) Rationale. The police should not benefit from illegality, but should also not be put in worse position.

2. Examples:

a) *United States v. Kozak*, 12 M.J. 389 (C.M.A. 1982). Illegal search of train station locker and seizure of hashish, which exceeded authority to wait for accused to open locker and then apprehend him, did not so taint apprehension of accused as to make subsequent seizure of drugs after accused opened locker inadmissible. Drugs would have been inevitably discovered.

b) *United States v. Carrubba*, 19 M.J. 896 (A.C.M.R. 1985). Evidence found in trunk of accused’s car admissible despite invalid consent to search. Evidence inevitably would have been discovered as police had probable cause and were in process of getting search authorization.

c) *United States v. Kaliski*, 37 M.J. 105 (C.M.A. 1993). Inevitable discovery doctrine should be applied to witness testimony only if prosecution establishes witness is testifying of her own free will, independent of illegal search or seizure. Testimony of accused's partner in sodomy should have been suppressed where she testified against accused only after police witnessed sodomy during illegal search.

d) *Computers* – Inevitable discovery is a commonly argued exception in otherwise unlawful computer searches. See *United States v. Wallace*, 66 M.J. 5 (C.A.A.F. 2008) (finding results of unlawful search admissible, but with only 3 judges finding inevitable discovery as the basis for admissibility); *United States v. Osorio*, 66 M.J. 632 (A.F. Ct. Crim. App. 2008) (finding forensic examiner's search of computer unlawful because it went beyond the scope of the warrant and refusing to allow inevitable discovery exception based on facts of the case).

3. Distinguish between “independent source” and “inevitable discovery.”

a) Independent source deals with *facts*. Did police in fact find the evidence independently of the illegality?

b) Inevitable discovery deals with hypotheticals. *Would* the police have found the evidence independently of the illegal means?

F. Exception: Attenuation of Taint.

1. General rule. Evidence that would not have been found *but for* official misconduct is admissible if the causal connection between the illegal act and the finding of the evidence is so attenuated as to purge that evidence of the primary taint. See *Wong Sun v. United States*, 371 U.S. 471, 484-87 (1963) (holding that the unlawful arrest did not taint subsequent confession where it was made after his arraignment, release on own recognizance, and voluntary return to the police station several days later). See also *U.S. v. Conklin*, 63 M.J. 333 (C.A.A.F. 2006) which establishes three factors to determine whether an accused's consent was an independent act of free will, breaking the causal chain between the consent and a prior unconstitutional search: (1) the temporal proximity of the illegal search and the consent; (2) the presence of intervening circumstances; and (3) the purpose and the flagrancy of the initial search. See also *U.S. v. Jones*, 64 M.J. 596 (A. Ct. Crim. App., 2007).

2. *United States v. Rengel*, 15 M.J. 1077 (N.M.C.M.R. 1983). Even if accused was illegally apprehended, later seizure of LSD from him was attenuated because he had left the area and was trying to get rid of drugs at the time of the seizure.

3. *But see Taylor v. Alabama*, 457 U.S. 687, 691 (1982). Defendant was arrested without probable cause, repeatedly questioned by police who took fingerprints and put him in line-up without counsel present. Confession was obtained six hours after arrest was inadmissible.

4. Mil. R. Evid. 311(e)(2). Evidence challenged as derived from an illegal search or seizure may be admitted if the military judge finds by a preponderance of evidence that it was not obtained as a result of the unlawful search or seizure.

G. Exception: Impeachment.

1. Illegally obtained evidence may be used to impeach accused's in-court testimony on direct examination or to impeach answers to questions on cross-examination. *United States v. Havens*, 44 U.S. 962 (1980). Defendant's testimony on direct that he did not know his luggage had a T-shirt that was being used for smuggling cocaine allowed admissibility of illegally obtained T-shirt on cross-examination to impeach defendant's credibility. *See also Walder v. United States*, 347 U.S. 62 (1954).

2. Mil. R. Evid. 311(b)(1). Evidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused.

APPENDIX A: SECTION III DISCLOSURE

UNITED STATES)	
)	Fort Blank, Missouri
v.)	
)	DISCLOSURE OF
William Green)	SECTION III EVIDENCE
Private (E-1), U.S. Army)	
A Co., 1st Bn, 13th Inf.)	22 July 200X
8th Inf. Div. (Mech))	

Pursuant to Section III of the Military Rules of Evidence, the defense is hereby notified:

1. Rule 304(d)(1). There are (no) relevant statements, oral or written, by the accused in this case, presently known to the trial counsel (and they are appended hereto as enclosure ____).

2. Rule 311(d)(1). There is (no) evidence seized from the person or property of the accused or believed to be owned by the accused that the prosecution intends to offer into evidence against the accused at trial (and it is described with particularity in enclosure ____) (and it is described as follows:
_____).

3. Rule 321(d)(1). There is (no) evidence of a prior identification of the accused at a lineup or other identification process which the prosecution intends to offer against the accused at trial (and it is described with particularity in enclosure ____) (and it is described as follows:

_____).

A copy of this disclosure has been provided to the military judge.

PETER MUSHMAN
CPT, JA
Trial Counsel

APPENDIX B: GUIDE TO ARTICULATING PROBABLE CAUSE

1. Probable cause to authorize a search exists if there is a *reasonable belief, based on facts*, that the person or evidence sought is at the place to be searched. Reasonable belief is more than mere suspicion. Witness or source should be asked three questions:
 - A. What is where and when? Get the facts!
 1. Be specific: how much, size, color, etc.
 2. Is it still there (or is information stale)?
 - a) If the witness saw a joint in barracks room two weeks ago, it is probably gone; the information is stale.
 - b) If the witness saw a large quantity of marijuana in barracks room one day ago, probably some is still there; the information is not stale.
 - B. How do you know? Which of these apply?
 1. "I saw it there." Such personal observation is extremely reliable.
 2. "He [the suspect] told me." Such an admission is reliable.
 3. "His [the suspect's] roommate/wife/ friend told me." This is hearsay. Get details and call in source if possible.
 4. "I heard it in the barracks." Such rumor is unreliable unless there are specific corroborating and verifying details.
 - C. Why should I believe you? Which of these apply?
 1. Witness is a good, honest soldier; you know him from personal knowledge or by reputation or opinion of chain of command.
 2. Witness has given reliable information before; he has a good track record (CID may have records).
 3. Witness has no reason to lie.
 4. Witness has truthful demeanor.
 5. Witness made statement under oath. ("Do you swear or affirm that any information you give is true to the best of your knowledge, so help you God?")
 6. Other information corroborates or verifies details.
 7. Witness made admission against own interests.
2. The determination that probable cause exists must be based on facts, not only on the conclusion of others.
3. The determination should be a common sense appraisal of the totality of all the facts and circumstances presented.

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DISCOVERY AND PRODUCTION

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**MAJ PHILIP STATEN
SPRING 2012**

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DISCOVERY AND PRODUCTION

I. REFERENCES

- A. UCMJ art. 46 (2008).
- B. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 701, 702, 703, 914 [hereinafter MCM, RCM].
- C. MCM, MIL. R. EVID. 301, 304, 311, 321, 404(b), 412, 413, 414, 807 [hereinafter, MRE].
- D. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 June 1992) [hereinafter, AR 27-26].
- E. RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL, UNITED STATES ARMY TRIAL JUDICIARY (15 Sept. 2009) [hereinafter, RULES OF PRACTICE].
- F. JOSHUA DRESSLER AND ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE, VOL. 2: ADJUDICATION (4th ed. 2006) [hereinafter, UNDERSTANDING CRIMINAL PROCEDURE].
- G. James W. McElhaney, *Hunt for the Winning Story*, A.B.A. J., July 2006, at 22.
- H. James W. McElhaney, *Discovery is the Trial*, A.B.A. J., Aug. 2007, at 26.
- I. Lieutenant Colonel Eric R. Carpenter, *Simplifying Discovery and Production: Using Easy Frameworks to Evaluate the 2009 Term of Cases*, Army Law., Jan. 2011, at 31.

II. INTRODUCTION

- A. How to use this outline.
 1. This outline is set up so that you can go to your respective section (government or defense) and see what you must disclose (even without the other party asking for anything); what you must disclose if the other party asks; and what discovery you can seek from the other party. Look to the other party's section on mandatory disclosures to see what that party owes you even if you do not ask for anything.
 2. This outline contains those discovery requirements that are found in the RULES OF PRACTICE that relate to the exchange of information between the parties. The RULES OF PRACTICE contain other requirements for the exchange of information between the parties and the military judge, to include the exchange of information related to motions. Chapter 5, AR 27-10 also contains requirements for information exchanges with the military judge.
 3. This outline does not cover Article 32 investigations; however, the Article 32 investigation should be an integrated part of your discovery plan.
- B. Discovery basics.
 1. The rules for discovery establish how each party will help the *other* party to develop the *other* party's case. Fundamentally, these rules govern how the parties will exchange information.
 - a) Discovery is a broad term. It means attaining that which was previously unknown. BLACK'S LAW DICTIONARY 322 (6th ed. 1991). It includes "the pre-trial devices that can be used by one party to obtain facts and

information about the case from the other party in order to assist the party's preparation for trial." *Id.*

- b) Generally, one party requests *discovery*, to which the other party provides *disclosure* of the material. Disclosure means to bring into view or to make known. *Id.* at 320. The terms "disclosure" and "allowing to inspect" are often used interchangeably. The difference is really just a question of which party has to press the button on the copy machine.
 - c) Discovery includes *disclosure* of something tangible or *notice* of something intangible, like a party's intent to do something.
2. The discovery rules in the military are very liberal and are designed to encourage an efficient system. Requiring parties to exchange information early in the process reduces pretrial motions practice; reduces surprise and gamesmanship; reduces delay at trial when delay is especially costly because the court is assembled; leads to better-informed decisions about the merits of the case; and encourages early decisions concerning withdrawal of charges, motions, pleas, and composition of court-martial. RCM 701 analysis, app. 21, at A21-33.
 - a) Showing your cards encourages realistic settlements. James W. McElhaney, *Discovery is the Trial*, A.B.A. J., Aug. 2007, at 26.

C. Production basics.

1. Production and discovery are different concepts. Discovery deals with case development. Information learned during the discovery process may or may not ultimately be introduced at trial.
2. Production is where one party (typically, the defense) requests that the other party (typically, the government) be responsible for ensuring a witness or item of evidence makes it to the courthouse on the date scheduled for a motions hearing or trial. The party seeking production intends to call this witness or introduce this evidence at the hearing or trial. If the accused is denied production, or does not want to request that the government produce a witness or some evidence, the accused can always arrange for the production of that witness or evidence at his own expense (having family members drive in on sentencing but not seek reimbursement from the government, for example).
3. In the federal system, the judiciary is responsible for processing witness and evidence requests. In the military, the command which convened the court-martial is responsible for those duties. The production rules found in RCM 703 explain what the defense must include in its requests; that the trial counsel can grant the requests; and if the trial counsel denies the request, that the military judge will rule on the production of the witness or evidence. RCM 703 analysis, app. 21, at A21-36.

III. GENERAL

- A. UCMJ art. 46 (2008) is the root source for much of the military's discovery and production rules: "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence."
 1. For discovery, this statute is embodied in RCM 701(e), Access to Witnesses and Evidence: "Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence."

- a) Generally speaking, the government cannot require that a government representative be present during defense interviews of government witnesses, although in certain circumstances a third party observer may be permissible. *United States v. Irwin*, 30 M.J. 87 (C.M.A. 1990). If a third party observer is required, that requirement would need to apply to both defense and government interviews. *Id.* at 93. *See also United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980).
 - b) If the government analyzes the evidence, then the defense can analyze it too. *United States v. Walker*, 66 M.J. 721 (N-M. Ct. Crim. App. 2008) (in a capital trial, the military judge erred when he refused to allow the defense experts to conduct independent testing of physical evidence admitted a trial).
2. For production, this statute is embodied in RCM 703(a): “The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process.”
- B. Ethical considerations. AR 27-26, para. 3.4.
1. It is unethical to unlawfully obstruct another party’s access to evidence, to make a frivolous discovery request, or fail to make a reasonably diligent effort to comply with a proper discovery request from an opposing party. Rule 3.4(a) and (d).
 2. “Subject to evidentiary privileges, the right of an opposing party, including the Government, to obtain evidence through discovery or subpoena is an important procedural right.” (Comment to rule).
 3. The ABA Standards for Criminal Justice, which apply to Army lawyers to the extent that they do not conflict with AR 27-26, contains additional ethical considerations. For example, the Standards contain guidance on how to deal with a witness that asks a party whether or not she should communicate with the other party (see Standard 3-3.1 and accompanying commentary) and whether a trial counsel should read a witness her rights for the purpose of influencing whether that witness should testify (Standard 3-3.2).
- C. Continuing Duty to Disclose. If, before or during the court-martial, a party discovers additional evidence or material previously requested or required to be produced, which is subject to discovery or inspection under this rule, that party shall promptly notify the other party or the military judge of the existence of the additional evidence or material. RCM 701(d). *See United States v. Eshalomi*, 23 M.J. 12 (C.M.A. 1986); *United States v. Jackson*, 59 M.J. 330 (C.A.A.F. 2004).
- D. Information not subject to disclosure. RCM 701(f). Disclosure is not required if the information is protected under the Military Rules of Evidence or if the information is attorney work product (notes, memoranda, or similar working papers prepared by counsel or counsel’s assistants or representatives).
1. *United States v. Vanderwier*, 25 M.J. 263, 269 (C.M.A. 1987) (“Even though liberal, discovery in the military does not ‘justify unwarranted inquiries into the files and the mental impressions of an attorney.’”)
 2. *United States v. King*, 32 M.J. 709 (A.C.M.R. 1991), *rev’d on other grounds*, 35 M.J. 337 (C.M.A. 1992). A defense expert is subject to a pretrial interview by TC, but a defense “representative” under MRE 502 is not. It was improper for TC to communicate with defense representative concerning interview with appellant.

3. *United States v. Vanderbilt*, 58 M.J. 725 (N-M. Ct. Crim. App. 2003) (holding that a civilian witness' agreement to testify pursuant to a pretrial agreement with the U.S. Attorney's Office does not waive that witness' attorney-client privilege regarding statement made to his attorney during the course of pretrial negotiations).

IV. GOVERNMENT DISCOVERY RESPONSIBILITIES AND REQUESTS

A. Mandatory disclosure or notice requirements for trial counsel.

1. Evidence that reasonably tends to negate guilt, reduces the degree of guilt, or reduces punishment (disclose as soon as practicable).
 - a) Sources.
 - (1) RCM 701(a)(6). The trial counsel shall disclose evidence which reasonably tends to:
 - (a) Negate guilt;
 - (b) Reduce the degree of guilt; or
 - (c) Reduce the punishment.
 - (2) *Brady v. Maryland*, 373 U.S. 83 (1963). In a death penalty case, the government did not disclose a statement where the codefendant admitted to being the actual killer. The Court stated that the government must disclose evidence that is favorable to the accused and material to either guilt or punishment.
 - (3) AR 27-26, para. 3.8(d). Trial counsel will disclose all evidence that tends to:
 - (a) Negate guilt;
 - (b) Mitigate the offense; or
 - (c) Mitigate the sentence.
 - (d) *See United States v. Kinzer*, 39 M.J. 559, 562 (A.C.M.R. 1994); *United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002).
 - b) Favorable.
 - (1) Impeachment information. *Banks v. Dretke*, 124 S. Ct. 1256 (2004); *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667 (1985); *Giglio v. United States*, 405 U.S. 150 (1972).
 - (2) This impeachment information may include:
 - (a) Any promise of immunity or leniency offered to a witness in exchange for testimony. *See, e.g., Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959).
 - (b) Specific instances of conduct of a witness for the purpose of attacking the witness's credibility or character for truthfulness. *See, e.g., United States v. Watson*, 31 M.J. 49 (C.M.A. 1990) (finding evidence that witness had monetary interest in outcome of case could have been

favorable); *United States v. Mahoney*, 58 M.J. 346 (C.A.A.F. 2003) (holding that trial counsel's failure to disclose a letter impeaching government's expert witness was reversible error).

- (c) Evidence in the form of opinion or reputation as to a witness's character for truthfulness.
 - (d) Prior inconsistent statements. *See, e.g., United States v. Romano*, 46 M.J. 269 (C.A.A.F. 1997); *Graves v. Cockrell*, 351 F. 3d 156 (5th Cir. 2003). *See also* MRE 613(a)
 - (e) Information to suggest that a witness is biased. *See, e.g., Bagley*, 473 U.S. at 667; *Banks*, 124 S. Ct. 1256 (2004) (finding that the State's failure to disclose that key state witness in capital sentencing proceeding was a paid government informant and played an important role in setting up Banks' arrest was error).
 - (f) *United States v. Romano*, 46 M.J. 269 (C.A.A.F. 1997). The trial counsel had a duty to disclose statements by witnesses at the Art. 32 investigation of co-accuseds, where the prior statements were inconsistent with the government's main witness' testimony at trial.
- c) Scope of the government's duty.
- (1) The prosecutor does *not* have to have actual knowledge of the evidence to commit a *Brady* violation. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Mahoney*, 58 M.J. 346 (C.A.A.F. 2003); *Bailey v. Rae*, 339 F.3d 1107 (9th Cir. 2003).
 - (2) The government may be required to look beyond its files for exculpatory evidence. *United States v. Williams*, 50 M.J. 436 (C.A.A.F. 1999). The scope of the government's duty to search with beyond the prosecutor's own files generally is limited to:
 - (a) The files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses. *Id.* at 441.
 - (i) *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989) (the "prosecutor will be deemed to have knowledge of and access to anything in the possession, custody, or control of any federal agency participating in the same investigation of the defendant.")
 - (ii) *United States v. Simmons*, 38 M.J. 376 (C.M.A. 1993) (holding that trial counsel must exercise due diligence in discovering the results of exams and tests which are in possession of CID).
 - (iii) *United States v. Sebring*, 44 M.J. 805 (N-M. Ct. Crim. App. 1996) (holding that trial counsel had a duty to discover quality control investigation

into problems at Navy drug lab that tested the accused's urine sample).

- (iv) *Kyles v. Whitley*, 514 U.S. at 437 (“the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police”).
- (b) Investigative files in a related case maintained by an entity closely aligned with the prosecution. *United States v. Williams*, 50 M.J. at 441.
 - (i) *United States v. Hankins*, 872 F. Supp. 170, 173 (D.N.J. 1995) (“when the government is pursuing both a civil and criminal prosecution against a defendant stemming from the same underlying activity, the government must search both the civil and criminal files in search of exculpatory material.”)
- (c) Investigative files of tangential or unrelated investigations if specifically requested by the defense. *Williams*, 50 M.J. at 441; *United States v. Veksler*, 62 F.3d 544 (3d Cir. 1995) (the request provides constructive notice to the prosecution about the existence of the files). (These requests should also be analyzed under RCM 701(a)(2).)
 - (i) *United States v. Green*, 37 M.J. 88, 89 (C.M.A. 1993). The defense requested “[a]ny record of prior conviction, and/or nonjudicial punishment of” any government witness. The trial counsel responded without comment. The CID agent had an Art. 15 for fraternization, false claim, and larceny. Error was harmless beyond a reasonable doubt because the CID agent was only used to authenticate physical evidence.
- (3) The *Brady* rule is designed to ensure the defendant learns of exculpatory evidence that is known only to the government. If the defendant knows or should know the essential facts permitting him to take advantage of the exculpatory evidence (like the witness’ identity), then the government does not have a duty to disclose the information. *United States v. Grossman*, 843 F.2d 78, 85 (2d Cir. 1988) (no *Brady* violation when the defense knew the witness’ name; that he might have testified before a grand jury; and that the testimony might have been favorable).
- d) Understanding and applying RCM 701(a)(6) and *Brady* at trial.
 - (1) Applying RCM 701(a)(6) and *Brady* at trial is not that difficult. Typically, these issues arise when the government makes a late disclosure or the defense discovers this evidence on its own late in the process. Everyone knows about the evidence (they are, after all, litigating about it). The real problem is that the defense needs more time to prepare for trial based on this newly

discovered evidence. The military judge just needs to fashion a just action in response under RCM 701(g), which will probably be to grant a continuance.

- (a) Whether disclosure is sufficiently complete or timely to satisfy *Brady* can only be evaluated in terms of “the sufficiency, under the circumstances, of the defense’s opportunity to use the evidence when disclosure is made.” *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001). “The opportunity for use under *Brady* is the opportunity for a responsible lawyer to use the information with some degree of calculation and forethought.” *Id.* at 103.
 - (2) The key point is that, in the military, under RCM 701(a)(6) (and for Army attorneys, under AR 27-26, para. 3.8(d)), the trial counsel *must always disclose favorable matter*, whether or not that matter may later be found to be material or not.
 - (3) The RCM 701(a)(6) language uses the phrase “reasonably tends” rather than the *Brady* term “material.” Under *Brady*, if the government fails to disclose favorable information, that non-disclosure violates due process only if the matter was material. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Cone v. Bell*, 129 S.Ct. 1769 (2009). If a local jurisdiction has not implemented rules like RCM 701(a)(6) or AR 27-26, para. 3.8(d), then the prosecutor might consider whether favorable evidence is material before disclosing. That is not the case in our practice.
 - (4) The phrase “reasonably tends” can be readily applied at during trial proceedings, where the parties are arguing *prospectively*. The term “material” is essentially a test for prejudice that is applied *retrospectively*, on appeal, where the defense has only now learned of the evidence. The issue on appeal is whether the first trial should be set aside based on this discovery violation. As such, much of the case law related to the term “material” may not translate well to litigation at trial. At trial, use “reasonably tends.”
 - (5) The case law that has developed around the term “favorable” does have application at trial litigation, but again, if the issue is being litigated at trial, then the defense knows about the evidence and the real issue is whether the defense has enough time to prepare based on that new knowledge. And, if the defense has made a discovery request under RCM 701(a)(2), the defense does not have to make a showing that the evidence is “favorable.” Under that rule, the information only needs to be “material.”
- e) Understanding and applying RCM 701(a)(6) and *Brady* on appeal.
- (1) Applying RCM 701(a)(6) and *Brady* on appeal is more complex. The issue now is whether the matter was favorable; whether the government failed to properly disclose; and whether the defendant suffered prejudice as a result (the “material” inquiry). *See generally, Strickler v. Greene*, 527 U.S. 263 (1999).
 - (2) Favorable. Discussed above.

- (3) Scope of government’s duty to disclose. Discussed above.
- (4) If there is no specific request by the defense, use *material*.
 - (a) A failure to disclose is material if there is a reasonably probability that there would have been a different result at trial had the evidence been disclosed. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). The Supreme Court in *Banks v. Dretke*, 540 U.S. 668 (2004), reiterated that the touchstone of materiality is the *Kyles* case.
 - (b) “The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Kyles*, 514 U.S. at 434.
 - (c) In cases of knowing use of perjured testimony by the prosecutor, the failure to disclose favorable evidence is material unless the failure to disclose is harmless beyond a reasonable doubt. *United States v. Bagley*, 473 U.S. 667 (1985).
- (5) If there is a specific defense request under RCM 701, then use harmless beyond a reasonable doubt.
 - (a) Where the defense makes a specific discovery request under RCM 701 and the government fails to disclose that evidence, the standard of review is *harmless beyond a reasonable doubt*. *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004). This heightened standard is often incorrectly confused with *Brady* material analysis (reasonable probability of different result). See *United States v. Figueroa* 55 M.J. 525 (A.F. Ct. Crim. App. 2001).
 - (b) The source of the “harmless beyond a reasonable doubt” standard is Article 46 and RCM 701, not *Brady*. *United States v. Eshalomi*, 23 M.J. 12 (C.M.A. 1986); *United States v. Hart*, 29 M.J. 407 (C.M.A. 1990); *Roberts*, 59 M.J. 323.
- f) Comparison to RCM 701(a)(2). (For more discussion of RCM 701(a)(2), see section B.1 below).
 - (1) If the defense makes a specific discovery request under RCM 701(a)(2) (discussed below), the government must provide the information if, among other things, it is *material to the preparation of the defense*. Unlike RCM 701(a)(6) and *Brady*, there is no requirement that the information be *favorable*. It can be unfavorable and still be material to the preparation of the defense.

- (2) Unlike RCM 701(a)(6) and *Brady*, the government only has to disclose RCM 701(a)(2) information if requested by the defense.
 - (3) Where the defense makes a specific discovery request under RCM 701 and the government fails to disclose that evidence, or where there is prosecutorial misconduct, the standard of review is *harmless beyond a reasonable doubt*. *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004). This heightened standard is often incorrectly confused with *Brady* material analysis (reasonable probability of different result). *See United States v. Figueroa* 55 M.J. 525 (A.F. Ct. Crim. App. 2001).
 - (4) The scope of the government’s duty to locate the evidence is different under RCM 701(a)(2) than under RCM 701(a)(6) and *Brady*. Under RCM 701(a)(2), the trial counsel must search that which is within the “possession, custody, or control of military authorities,” which includes non law-enforcement authorities. Under RCM 701(a)(6) and *Brady*, the trial counsel must search her files, files of other law enforcement agencies that have been involved in the investigation, files of related cases maintained by an entity closely aligned with the prosecution.
- g) Miscellaneous.
- (1) The duty to disclose favorable evidence exists even without a request by the accused. *United States v. Agurs*, 427 U.S. 97, 107 (1976).
 - (2) Bad faith on the part of the government not required. *Brady v. Maryland*, 373 U.S. 83 (1963).
 - (3) The Constitution does not require the pre-guilty plea disclosure of impeachment information. The Court noted that disclosure of impeachment information relates to the fairness of a *trial*, as opposed to the voluntariness of a plea. Impeachment information, the Court declared, is particularly difficult to characterize “as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant.” *United States v. Ruiz*, 536 U.S. 622 (2002).
2. Charges (as soon as practicable). RCM 308(a).
- a) Within 24 hours to both accused and defense counsel. RULES OF PRACTICE, at 1.
3. Allied papers (as soon as practicable after service of charges). 701(a)(1):
- a) Any papers that accompanied the charges when referred;
 - b) The convening orders.
 - c) Also, ERB/ORB. RULES OF PRACTICE, at 1.
4. Sworn or signed statements (as soon as practicable after service of charges). RCM 701(a)(1):
- a) Any sworn or signed statement relating to an offense charged which is in the possession of the trial counsel.

5. Report of Article 32 investigation (promptly). RCM 405(j)(3).
6. Merits witnesses (before the beginning of the trial on the merits). RCM 701(a)(3).
 - a) The trial counsel shall notify the defense of the names and addresses of the witnesses the trial counsel intends to call:
 - (1) In the prosecution case-in-chief; and
 - (2) To rebut a defense of alibi, innocent ingestion, or lack of mental responsibility, when the trial counsel has received timely notice of such a defense.
 - b) The RULES OF PRACTICE, at 21, requires notice ten days prior to trial.
7. Prior convictions of the accused (before arraignment). RCM 701(a)(4).
 - a) The trial counsel shall notify the defense of any records of prior civilian or court-martial convictions of the accused of which the trial counsel is aware and which the trial counsel may offer on the merits for any purpose, including impeachment.
8. "Section III" disclosures under the Military Rules of Evidence.
 - a) Grants of immunity or leniency (prior to arraignment or within a reasonable time before the witness testifies). MRE 301. The grant must be reduced to writing. *See also Giglio v. United States*, 405 U.S. 150 (1972).
 - b) Accused's statements (prior to arraignment). MRE 304(d)(1). The prosecution shall disclose all statements of the accused, oral or written, that are relevant to the case *irrespective of intent to use at trial*. "All statements:"
 - (1) Includes remarks made during informal conversations. *United States v. Callara*, 21 M.J. 259, 262 (C.M.A. 1986).
 - (2) Is not limited to those made to military superiors or law enforcement. *United States v. Trimper*, 28 M.J. 460, 468 (C.M.A. 1989).
 - (3) Provide timely notice of an intent to offer a statement that was not disclosed prior to arraignment. MRE 304(d)(2).
 - c) Evidence seized from the accused or property owned by the accused (prior to arraignment). MRE 311(d)(1). The prosecution shall disclose all evidence seized from the accused or property owned by the accused, that it *intends to offer* into evidence against the accused at trial.
 - (1) Provide timely notice of an intent to offer this evidence that was not disclosed prior to arraignment. MRE 311(d)(2)(B).
 - d) Identifications (prior to arraignment). MRE 321(c)(1). The prosecution shall disclose all evidence of prior identifications of the accused that it *intends to offer* into evidence against the accused at trial.
 - (1) Provide timely notice of an intent to offer lineup evidence that was not disclosed prior to arraignment. MRE 321(c)(2)(B).
 - e) The RULES OF PRACTICE, at 3, requires disclosure not later than two duty days after the trial date is set if arraignment is the day of trial.

9. Similar sex assault or molestation crimes (5 days prior to trial). MRE 413 and 414.
 - a) If the government intends to offer evidence of similar crimes (sexual assault or child molestation), the trial counsel must notify the defense of its intent and disclose the evidence.
 10. Testing may consume only available samples of evidence. *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986). Inform the accused when testing may consume the only available samples and permit the defense an opportunity to have a representative present.
 11. Residual hearsay (sufficiently in advance of trial to provide fair opportunity to respond). MRE 807.
 - a) The proponent of residual hearsay must give the opponent notice of the intent to offer out-of-court statements as residual hearsay. *See United States v. Holt*, 58 M.J. 227 (C.A.A.F. 2003) (holding that Air Force Court of Criminal Appeals abused its discretion when it affirmed the introduction of residual hearsay statement when there was no indication in the record as to whether the required notice was given and by misapplying the foundational requirement of necessity).
 12. Aggravating circumstances in capital cases (before arraignment). RCM 1004(b)(1)(B).
 13. Judicial notice of a foreign law (reasonable time). MRE 201A(b).
 14. Original writing in possession of other party. MRE 1004(3).
 15. Evidence of a conviction more than 10 years old (sufficient advance notice as to provide a fair opportunity to contest the use). MRE 609(b).
 16. Notice of intent to employ an expert at government expense (in advance of employment). RCM 703(d).
- B. Disclosures and notices made upon defense request.
1. Documents and tangible objects (after service of charges). RCM 701(a)(2)(A).
 - a) Books, papers, documents, photographs, tangible objects, buildings, or places, AND
 - b) In the possession, custody, or control of military authorities, AND
 - c) Either *intended for use* by the trial counsel as evidence in the case-in-chief OR *material* to the preparation of the defense;
 - (1) Unlike RCM 701(a)(6) and Brady, this matter does not have to be favorable – just material to the preparation of the defense. Unfavorable matter can be material to the preparation of the defense. *See United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002).
 - (a) The definition of “material” in Black’s Law Dictionary includes matter that is of “such a nature that knowledge of the item would affect a person’s decision-making process.” BLACK’S LAW DICTIONARY 1066 (9th ed. 2009).

- (b) The decisions might how to plead (*see generally United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002); *United States v. Trigueros*, 69 M.J. 604, 611 (A. Ct. Crim. App. 2010)) or to pursue lines of investigation, defenses, or trial strategies (*United States v. Eshalomi*, 22 M.J. 12, 27 (C.M.A. 1986); *United States v. Webb*, 66 M.J. 89 (C.A.A.F. 2008)).
 - (c) Evidence might be material if the defense could use it to persuade the convening authority not to refer the case. *United States v. Eshalomi*, 22 M.J. 12, 28 (C.M.A. 1986)).
 - (d) There is no requirement that “material” matters be known to be admissible at trial or that the government intend to introduce it. See *United States v. Luke*, 69 M.J. 309 (C.A.A.F. 2011).
- (2) Where the defense makes a *specific* discovery request and the government fails to disclose that evidence, or where there is prosecutorial misconduct, the standard of review is harmless beyond a reasonable doubt. *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004).
- (a) Some of the military judge’s decisions are reviewed under the abuse of discretion standard. A military judge abuses her discretion when her factual findings are clearly erroneous or she applies the wrong law. Next, the appellate courts review the decision that the matter is “material to the preparation of the defense” under a *de novo* standard. If the appellate court finds that the material should have been disclosed, then the appellate courts apply “harmless beyond a reasonable doubt” to test for prejudice. *Roberts*, 59 M.J. at 326.
- (3) Courts often incorrectly confuse this analysis with *Brady* analysis. See *United States v. Figueroa* 55 M.J. 525 (A.F. Ct. Crim. App. 2001). The obligations under RCM 701(a)(2) are in addition to the obligations found under *Brady*.
- (4) Trial counsel’s duty to search. The government must make good faith efforts to comply with the requests. *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999). “The government cannot intentionally remain ignorant and then claim it exercised due diligence.” *United States v. Trigueros*, 69 M.J. 604, 611 (A. Ct. Crim. App. 2010).
- (5) Trial counsel’s rebuttal evidence on the merits.
- (a) Government must disclose evidence that is “material to preparation of defense” under R.C.M. 701(a)(2) regardless of “whether the government intends to offer the evidence in its case-in-chief, in rebuttal, or not at all.”

United States v. Adens, 56 M.J. 724 (Army Ct. Crim. App. 2002).

- (b) In *Adens*, the government knew the defense theory of the case and knew of evidence that was *unfavorable* to that defense; did not present that evidence during a direct examination but instead waited for the defense to cross-examine a government witness based on the defense theory; then the government introduced the evidence in re-direct examination of that witness. While stating that RCM 701(a)(2) includes rebuttal evidence, the court noted that technically this evidence was introduced in the government case-in-chief. Because this failure to disclose was pursuant to a specific request, court reviewed under the harmless beyond a reasonable doubt standard, found material prejudice existed, and reversed.
- (c) “[A] trial counsel who holds back material evidence for possible use in rebuttal to ambush the defense runs a risk . . . In the exercise of that control, a military judge is entitled to exclude prosecution evidence in rebuttal, if the judge concludes that it should have been offered in the prosecution case-in-chief . . .” *United States v. Murphy*, 33 M.J. 323 (C.M.A. 1991).

2. Reports (after service of charges). RCM 701(a)(2)(B).

- a) Results or reports of physical or mental examinations, and of scientific tests or experiments, AND
- b) In the possession, custody, or control of military authorities, AND
- c) Either *intended for use* by the trial counsel as evidence in the case-in-chief OR *material* to the preparation of the defense;
- d) *United States v. Jackson*, 59 M.J. 330 (C.A.A.F. 2004). Defense counsel specifically requested “any reports, memos for record or other documentation relating to Quality Control and/or other documentation relating to Quality Control and/or inspections pertaining to quality control at the Brooks Lab for the three quarters prior to [the accused]’s sample being tested, and the available quarters since [the accused]’s sample was tested.” The lab failed to identify a blind quality control sample by reporting a negative sample as a positive less than four months after the accused’s sample was tested and less than three months after the defense’s request. The trial counsel failed to discover and disclose the report to the defense. That failure violated the accused’s rights under RCM 701(a)(2)(B). The CAAF found prejudice because had the information been disclosed, the defense could have used the information to demonstrate the existence of quality control problems.

3. Sentencing information (upon request). RCM 701(a)(5).

- a) Written material that will be presented by the prosecution during the presentencing proceedings.
 - (1) Trial counsel are not required to written matters intended to be offered in *rebuttal* of an accused’s presentencing case where the matter *could not have been offered* during government’s

presentencing case. *United States v. Clark*, 37 M.J. 1098 (N.M.C.M.R. 1993).

- b) Names and addresses of witnesses the trial counsel intends to call during the presentencing proceedings.
 - (1) The RULES OF PRACTICE, at 21, requires notice ten days prior to trial and do not require a defense request for this information.
- 4. Notice of uncharged misconduct (reasonable notice in advance of trial). MRE 404(b).
 - a) Upon defense request, the government must provide pretrial notice of the general nature of evidence of other crimes, wrongs, or acts which it intends to introduce at trial.
- 5. Statements by a witness that has testified (after testimony). RCM 914.
 - a) A witness, not the accused, testifies. Upon a motion by the party who did not call the witness, the judge shall order disclosure of any “statement” by the witness that relates to the subject of his testimony.
 - b) RCM 914 is a counterpart to the Jencks Act, 18 U.S.C. § 3500. Much of what the government would have to disclose to the defense under RCM 914 will also fall under other discovery rules like RCM 701(a)(1, 2, 6) and *Brady*.
 - (1) Under RCM 701(a)(1), for example, the government must disclose all sworn or signed statements relating to a charged offense.
 - c) A statement is a “written statement by the witness that is signed, adopted or approved by the witness.”
 - (1) Includes a substantially verbatim account of an oral statement made by the witness that is recorded contemporaneously with the oral statement. *See United States v. Holmes*, 25 M.J. 674 (A.F.C.M.R. 1987).
 - (2) CID Agent investigator notes. If the agent testifies or if a witness who has reviewed and approved the agent’s notes testifies, the notes must be produced under this rule. *See Goldberg v. United States*, 425 U.S. 94 (1976) and *United States v. Smaldone*, 484 F. 2d 311 (10th Cir. 1973). If the agent does not testify, then the defense will have to look to another rule to seek discovery.
 - (3) Article 32 testimony.
 - (a) *United States v. Lewis*, 38 M.J. 501 (A.C.M.R. 1993). CID agent testifies at trial. Defense motion to strike because tape recordings of his Article 32 testimony erased by legal clerk. The trial judge correctly denied the motion when the accused failed to show that the government acted in bad faith causing the destruction or loss of the Article 32 tapes and the agent’s testimony was internally consistent and corroborated by other witnesses.
 - (b) *United States v. Marsh*, 21 M.J. 445 (C.M.A. 1986). The Jencks Act applies to courts-martial and to statements made by witnesses at an Article 32 Investigation.

Negligent loss of Article 32 tapes, without any intent to suppress, does not require the court to strike the testimony of the witness.

- (4) Administrative board hearings. *United States v. Staley*, 36 M.J. 896 (A.F.C.M.R. 1993). Military judge found that statements made by witnesses before an administrative discharge board were within the general mandate of RCM 914. Destruction of the tape recording of the testimony was in good faith; thus, exclusion of the witnesses' testimony was not required.
 - (5) Confidential informant's notes.
 - (a) *United States v. Guthrie*, 25 M.J. 808 (A.C.M.R. 1988). No Jencks Act violation when a handwritten statement was destroyed after a typed version was created and adopted by the witness.
 - (b) *United States v. Douglas*, 32 M.J. 694 (A.F.C.M.R. 1991). An informant did not keep his notes about an investigation. Lesson to be learned: "Whenever military law enforcement agents request that an informant prepare written notes regarding an on-going investigation, those notes should be obtained from the informant and included in the investigative case file." *Id.* at 698 n.2.
 - d) Remedy for non-disclosure. "The military judge shall order that the testimony of the witness be disregarded by the trier of fact and that the trial proceed, or, if it is the trial counsel who elects not to comply, shall declare a mistrial if required in the interest of justice." RCM 914(e).
6. Writings used to refresh memory (while testifying, or before testifying if the judge determines it is necessary in the interest of justice). MRE 612.
- a) Remedy for non-disclosure. "The military judge shall make any order justice requires, except that when the prosecution elects not to comply, the order shall be one striking the testimony . . . or a mistrial."
7. Inconsistent prior statements (on request). MRE 613(a).
- C. Government requests.
1. Names and addresses of sentencing witnesses. RCM 701(b)(1)(B)(i). Due upon request.
 2. Written sentencing materials. RCM 701(b)(1)(B)(ii). Due upon request.
 3. Reciprocal discovery. If the defense requests discovery under RCM 701(a)(2), upon compliance with such request by the government, the defense, on request of the trial counsel, shall permit the trial counsel to inspect:
 - a) Papers, documents, photographs, objects within the possession, custody and control of the defense and which the defense *intends to introduce as evidence* in the defense case-in-chief. RCM 701(b)(3). Due upon government request and government compliance with defense request.
 - b) Reports of physical or mental examinations and scientific tests or experiments within the possession, custody and control of the defense and which the defense *intends to introduce as evidence* in the defense case-in-chief or which were prepared by a defense witness who will be called at

trial. RCM 701(b)(4). Due upon government request and government compliance with defense request.

4. Statements by a witness that testifies (after testifying, upon motion). RCM 914.
 - a) A witness, not the accused, testifies. Upon a motion by the party who did not call the witness, the judge shall order disclosure of any “statement” by the witness that relates to the subject of his testimony.
 - b) RCM 914 is a counterpart to the Jencks Act, 18 U.S.C. § 3500.
 - c) For a complete discussion of RCM 914 and the Jencks Act, see paragraph IV.b.5 above.
 5. Writings used to refresh memory (while testifying, or before testifying if the judge determines it is necessary in the interest of justice). MRE 612.
 - a) Keep track of what your witness looks at in preparation for testifying.
 6. Inconsistent prior statements (on request). MRE 613(a).
 7. Full contents of the sanity board (upon motion). MRE 302(c).
 - a) If the defense offers expert testimony concerning the mental condition of the accused, the military judge shall order the release of the full contents (except for statements made by the accused).
 - b) If the defense also offers the statements made by the accused at the sanity board, the military judge may also order the disclosure of those statements.
- D. Practice tip. Note that if the trial counsel does not ask for certain information, the defense is under no obligation to provide it – so ask for it.

V. DEFENSE DISCOVERY RESPONSIBILITIES AND REQUESTS

- A. Mandatory disclosure or notice requirements for defense counsel.
 1. Merits witnesses (before beginning of trial on the merits). RCM 701(b)(1)(A).
 - a) The defense shall notify the trial counsel of the names and addresses of all witnesses, other than the accused, whom the defense intends to call during the defense case-in-chief.
 - b) The RULES OF PRACTICE, at 21, requires notice ten days prior to trial.
 2. Merits witnesses’ sworn or signed statements (before beginning of trial on the merits). RCM 701(b)(1)(A).
 - a) The defense shall provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.
 - b) The RULES OF PRACTICE, at 21, requires notice ten days prior to trial.
 3. Notice of certain defenses (before the beginning of trial on the merits). RCM 701(b)(2). The defense shall give notice before the beginning of trial on the merits of its intent to offer the defense of:
 - a) Alibi, to include the place or places at which the defense claims the accused to have been at the time of the alleged offense.
 - b) Innocent ingestion, to include the place or places where, and the circumstances under which the defense claims the accused innocently ingested the substances in question.

- (1) *United States v. Lewis*, 51 M.J. 376 (C.A.A.F. 1999). The trial judge erroneously prevented the accused from presenting an innocent ingestion defense because the defense could not give notice of places where the innocent ingestion occurred and witnesses to be relied upon. The judge prevented the accused from raising this defense herself by her testimony alone. CAAF reversed holding that RCM 701(b)(2) does not require corroborative witnesses or direct evidence as a condition for raising innocent ingestion.
 - c) Lack of mental responsibility.
 - d) Notice shall include places, circumstances, and witnesses to be relied upon for these defenses.
 - e) The RULES OF PRACTICE, at 4, requires notice at least ten days before trial.
 4. Notice of intent to introduce expert testimony as to the accused's mental condition (before beginning of trial on the merits). RCM 701(b)(2).
 - a) Note the relationship to MRE 302(c). If the defense does then offer this testimony, the defense may have to disclose the full contents of the sanity board report.
 5. Evidence of the victim's sexual behavior or predisposition (5 days prior to entry of plea). MRE 412.
 6. Residual hearsay (sufficiently in advance of trial to provide a fair opportunity to respond). MRE 807.
 - a) *See United States v. Holt*, 58 M.J. 227 (C.A.A.F. 2003) (holding that Air Force Court of Criminal Appeals abused its discretion when it affirmed the introduction of residual hearsay statement when there was no indication in the record as to whether the required notice was given and by misapplying the foundational requirement of necessity).
 7. Notice of intent to disclose classified or government information. MRE 505(h)(1), 506(h).
 8. Judicial notice of a foreign law (reasonable time). MRE 201A(b).
 9. Testimony of accused for limited purpose regarding a confession, MRE 304(f); seizures, MRE 311(f); or lineups, MRE 321(c)(2)(B).
 10. Original writing in possession of other party. MRE 1004(3).
 11. Evidence of a conviction more than 10 years old (sufficient advance notice as to provide a fair opportunity to contest the use). MRE 609(b).
 12. Notice of plea and forum. Unless the judge sets a different deadline, defense counsel will notify the trial counsel and judge, in writing, at least ten duty days before the date of trial (whichever is earlier), of the forum and pleas. RULES FOR PRACTICE, at 3.
- B. Disclosures or notices made upon government request (not based on reciprocity).
1. Sentencing witnesses (no time given). RCM 701(b)(1)(B)(i). Provide the trial counsel with the names and addresses of any witness whom the defense intends to call at the presentencing proceeding.

2. Written presenting material (no time given). RCM 701(b)(1)(B)(ii). Permit the trial counsel to inspect any written material that will be presented by the defense at the presentencing proceeding.
 3. Statements by a witness that testifies (after testifying, upon motion). RCM 914.
 - a) A witness, not the accused, testifies. Upon a motion by the party who did not call the witness, the judge shall order disclosure of any “statement” by the witness that relates to the subject of his testimony.
 - b) RCM 914 is a counterpart to the Jencks Act, 18 U.S.C. § 3500. Some of what the defense would have disclose is also covered by RCM 701(b)(1)(A): merits witnesses’ sworn or signed statements.
 - c) For a complete discussion of RCM 914 and the Jencks Act, see paragraph IV.b.5 above.
 4. Writings used to refresh recollection (while testifying, or before testifying if the judge determines it is necessary in the interest of justice). MRE 612.
 - a) Keep track of what your witness looks at in preparation for testifying.
 5. Prior inconsistent statements by a witness (on request). MRE 613(a).
 6. Full contents of the sanity board report (upon the granting by the military judge of a motion to compel disclosure). MRE 302(c).
 - a) If the defense offers expert testimony concerning the mental condition of the accused, the military judge shall order the release of the full contents (except for statements made by the accused).
 - b) If the defense also offers the statements made by the accused at the sanity board, the military judge may also order the disclosure of those statements.
- C. Disclosures made upon government requests (based on reciprocity). If the defense requests discovery under RCM 701(a)(2), upon compliance with such request by the government, the defense, on request of the trial counsel, shall permit the trial counsel to inspect:
1. Papers, documents, photographs, objects within the possession, custody and control of the defense and which the defense *intends to introduce as evidence* in the defense case-in-chief. RCM 701(b)(3).
 - a) Defense not required to disclose surrebuttal evidence. *United States v. Stewart*, 29 M.J. 621 (C.G.C.M.R. 1989).
 2. Reports of physical or mental examinations and scientific tests or experiments within the possession, custody and control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief or which were prepared by a defense witness who will be called at trial. RCM 701(b)(4).
- D. Defense requests.
1. Documents and tangible objects. RCM 701(a)(2)(A).
 - a) Where the defense makes a specific discovery request and the government fails to disclose that evidence, or where there is prosecutorial misconduct, the standard of review is harmless beyond a reasonable doubt.
 - b) “Where an appellant demonstrates that the Government failed to disclose discoverable evidence in response to a specific request or as a result of

prosecutorial misconduct, the appellant will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt.” *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004). *See also United States v. Green*, 37 M.J. 88, 90 (C.M.A. 1993) (Wiss, J., concurring); *United States v. Stone*, 37 M.J. 558 (A.C.M.R. 1993) (finding nondisclosure harmless beyond a reasonable doubt).

- c) For more, see the RCM 701(a)(2) discussion in section IV above.
 2. Reports. RCM 701(a)(2)(B)
 3. Sentencing materials and witnesses. RCM 701(a)(5):
 4. Notice of uncharged misconduct (reasonable notice in advance of trial). MRE 404(b).
 5. Statements by a witness that has testified (after testimony). RCM 914.
 - a) A witness, not the accused, testifies. Upon a motion by the party who did not call the witness, the judge shall order disclosure of any “statement” by the witness that relates to the subject of his testimony.
 - b) RCM 914 is a counterpart to the Jencks Act, 18 U.S.C. § 3500.
 - c) For more, see the RCM 914 in section IV above.
 6. Writings used to refresh memory (while testifying, or before testifying if the judge determines it is necessary in the interest of justice). MRE 612.
- E. Practice tips.
1. Note that if the defense counsel does not ask for certain information, the government is under no obligation to provide it unless another rule or due process separately requires disclosure – so ask for it.
 2. If defense counsel can identify what they are looking for and make a specific discovery request and the government does not disclose that evidence, then the accused will benefit from a higher standard of review on appeal.
 3. Defense counsel should generally make an RCM 701(a)(2) request. Note that after making that request, if the government makes a reciprocal request, the defense only has to disclose that evidence that it *intends to introduce* in its case-in-chief. Defense counsel do not usually introduce damaging evidence during its case-in-chief. They only introduce positive information – and this positive information may further negotiations. If the circumstances of your case weight against making an RCM 701(a)(2) request, remember to request the other items in this section.

VI. REGULATION OF DISCOVERY

- A. General. The basic rules for discovery, to include the basic remedies available for noncompliance, come from RCM 701(g). However, many discovery rules contain their own remedies for noncompliance. *See* RCMs 308(c), 405(j)(4), 914(e), 1004(b)(1)(A); MREs 301(c)(2), 302(d), 304(d)(2)(B), 311(d)(2)(B), 321(c)(2)(B), 505, 506, 507, 612.
- B. Pretrial orders.
 1. The military judge may issue pretrial orders that regulate when the parties will provide notices and make disclosures to the other party.

- a) “The military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just.” RCM 701(g)(1)
 - b) The judiciary “may make rules of court not inconsistent with these rules for the conduct of court-martial proceedings.” RCM 108.
- C. Protective and modifying orders.
- 1. A party may seek relief from a discovery obligation by providing the military judge with a sufficient showing that relief is warranted. RCM 701(g)(2). *See generally* RCM 906(b)(7) (motion for appropriate relief – discovery).
 - 2. The military judge may order that discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. RCM 701(g)(2).
 - 3. *In camera* review.
 - a) Rules.
 - (1) Upon motion, the military judge may permit a party to make such showing, in whole or in part, in writing to be inspected only by the judge. RCM 701(g)(2).
 - (2) If the military judge withholds some or all of the reviewed material, the entire text of the material must be sealed and attached to the record of trial as an appellate exhibit RCM 701(g)(2).
 - (a) Failure of military judge to seal and attach military records of government's key witness, after denying defense request for their disclosure for impeachment purposes, made proper appellate review impossible. *United States v. Abrams*, 50 M.J. 361 (C.A.A.F. 1999).
 - b) The framework for deciding (1) whether to conduct an *in camera* review in first place, and (2) whether to then grant the request to prevent disclosure of certain information is not entirely clear. The cases on this issue tend to move between RCM 701 and 703 without much precision even though there are significant differences between the two rules (see subparagraph d below). A suggested framework for *in camera* reviews of discovery requests under RCM 701(a)(2) (*see generally United States v. Abrams*, 50 M.J. 361 (C.A.A.F. 1999); *United States v. Trigueros*, 69 M.J. 604 (A. Ct. Crim. App. Mar. 29, 2010)) is:
 - (1) Does the party allege with a sufficient showing that some of what is being requested is not subject to disclosure under RCM 701(f) (privileged) or is otherwise confidential? If yes, then the court should grant *in camera* review.
 - (2) Is the matter protected from disclosure under the Military Rules of Evidence (privileges)? If yes, then do not disclose but attach to the record.
 - (a) MRE 506. *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998).
 - (3) Is the matter otherwise confidential? Potentially confidential matters include:

- (a) Medical records, mental health records, therapist notes. *United States v. Cano*, 61 M.J. 74 (C.A.A.F. 2005); *United States v. Abrams*, 50 M.J. 361 (C.A.A.F. 1999); *United States v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998); *United States v. Kelly*, 52 M.J. 773 (Army Ct. Crim. App. 1999); *United States v. Trigueros*, 69 M.J. 604 (Army Ct. Crim. App. Mar. 29, 2010).
 - (b) Personnel records. *United States v. Kelly*, 52 M.J. 773 (Army Ct. Crim. App. 1999).
 - (c) Inspector General’s Report of Inquiry. *United States v. Sanchez*, 50 M.J. 506 (A.F. Ct. Crim. App. 1999).
- (4) If no, end the *in camera* review. If yes, is the matter material to the preparation of the defense?
- (a) Military judges can allow the defense counsel to perform a review for materiality under a protective order to enable them to make informed arguments about discoverability. *United States v. Abrams*, 50 M.J. 361, 364 (C.A.A.F. 1999).
 - (b) When trial judges consider whether the information is material to the preparation of the defense they should remember that they may not be in the best position to judge what is relevant and what is not: “An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances.” *Alderman v. United States*, 394 U.S. 165, 182 (1969).
- (5) If yes, disclose with a protective order. If no, do not disclose but attach to the record.
- c) The military judge should perform the *in camera* review rather than having a trial counsel state that sought after records do not contain exculpatory material. *United States v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998); *United States v. Kelly*, 52 M.J. 773 (Army Ct. Crim. App. 1999).
 - d) Comparison with RCM 703(f) *in camera* analysis (see RCM 703(f) discussion in section VII below).
 - (1) Timing. Under RCM 701(g), a party has a disclosure obligation. The party tells the military judge that it believes the matter is not subject to disclosure and asks for an *in camera* review. The military judge grants *in camera* review before deciding on the importance of the information (whether the matter is material to the preparation of the defense). Under RCM 703(f), the government has already issued a subpoena for the evidence (the “relevant and necessary” decision has already been made) and now the custodian of the evidence requests relief from the

subpoena. The *in camera* review comes *after* the decision on the importance of the information. The military judge is now dealing with how to enforce that subpoena.

- (2) Person seeking relief. Under RCM 701(g), the person seeking relief is a party to the trial. Under RCM 703(f), the person seeking relief is the custodian of the evidence (not one of the parties).
- (3) Remedy. Under RCM 701(g), once the military judge has ruled, the party that was denied discovery has no relief until appeal. Under RCM 703(f)(4), the party denied production of the evidence then seeks relief under RCM 703(f)(2) (unavailable evidence). Remember, at this point, the evidence has already been determined to be relevant and necessary. Now, the threshold for relief is raised to “such central importance to an issue that is essential to a fair trial and no adequate substitute.”

D. Remedies for Nondisclosure. RCM 701(g)(3). At any time during the court-martial, if a party has failed to comply with RCM 701, the military judge can take one or more of the following actions:

1. Order discovery. RCM 701(g)(3)(A).
2. Grant a continuance (common remedy). RCM 701(g)(3)(B);
 - a) *United States v. Trimper*, 28 M.J. 460 (C.M.A. 1989). Defense counsel moved to preclude use of a urinalysis report that was disclosed by the government just before trial. The military judge denied the request for exclusion, but granted a continuance, which was an appropriate remedy.
 - b) *United States v. Murphy*, 33 M.J. 323 (C.M.A. 1991). The Government did not disclose its sole witness (an eyewitness accomplice) that they learned of the night before trial, but used the witness on rebuttal. Exclusion of testimony was not necessary. Violation of disclosure was adequately remedied by military judge’s actions in granting accused a continuance for several hours to allow the defense to interview the witness, read her statement, interview the investigator that interviewed the witness, and conduct background checks of the witness.
3. Prohibit introduction of the evidence, calling a witness, or raising a defense not disclosed. RCM 701(g)(3)(C).
 - a) The discussion to RCM 701(g)(3) includes factors to consider in determining whether to grant this remedy:
 - (1) The extent of disadvantage that resulted from a failure to disclose;
 - (2) The reason for the failure to disclose;
 - (3) The extent to which later events mitigated the disadvantage caused by the failure to disclose;
 - (4) Any other relevant factors.
 - b) Excluding defense evidence.
 - (1) RCM 701(g)(3) discussion.
 - (a) Only use this sanction upon finding that the defense counsel’s failure to comply was willful and motivated by

a desire to obtain tactical advantage or to conceal a plan present fabricated testimony.

- (b) Only use if alternative sanctions could not have minimized the prejudice to the Government.
 - (c) Before imposing the sanction, the military judge must weigh the defendant's right to compulsory process against the countervailing public interests, including:
 - (i) The integrity of the adversarial process;
 - (ii) The interest in the fair and efficient administration of justice;
 - (iii) The potential prejudice to the truth-determining function of the trial process.
- (2) The Sixth Amendment right to present witnesses is not absolute. The sword of compulsory process cannot be used irresponsibly. Excluding testimony is allowable; however, alternative sanctions will be adequate and appropriate in most cases. *Taylor v. Illinois*, 484 U.S. 400, 414 (1988).
- (3) *United States v. Nobles*, 422 U.S. 225 (1975). Defense expert testimony excluded because expert refused to permit discovery of a "highly relevant" report. "The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *Id.* at 241.
- (4) *Michigan v. Lucas*, 500 U.S. 145 (1991). The Court held that the state court of appeals erred in holding that the exclusion of evidence for the violation of a notice requirement under a state rape-shield law always violates the Sixth Amendment. The preclusion may be appropriate where willful misconduct is designed to gain a tactical advantage over the prosecution.
- (5) *United States v. Pomarleau*, 57 M.J. 352 (C.A.A.F. 2002). The military judge erred by excluding defense evidence as a discovery sanction without conducting a fact-finding hearing or otherwise ascertaining the cause for untimely disclosure by the defense, and by not making findings of fact on the record as to whether less restrictive measures could have remedied any prejudice to the government.
- (6) *United States v. Preuss*, 34 M.J. 688 (N.M.C.M.R. 1991). Applying the RCM 703(g)(3) discussion factors, the court found that the military judge abused his discretion by excluding the defense's alibi witness because the defense counsel failed to give notice of its intent to offer the alibi defense before the beginning of the trial.
4. Such other order as is just under the circumstances.
- a) Mistrial. RCM 915.
 - b) Order a deposition.

- (1) Depositions are primarily used to preserve testimony for later use at trial; however, depositions can be used for discovery when the government has improperly impeded defense access to a witness. RCM 702(c)(3)(A) discussion; RCM 702(a) analysis, app. 21, at A21-35.
 - (2) Where the government substantially impaired the defense counsel's ability to interview a witness, the defense could have sought a deposition. *United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980).
 - (3) Where the government substantially impaired the defense's ability to interview witnesses, "timely use of the deposition process would provide the defense with meaningful discovery of these witnesses' testimony . . ." *United States v. Cumberledge*, 6 M.J. 203, 206 n.13 (C.M.A. 1979).
- c) Count the delay caused by the noncompliance against the government when calculating speedy trial. *United States v. Tebsherany*, 32 M.J. 351, 354 (C.M.A. 1991) "[T]ime requested by counsel to examine material not disclosed until the pretrial investigation might, under facts showing bad faith, be charged to the United States in accounting for pretrial delay."
 - d) *United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002). The government failed to disclose unfavorable but material evidence to the defense. A government witness then testified early on in the trial regarding this undisclosed evidence. The remedies fashioned by military judge for the government's failure to disclose the evidence included making the assistant trial counsel lead counsel for the remainder of the case, with the "quiet assistance" of the lead counsel, and exclusion of the undisclosed evidence and some related evidence. The military judge failed, however, to instruct the members to disregard the testimony from the government witness, given five days earlier, about the evidence. The court held that while the decision not to instruct the members was "understandable under the circumstances," the failure to instruct negated the validity of the other remedies.
- E. Post-Trial: A military judge has the authority under Article 39(a), UCMJ to convene a post-trial session (but before authentication of the record) to consider a discovery violation and to take whatever remedial action is appropriate to include ordering a new trial. *United States v. Webb*, 66 M.J. 89 (C.A.A.F. 2008).

VII. PRODUCTION

A. General.

1. RCM 703 provides that "[t]he prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process." This rule is based on Article 46, UCMJ and implements the accused's Sixth Amendment right to compulsory process.
 - a) Merits witnesses. Each party is entitled to production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary. RCM 703(b)(1).
 - (1) Necessary means the evidence is not cumulative and would contribute to a party's presentation of the case in some positive

way on a matter in issue. RCM 703(b)(1) discussion. A matter is not in issue when it is stipulated as a fact.

- b) Sentencing witnesses. Each party is entitled to the production of any witness whose testimony on sentencing is required under RCM 1001(e). RCM 703(b)(2).
 - (1) There is much greater latitude during the presentencing proceeding to receive information from means other than the testimony of witnesses in the courtroom. RCM 1001(e)(1).
- c) Evidence. Each party is entitled to production of evidence that is relevant and necessary. RCM(f)(1).
 - (1) Necessary means the evidence is not cumulative and would contribute to a party's presentation of the case in some positive way on a matter in issue. RCM 703(f)(1) discussion. A matter is not in issue when it is stipulated as a fact.

2. How the process works.

- a) The parties identify the witness or evidence that they want produced.
- b) The defense submits its requests to the trial counsel.
- c) If the trial counsel contends that some defense witnesses or evidence do not satisfy the production standards, the trial counsel tells the defense. The defense may file a motion for production with the military judge.
- d) The military judge rules on production.
- e) The trial counsel then arranges for the presence of those required witnesses and that evidence, to include prosecution witnesses and evidence. The trial counsel arranges for orders or subpoenas of witnesses, depending on the witnesses' status, and arranges for requests or subpoenas for evidence, depending on who controls the evidence.

B. Production standards for the prosecution.

1. Witnesses.

- a) The trial counsel shall obtain the presence of witnesses for the prosecution whose testimony the trial counsel considers relevant and necessary. RCM 703(c)(1).

2. Evidence

- a) The trial counsel shall obtain evidence that the trial counsel considers relevant and necessary. RCM 703(f)(3), relating back to RCM 703(c)(1).

C. Production standards for the defense.

1. Witnesses. RCM 703(c)(2). The defense shall submit to the trial counsel a written list of the witnesses that the defense wants the government to produce.

- a) Merits and interlocutory questions. Requests shall include:
 - (1) A synopsis of the expected testimony sufficient to show its relevance and necessity.
 - (2) The contact information found in RCM 703(c)(2)(B)(i). *See, e.g., United States v. Barreto*, 57 M.J. 127 (C.A.A.F. 2002).

- b) Sentencing. Requests shall include:
 - (1) A synopsis of the expected testimony and why personal appearance is necessary under the standards set forth in RCM 1001(e). Personal appearance is required only if all of the below are satisfied:
 - (a) The testimony is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence.
 - (b) The weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence.
 - (c) The other party refuses to enter into a stipulation of fact.
 - (d) Other forms of evidence (depositions, interrogatories, former testimony, testimony by remote means) would not be sufficient in the determination of an appropriate sentence.
 - (e) The significance of the personal appearance to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production.
 - (i) See RCM 1001(e)(2)(E) for a list of factors related to this balancing test.
 - (2) The contact information found in RCM 703(c)(2)(B)(ii).

2. Evidence. RCM 703(f)(3).

- a) Defense requests for evidence shall:
 - (1) List the items of evidence to be produced, and
 - (2) Must include a description of each item sufficient to show its relevance and necessity.
 - (3) Must include a statement of where it can be obtained; and, if known, the name, address, and telephone number of the custodian of the evidence.
- b) Generally, the government has no responsibility to create records to satisfy demands for them. *United States v. Birbeck*, 35 M.J. 519, 522 (A.F.C.M.R. 1992) (military judge did not err in denying defense request for the government to create laboratory reports on two negative urinalysis). The court used “discovery” language rather than “production” language. If the government will not produce a report, the defense can seek the employment of an expert witness, who can then test the evidence and produced a report. *See, e.g., United States v. Walker*, 66 M.J. 721 (N-M. Ct. Crim. App. 2008).

D. Regulation of production.

- 1. If the trial counsel contends that the defense requests for production are not required by the rules, then the defense may file a motion for production. RCM 703(c)(2)(D); RCM 906(b)(7).

2. Whether a witness shall be produced to testify during the presentencing proceeding is a matter within the discretion of the military judge, subject to the production rules. RCM 1001(e)(1).
3. If the military judge grants a motion for production, the trial counsel shall produce the witness or evidence or the proceedings shall be abated. RCM 703(c)(2)(D), 703(f)(3).
4. The standard of review for the denial of a request for production is abuse of discretion. *United States v. Powell*, 49 M.J. 220, 225 (C.A.A.F. 1998); *United States v. Mosley*, 42 M.J. 300, 303 (C.A.A.F. 1995). If the military judge abused her discretion, then the test for prejudice is harmless beyond a reasonable doubt. *Powell*, 49 M.J. at 225.
5. Remote testimony. RCM 703(b)(1).
 - a) With the consent of both the accused and the Government, the military judge may authorize any witness to testify via remote means.
 - b) Over a party's objection, the military judge may authorize any witness to testify on *interlocutory questions* (not on issues of ultimate guilt) via remote means or similar technology if:
 - (1) The practical difficulties of producing the witness outweigh the significance of the witness' personal appearance.
 - (2) Factors include: costs of producing the witness; the timing of the request for production; potential delay caused by production; willingness of the witness to testify in person; the likelihood of significant interference with military operations; and for child witnesses, the traumatic effect of providing in-court testimony.
6. Unavailable witnesses and evidence.
 - c) A party is not entitled to the presence of a witness who is unavailable under MRE 804(a) or evidence that is destroyed, lost, or otherwise not subject to compulsory process. RCM 703(b)(3) and (f)(2).
 - d) However, if the testimony or the evidence is of such central importance to an issue that is essential to a fair trial, and there is no adequate substitute, the military judge shall:
 - (1) Grant a continuance or other relief in order to attempt to secure the witness or evidence; or
 - (2) Shall abate the proceedings.
 - e) A party cannot seek a remedy under this rule if they are the reason that the evidence is unavailable. RCM 703(f)(2). Otherwise, there is no "bad faith" requirement, unlike the constitutional jurisprudence regarding preservation and destruction of evidence (discussed below). The defense can seek a remedy under this rule even if the government was not at fault when destroying the evidence, or was simply negligent in losing the evidence.
 - f) Lost or destroyed evidence instruction.
 - (1) "If you find that the State has . . . allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer

that the true fact is against the State's interest." *Arizona v. Youngblood*, 488 U.S. 51, 59-60 (1988) (Stevens, J., concurring).

- (2) "An adverse inference instruction is an appropriate curative measure for improper destruction of evidence." *United States v. Ellis*, 57 M.J. 375 (C.A.A.F. 2002).

g) Cases.

- (1) *United States v. Terry*, 66 M.J. 514 (A.F. Ct. Crim. App. 2008). After the first trial, the government lost or destroyed almost all of the physical evidence in a rape case. The second trial judge dismissed the related charges. The appellate court found that there were adequate substitutes and the evidence did not go to an issue of central importance.
- (2) *United States v. Barreto*, 57 M.J. 127 (C.A.A.F. 2002). Appellant caused a car accident, killing a passenger and injuring himself. The government was unable to locate two unknown witnesses to the fatal traffic accident whom the defense requested, despite efforts that included running ads in German and U.S. newspapers. The defense moved to compel their production, or, in the alternative, abate the proceedings until the witnesses could be produced. The court found that these witnesses were unavailable and that other eyewitnesses with unobstructed views of the accident who testified at trial were an adequate substitute for the potential testimony of the unknown witnesses.
- (3) *United States v. Eiland*, 39 M.J. 566 (N.M.C.M.R. 1993). Military judge abated the proceedings when the government failed to produce two critical witnesses requested by the defense in a rape case. One witness was the doctor who examined the alleged victim and the other witness was another employee of the hospital who observed her demeanor. Defense refused to stipulate. No abuse of discretion in abating trial when testimony is "of such central importance to an issue that it is essential to a fair trial." *Id.* at 568.
- (4) *United States v. Ellis*, 57 M.J. 375 (C.A.A.F. 2002). Appellant convicted of involuntary manslaughter and assault upon a child. After an autopsy was performed on the victim, the brain and its meninges were stored pursuant to laboratory regulations. Several months later, the specimen container was accidentally discarded when the laboratory was moved to a new location. The defense expert was never able to examine the specimens. At trial, the military judge never gave an adverse inference instruction relating to the lost specimen, and did not stop the trial counsel from commenting on the defense's inability to examine it. The court did not reach the RCM 703(f)(2) analysis, finding any error was harmless.

E. Duty to preserve evidence.

1. Due process test. Unless the government acts in bad faith, failure to preserve potentially useful evidence does not constitute a denial of due process

- a) *Arizona v. Youngblood*, 488 U.S. 51 (1988). The Government did not preserve clothes or perform certain tests on physical evidence taken from a child victim who had been sexually assaulted. The Government did not make use of any of the materials in its case-in-chief. The Court stated “that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process.” *Id.* at 58.
- (1) *See also Illinois v. Fisher*, 540 U.S. 544 (2004) (bad faith is the issue, even when the government destroys evidence for which the defense has submitted a discovery request).
 - (2) *Youngblood* clarified *California v. Trombetta*, 467 U.S. 479, 488-89 (1984), which stated that absent bad faith, any constitutional duty to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect's defense; that is, the evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Some military cases from the period 1984-1988 refer to *Trombetta* as the controlling source.
 - (3) Seventeen years after his conviction, DNA testing on some remaining evidence cleared Youngblood. UNDERSTANDING CRIMINAL PROCEDURE § 7.04.
- b) Military cases.
- (1) *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986). Blood stained fabric was consumed during testing. The court applied the *Trombetta* test which applied at the time and found no constitutional violation. However, the court stated, “Under Article 46, the defense is entitled to equal access to all evidence, whether or not it is apparently exculpatory. . . . Thus, the better practice is to inform the accused when testing may consume the only available samples and permit the defense an opportunity to have a representative present.”
 - (2) *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990). Crime scene processors took evidence (including swatches) from a car and then released the car to the owners before the defense had an opportunity to examine the car. At trial, the defense made a due process objection. The court found no bad faith, and the evidence collected from the car was still available for testing.
 - (3) *United States v. Gill*, 37 M.J. 501 (A.F.C.M.R. 1993). The accused is not entitled to relief on due process grounds for the government’s failure to preserve evidence.
 - (4) *United States v. Terry*, 66 M.J. 514 (A.F. Ct. Crim. App. 2008). After the first trial, the government lost or destroyed almost all of the physical evidence in a rape case. The court conducted due process analysis, finding no bad faith. (The court also conducted separate, R.C.M. 703(f)(2) analysis).

2. Contrast with RCM 703(f)(2).

- a) The rules for unavailable evidence in RCM 703(f)(2) are consistent with but broader than the due process jurisprudence related to the preservation of evidence. Many states declined to follow *Youngblood* and either enacted rules for production or made rulings under state constitutions that provided the same protections that are found under RCM 703(f)(2): no requirement for bad faith, and a “critically important to a fair trial” test. *See generally* UNDERSTANDING CRIMINAL PROCEDURE § 7.04.
 - b) At trial, counsel and military judges should generally apply the RCM 703(f)(2) analysis. *See generally United States v. Kern*, 22 M.J. 49 (C.M.A. 1986). If the government did act in bad faith, then shift analysis to the due process jurisprudence.
 - c) RCM 703(f)(2) is also a prospective rule – the parties at trial know that the evidence is unavailable. The question on appeal is whether the military judge correctly applied the rule. If the accused did not know at trial that that some evidence had been destroyed, and so could not litigate under RCM 703(f)(2), then the question on appeal would be whether due process was violated and so that analysis would be used. Appellate courts can conduct separate analysis under both tests. *See United States v. Terry*, 66 M.J. 514 (A.F. Ct. Crim. App. 2008).
3. Service regulations may provide further rights and remedies.
- a) *United States v. Manuel*, 43 M.J. 282 (C.A.A.F. 1995). Destruction of accused’s positive urine sample one month after testing violated Air Force regulation and DoD directive. Lower court’s suppression of positive results not an abuse of discretion where court concluded that standards for preserving samples conferred a substantial right on the accused.
 - b) *United States v. Madigan*, 63 M.J. 118 (C.A.A.F. 2006). An Air Force Institute of Pathology regulation required that positive urine samples be kept for two years. The lab inadvertently destroyed the accused’s sample before the two years were up. The defense did not request access to the sample during this period. Later, the defense discovered the sample was destroyed. The court found that applicable regulations concerning retention of drug testing samples conferred a right on servicemembers to discover evidence, and suppression is an appropriate remedy for lost or destroyed evidence in those cases. If the defense does not make a request to preserve the evidence before the period ends, they have essentially become the reason that the evidence is unavailable and so cannot seek a remedy under RCM 703(f)(2).
 - c) Department of Defense policy requires retention for one year. Dep’t of Defense, Instr. 1010.16, Technical Procedures for the Military Personnel Drug Abuse Testing Program para. E1.9.2 (Dec. 9, 1994)

F. Procedures.

- 1. Witnesses.
 - a) Military Personnel: Request that the witness’ commander issue any necessary orders. RCM 703(e)(1).
 - b) Civilian Witnesses: Subpoena. RCM 703(e)(2).
 - (1) Use for trial or depositions but not for pretrial interviews or Article 32 investigations. RCM 703(e)(2)(B) discussion.

- (2) Issued by the trial counsel. RCM 703(e)(2)(C).
- (3) Use DD Form 453. See the content requirements of RCM 703(e)(2)(B) and follow the requirements of RCM 703(e)(2).

2. Evidence.

- a) Evidence is under the control of the government. Trial counsel notifies the custodian of the evidence of the time, place, and date evidence is required and requesting custodian to send or deliver the evidence. RCM 703(f)(4)(A).
- b) Evidence not under control of the government. Subpoena. RCM 703(f)(4)(B).

G. Enforcement.

1. Witnesses. Article 47, RCM 703(e)(2)(G).

- a) If the witness neglects or refuses to appear, a military judge (or the convening authority if there is no military judge), may issue a warrant of attachment. RCM 703(e)(2)(G)(i).
 - (1) A warrant of attachment is issued only upon probable cause to believe that the witness was duly served with the subpoena, that fees and mileage were tendered, that the witness was material, that the witness refused or willfully neglected to appear, and that no valid excuse exists. RCM 703(e)(2)(G)(ii).
 - (2) Only non-deadly force may be used to bring the witness to before the court-martial. RCM 703(e)(2)(G)(iv).
- b) Refusal to appear or testify is a separate offense under Article 47.
- c) Cases.
 - (1) *United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989). The military judge ordered a post-trial Article 39(a) to hear allegedly newly discovered evidence to be offered by defense witness. Trial counsel issued a subpoena to the defense witness, but the convening authority refused to pay expenses on the basis of bad advice from his SJA. The Court of Military Appeals determined that since the record of trial wasn't authenticated, the judge could order the government to show cause why the findings and sentence should not be set aside or the judge could order accused released from confinement pending the motion for new trial.

2. Evidence. RCM 703(f)(4)(C).

- a) If the person who has the evidence believes that compliance with the subpoena or order of production is unreasonable or oppressive, the person may seek relief from the military judge.
- b) The military judge can withdraw or modify the subpoena or order of production.
 - (1) *United States v. Rodriguez*, 57 M.J. 765 (N-M. Ct. Crim. App. 2002). Law enforcement agents invited NBC for a "ride along" where an NBC videographer may have taped the scene of the traffic stop and search of appellant's vehicle. The accused filed a motion to suppress based on violations of his Fourth Amendment

rights and believed that the video may contain evidence in support of his motion. NBC provided a videotape of the broadcast material of the traffic stop but stated that it relied on its First Amendment privilege regarding the production of the video “outtakes” and reporter’s notes. The trial defense counsel requested the military judge to order production of any remaining videotape. The military judge denied the defense request to compel production. The appellate court stated that, essentially, the accused ask for production; NBC asked for relief; and the trial counsel supported that with a motion to quash the subpoena. The court found that the accused never met his burden for production: relevance and necessity. Even if it was, and assuming the evidence was unavailable under RCM 703(f)(2) because it was not subject to compulsory process, the evidence was not of central importance to an issue that was essential to a fair trial. The military judge should have at least reviewed the material *in camera*, though.

- c) *In camera*. The military judge may direct an *in camera* review in order to determine whether relief should be granted.
 - (1) Note how this *in camera* review differs from the *in camera* review found in RCM 701(g). This review comes after a subpoena has been issued, which means someone has decided that the matter is relevant and necessary. Now, the custodian of the evidence does not want to give the matter to the court. The military judge now does an *in camera* review. If the military judge agrees, the matter now has become “unavailable,” and the parties shift to the unavailable evidence analysis found in RCM 703(f)(2). See the discussion in section VI above.
- d) Types of potentially oppressive or unreasonable subpoenas.
 - (1) First Amendment claims.
 - (a) *United States v. Rodriguez*, 57 M.J. 765 (N-M. Ct. Crim. App. 2002) (discussed above).
 - (b) *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008). The accused gave an interview to CBS. CBS broadcast a portion of the interview and the government issued a subpoena for the remainder. The military judge did not conduct an *in camera* review and ordered the subpoena quashed. The court remanded for an *in camera* review and suggested that if the outtakes were not cumulative, then production and a subpoena would be appropriate.
 - (2) Medical treatment and disciplinary records of minors. *United States v. Reece*, 25 M.J. 93 (C.M.A. 1987). The military judge should have conducted an *in camera* inspection of the victims’ treatment and disciplinary records. The defense counsel “made as specific a showing of relevance as possible, given that he was denied all access to the documents.” Witness credibility would be central in this case because there were no eyewitnesses. The court held that the military judge abused his discretion in failing to

order production of the requested records for an *in camera* review.

- (3) *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006) Defense counsel requested production of a rape victim's medical records during discovery. Trial counsel subpoenaed the requested records; however the custodian, a private social worker who had counseled the victim, refused to produce the records. Defense counsel filed a motion asking the military judge to order production of the records, which he agreed to do after a hearing where he considered M.R.E. 513 and decided an *in camera* review would be appropriate. When the social worker still declined to produce the records, the military judge issued a warrant of attachment IAW R.C.M. 703(e)(2)(G). The warrant of attachment authorized the United States Marshal Service to seize the records and deliver them to the judge. The U.S. Marshal Service failed to seize the records, instead merely asking the social worker to produce the records, and gave up when she declined to do so. Faced with the government's failure to enforce the warrant of attachment, and deciding that the case could not proceed without *in camera* consideration of the records, the military judge abated the proceedings with regard to the rape charge. The appellate courts upheld the military judge.

VIII. APPOINTMENT AND PRODUCTION OF EXPERT ASSISTANTS AND WITNESSES

A. Expert Assistance.

1. General.

- a) An expert assistant is someone detailed to the defense team to assist the accused and defense counsel during the investigative stage of the trial process, although expert assistance can be requested for any stage. In this sense, expert assistance issues are more like *discovery* issues than production issues.
- b) Expert assistants most commonly assist defense counsel in the evaluation of scientific or technical evidence that the government intends to offer at trial. Expert assistants can also be helpful in the areas of mitigation, member selection, evaluation of physical evidence, or in providing a psychological evaluation of the accused.
- c) Even if the defense is successful in obtaining an expert assistant, that does not necessarily mean that the defense will be entitled to have that assistant testify as an expert *witness*. Ordinarily the two will merge but such merger is not automatic. The distinction matters, particularly with respect to privileges.
 - (1) If the defense successfully obtains expert assistance, then the expert becomes a part of the defense team. Therefore, communications between the expert and the defense counsel or the expert and the accused are privileged under M.R.E. 502. *United States v. Turner*, 28 M.J. 487 (C.M.A. 1989). The government may not interview a defense expert assistant without the approval of the defense counsel.

- (2) However, once the defense lists the expert as a witness, the government is free to contact and interview the witness. *United States v. Langston*, 32 M.J. 894 (A.F.C.M.R 1991).
- d) The limited right to expert assistance is guaranteed by the Due Process Clause, federal case law, and military case law, provided certain circumstances exist.
 - (1) *Ake v. Oklahoma*, 470 U.S. 68 (1985). In a capital case, the accused asked for a court-appointed psychiatrist to assist with the defense. The trial court denied the request. The Supreme Court held when an indigent accused makes a showing that expert assistance is needed on a substantial issue in the case both during case-in-chief and at sentencing, Due Process requires that the government provide that assistance.
 - (2) *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986). The court held that as a matter of military due process, servicemembers are entitled to investigative or other expert assistance when necessary for an adequate defense, without regard to indigence.
- e) Unlike the production of expert witnesses, the appointment of expert assistants does not have a source in the R.C.M.s.

2. Requests.

- a) The defense is entitled to expert assistance if the services are necessary. *Garries*, 22 M.J. 288; *United States v. Robinson*, 39 M.J. 88 (C.M.A. 1994).
- b) The standard on appeal is abuse of discretion, tested for prejudice with something like a materiality standard: the findings were substantially swayed by the error or would have changed the evidentiary posture of the case. *United States v. McAllister*, 55 M.J. 270, 276 (2001)
- c) In order to determine necessity, courts apply a two pronged test: “[T]he accused has the burden of establishing that a *reasonable probability* exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial.” *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2006) (emphasis added).
 - (1) The defense must show more than just a mere possibility that the expert would be of assistance. *United States v. Lloyd*, 69 M.J. 95 (2010) (the defense’s desire to “explore all possibilities” did not reach the “reasonable probability” threshold).
- d) Toward that first prong, courts use the three-pronged test adopted in *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1991).
 - (1) Why is the expert assistance needed?
 - (a) The issue must be central to the defense theory of the case. *United States v. Lloyd*, 69 M.J. 95 (2010). In *Lloyd*, the C.A.A.F. used the word “necessary” instead of “needed.”
 - (2) What would expert assistance accomplish for the accused?
 - (3) Why is the defense unable to gather and present the evidence that the expert assistant would be able to develop?

- (a) Defense counsel are expected to educate themselves to attain competence in defending the issues in a particular case. *United States v. Kelley*, 39 M.J. 235, 238 (C.M.A. 1994).
 - (b) The rapid growth in forensic science techniques at trial may make cases more complex than general practitioners can handle on their own. *United States v. McAllister*, 55 M.J. 270, 275 (2001); *United States v. Warner*, 62 M.J. 114, 118 (C.A.A.F. 2005).
 - (c) In *United States v. Lee*, 64 M.J. 213 (2006), CAAF commented on *Warner* and Article 46, saying that the playing field is uneven when the government benefits from scientific evidence and expert testimony and the defense is denied a necessary expert to prepare for and respond to the government's expert.
 - (d) Absent a showing that his case was unusual, when the government offered CID laboratory experts in a child sexual assault case, the military judge did not abuse his discretion when denying the request. *United States v. Ndanyi*, 45 M.J. 315 (C.A.A.F. 1996).
 - (e) However, the military judge cannot deny a defense request for an expert assistant by telling the defense to use the government's own expert to prepare for trial. *United States v. Lee*, 64 M.J. 213 (2006).
 - (f) Where the defense counsel had already tried 15-20 urinalysis cases; had previously worked with an expert assistant on two urinalysis cases; had telephonic access to an expert consultant during trial; knew of the appropriate sources in the field; and did not raise irregularities in the handling of the urine specimen, the military judge did not err in not requiring the physical presence of the expert assistant during trial. *United States v. Kelley*, 39 M.J. 235, 238 (C.M.A. 1994).
- (4) Adequate substitute.
- (a) The government cannot secure for itself the top expert in the field and then provide the defense with a generalist: "Article 46 is a clear statement of congressional intent against government exploitation of its opportunity to obtain an expert vastly superior to the defense's." *United States v. Warner*, 62 M.J. 114 (C.A.A.F. 2005). To do so violates the letter and spirit of Article 46.
 - (b) However, giving the defense a generalist but then having the government call a specialist in rebuttal is not *per se* unfair. *United States v. Anderson*, 68 M.J. 378 (C.A.A.F. 2010). The disparity must cause some prejudice to the accused.

- e) Defense counsel may have to provide evidence that the favorable evidence they are seeking actually exists. *United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005).
- f) For cases involving requests for expert assistance in false confessions and interrogation techniques, *see United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005); *United States v. Freeman*, 65 M.J. 451 (C.A.A.F. 2008) (defense counsel may be capable of developing the expertise in this area without expert assistance).

B. Expert Witnesses.

1. General.

- a) Under M.R.E. 702, an expert witness is someone who possesses particular knowledge, skill, experience, training or education and can offer scientific, technical, or other specialized knowledge testimony that will assist the trier of fact to understand the evidence or to determine a fact in issue. An expert witness is allowed to testify in the form of an opinion.
- b) As with an expert assistant, an accused has the right to obtain an expert witness and produce her for trial at his own expense. If an accused intends to do so, all the notice and disclosure requirements outlined in R.C.M. 701(b) concerning witnesses must be observed.

2. Process.

- a) The production and employment of expert witnesses is governed by R.C.M. 703(d).
 - (1) If the defense *or the government* is seeking to have an expert witness produced and to have the convening authority cover the expense of the witnesses, counsel must:
 - (a) Submit a request to the convening authority to authorize employment and fix compensation before employment;
 - (i) Nothing in the Manual for Courts-Martial permits the government to ratify previous employment of a defense expert.
 - (b) Provide notice to the other party.
 - (2) The request must include a complete statement of reasons why the expert is *necessary*, and an estimate of costs.
 - (a) This list of reasons should include a synopsis of testimony as required by R.C.M. 703(c)(2). *United States v. Ndanyi*, 45 M.J. 315 (C.A.A.F. 1996).
 - (3) If the convening authority denies the request, the defense can raise the issue with the military judge.
 - (a) The military judge will determine whether the testimony of the expert is *relevant* and *necessary*. *United States v. Ndanyi*, 45 M.J. 315, 319 (C.A.A.F. 1996).
 - (b) If so, whether the government has provided an *adequate substitute*.

- (4) The defense may be entitled to an ex parte hearing to justify their request for a defense expert. This is not an absolute right and is only for unusual situations. *United States v. Garries*, 22 MJ 288, 291 (C.M.A. 1986); *United States v. Kaspers*, 47 MJ 176 (C.A.A.F. 1997).
 - (5) If the military judge finds that a defense expert is needed, she may order the government to provide the expert. If the government fails to comply, the military judge may abate the proceedings. R.C.M. 703(d).
- b) Relevant and necessary. Courts may use the *Houser* factors, *United States v. Houser*, 36 M.J. 392 (C.M.A. 1993), when determining whether the expert's testimony would be necessary and relevant. *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998).
 - c) Adequate substitute.
 - (1) The defense is not entitled to its named expert. If the government decides an expert is needed, or if the military judge orders the government to produce an expert, the government may provide a reasonable substitute. *United States v. Burnette*, 29 M.J. 473 (C.M.A. 1990).
 - (2) Except in unusual circumstances, the military judge does not have authority to appoint a specific expert. *United States v. Thorpe*, 38 M.J. 8 (C.M.A. 1993).
 - (3) If the defense requests an expert and the government provides an expert that has a divergent view from the one held by the defense requested expert, then the substitute might not be adequate. *United States v. Robinson*, 43 M.J. 501 (A.F.C.C.A. 1995).
 - (4) The defense is not entitled to an eminent expert in a particular field. The defense is only entitled to receive a qualified expert. *United States v. Gray*, 37 M.J. 730 (A.C.M.R. 1993).

IX. CONCLUSION AND PRACTICE TIPS

- A. The gaps between discovery and production can lead to Catch-22 scenarios. Say the defense counsel believes his client suffered an adverse reaction from a new medication. The defense counsel wants to review reports made to the Food and Drug Administration to see if others have had similar reactions. Can the defense counsel get these reports under RCM 701 or 703? Probably not.
 1. RCM 701(a)(6) and *Brady* do not provide a mechanism. Even if there were exculpatory material in the reports, the trial counsel is not obligated to disclose them – the reports are not in the files of a law enforcement agency that is somehow related to the case.
 2. RCM 701(a)(2) does not provide a mechanism. The reports are not in the possession, custody, or control of *military* authorities.
 3. The defense counsel has to rely on the production rules in RCM 703. While the files are subject to production without subpoena (they are under the control of the Government), the defense counsel may not be able to make a good argument about why the matter is relevant and necessary – because the defense counsel has not seen them yet.

4. The defense counsel's only remedy may be to ask the Article 32 officer to produce the reports at the Article 32 hearing (RCM 405(g)(1)(B)) or ask for the reports under the Freedom of Information Act and then wait patiently for them to arrive, asking the military judge for continuances until they do.
- B. Knowing the difference between the various discovery rules and between the discovery rules and similar production rules is important. Be precise in your analysis. When conducting research, note whether the appellate court is using RCM 701 or 703 as the basis for its reasoning (and whether the appellate court incorrectly applied one or the other). For example:
1. Scope of government duty to locate. Under RCM 701(a)(2), the trial counsel must search what is in the possession, custody, or control of *military* authorities, which includes non law-enforcement authorities. Under RCM 701(a)(6) and *Brady*, the trial counsel generally must search law enforcement files. Under RCM 703, the government may have to issue a subpoena to *anyone*, military or government or not.
 2. The kind of information. Under RCM 701(a)(2), the threshold is low: the matter only needs to be *material to the preparation of the defense*. Under RCM 701(a)(6) and *Brady*, the matter needs to be *favorable and material*. Under RCM 703, the matter needs to be *relevant and necessary*. These are all different standards.
 3. When. Under RCM 701(a)(2), the government only has to provide the information when asked. Under RCM 701(a)(6) and *Brady*, the government must disclose the matter without being asked. Under RCM 703, the government must produce the witness or evidence if the government determines that it is relevant and necessary, or the military judge tells the government to produce it.
 4. *In camera*. Under RCM 701(g), the military judge grants *in camera* review before deciding on the importance of the information (whether the matter is material to the preparation of the defense); the person seeking relief is a party to the trial; and the party that is denied discovery has no relief until appeal. Under RCM 703(f), the *in camera* review comes *after* the decision on the importance of the information (relevant and necessary); the person seeking relief is the custodian of the evidence; and the party denied production of the evidence then seeks relief under RCM 703(f)(2) (unavailable evidence).
 5. Standard on review. For specific requests under RCM 701(a)(2), the standard for prejudice is harmless beyond a reasonable doubt. Under RCM 701(a)(6) and *Brady*, the standard for prejudice is material (reasonable probability of different result) unless government bad faith, when it is harmless beyond a reasonable doubt. Under RCM 703, the standard for prejudice is harmless beyond a reasonable doubt.
- C. Discovery and trial advocacy.
1. After trial advocates have framed their problem by identifying the elements at issue in the case and have constructed basic arguments that support their positions on those elements, the advocates need to develop the evidence that supports those arguments.
 2. Before you can find something, you need know what you are looking for. Develop a plan for finding what you need. Brainstorm. See ALBERT J. MOORE, ET AL., TRIAL ADVOCACY: INFERENCES, ARGUMENTS, AND TECHNIQUES (1996).

- a) If my claim is true, what evidence indicates a motive or reason for why my claim is accurate? What should we expect to have happened before and after? What actually did happen before and after? If my claim is true, what else is likely to have occurred?
 - b) How do people typically act? How do institutions typically behave? How do mechanical devices operate? How do people typically think? How do people typically react in emotional situations?
 - c) What is the custom and practice? Were less restrictive alternatives available? What positive or negative consequences resulted or could have resulted from the conduct?
 - d) What was the person's physical ability to observe? Is there a reason they would or would not have seen the event? Is there a reason why they would or would not remember the event? Are there internal inconsistencies (if they did this, they would not have done that)? Are there external inconsistencies (they said they did this, but someone else says that did not happen)? Did the person have the authority to do what they said they did? Are there reasons the person would be neutral or biased?
3. Discovery is just a part of that plan. "[T]he role of discovery is not just to get your case into or out of court. It's to find the facts – the human elements – that tell the winning story." James W. McElhaney, *Hunt for the Winning Story*, A.B.A. J., July 2006, at 22.
 4. The starting point for developing evidence is to apply a liberal amount of elbow grease. If you want it, go get it. If there is an obstacle between you and the evidence that you cannot get around, but the other party can get around the obstacle, then seek discovery.
 5. While not discussed in this outline, the Article 32 is an integral part of both party's discovery plans.

X. APPENDIX

Discovery in the Military Justice System

Preferral, Article 32 Investigation, Referral (Until Arraignment)

***This document is intended to give a general framework to help counsel understand how discovery works in court-martial practice. It is only a starting point and is not a substitute for the rules and cases actually governing discovery.*

I. Preferral

After the accused is informed of the charges against him or her, the trial counsel should provide a copy of the charge sheet and associated documents (sworn statements etc.) to the defense counsel. If the accused does not have a defense counsel assigned, this is the time to get one detailed (work with your Chief of Justice). This will foster good working relations with the Trial Defense Service, streamline the process, and make it work better for all concerned.

Authority	Burden On	Trigger/Deadline	What is Required
R.C.M. 308	Government	As soon as practicable after preferral	Identification of accuser

II. Article 32 Investigation

There is no formal requirement for disclosure under RCM 701 before the Article 32 hearing. However, RCM 405 does require that witnesses and evidence against the accused be produced. From a practical standpoint, the defense counsel should be provided with a packet that includes all charge sheets, sworn statements, evidence custody documents, and copies of pictures. This will streamline the process. You should always use a tracking document when you turn something over to the defense so that there is a paper trail.

Authority	Burden On	Trigger/Deadline	What is Required
R.C.M. 405(j)(3)	Government	Promptly after report is completed	Article 32 Investigating Officer's Report

III. Referral

Note that many of these rules have different triggers. In practice, all evidence should be disclosed before arraignment, according to the dates set by the Military Judge. The Military Judge regulates discovery once a case is referred to trial.

Authority	Burden On	Trigger/Deadline	What is Required
R.C.M. 701(a)(1)	Government	As soon as practicable after service of charges	Papers accompanying the charges; convening orders; & statements
R.C.M. 701(a)(6)/Brady	Government	As soon as practicable	Evidence that reasonably tends to be favorable to the defense
Trombetta, Youngblood, and Garries	Government	Before evidence used up in testing	Inform accused that testing may consume all available samples of

			evidence (even if that evidence is apparently not exculpatory)
R.C.M. 701(a)(2)	Government	Defense Request	Documents, tangible objects and reports etc.
R.C.M. 701(a)(3)(B)	Government	Defense notice under RCM 701(b)((1) or (2); Before start of trial	Witnesses to rebut certain defenses
R.C.M. 701(a)(5)	Government	Defense Request	Information to be used at sentencing
M.R.E. 404(b)	Government	Defense Request	Uncharged misconduct
M.R.E. 505	Government and Defense	Defense request or government claim of privilege	Classified Information
M.R.E. 506	Government	Defense Request	Privileged information other than classified information
M.R.E. 507	Government (claim of privilege); Defense (motion to disclose)		Identity of informant
M.R.E. 609	Proponent	Sufficient advance notice	Notice of intent to impeach w/ > 10 year old conviction

Authority	Burden On	Trigger/Deadline	What is Required
R.C.M. 706(c)(3)(B)	Government	Completion of sanity board	Mental examination of accused – distribution of the report
R.C.M. 701(b)(1)(B)	Defense	Government request	Pre-sentencing witnesses and evidence
R.C.M. 701(b)(3)	Defense	Reciprocal Discovery (once government has responded to earlier defense discovery request, <i>and</i> has affirmatively requested this information pursuant to this rule)	Documents and tangible objects
R.C.M. 701(b)(4)	Defense	Reciprocal Discovery (once government has responded to earlier defense discovery request, <i>and</i> has affirmatively requested this information pursuant to this rule)	Reports of results of mental examinations, tests, and scientific experiments

Discovery in the Military Justice System

Arraignment

Authority	Burden On	Trigger/Deadline	What is Required
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R.C.M. 701(a)(4)	Government	Before arraignment	Prior convictions of accused to be offered on the merits for any reason, including impeachment
M.R.E. 301	Government	Before arraignment or within reasonable time before witness testifies	Immunity
M.R.E. 304(d)	Government	Before arraignment	Statements of accused relevant to case, <i>regardless</i> of whether government intends to use them
M.R.E. 311(d)	Government	Before arraignment	Property seized from accused
M.R.E. 321(c)	Government	Before arraignment	Identifications of accused
R.C.M. 1004(b)(1)	Government	Before arraignment	Capital cases – notice of aggravating factors under RCM 1004(c)
M.R.E. 311(f)	Defense	Accused to testify in motion to suppress evidence seized from accused	Notice that accused will testify for limited purposes of the motion
M.R.E. 321(e)	Defense	Accused to testify in motion to suppress out of court identification	Notice that accused will testify for limited purposes of the motion

Discovery in the Military Justice System

Trial

Authority	Burden On	Trigger/Deadline	What is Required
R.C.M. 701(a)(3)(A)	Government	Before start of trial	Witnesses in case-in-chief
M.R.E. 412(c)	Proponent (normally defense)	Minimum of 5 days before entry of pleas	Rape shield
M.R.E. 413/414	Government	Minimum of 5 days before scheduled date of trial	Evidence of similar crimes (child molestation and sexual assault cases)
R.C.M. 914 (Jencks Act)	Proponent of witness	After witness testifies on direct, on motion of opposing party	Production of statements concerning which witness testified (could be CID Agent Activity Summaries; Article 32 tapes; witness interview notes; Administrative board proceedings; confidential informant's notes, etc.

R.C.M. 701(b)(1)(A)	Defense	Before trial on the merits	Names of witnesses and statements
R.C.M. 701(b)(2)	Defense	Before trial on the merits	Notice of certain defenses (alibi; lack of mental responsibility; innocent ingestion, etc.)

Post-Trial

Remember that the duty to disclose is a continuing duty. Even if something covered by these rules is discovered after trial, it must be disclosed.

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ARTICLE 32 PRETRIAL INVESTIGATIONS

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SPRING 2012**

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ARTICLE 32 PRETRIAL INVESTIGATIONS

Outline of Instruction

I. WHAT IS AN ARTICLE 32 PRETRIAL INVESTIGATION?

A. **IN GENERAL.** The Article 32 investigation is a formal investigation conducted prior to trial. Article 32, UCMJ reads, “No charge or specification may be referred to a *general court martial* for trial until a *thorough and impartial investigation* of all the matters set forth therein has been made.”

1. Formal investigation conducted before trial.
2. The Article 32 investigation has been labeled the “military equivalent” of a civilian grand jury proceeding. *United States v. Bell*, 44 M.J. 403, 406 (C.A.A.F. 1996). *See also United States v. Powell*, 17 M.J. 975, 976 (A.C.M.R. 1984).

B. **RESOURCES.** DA Pam 27-17, *Procedural Guide for Article 32(b) Investigating Officer* (16 Sep 90); DA Pam 27-173, *Trial Procedure*, Chapter 16 (31 Sep 92).

II. WHAT ARE ITS PURPOSES?

A. **IN GENERAL.** “The Article 32 investigation ‘operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges.’” *United States v. Garcia*, 59 M.J. 447, 451 (C.A.A.F. 2004) (quoting *United States v. Samuels*, 27 C.M.R. 280, 286 (C.M.A. 1959)).

B. **STATUTORY PURPOSES.** UCMJ art. 32; RCM 405(a) discussion; RCM 405(e).

1. Inquire into the truth of the matter alleged in the charges.
2. Consider the form of the charges.
3. Make recommendations as to disposition of the charges.

C. **DISCOVERY AS A PURPOSE.** “The investigation also serves as a means of discovery.” RCM 405(a) Discussion. *See also* Article 32(b), UCMJ; *United States v. Garcia*, 59 M.J. 447, 451 (C.A.A.F. 2004).

D. **PRESERVATION OF TESTIMONY.**

1. Article 32 testimony may be admissible as *substantive evidence* at trial, as a prior inconsistent statement under M.R.E. 801(d)(1) or as prior testimony under M.R.E. 804(b)(1). Use caution: *United States v. Austin*, 35 M.J. 271 (C.M.A. 1992). Child victim testified in detail at the Article 32 but recanted her testimony at trial and refused to talk about the offense. Over defense objection, trial court admitted 15-page transcript of Article 32 testimony as prior inconsistent statement pursuant to M.R.E. 801(d)(1)(A) and as former testimony under M.R.E. 804(b)(1). The transcript was read to the panel *and* then given to the panel to take into the deliberation room. Held: reversible error to send transcript back to deliberation room with panel. The transcript was not an exhibit under RCM 921.
2. *See also United States v. Ureta*, 44 M.J. 290 (C.A.A.F. 1996), *cert. denied*, 519 U.S. 1059 (1997). Article 32 transcript admissible as prior inconsistent statement and substantive evidence on issue of guilt in case of rape and carnal knowledge of 13-year-old daughter, under M.R.E. 801(d)(1). Accused’s wife testified at Article 32 that accused confessed. After Article 32 terminated, wife refused to discuss her testimony with Government. Unsure whether wife would recant her Article 32 testimony at trial, Government called wife as witness, she recanted, acknowledged inconsistency, and over defense objection, Article 32 transcript was admitted and taken into deliberations. CAAF

held that Article 32 transcript was not admissible under M.R.E. 608(b) (no extrinsic evidence of prior inconsistent statement when witness available and testifies, admits making prior statement, and acknowledges specific inconsistencies), *but* Article 32 transcript admissible under M.R.E. 801(d)(1)(A) as substantive evidence and Government can call witness to establish foundation for admission. Error to send transcript into deliberations, but harmless because unlike *Austin*, transcript was not the only evidence against accused.

3. Article 32 testimony may be admissible at trial as former testimony under M.R.E. 804(b)(1), when the witness is unavailable. *See Austin* (above) and *United States v. Connor*, 27 M.J. 378 (C.M.A. 1989) (“If the defense counsel has been allowed to cross-examine the Government witness without restriction on the scope of cross-examination, then the provisions of M.R.E. 804(b)(1) and of the 6th Amendment are satisfied, even if that opportunity is not used, and the testimony can later be admitted at trial.”). *See also United States v. Ortiz*, 35 M.J. 391 (C.M.A. 1992) (Government must establish that the witness was unavailable before former testimony may be properly admitted). *United States v. Hubbard*, 28 M.J. 27 (C.M.A. 1989) (When Article 32 testimony is offered at trial, the proponent must establish the unavailability of the witness per M.R.E. 804(b)(1) and the 6th Amendment). The Government proves unavailability through serving a subpoena (with appropriate fees), and in the last resort, a warrant of attachment on the witness.

4. Article 32 testimony may be admissible at trial as residual hearsay for unavailable declarants under M.R.E. 807. *United States v. Cabral*, 47 M.J. 268 (C.A.A.F. 1997), *affirming* 43 M.J. 808 (A.F. Ct. Crim. App. 1996). Five-year-old victim of sexual abuse appeared for trial but refused to testify. Witness declared “functionally unavailable” and Article 32 videotaped testimony, which had “particularized guarantees of trustworthiness” (language suitable for 5 year old, described acts not common to experience of 5 year old, use of non-leading questions, no motive to fabricate) was admissible as residual hearsay. **Caution:** What is effect of *Crawford v. Washington*, 541 U.S. 36 (2004) on the continued viability of this opinion?

E. **IMPROPER PURPOSE.** RCM 405(a) discussion.

1. Purpose is *not* to perfect a case against the accused.
2. *Rather*, the purpose is to ascertain and weigh all the evidence in arriving at conclusions and recommendations.

III. **WHEN IS AN ARTICLE 32 INVESTIGATION NECESSARY?**

A. **PREREQUISITE TO TRIAL BY GENERAL COURT-MARTIAL.** Article 32, UCMJ; RCM 405(a).

1. Not required for trial by special court-martial.
2. Not required for trial by summary court-martial.

B. **EXCEPTIONS TO THE ARTICLE 32 REQUIREMENT.**

1. **Adequate substitute.** RCM 405(b). There has already been an investigation into the subject matter of the charges before the accused is charged.

- a) *United States v. Diaz*, 54 M.J. 880 (N-M. Ct. Crim. App. 2000). After the Article 32, the accused identified a defect in the preferral of the initial charges, which were dismissed, and new charges preferred. The accused requested a new Article 32, contending that the preferral defect meant that no charges had been investigated by the first Article 32. The Navy Court held the first Article 32 was valid and satisfied the requirements of Article 32.

b) *United States v. Burton*, No. 36296, 2007 CCA LEXIS 281 (A.F. Ct. Crim. App. Jul. 16, 2007) (unpublished). A rape charge was preferred against the accused and the charge was investigated in accordance with UCMJ art. 32. At the investigation, the accused was represented by counsel and had an opportunity to cross-examine the victim. The charge was referred to trial, but subsequently withdrawn because the accused committed additional misconduct. The rape charge was re-preferred (along with several other charges) in an identical fashion except the accused's unit had changed. The charges were once again sent to an Article 32 investigating officer. The defense counsel noted that the Government intended to rely on the previous Article 32 investigation for the rape charge and objected, demanding further investigation into the rape charge under RCM 405(b) because of new evidence calling the victim's credibility into question. The investigating officer did not investigate the rape charge, but simply attached a copy of the previous Article 32 investigation to the report of the investigation for the three new charges. The defense objected that the original rape charge had not been re-investigated and filed a motion to dismiss at trial. The military judge denied the motion to dismiss, finding that the original rape charge was identical to the new rape charge (except for the unit) and that charge had been properly investigated, so no new investigation was required. The AFCCA held that the military judge abused his discretion in failing to order a new Article 32 investigation into the rape charge. The court found that "[W]hen the government relies on a previously completed Article 32 . . . hearing to support re-referral of dismissed charges, with no new recommendations by an investigating officer, the investigation is covered by Article 32(c) . . . and an accused has the opportunity to demand further investigation." However, the court held that the error was harmless beyond a reasonable doubt because the convening authority had been given the information concerning her credibility, the SJA had commented on the victim's credibility in the Article 34 advice, and the defense conducted a detailed cross-examination of the victim at trial.

2. ***Accused may waive the investigation.*** RCM 705(c)(2)(E) and RCM 905(e).

a) Personal right of the accused. *United States v. Garcia*, 59 M.J. 447 (C.A.A.F. 2004). Accused must personally waive right to Article 32 hearing (attorney cannot waive it for him). Court does not proscribe method for waiver.

b) May be waived for personal reasons. If waived for personal reasons, withdrawal of the waiver need only be permitted upon a showing of good cause. *United States v. Stone*, 37 M.J. 558 (A.C.M.R. 1993). *See also United States v. Nickerson*, 27 M.J. 30 (C.M.A. 1988).

c) Defense offer to waive is not binding on the Government; investigation may still be held. RCM 405(a) Discussion.

d) May be waived as a condition of a pretrial agreement. RCM 705(c)(2)(E); *United States v. Shaffer*, 12 M.J. 425 (C.M.A. 1982). Article 32 is not a jurisdictional requirement. RCM 905(b)(1) Discussion.

IV. SCOPE OF THE INVESTIGATION

A. IN GENERAL.

1. Should be limited to issues raised by the charges and necessary to proper disposition of the case. RCM 405(a) Discussion.

2. Not limited to examination of the witnesses and evidence mentioned in the accompanying allied papers (or to what the Trial Counsel initially provides the Investigating Officer (IO)).

B. INVESTIGATION OF UNCHARGED OFFENSES. Article 32(d); RCM 405(e) and Discussion. IO may investigate subject matter of the uncharged offense(s) without preferral of additional charge(s), provided notice and certain rights are afforded to the accused.

1. IO may investigate subject matter of the uncharged offense without preferral of new/additional charge(s).
2. Similarly, if charges are changed to allege a more serious or essentially different offense, further investigation should be directed with respect to the new or different matter. *See, e.g., United States v. Bender*, 32 M.J. 1002 (N.M.C.M.R. 1991).

C. ADMISSIBILITY DETERMINATIONS. May include inquiry into legality of searches or the admissibility of a confession. RCM 405(e) (Discussion).

1. *But* investigating officer not required to rule on admissibility.
2. Investigating officer should note the issue in the report of investigation.

D. BURDEN OF PROOF. RCM 405(j)(2)(H). IO determines whether “reasonable grounds” exist to believe the accused committed the offense. “Reasonable grounds” is best translated as “probable cause.” “Probable cause” means “more than a bare suspicion but less than evidence that would justify a conviction” BLACK’S LAW DICTIONARY 1321 (9th ed. 2009).

E. NON-BINDING RECOMMENDATION. IO’s recommendations are only advisory. RCM 405(a) Discussion.

V. PARTICIPANTS.

A. APPOINTING AUTHORITY. RCM 405(c).

1. Any court-martial convening authority (including summary court-martial convening authority) may direct an Article 32 investigation.
2. Usually, the special court-martial convening authority (SPCMCA) will order the investigation.
3. Appointing Authority should be neutral and detached, within reason.
 - a) **Accuser** means a person who (1) signs and swears to charges, any person who (2) directs that charges nominally be signed and sworn to by another, and (3) any other person who has an interest other than an official interest in the prosecution of the accused. *See* UCMJ art. 1(9); RCM 601(c) discussion.
 - b) **Statutory Disqualification.** A convening authority is statutorily disqualified if he or she prefers charges or directs another to prefer charges (the first two types of accuser in UCMJ art. 1(9)). *See, e.g., McKinney v. Jarvis*, 46 M.J. 870 (A. Ct. Crim. App. 1997) (convening authority who becomes an accuser by virtue of preferring charges in an official capacity as a commander is not, *per se*, disqualified from appointing a pretrial IO to conduct a thorough and impartial investigation of those charges).
 - c) **Personal Disqualification.** A convening authority is personally disqualified if he or she has an other-than-official interest in the case (a “Type 3” accuser in Article 1(9), UCMJ).

- (1) *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994). Accuser concept also applies to those who forward the charges. Special court-martial

convening authority's (SPCMCA's) girlfriend (later spouse) was acquainted with accused. Record did not establish that SPCMCA acted without improper motives. SPCMCA must disclose any potential personal interests, and if disqualified, forward without recommendation.

(2) *United States v. v. Dinges*, 55 M.J. 308 (C.A.A.F. 2001). A convening authority who becomes an accuser by virtue of having such a close connection to the offense that a reasonable person would conclude he had a personal interest in the case is disqualified from taking further action as a convening authority. At a GCM the accused was convicted of sodomy arising out of his activities as an assistant scoutmaster with a local troop of the Boy Scouts. The Scout Executive terminated his status as an assistant, and contacted the CA (who was a district chairman of the Big Teepee District, Boy Scouts of America) about the matter. Prior to preferral of charges, the accused was assigned to the CA's wing (a special court-martial convening authority level command). The CAAF ordered a *DuBay* hearing to determine whether the convening authority had an other than official interest that would disqualify him under UCMJ art. 1(9) and *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994). Based on facts gathered at the *DuBay* hearing, the CAAF held the SPCMCA did not become an accuser because he did not have such a close connection to the offense that a reasonable person would conclude he had a personal interest in the case. As such, he was not disqualified from taking action as a CA.

d) ***Fact that appointing authority has determined to send the accused's case to a general court-martial does not show he is biased.*** *United States v. Wojciechowski*, 19 M.J. 577 (N.M.C.M.R. 1984) (appointing authority was not personally disqualified after telling an NIS agent and the defense counsel, prior to completion of the Article 32, that he was "going to send (appellant) to a general court-martial").

4. Why does statutory vs. personal disqualification matter? It will affect the range of options available.

<i>Action contemplated</i>	<i>If statutorily disqualified -</i>	<i>If personally disqualified -</i>
Appointing UCMJ art 32 investigating officer (IO)	May appoint Article 32 IO	May not appoint Article 32 IO
Dismissal of charges	May dismiss	May dismiss
Disposition by other means	May dispose of case via Article 15, Ltr of Reprimand, etc.	May dispose of case via Article 15, Ltr of Reprimand, etc.
Convening a court martial	May convene a SCM, but not a SPCM or a GCM	May convene a SCM, but not a SPCM or a GCM
Forwarding to superior	May forward with recommendation as to disposition (must note statutory disqualification)	May forward but may not make recommendation

B. **INVESTIGATING OFFICER (IO).** RCM 405(d)(1).

1. **Must be a commissioned officer.** In the Army, the IO cannot be a commissioned warrant officer. AR 27-10, para. 7-7d.
2. **Preference for field grade officers or officers with legal training** (judge advocates). RCM 405(d)(1) Discussion.
3. **Controls the proceedings.** It was not error for the IO to limit redundant, repetitive, or irrelevant questions by the defense counsel. *United States v. Lewis*, 33 M.J. 758 (A.C.M.R. 1991).
4. **Disqualified from serving later in same case in any capacity.** RCM 405(d)(1).
5. **Must be impartial.**
 - a) May not be the accuser in the case.
 - b) IO must be impartial, but not disqualified merely because of:
 - (1) Prior knowledge about the case. *United States v. Schreiber*, 16 C.M.R. 639 (A.F.B.R. 1954).
 - (2) Investigated a related case. *United States v. Collins*, 6 M.J. 256 (C.M.A. 1979).
 - c) The IO *is partial* and *is disqualified* if the IO:
 - (1) Played a prior role in perfecting the case against the accused. *United States v. Lopez*, 42 C.M.R. 268 (C.M.A. 1970); *United States v. Parker*, 19 C.M.R. 201 (C.M.A. 1955).
 - (2) Previously formed or expressed an opinion about the accused's guilt. *United States v. Natallelo*, 10 M.J. 594 (A.F.C.M.R. 1980).
 - (3) Served as DSJA in the SJA office. *United States v. Davis*, 20 M.J. 61 (C.M.A. 1985).
 - (4) **Anytime his/her impartiality might reasonably be questioned.** An IO is bound by the ethical standards applicable to judges, i.e. Code of Judicial Conduct and the ABA Standards for Criminal Justice. ABA Standards for Criminal Justice, Special Functions of the Trial Judge, Standard 6-1.6 (3d ed. 2000). *United States v. Castleman*, 11 M.J. 562 (A.F.C.M.R. 1981) (IO was close personal friend of accuser, purchased airplane and vacationed with accuser two days before Article 32); *United States v. Davis*, 20 M.J. 61 (C.M.A. 1985) (IO was XO of NLSO and was defense counsel's supervisor.) *See also United States v. Willis*, 43 M.J. 889 (A.F. Ct. Crim. App. 1996) (IO not biased, even though misapplied 100-mile rule as reason for not interviewing witnesses and considered sworn statements of unavailable witnesses and videotaped confession.)
6. **Advice.** With regard to *substantive matters*, any advice received must be from a neutral source. *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977).
 - a) Persons performing prosecutorial functions are not neutral. *United States v. Grimm*, 6 M.J. 890 (A.C.M.R. 1979).
 - b) Advice must not be given ex parte. *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977). ABA Standards, Special Functions of the Trial Judge 6-2.1 (1982). After receiving the advice notice must be given of the person consulted, the substance of the advice, and the parties must be afforded a

reasonable opportunity to respond. Canon 3(A)(4), Code of Judicial Conduct (1972).

7. **Ex parte communication.** Ex parte contacts by the IO regarding substantive matters constitute error that will be tested for prejudice. Ex parte contacts have a presumption of prejudice that may be rebutted by the trial counsel, *but* actual prejudice to accused very unlikely to be found. See *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977) (seven meetings with trial counsel); *United States v. Whitt*, 21 M.J. 658 (A.C.M.R. 1985) (two “informal” ex parte interviews with three witnesses); *United States v. Francis*, 25 M.J. 614 (C.G.C.M.R. 1987) (meeting with CO, trial counsel, and accuser); and *United States v. Rushatz*, 30 M.J. 532 (A.C.M.R.), *aff’d*, 31 M.J. 450 (C.M.A. 1990) (contacting CID, visiting housing & finance offices, talking with potential witness),

a) *United States v. Argo*, 46 M.J. 454 (C.A.A.F. 1997). Staff Judge Advocate’s request to Article 32(b) IO (a subordinate officer not under his supervision) to: reopen investigation to look into issue of unlawful command influence; and reject the defense’s interpretation of precedent regarding “no-contact” order did not constitute unlawful command influence. Accused suffered no prejudice by a full investigation of the unlawful command influence issues. Although SJA’s *ex parte* contact violated the law, there was no prejudicial impact because the IO consulted her own SJA for legal advice and exercised independent judgment; and the defense did not enter an objection at any stage of the court-martial process.

b) *United States v. Holt*, 52 M.J. 173 (C.A.A.F. 1999). IO’s furnishing trial counsel with name and phone number of blood spatter expert who later provided helpful blood test and spatter testimony at trial created at least the appearance of impropriety by providing trial counsel with what was, in effect, a supplementary report that was neither transmitted to the commander who ordered the investigation nor served on the accused. Such communication did not prejudice the accused, although the CAAF held that, in the future, such supplementary communications must be reported promptly to the command and to the accused. If such a matter arises after referral, the information shall be provided promptly to the commander who referred the case to trial, the military judge, and the accused. The parties will be in the best position to determine whether any motions or objections are warranted based upon the nature of the information.

8. **Delay Authority.** *United States v. Lazauskas*, 62 M.J. 39 (C.A.A.F. 2005). CAAF interprets RCM 707(c) to exclude, for 120-day calculation purposes, any delay approved by the ART 32 IO if the convening authority previously delegated authority to the IO to approve delays.

C. **ACCUSED.** RCM 405(f). The accused has the following rights:

1. To be informed of the charges under investigation.
2. To be informed of the identity of the accuser.
3. To be present throughout the taking of evidence unless the accused:
 - a) Is disruptive.
 - b) Is *voluntarily* absent (technically, cannot force accused to be present).
4. To be represented by counsel.
5. To be informed of the witnesses and other evidence then known to the IO.
6. To be informed of the purpose of the investigation.
7. To be informed of the right against self-incrimination under Article 31.

8. To cross-examine witnesses.
 - a) Accused given broad latitude to cross-examine. RCM 405(h)(1)(A).
 - b) This right is not absolute. *United States v. Lewis*, 33 M.J. 758 (A.C.M.R. 1991). The IO believed the defense counsel's questions were "going off into the ozone."
9. To have witnesses produced if they are reasonably available.
10. To have evidence produced which is within the control of military authorities, if reasonably available.
11. To present evidence in defense, mitigation, and extenuation.
12. To make a statement in any form, including an unsworn statement.

D. DEFENSE COUNSEL. RCM 405(d)(2).

1. Will be detailed.
2. Accused may also request individual military counsel (IMC), who will be provided if reasonably available.
3. Accused may be represented by civilian counsel at no expense to the Government.
 - a) Accused entitled to a reasonable time to acquire civilian counsel.
 - b) Investigation will not be unduly delayed to acquire civilian counsel. *United States v. Pruner*, 33 M.J. 272 (C.M.A. 1991).
 - c) Use of civilian counsel does not limit the accused's rights to military counsel.
4. Multiple representation of accused and three co-defendants at *joint* Article 32 did not demonstrate conflicts of interest. *United States v. Muma*, 5 M.J. 675 (A.C.M.R. 1978).

E. GOVERNMENT REPRESENTATIVE (Trial Counsel). RCM 405(d)(3)(A). Appointed or requested by the Appointing Authority to represent the Government.

1. Need not be an attorney.
2. May question witnesses at the hearing. DA PAM 27-17, *Procedural Guide for Article 32(b) Investigating Officer*, para. 1-2d (16 Sep. 1990).
3. Examine evidence considered by the IO. RCM 405(h)(1)(B).
4. Argue for an appropriate disposition of the case. DA Pam 27-17, para 1-2d.

F. REPORTER. RCM 405(d)(3)(B).

1. May be appointed by convening authority.
2. Assists the investigating officer in recording the proceeding.

VI. WITNESS AND EVIDENCE PRODUCTION.

A. GENERAL RULE (RCM 405(g)):

Any witness whose testimony would be relevant to the investigation and not cumulative shall be produced if the witness is "reasonably available." This includes witnesses for the accused upon a timely request.

B. DETERMINATION OF "REASONABLE AVAILABILITY." RCM 405(g)(1)(A).

1. *Availability within 100 miles of situs.* "A witness is reasonably available when the witness is located within 100 miles of the situs of the investigation and the significance of

the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance." The IO makes the determination whether a witness is reasonably available. *Note, despite the "100 mile" language in RCM 405(g)(1)(A), the witness' immediate commander may veto an Article 32 IO's determination per RCM 405(g)(2)(A).

2. ***Interpretation of 100-Mile Test.*** *United States v. Marrie*, 43 M.J. 35 (C.A.A.F. 1995). A witness located more than 100 miles away from the situs of an Article 32 investigation *is not per se unavailable*. IO's determination that three child sexual abuse victims were not reasonably available based on the 100-mile rule was error (although harmless) in light of IO's failures to apply the balancing test and obtain testimony through alternative form (*e.g.*, telephone, written sworn statement). The determination of reasonable availability for witnesses located more than 100 miles from the situs of the investigation is left to the discretion of the commander. The court effectively dissolved Change 5 to the MCM (established 100-Mile test). *See* Discussion, RCM 405(g)(1)(A) and RCM 405(g)(2)(A).

3. *United States v. Burfitt*, 43 M.J. 815 (A.F. Ct. Crim. App. 1996). Not every ruling of unavailability premised on wooden application of 100-mile rule is fatal. IO's error in applying the 100-mile rule *must cause some prejudice* to accused. It was harmless error for the IO to apply 100-mile test without determining if importance of testimony outweighed the difficulty, delay, and expense of securing physical presence of witness because IO obtained evidence via telephone, permitted defense counsel to conduct cross-examination, and MJ allowed accused further opportunity to interview witnesses. Record should support IO's determination of availability when victim does not appear for Article 32 investigation. IO's determination must be carefully considered, clearly articulated, and amply supported in the record.

4. *United States v. Willis*, 43 M.J. 889 (A.F. Ct. Crim. App. 1996). IO's misapplication of 100-mile rule, amongst other things, did not substantiate claims of IO bias.

5. ***Determining availability of witnesses.***

a) Military witnesses.

- (1) IO makes an initial determination whether a witness is reasonably available.
- (2) Immediate commander of the witness has the discretion and may exercise a "veto" and determine that the witness is not reasonably available.
- (3) Unavailability determination is not subject to appeal, but may be reviewed at trial.

b) Civilian witnesses.

- (1) IO makes initial determination.
- (2) Final decision is within the discretion of the commander who ordered the investigation. Payment of transportation and per diem to civilian witnesses must be approved by the GCMCA. AR 27-10, para. 5-12.
- (3) Cannot be subpoenaed to appear at an Article 32 hearing.
- (4) Can be compelled by subpoena to testify at a deposition. RCM 702.
- (5) Can be ordered to testify as an incident of employment if employed by the United States government and the Article 32 investigation concerns

matters which are related to the civilian's job. *Weston v. Dep't. of Housing & Urban Develop.*, 724 F.2d 943 (Fed. Cir. 1983).

(6) Local status of forces agreements (SOFA) may provide a mechanism for compelling attendance of foreign nationals.

6. ***Immunized witnesses.*** Only a General Court-Martial Convening Authority (GCMCA) has the authority to grant immunity to witnesses to testify at an Article 32 investigation (or Court-Martial). RCM 704(c) and Discussion. *United States v. Douglas*, 32 M.J. 694 (A.F.C.M.R. 1991) (no abuse of discretion in denying defense requested immunity for two witnesses at Article 32).

C. AVAILABLE WITNESSES.

1. Must be compelled to testify if available and does not claim any privilege. *United States v. Colter*, 15 M.J. 1032 (A.C.M.R. 1983). Witness was a Government drug informant.

2. *United States v. Bell*, 44 M.J. 403 (1996). Appellant was not protected from prosecution for perjury by absence of Article 31 warnings at Article 32 investigation where he made statements during testimony as a defense witness. Article 32 investigations are judicial proceedings, not a disciplinary or law enforcement tool within the context of Article 31. The Article 31 requirement for warnings does not apply at trial.

D. UNAVAILABLE WITNESSES AND EVIDENCE.

1. IO must state in the report of investigation the reason(s) for an unavailability determination if the defense objects.

2. Witnesses who invoke their right to self-incrimination at the Article 32 are "not reasonably available" within the meaning of RCM 405(g)(1)(a); *United States v. Douglas*, 32 M.J. 694 (A.F.C.M.R. 1991). See also RCM 405(g)(1)(A) and MRE 804(a)(1).

VII. ALTERNATIVES TO TESTIMONY AND EVIDENCE.

A. **RULE.** RCM 405(g)(4) and (5).

B. ALTERNATIVES TO TESTIMONY.

1. The following are admissible if there is no defense objection, regardless of availability of the witness.

- a) Sworn statements.
- b) Statements under oath taken by telephone, radio, etc.
- c) Prior testimony under oath.
- d) Depositions. RCM 702.
- e) Stipulations of fact or expected testimony.
- f) Unsworn statements.

2. The following are admissible even if there is a defense objection if the witness is *not* reasonably available.

- a) Sworn statements.
- b) Statements under oath taken by telephone, radio, etc.
- c) Prior testimony under oath.
- d) Depositions; and,

- e) in time of war, unsworn statements.

C. ALTERNATIVES TO EVIDENCE.

1. If no defense objection, regardless of availability of the evidence.
 - a) Testimony describing the evidence.
 - b) An authenticated copy, photograph, or reproduction.
 - c) Stipulation of fact document's contents, or expected testimony.
 - d) Unsworn statement describing the evidence.
 - e) Offer of proof concerning pertinent characteristics of the evidence.
2. Over defense objection, if evidence *not* reasonably available.
 - a) Testimony describing the evidence.
 - b) Authenticated copy, photograph, or reproduction.

VIII. PROCEDURE FOR CONDUCTING THE INVESTIGATION.

A. GENERAL PROCEDURE.

1. CA is authorized to prescribe specific procedures for conducting the investigation. RCM 405(c). *See United States v. Bramel*, 32 M.J. 3 (C.M.A. 1990) (appointing authority's instructions to IO to place a partition between the child witness and the accused okay).
 - a) Normally, DA Pam 27-17 (Sep 90) will be followed.
 - b) The CA will usually require expeditious proceeding and set the deadline for receipt of the record of investigation. Per RCM 707(c) and Discussion, have appointing authority delegate limited authority to approve delay to Article 32 IO. *See United States v. Thompson*, 46 M.J. 472 (1997), *affirming* 44 M.J. 598 (N-M. Ct. Crim. App. 1996). Defense requested delays that were granted by the Article 32 investigating officer and later ratified by the convening authority after the fact were properly excluded from the speedy trial calculations under RCM 707. The court leaves for another day the issue of whether the Article 32 Investigating Officer (IO) has inherent, independent power to exclude a delay from speedy trial consideration.
 - c) Report of investigation should be forwarded to GCMCA within eight days if accused in pretrial confinement. RCM 405(j)(1) discussion.
2. Investigating officer has broad discretion regarding sequence of events and other details. IO decides the –
 - a) Time and place of the hearing.
 - b) Order witnesses will testify.
 - c) Order in which evidence will be presented.
 - d) Order of examination by counsel.
 - e) Number of sessions needed to complete the investigation.

B. MILITARY RULES OF EVIDENCE. RCM 405(i). Military Rules of Evidence do *not* apply other than M.R.E. 301 (self incrimination), 302 (statements from mental examination), 303 (degrading), 305 (rights warning), 412 (rape shield) and Section V (privileges). *See United States v. Martel*, 19 M.J. 917 (A.C.M.R. 1985) (error for Article 32 Officer to consider evidence which violated marital privilege).

C. RIGHT TO CONFRONTATION.

Article 32 investigation, while an important pretrial right, is not the equivalent of a crucial trial right for Confrontation Clause purposes. See *United States v. Bramel*, 32 M.J. 3 (C.M.A. 1990). It is not improper for accused to be separated from child witness by a screen at Article 32. Consider admissibility at trial of testimony obtained in this manner if witness is later unavailable in light of *Crawford v. Washington*, 541 U.S. 36 (2004).

D. **OPEN vs. CLOSED HEARING.** RCM 405(h)(3). The proceedings may be closed or access restricted in the discretion of the appointing authority or the investigating officer. Ordinarily, though, the proceedings should be open. The analysis to RCM 405(h)(3) refers to RCM 806 (governing closure of the trial) for some reasons why the hearing may be closed.

1. See *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997). SPCMA’s reasons (maintain integrity of military justice system, prevent dissemination of evidence that might not be admissible at trial, and shield alleged victims from possible news reports about anticipated attempts to delve into each woman’s sexual history) supporting decision to close *entire* investigation were unsubstantiated. The CAAF holds that the accused has a qualified right to an open Article 32 hearing.

a) Closure determination must be a “‘reasoned,’ not ‘reflexive’” one, made on a “‘case-by-case, witness-by-witness, and circumstance-by-circumstance basis whether closure in a case is necessary to protect the welfare of a victim. . . .”

b) Absent cause shown that outweighs the value of openness (overriding interest articulated in the findings), the military accused is entitled to a public Article 32 hearing. The right is *not* absolute.

c) The press enjoys the same right to a public Article 32 and has standing to complain if access is denied.

2. *United States v. Davis*, 62 MJ. 645 (A.F. Ct. Crim. App. 2006), *aff’d*, 64 M.J. 445 (C.A.A.F. 2007). The IO closed the Article 32 hearing during testimony of two victims of alleged sexual assault “due to the sensitive and potentially embarrassing nature of the testimony and in order to encourage complete testimony about the alleged sexual offenses.” The IO failed to speak to either witness and no evidence existed that the witnesses were reluctant to testify in a public hearing. The MJ held that the IO’s decision was not supported by the evidence and was error, but the MJ declined to fashion any relief because he could determine no “articulable harm” to the accused. The AFCCA agreed that the IO erred in closing the hearing but held that once the MJ found that the accused’s rights to a public hearing were violated, however, that “the [MJ]—without a showing of prejudice or articulable harm—. . . should have dismissed the affected charges to allow for reinvestigation under Article 32.” The AFCCA, however, did not reverse or order a new Article 32 hearing because the closure did not adversely affect the accused’s rights at trial so setting aside his conviction was not warranted. On appeal, CAAF affirmed, clarifying that, on appeal, Article 32 issues will be reviewed under Article 59(a). CAAF noted that the AFCCA was correct in holding that the MJ erred by requiring a showing of prejudice before providing a remedy.

3. *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996) (cited with approval in *ABC, Inc. v. Powell*). Court denied newspaper’s extraordinary writ to reverse by mandamus IO’s decision to close hearing, over defense objection, concerning O-4 charged with murder of 11-year old girl. While Article 32 investigations are presumptively public hearings, the IO did not abuse discretion, and articulated good reasons supporting her action (citing a need to protect against the dissemination of information that might not be admissible in court; to prevent against contamination of a potential jury pool; to maintain a dignified, orderly, and thorough hearing; and to

encourage the complete candor of witnesses called to testify). The court reasoned that RCM 405(h)(3) is unclear how competing interests are to be weighed in deciding whether to close a hearing, or whether the entire hearing could be closed, so mandamus was not appropriate for this area of law that is “developing” and “subject to differing interpretations.”

4. *See also United States v. Anderson*, 46 M.J. 728 (A. Ct. Crim. App. 1997) (adopting the “stringent test” for closure of court-martial proceedings (citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986)). A court-martial may be closed to the public provided the following test is met:

- a) The party seeking closure must advance an overriding interest that is likely to be prejudiced;
- b) The closure must be narrowly tailored to protect that interest;
- c) The trial court must consider reasonable alternatives to closure;
- d) And it must make adequate findings supporting the closure to aid in review.

5. There is no “national security” exception to these principles. The appointing authority must still conduct a case-by-case, witness-by-witness, circumstance-by-circumstance determination.

a) *Denver Post Corp. v. United States*, No. 20041215 (A. Ct. Crim. App. Feb. 23, 2005) (unpub.). The IO conducted preliminary matters in an open forum and then closed the proceeding to hear testimony from a security specialist regarding classified information. After receiving the security specialist’s testimony, the IO closed the *entire* hearing. Additional witnesses testified to non-classified information in a closed session later in the day. *Denver Post* filed a writ demanding a stay of the proceeding until ACCA could rule on the hearing’s closure. ACCA granted the stay and ruled that the IO erred in closing the entire proceeding. Closing a proceeding is only warranted when a “compelling showing [exists] that such was necessary to prevent the disclosure of classified information.” *Id.* at *3 (quoting *United States v. Grunden*, 2 M.J. 116, 121 (C.M.A. 1977)). An IO may only close a proceeding “after consideration of the specific substance of the testimony of individual witnesses expected by the parties and a factual determination that all of the expected testimony of such a witness will reveal classified information.” *Id.* at *6. Additionally, ACCA ordered the Government provide *The Denver Post* a verbatim transcript of the testimony, with classified information redacted.

b) *In re Halabi*, Misc Dkt. 2003-07 (A.F. Ct. Crim. App. Sep. 16, 2003) (unpub.) (granting writ of mandamus quashing blanket order excluding the public from entire investigation due to national security concerns).

6. For a good analysis of the case law in this area, *see* Major Mark Kulish, *The Public’s Right of Access to Pretrial Proceedings Versus The Accused’s Right to a Fair Trial*, ARMY LAW., Sept. 1998, at 1.

E. **TESTIMONY BY WITNESSES.** RCM 405(h)(1)(A).

1. All testimony must be under oath.
2. *Except* accused may make an unsworn statement.

IX. REPORT OF INVESTIGATION.

A. **AUTHORITY.** Per RCM 405(j), the IO must submit a timely report of investigation to the appointing authority.

B. CONTENTS. The report must include:

1. Names and organizations/address of defense counsel.
2. Whether defense counsel were present at proceedings, and if not, why.
3. Substance of the testimony. Usually summarized, though it may be verbatim. *See* D.A. PAM 27-17, *Procedural Guide for the Article 32(b) Investigating Officer*, paras. 3-3a(1) and 4-1, (16 Sep 90) (hereinafter DA Pam 27-17).
4. Any other evidence considered by the IO.
5. A statement regarding any belief that the accused was not mentally responsible at the time of the offense(s) or during the investigation.
6. A statement regarding availability of witnesses, including the reasons why any were unavailable.
7. IO's conclusion whether the charges and specifications are in proper form.
8. IO's conclusion whether reasonable grounds exist that the accused committed the offense(s).
9. Recommendation for disposition.

C. FORM OF THE REPORT. Usually consists of DD Form 457 (Investigating Officer's Report) and attached summarized testimony of witnesses and evidence considered. DA Pam 27-17, para 4-1.

D. DISTRIBUTION OF THE REPORT.

1. Original goes to the appointing authority.
2. One copy goes to the accused.

X. ACTION BY THE APPOINTING AUTHORITY.

A. IN GENERAL.

1. Dismiss the Charges.
2. Administrative Disposition.
3. Nonjudicial Punishment.
4. Referral to SCM or SPCM.
5. Forwarding with recommendations to GCMCA.

B. REOPEN THE INVESTIGATION.

XI. TREATMENT OF DEFECTS.

A. OVERVIEW. During post-trial appeal, relief for a defective may only be granted where an accused can show a timely objection and violation of his substantial rights. *See* Article 59(a), UCMJ ("A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error *materially prejudices* the *substantial rights* of the accused.").

1. It may be very difficult to show prejudice. *See United States v. Von Bergen*, 67 M.J. 290 (C.A.A.F. 2009) ("Article 32, UCMJ, errors are tested on direct review for prejudice as defined by Article 59(a)") (citing *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007)). *Von Bergen* noted military courts have a long history of deciding that the Article 32 proceedings are "superseded" by the trial procedures, so the accused's rights at an Article 32 "merge into his rights at trial" (citing *United States v. Mickel*, 26 C.M.R. 104,

107 (C.M.A. 1958)). Because these rights merge, the court held the accused suffered no prejudice, even though he was erroneously denied his right to an Article 32 hearing.

2. “[I]n the event that a pretrial investigation, less complete than is provided here, is held and thereafter at the trial full and complete evidence is presented which establishes beyond a reasonable doubt the guilt of the accused, there doesn’t seem to be any reason . . . that the case should be set aside if lack of full compliance doesn’t materially prejudice his substantial rights Now, if it has, that is and should be grounds for a reversal of a verdict of guilty.” *United States v. Allen*, 5 C.M.A. 626, 633, 18 C.M.R. 255, 257 (1955) (quoting testimony of Mr. Larkin at *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 998 (1949)).

3. “[I]f an accused is deprived of a substantial pretrial right on a timely objection, he is entitled to judicial enforcement of his right, without regard to whether such enforcement will benefit him at trial. At that stage of the proceedings, he is perhaps the best judge of the benefits he can obtain from the pretrial right. Once the case comes to trial on the merits, the pretrial proceedings are superseded by the procedures at trial; the rights accorded to the accused at the pretrial stage merge into his rights at trial. If there is no timely objection to the pretrial proceedings or no indication that these proceedings adversely affected the accused’s rights at the trial, there is no good reason in law or logic to set aside his conviction.” *United States v. Mickel*, 26 C.M.R. 104 (C.M.A. 1958).

4. *United States v. Davis*, 64 M.J. 445 (C.A.A.F. 2007). Case involves closing an Article 32 and clarifies the standard for appellate review. “The time for correction of [procedural errors in the Article 32] is when the military judge can fashion an appropriate remedy . . . before it infects the trial” CAAF explains that, on appeal, the standard of review of Article 32 procedural errors is under Article 59(a), UCMJ, which states, “A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error *materially prejudices the substantial rights of the accused.*”

B. OBJECTIONS MUST BE TIMELY MADE.

1. Defects discovered during the investigation. RCM 405(h)(2).
 - a) Must be raised promptly. Allows Government to take curative action.
 - b) Errors not promptly raised are waived absent a showing of good cause. RCM 405(k).
 - c) IO is not required to rule on the objection.
 - d) Objection must be noted in the report of investigation, if requested.
 - e) IO may require the objection to be in writing.
2. Defects in the report of investigation. RCM 405(j)(4).
 - a) Objections must be made to the appointing authority.
 - b) Must be made within five days of receipt of report by accused.
 - c) Failure to raise the objection within 5 days is a waiver absent good cause. RCM 405(k).
 - d) **NOTE:** Appointing authority not precluded from referring the charges or taking other action within the five days.
3. If error is alleged erroneous denial of witness, defense may be required to request deposition in order to preserve objection. *United States v. Chuculate*, 5 M.J. 143 (C.M.A. 1978).

C. MOTION FOR APPROPRIATE RELIEF MUST BE MADE AT TRIAL. RCM 905(b)(1).

1. Must be made before plea is entered.
2. Failure to raise before plea waives the error, absent good cause. RCM 405(k), RCM 905(b) and Discussion.

D. STANDARDS FOR MOTION.

1. ***Broad standards.***

- a) “[N]o charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation . . . has been made in substantial compliance with this rule.” RCM 405(a).
- b) Failure to substantially comply with the requirements of Article 32, which failure prejudices the accused, may result in delay of disposition of the case or disapproval of the proceedings. RCM 405(a) Discussion.
- c) Motions for appropriate relief (including a motion to correct defects in the Article 32 investigation) are designed to cure defects which deprive a party of a right or hinder a party from preparing for trial. RCM 906(a); RCM 906(b)(3).

2. ***Types of defects.***

- a) Investigation improperly convened. Accused is denied a substantial pretrial right when the Article 32 investigation is ordered by an officer who lacks proper authority. *United States v. Donaldson*, 49 C.M.R. 542 (C.M.A. 1975) (jurisdictional error).
- b) Partiality of the IO. Partiality of the IO will be *tested for prejudice*. *United States v. Cunningham*, 30 C.M.R. 402 (C.M.A. 1961).
- c) Denial of right to counsel/ineffective assistance of counsel.
 - (1) The right to the assistance of counsel of one’s own choice during the pretrial investigation is a substantial pretrial right of the accused. *United States v. Maness*, 48 C.M.R. 512 (C.M.A. 1974); *United States v. Miro*, 22 M.J. 509 (A.F.C.M.R. 1986) (“An unprepared counsel is tantamount to no counsel at all”). There is no requirement to demonstrate prejudice, *but*
 - (2) Improper denial of counsel and denial of effective assistance of counsel at the Art. 32 investigation should be tested for prejudice. *United States v. Davis*, 20 M.J. 61 (C.M.A. 1985); *United States v. Freedman*, 23 M.J. 820 (N.M.C.M.R. 1987).
- d) Nonproduction of reasonably available witnesses.
 - (1) Failure to produce reasonably available defense requested witnesses is a denial of a *substantial pretrial right* of the accused. *United States v. Chestnut*, 2 M.J. 84 (C.M.A. 1976); *but*
 - (2) Nonproduction of reasonably available defense requested witnesses will be assessed for prejudice to the accused. *See United States v. Burfitt*, 43 M.J. 815 (1996) and *United States v. Marrie*, 43 M.J. 35 (1995). *See also United States v. Martinez*, 12 M.J. 801 (N.M.C.M.R. 1981).
- e) Minor/technical irregularities. IO’s improper limitation of defense counsel’s right of cross-examination was an error that did not prejudice the accused at trial. *United States v. Harris*, 2 M.J. 1089 (A.C.M.R. 1977).

E. **REMEDY.**

1. Ordinarily the remedy is a continuance to re-open the investigation. RCM 906(b)(3) discussion.
2. If the charges have already been referred, re-referral is not required following a re-opening of the investigation; affirmance of the prior referral is sufficient. *United States v. Clark*, 11 M.J. 179 (C.M.A. 1981).

XII. APPENDIX – ARTICLE 32 SUMMARY

MAJOR POINT

SUMMARY

<p>PRESERVATION AND ADMISSION OF 32 TESTIMONY</p>	<ul style="list-style-type: none"> ○ Article 32 testimony may be admissible as substantive evidence at courts-martial (once the foundational elements for each provision are satisfied): <ul style="list-style-type: none"> • M.R.E. 801(d)(1) (prior inconsistent statement); • M.R.E. 804(b)(1) (former testimony); • M.R.E. 807 (residual hearsay).
<p>PARTICIPANTS</p>	<ul style="list-style-type: none"> ○ The appointing authority (AA) must be neutral and detached. An AA who is merely a statutory “accuser” has more options than an AA with an other than official interest in the case. <i>See United States v. Wojciechowski</i>, 19 M.J. 577 (N.M.C.M.R. 1984); <i>McKinney v. Jarvis</i>, 46 M.J. 870 (A. Ct. Crim. App. 1997); <i>see also United States v. Dinges</i>, 49 M.J. 232 (1998). The investigating officer must be “neutral and detached,” and must avoid <i>ex parte</i> contact. The IO is bound by the ethical standards applicable to judges. IO actions that violate the above, upon appropriate motion, must be tested for prejudice to the accused.
<p>PRODUCTION OF WITNESSES</p>	<ul style="list-style-type: none"> ○ RCM 405(g)(1)(A) controls whether the Gov’t must secure the physical presence of witnesses. A witness is reasonably available if within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witnesses’ appearance. Relief from an IO’s misapplication of the balancing test is granted only upon a showing of undue prejudice to the accused. Alternative means of obtaining the testimony (i.e. telephonic direct and cross examination) may negate prejudice. <i>United States v. Marrie</i>, 43 M.J. 35 (1995); <i>United States v. Burfitt</i>, 43 M.J. 815 (A.F. Ct. Crim. App. 1996).
<p>PROCEDURE FOR CONDUCTING THE INVESTIGATION</p>	<ul style="list-style-type: none"> ○ Speedy Trial Considerations: RCM 707 appears to vest authority to exclude article 32 delays from the speedy trial clock only in the AA. An IO does not have inherent authority to do the same, but it appears that the AA can delegate this authority to an IO. <i>United States v. Thompson</i>, 46 M.J. 472 (1997). ○ M.R.E. application: Only the rules on privileges, Rape Shield, and self-incrimination apply at the Article 32 investigation. RCM 405(i). ○ Standard for Closure: Whether there is cause that outweighs the value of openness. The cause must be an overriding interest articulated in the findings. This determination must be made on a case-by-case, witness-by-witness basis. <i>See generally ABC, Inc. v. Powell</i>, 47 M.J. 363 (C.A.A.F. 1997); RCM 405(h)(3).

**TREATMENT OF DEFECTS
AND REMEDY**

- Objections to the investigation must be made “promptly upon discovery” or are waived, absent good cause. RCM 405(h)(2) and 405(k).
- Objections to the report must be made “timely” (that is, within five days of service of the report on the accused) or are waived, absent good cause. RCM 405(j)(4) and 405(k).
- Objections not made prior to entry of plea are waived, absent good cause. (Defects are nonjurisdictional). Objections are made by motion for appropriate relief. RCM 905(b), 905(e) and 906(b)(3).
- If objection is to failure to produce a witness, accused may need to request deposition of witness in order to preserve objection. *United States v. Chuculate*, 5 M.J. 143 (C.M.A. 1978).
- The burden of proof that the Government has not substantially complied with the provisions of Article 32, to the prejudice of the accused, is on the accused by a preponderance of the evidence. RCM 405(a), Discussion; RCMs 905(c)(1) and 905(c)(2).
- The remedy to correct a defect is normally a continuance to correct the defect. RCM 906(b)(3), Discussion.

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PRETRIAL ADVICE

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SUMMER 2012

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PRETRIAL ADVICE (ARTICLE 34, UCMJ)

I. PRETRIAL ADVICE, GENERALLY

- A. Pretrial Advice (also known as Article 34 Advice) is the SJA's written advice given to the Convening Authority prior to referral. There are mandatory components to the advice (covered in this outline and also found at RCM 406), and optional components.
- B. Pretrial Advice is a **Prerequisite to Referral to a GCM**, and for the Army, it is also now a **Prerequisite to Referral to a Special Court-Martial**, per AR 27-10, 5-28(b):
 - a) "The servicing staff judge advocate will prepare a pretrial advice, following generally the format of RCM 406(b)."

II. PURPOSES OF THE PRETRIAL ADVICE

- A. Substantial Pretrial Right of the Accused.
 - 1. Protects accused against trial on baseless charges.
 - 2. Protects accused against referral to an inappropriate level of court-martial.
 - 3. Limited veto over convening authority's power to refer charges.
- B. Prosecutorial Tool.
 - 1. Provides legal advice to the convening authority regarding the charges.
 - 2. Additional opportunity for the SJA/military justice section to review the charges (form, substance, etc) prior to referral.

III. PREPARATION OF THE PRETRIAL ADVICE

- A. **Mandatory Contents.** UCMJ art. 34.
 - 1. The Pretrial Advice is only *required* to include:
 - a) Conclusions with respect to whether each specification alleges an offense under the code; [**binding**]

b) Conclusions with respect to whether the allegation of each offense is warranted by the evidence indicated in the report of investigations; [**binding**]

(1) The standard is probable cause. RCM 406(b) discussion.

c) Conclusions with respect to whether a court-martial would have jurisdiction over the accused and the offense; and [**binding**]

d) Recommendation of the action to be taken by the convening authority. [**non-binding**]

2. Binding v. Non-Binding

a) The first three legal conclusions are binding, meaning that if the SJA concludes that any of those three requirements has not been met (for example, there is no jurisdiction over the offense) than that/those specification(s) and/or charge(s) that are deficient CANNOT be referred.

b) The last conclusion, the SJA's recommendation is non-binding, and therefore the convening authority can choose to follow it, or not follow it, as he deems appropriate.

3. Staff Judge Advocate's Rationale/ Underlying Analysis

a) There is no requirement that the Staff Judge Advocate include his rationale or underlying analysis regarding his legal conclusions or recommendation.

4. Practice Tip: when preparing a Pretrial Advice, look at RCM 406 which lays out exactly what must be included in the advice, and always check RCM 406 once the advice has been prepared to make certain all of the mandatory contents are covered.

B. **Optional/Additional Contents**

1. "The pretrial advice should include, when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; any previous recommendations by commanders or others who have forwarded the charges, for disposition of the case." RCM 406(b) Discussion.

2. The word “Optional” is key – failure to include optional information is not error.
3. Matters included in the Pretrial Advice MUST BE ACCURATE.
4. **Capital Cases** are, of course, different. In a capital case, the pretrial advice should give notice of aggravating factors prior to arraignment per RCM 1004(b)(1) and (c).
5. Practice Tip: While there may be times when additional comments are warranted, make certain those additional comments contain accurate information. Additionally, make certain those comments will not serve to disqualify the SJA from delivering post-trial recommendations. (This is explained later in the outline).

C. Who Prepares/Signs the Advice?

1. The SJA does not have to personally prepare the advice, but the SJA is personally responsible for the advice. The SJA must make an independent and informed appraisal of the charges and the SJA (or Acting SJA) must personally sign the pretrial advice.
 - a) Trial counsel may draft the pretrial advice for the SJA’s consideration.
 - b) May not sign the advice “For the SJA”. *United States v. Hayes*, 24 M.J. 786 (A.C.M.R. 1987).
 - (1) If someone other than the SJA signs the advice, then that person should sign as the Acting SJA (but of course only if that person is actually the acting SJA).

D. Disqualification of the SJA to Prepare Post-Trial Recommendations

- a) Under RCM 1106(b), the SJA may be disqualified from preparing the post-trial recommendation when the sufficiency or correctness of the earlier action is placed in issue.
 - (1) *United States v. Lynch*, 39 MJ 223(CMA 1994). Accused questioned the pretrial advice in a motion prior to trial. “[W]here a legitimate factual controversy exists between the SJA and the Defense Counsel; the SJA must disqualify himself from participating in the post-trial recommendation.

- b) Inappropriate comments by the SJA in the pretrial advice may disqualify the SJA from preparing the post-trial recommendation.
 - (1) *United States v. Plumb*, 47 MJ 771 (A. F. Ct. Crim. App. 1997). In the pretrial advice, the SJA referred to the accused, an Air Force OSI CPT, as a “shark in the waters, [who] goes after the weak and leaves the strong alone.” The Air Force court said that such a comment was “so contrary to the integrity and fairness of the military justice system that it has no place in a pretrial advice.” The comment (in conjunction with other errors) resulted in the findings and sentence being set aside.

E. Enclosures to the Pretrial Advice

- 1. Charge Sheet
- 2. Forwarding Letters and Endorsements
- 3. Report of Investigation, DD Form 457
- 4. Practice Tip: Try to always have the same enclosures. If your CG wants to see ERBs or ORBs, for example, then include them in every referral action (but make sure those documents are accurate). Also, fly speck the advice to ensure that all of the enclosures are listed.

F. Discovery

- 1. A copy of the pretrial advice must be provided to the defense if the charges are referred to a GCM, per RCM 406(c). Because 27-10 now mandates pretrial advice in Special Courts-Martial, provide those to the defense, as well.

IV. DEFECTS IN THE PRETRIAL ADVICE

A. Must be Raised at Trial- Otherwise Waived

- 1. Objections are waived if not raised prior to entry of plea or if the accused pleads guilty. RCM 905(b) and (e); *see generally* RCM 910(j)

B. Non-Jurisdictional

- 1. Defects in the Pretrial Advice must be raised by motion for appropriate relief.

C. Standards for Relief

1. At trial: Information which is so incomplete as to be misleading may result in a defective advice, necessitating appropriate relief. RCM 406(b) Discussion.
2. Appellate Review: Is the advice so “incomplete, ill considered, or misleading” as to a material matter that the convening authority might have made an erroneous referral?” *United States v. Kemp*, 7 MJ 760 (A.C.M.R. 1979).
 - a) *United States v. Murray*, 25 MJ 445 (CMA 1988). Pretrial advice omitted a charge. Procedural error tested for prejudice, considering several factors: whether the charges were serious enough to warrant trial by general court-martial; whether they were supported by the evidence before referral; how the appellant pleaded; whether the appellant objected to the advice at trial; and whether the error was disclosed to the convening authority during the post-trial process.

D. Types of Relief

1. SJA neglects to include the mandatory contents: return the case for a new pretrial advice.
2. Convening Authority refers charges and specifications despite the fact that the SJA’s legal conclusions do not support a referral: dismiss the charges.

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PLEAS & PRETRIAL AGREEMENTS

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I. PRETRIAL AGREEMENTS

A. AGREEMENT BETWEEN CONVENING AUTHORITY AND ACCUSED.

1. *Only* the convening authority can bind government. *But see United States v. Manley*, 25 M.J. 346 (C.M.A. 1987). Once accused completed performance of pretrial agreement, as modified by parties at trial, the convening authority was not authorized to unilaterally withdraw from the agreement.

B. TYPICAL AND SIMPLEST AGREEMENT.

1. Accused promises to plead guilty; convening authority agrees when case reaches him for review he or she will limit sentence to that specified in agreement.
2. Guilty plea entered.
3. Military judge examines agreement, insures accused understands.
4. **“Two Bites at the Apple.”** Sentencing authority (military judge or members) proceeds unaware of limitation in agreement. If announced sentence is lower than agreement, accused gets the lower sentence.

C. NATURE OF AGREEMENT. RCM 705(b).

RCM 705. Pretrial agreements

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(b) *Nature of agreement.* A pretrial agreement may include:

- (1) A promise by the accused to plead guilty to, or to enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions which may be included in the agreement and which are not prohibited under this rule; and
- (2) A promise by the convening authority to do one or more of the following:
 - (A) Refer the charges to a certain type of court-martial;
 - (B) Refer a capital offense as noncapital;
 - (C) Withdraw one or more charges or specifications from the court-martial;
 - (D) Have the trial counsel present no evidence as to one or more specifications or portions thereof; and
 - (E) Take specified action on the sentence adjudged by the court-martial.

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1. An accused may: “[P]lead guilty to, or enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions which may be included in the agreement which are not prohibited under this rule”
 2. The convening authority may promise to do one or more of the following:
 - a. Refer the case to a certain level of court-martial;
 - b. Refer a capital offense as noncapital;
 - c. Withdraw one or more charges or specifications from the court-martial;
 - d. Have the trial counsel present no evidence as to one or more specifications or portions thereof; and
 - e. Take specified action on the sentence adjudged by the court-martial.

D. PROCEDURE. RCM 705(d).

RCM 705. Pretrial agreements

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(d) *Procedure.*

(1) *Negotiation.* Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives. Either the defense or the government may propose any term or condition not prohibited by law or public policy. Government representatives shall negotiate with defense counsel unless the accused has waived the right to counsel.

(2) *Formal submission.* After negotiation, if any, under subsection (d)(1) of this rule, if the accused elects to propose a pretrial agreement, the defense shall submit a written offer. All terms, conditions, and promises between the parties shall be written. The

proposed agreement shall be signed by the accused and defense counsel, if any. If the agreement contains any specified action on the adjudged sentence, such action shall be set forth on a page separate from the other portions of the agreement.

(3) *Acceptance*. The convening authority may either accept or reject an offer of the accused to enter into a pretrial agreement or may propose by counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the convening authority. When the convening authority has accepted a pretrial agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign.

1. ***Offer/negotiation***. Either side may propose any term or condition not prohibited by law or public policy.
2. ***Formal submission***. Must be in writing, encompassing all terms, and signed by accused and defense counsel.
 - a. ***No oral pretrial agreements***. *United States v. Mooney*, 47 M.J. 496 (C.A.A.F. 1997). Military judge erred by accepting accused's guilty plea and pretrial agreement after it was clear that the pretrial agreement was not in writing as required by RCM 705(d)(2). However, while CAAF criticized counsels' and the judge's disregard for the rule, court held that reversal of conviction not required where the specific terms of the oral agreement were placed on the record, all parties acknowledged and complied with terms of agreement, and accused conceded that he received the benefit of the bargain.
 - b. *United States v. Forrester*, 48 M.J. 1 (C.A.A.F. 1998). Term in *stipulation of fact* which required the accused to waive his right to "any and all defenses" did not violate RCM 705 or public policy. CAAF cautions the Government not to attempt to avoid the requirements of RCM 705(c)(1)(B) by including terms in a document other than the pretrial agreement itself (terms must not be in a stipulation of fact).
3. ***Acceptance***. Is within sole discretion of convening authority; must be signed by CA or person authorized by CA to do so.
4. ***Military judge's inquiry at trial***.
 - a. *United States v. Felder*, 59 M.J. 444 (C.A.A.F. 2004). Military judge did not inquire into a term of the PTA regarding defense's waiver of any motions for sentence credit based on Article 13 and/or restriction tantamount to confinement. Accused's counsel did inform the military judge that no punishment under Article 13 or restriction tantamount to confinement had occurred. While the judge's failure to discuss the term was error, the accused failed to show the error materially prejudiced a substantial right.
 - b. *United States v. Dunbar*, 60 M.J. 748 (A. Ct. Crim. App. 2004). The accused's PTA stated "[a]ny adjudged confinement of three (3) months or more shall be converted into a [BCD], which may be approved; any adjudged confinement of less than three (3) months shall be disapproved upon submission by the accused [of a Chapter 10]" with a handwritten annotation stating "with an Other Than Honorable (OTH) discharge." The MJ sentenced the accused to a BCD, two months confinement, and reduction to PFC, causing the parties to disagree whether the convening authority could approve the BCD. Defense argued the convening authority could not approve both an OTH and a BCD discharge. The government's position was that the accused could submit a Chapter 10 and the convening authority must disapprove the two months confinement but the PTA did not require the convening authority's approval of the Chapter 10. RCM 910(h)(3) provides, after the sentence is announced, if the parties disagree with the PTA terms the MJ shall "conform, with the consent of the Government, the agreement to the accused's understanding or permit the

accused to withdraw the plea.” The MJ did not clarify the accused’s understanding or attempt to conform the agreement. Findings and sentence set aside.

c. *United States v. Sheehan*, 62 M.J. 568 (C.G. Ct. Crim. App. 2005). Military judge failed to cover a misconduct clause and “specially negotiated provisions” of the accused’s PTA and provided an incorrect explanation as to another provision. CGCCA found that the military judge erred but that his omissions and misleading explanation did not prejudice the accused’s substantial personal rights.

d. *United States v. Sharper*, 17 M.J. 803 (A.C.M.R. 1984) (“While the military judge may not have the authority to directly intervene in the pretrial negotiations between an accused and a convening authority, he does have the responsibility to police the terms of pretrial agreements to insure compliance with statutory and decisional law as well as adherence to basic motions of fundamental fairness.”).

E. WITHDRAWAL FROM THE PRETRIAL AGREEMENT.

1. ***By the accused.*** Under RCM 705(d)(5)(a), “The accused may withdraw from a pretrial agreement at any time; however, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a pretrial agreement only as provided in RCM 910(h) or 811(d), respectively.”

a. *United States v. Bray*, 49 M.J. 300 (C.A.A.F. 1998). A convening authority may increase the sentence cap of a pretrial agreement when an accused withdraws a guilty plea after successful completion of a providence inquiry and, in the same court-martial, later reenters pleas of guilty to the same charges. The accused entered guilty pleas to assault and battery on a child, communicating a threat, and drunk driving. During extenuation and mitigation, a defense witness testified that the accused could have committed the offenses after being exposed to insecticide poisoning. Accused withdrew his guilty plea and from the pretrial agreement, which limited confinement to 20 years to pursue the “bug spray” defense. Accused obtained a new pretrial agreement after changing his mind. The sentence cap under the new PTA limited confinement to 30 years. Neither case law nor RCM 705 prohibit a convening authority from increasing a sentence cap in a new pretrial agreement after the convening authority properly withdraws from the original pretrial agreement. Accused chose to reopen the initial providence inquiry based on the “bug spray” defense and voluntarily withdrew from the original agreement after full consultation with counsel. The consequences of withdrawal were addressed in the original agreement, explained on the record, and the accused failed to object at trial.

b. *United States v. Olson*, 25 M.J. 293 (C.M.A. 1987). Accused had right to withdraw his guilty plea in light of additional, unanticipated subtraction from pay, if he had good-faith belief that he had fully settled his liability to reimburse Government for overpayment under allegedly false travel vouchers and if that belief had induced accused’s entry of his pleas.

2. ***By the convening authority.*** Under RCM 705(d)(5)(b), the convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement, upon the failure by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review. As a practical matter, once the accused begins performance, the convening authority has limited opportunity to withdraw from the PTA. *United States v.*

Dean, 67 M.J. 224 (C.A.A.F. 2009); *United States v. Manley*, 25 M.J. 346 (C.M.A. 1987) (once accused completed performance of pretrial agreement, as modified by parties at trial, the convening authority was not authorized to unilaterally withdraw from the agreement).

a. ***Appellate courts have strictly interpreted convening authority's right to withdraw from an approved pretrial agreement.*** *United States v. Dean*, 67 M.J. 224 (C.A.A.F. 2009). On eve of trial, convening authority withdrew from pretrial agreement because the accused refused to modify stipulation of fact to include new (post-preferral) misconduct. Relying on RCM 704(d)(4)(B), court held the convening authority could not withdraw once the accused began performance of any promise in the agreement; in this case, accused had signed stipulation of fact, filed an amended witness (to conform with provision in pretrial agreement), and elected trial by judge alone. Government argued the parties had a disagreement to a material term, as the Government believed a "good conduct" provision was implicit in the agreement; CAAF summarily dismissed that argument and held the convening authority improperly withdrew from the agreement. Of note, the accused signed the stipulation of fact and elected trial by military judge alone **before** the convening authority approved the pretrial agreement; the accused began performance before there was an approved agreement, and the Government could not withdraw once the convening authority signed the document.

b. *United States v. Williams*, 60 M.J. 360 (C.A.A.F. 2004). Accused's pretrial agreement required him to reimburse his victim(s) "once those individuals and the amounts owed have been ascertained." On the day of trial the government withdrew from the PTA reasoning, under RCM 705(d)(4)(B), that the accused's failure to reimburse his victim breached a material PTA term. Defense argued he was not in breach because the term failed to establish a time limit, allowing for restitution after trial. Defense requested specific performance of the PTA arguing (also under RCM 705(d)(4)(B)) that his execution of a stipulation of fact with the government constituted performance and he had not otherwise breached any material term. CAAF did not rule whether entrance into a stipulation of fact constitutes performance or whether the accused failed to fulfill a material term. CAAF, focusing on the parties' failure to establish a meeting of the minds for the restitution time limit, held, under RCM 705(d)(4)(B), that the government can withdraw from a PTA if the MJ "discloses a disagreement as to a material term in the agreement."

c. *United States v. Parker*, 62 M.J. 459 (C.A.A.F. 2006). Accused entered into a PTA to plead guilty to AWOL and missing movement by neglect in return for the CA suspending any adjudged BCD or confinement in excess of thirty days. The military judge, however, rejected the accused's plea to missing movement by neglect because the accused said he only overheard statements by his NCOs, as opposed to a direct or official conveyance, regarding the place and time of the movement. When the military judge rejected the accused's plea, the government withdrew from the PTA and moved forward to trial before the military judge alone on the charge of missing movement by design. The military judge found the accused guilty of missing movement by design and sentenced him to a BCD and five months confinement. The N-MCCA held that the military judge erroneously rejected the accused's plea by questioning the reliability of the information the accused relied upon to make his providence inquiry statements. Under this theory, the accused was entitled to his original PTA sentence limitation of a suspended BCD and no more than thirty-days confinement. After trial, however, the accused submitted a clemency letter stating he did not desire

suspension of his BCD. CAAF held that the MJ did not erroneously reject the accused's plea and defense never requested the MJ to reopen the plea. Therefore, PTA failed to exist and the accused's express and repeated request for a non-suspended BCD during his unsworn statement and clemency matters controls.

d. *United States v. Pruner*, 37 M.J. 573 (A.C.M.R. 1993). Convening authority withdrew from proposed agreement by accused. Performance of pretrial agreement was not commenced per RCM 705(d)(5)(b) when accused had not yet signed proposed stipulation of fact and had not yet requested witnesses.

e. *United States v. Villareal*, 52 M.J. 27 (C.A.A.F. 1999). Convening authority could lawfully withdraw from pretrial agreement based upon pressure from victim's family members, who were opposed to permitting the accused to plead guilty to manslaughter instead of murder. The decision to withdraw was based in part on the advice of the CA's superior. Afterward, the case was forwarded to a third, impartial CA, who convened the court, and the accused pled not guilty. CAAF, by a 3-2 vote, held that the military judge did not err in refusing to order specific performance of the pretrial agreement. The accused had not relied to his detriment on the agreement in any manner that would prejudice his right to a fair trial.

F. PERMISSIBLE TERMS OR CONDITIONS.

1. **Stipulation of fact.** A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty is entered or as to which a confessional stipulation will be entered. *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977).
2. **Promise to testify.** Accused may agree to testify or provide assistance to investigators as a witness in the trial of another person. However, it is likely impermissible to require an accused testify without a grant of immunity. See *United States v. Profitt*, 1997 WL 165434 (A.F. Ct. Crim. App. 1997) (unpub); *United States v. Rivera*, 46 M.J. 52 (C.A.A.F. 1997), affirming 44 M.J. 527 (A.F. Ct. Crim. App. 1996) (term which required accused to "testify in any trial related in my case without a grant of immunity" did not violate public policy, *under facts of this case* as the accused had not been called to testify. Both cases discussed *supra*).
3. **Provide restitution.** *United States v. Mitchell*, 46 M.J. 840 (N-M. Ct. Crim. App. 1997). Accused who fails to make full restitution pursuant to a defense proposed term in PTA is not unlawfully deprived of the benefit of the PTA where the failure to comply with the restitution obligation is based on indigency. Accused uttered bad checks and defrauded financial institutions of \$30,733. The defense proposed a term that required accused to make full restitution in exchange for suspension of confinement in excess of 60 months. The accused was sentenced, *inter alia*, to 10 years confinement. While in jail, the accused made partial restitution until his business failed. The accused, now indigent, cannot necessarily use indigency to negate operation of PTA term requiring full restitution. CA properly vacated suspension under PTA.
4. **Conform accused's conduct to certain conditions of probation.**
 - a. See *United States v. Spriggs*, 40 M.J. 158 (C.M.A. 1994) (an indeterminate term of suspension of up to 15 years to complete sex offender program was inappropriate).
 - b. *United States v. Wallace*, 58 M.J. 759 (N-M. Ct. Crim. App. 2003). Accused sentenced to life without parole. In accordance with his pretrial agreement, the convening authority suspended all confinement in excess of 30 years for the period of confinement plus 12 months after accused's release. Accused argued

that the period of suspension could only be 5 years from the date sentence was announced. HELD: Pretrial agreement provision suspension period for the period of confinement and one year from date of release does not violate public policy. RCM 1108 states that a period of suspension should not be unreasonably long. “It is this Court’s opinion that placing Accused on probation for 31 years of an adjudged life sentence without possibility of parole is not unreasonably long and does not violate public policy.”

5. ***Other misconduct provisions.***

a. *United States v. Bulla*, 58 M.J. 715 (C.G. Ct. Crim. App. 2003). Pretrial agreement included a misconduct provision “that permitted the convening authority, among other things, to disregard the sentence limiting part of the pretrial agreement if the [accused] committed a violation of the UCMJ between the time the sentence was announced at her court-martial and the time the convening authority acted on the sentence.” Accused was in an unauthorized absence status for two days shortly after the end of court-martial proceedings. Relying on the misconduct provision, the convening authority approved the sentence as adjudged, rather than as would have been limited by the PTA (which would have suspended the BCD for twelve months from action). Although CGCCA had “reservations about some of the potential results of this misconduct provision, it held that provision does not violate public policy” at least as applied in this case to a sentence element that the convening authority only agreed to suspend.” Further, accused’s two-day AWOL was a “material breach” of the PTA that allowed the convening authority to be released from his obligations under the agreement. Finally, court finds that prior to finding accused violated the misconduct provision, convening authority should hold a proceeding similar to that provided for by Article 72, UCMJ and RCM 1109 (vacation proceedings) and apply a preponderance of the evidence burden of proof. Although convening authority applied a lesser, incorrect burden of proof, the error was harmless.

b. *United States v. Tester*, 59 M.J. 644 (A. Ct. Crim. App. 2003). Pretrial agreement contained deferral of confinement provision and misconduct provision similar to that in *Bulla, supra*. Court held procedures of RCM 1109 (vacation of suspension) must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement. Convening authority followed provisions to rescind deferral of confinement.

6. ***Waive unreasonable multiplication of charges.*** *United States v. Mitchell*, 62 M.J. 673 (N-M. Ct. Crim. App. 2006). The accused agreed in his PTA to waive a motion alleging unreasonable multiplication of charges. The military judge reviewed this provision with the accused but did not ask him if he had an unreasonable multiplication of charges motion to make. On appeal, defense argued that the term violated public policy, requiring the nullification of the accused’s PTA under RCM 705(c)(1)(B). N-MCCA, noting the issue as one of first impression, held that an unreasonable multiplication of charges motion is not of a constitutional dimension and is not specifically prohibited under RCM 705 (c)(1)(B). Based on the facts of the accused’s case, the court held the provision did not violate public policy.

7. ***Waive Article 32 investigation and other procedural protections.*** Accused may waive the Article 32 as well as the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings. *United States v. Gansemer*, 38 M.J. 340, (C.M.A. 1993) (upholding term requiring accused waive separation board if punitive

discharge was not adjudged; term does not violate public policy or fundamental fairness, as accused can ask for discharge in lieu of court-martial and there was no overreaching).

8. **Forfeiture of personal property (computer).** *United States v. Henthorn*, 58 M.J. 556 (N-M. Ct. Crim. App. 2003). Accused convicted of receiving child pornography in violation of 18 U.S.C. § 2252A. Court holds that provision in pretrial agreement that required accused “to forfeit his personal property (laptop computer) pursuant to 18 U.S.C. §2253 did not constitute an unauthorized forfeiture or fine and was not an excessively harsh punishment.” Because the computer was used in the commission of the crime, its forfeiture was consistent with the application of the federal forfeiture statute, and was not a “punishment.” “Needless to say, if the [accused] found his agreement too onerous, he could have withdrawn from it.”

9. **Unlawful command influence.** *United States v. Weasler*, 43 M.J. 15 (C.A.A.F. 1995). While it is against public policy to require an accused to withdraw an issue of unlawful command influence in order to obtain a pretrial agreement, accused may *initiate* a waiver of unlawful command influence in order to secure a favorable pretrial agreement. *But see* Judge Wiss’ concurrence, which warns “that this Court will witness the day when it regrets the message that the majority opinion implicitly sends to commanders.”

10. **Fines.** *United States v. Smith*, 44 M.J. 720 (A. Ct. Crim. App. 1996). Including fines as a term in pretrial agreements is a recognized “good reason” for imposing same, where agreement is freely and voluntarily assented to avoid some more dreaded lawful punishment. Accused was convicted of felony murder. Military judge imposed a fine as part of the sentence which required the accused to pay the \$100,000 by the time he is considered for parole (sometime in the next century) or be confined for an additional 50 years or until he dies, whichever come first. The court held the fine was permissible but the contingent confinement provision was not, as it circumvented Secretary of Army’s parole authority.

11. **Waive Article 13 punishment.** *United States v. McFadyen*, 51 M.J. 289 (C.A.A.F. 1999). Accused’s waiver of Article 13 issue as part of pretrial agreement does not violate public policy. For all cases in which “a military judge is faced with a pretrial agreement which contains an Article 13 waiver, the military judge should inquire into the circumstances of the pretrial confinement and the voluntariness of the waiver, and ensure that the accused understands the remedy to which he would be entitled if he made a successful motion.” Here, accused agreed to plead guilty and, in exchange for a sentence limitation, to waive his right to challenge his pretrial treatment under Article 13. Accused was an airman who complained about his treatment in pretrial confinement at a Navy brig (where he was stripped of rank, prevented from contacting his attorney, and had his phone calls monitored). While announcing a prospective rule only, the court found no reason to disturb the waiver here: Accused did not contest the voluntariness of waiver, an inquiry was conducted by the military judge, the accused was allowed to raise and argue in mitigation his claims of ill-treatment at the hands of the Navy, and the military judge was able, if he wished, to consider the nature of pretrial confinement in determining the sentence.

12. **Waive comparative sentencing information.** *United States v. Oaks*, 2003 CCA LEXIS 301 (A.F. Ct. Crim. App. Dec. 10, 2003) (unpub.). Term waiving right to present comparative sentencing information in unsworn statement does not violate public policy. Term does not impermissibly limit right to present a full sentence case to the sentencing authority. Court finds *United States v. Grill*, 48 M.J. 131 (C.A.A.F. 1998), inapplicable, as presenting sentence comparison material was not permitted by military judge; in contrast, accused here agreed to waive his right under *Grill* in exchange for the benefits of a pretrial agreement.

13. **Enrollment in a sexual offender treatment program.** *United States v. Cockrell*, 60 M.J. 501 (C.G. Ct. Crim. App. 2004). MJ failed to discuss with the accused a provision in the PTA requiring the accused to enroll in a sexual offender treatment program following his release from confinement and the ramifications if he failed to comply with that requirement. While the ramifications of failing to comply with the terms of the sexual offender treatment program were unclear in the PTA, and left unexplained by the MJ, the court does not state that requiring an accused to enroll in a sexual offender treatment program is a per se impermissible term.

14. **Agreement not to discuss alleged constitutional violation.** *United States v. Edwards*, 58 M.J. 49 (C.A.A.F. 2003). As part of PTA, accused agreed not to discuss, in his unsworn statement, any circumstances surrounding potential constitutional violations occurring during AFOSI's interrogation of him (interrogation after detailing of defense counsel without first notifying defense counsel). If a provision is not contrary to public policy or RCM 705, accused may knowingly and voluntarily waive it. RCM 705 does not prohibit this pretrial term, and specifically does not deprive the accused of the right to a complete sentencing proceeding. Military judge conducted detailed inquiry of the accused to determine he knowingly and voluntarily agreed to it, and whether he understood the implications of his waiver.

15. **Forum selection (military judge alone).**

a. *United States v. Burnell*, 40 M.J. 175 (C.M.A. 1994). Government would not agree to two-year sentencing limitation unless accused waived members. COMA rules that with accused's voluntary and intelligent waiver, PTA was not violative of public interest. Even if government had declined any PTA unless accused waived members, the "government would not be depriving [accused] of anything he was entitled to."

b. *United States v. Andrews*, 38 M.J. 650 (A.C.M.R. 1993). Government indicated during pre-trial negotiations that if accused elected trial with members, "then the quantum portion would be higher than if we went with military judge alone." Court ruled, "[W]e hold that the change to RCM 705 now permits the government to propose as a term of the pretrial agreement, that the [accused] elect trial by military judge alone, and the amount of the sentence limitation may depend on that election." See also *United States v. McClure*, A.C.M.R. No. 9300748 (A.C.M.R. Nov. 23, 1993) (unpub.) (convening authority's handwritten counter-offer on pretrial agreement stated: "The foregoing is accepted only if the accused elects to be tried by military judge alone.").

c. Appellate courts might invalidate a pretrial agreement if accused asserts (s)he was "coerced" into waiving trial by members. *United States v. Young*, 35 M.J. 541 (A.C.M.R. 1992).

d. A service or command policy, such as standardized pretrial agreements, which undermines the legislative intent of Article 16 "will be closely scrutinized." However, agreements are permissible if waiver is "freely conceived defense product." *United States v. Zelenski*, 24 M.J. 1 (C.M.A. 1987).

G. PROHIBITED TERMS OR CONDITIONS.

RCM 705. Pretrial agreements.

.....
(c) *Terms and conditions*

(1) *Prohibited terms or conditions.*

(A) *Not voluntary.* A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it.

(B) *Deprivation of certain rights.* A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights.

1. ***Not voluntary.*** A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it.

2. ***Deprivation of certain rights.*** A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge jurisdiction of the court-martial; the right to speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights.

a. *United States v. Libecap*, 57 M.J. 611 (C.G. Ct. Crim. App. 2002). Accused contended that the pretrial agreement, requiring him to request a bad conduct discharge at trial, was unenforceable. The appellate court concluded that RCM 705(c)(1) prohibited the provision because it deprived the accused of a complete sentencing proceeding by negating the value of putting on a defense sentencing case. Moreover, the requirement to request a bad conduct discharge improperly placed the accused in the position of either giving up a favorable pretrial agreement or forgoing a complete sentence proceeding. The provision was against public policy for similar reasons. The accused was prejudiced by the provision, even though he had not requested a bad conduct discharge at trial, because he was precluded from telling the military judge that he wanted a second chance and from arguing for a sentence that did not include a punitive discharge. Since the accused had specifically stated that the error did not affect the voluntariness of his pleas, the appellate court determined that the appropriate remedy was a rehearing on sentence.

b. *United States v. McLaughlin*, 50 M.J. 272 (C.A.A.F. 1999). Accused offered to waive a speedy trial issue in his pretrial agreement (accused had been in pretrial confinement for 95 days). CAAF held that under the MCM this provision is unenforceable, so the military judge should have declared it impermissible, upheld the remainder of the agreement, and then ask the accused if he wished to litigate the issue. If he declined to do so, the waiver would be clearer. Nevertheless, the accused must make a prima facie showing or colorable claim for relief. Despite 95-day delay, no showing of prejudice.

c. *United States v. Benitez*, 49 M.J. 539 (N.M. Ct. Crim. App. 1998). Accused offered to waive all non-constitutional and non-jurisdictional motions. The military judge determined there was a speedy trial issue, and that the term was proposed by the government. The accused had been in pretrial confinement for 117 days at the time of arraignment. The court held that there was a colorable showing of a viable speedy trial claim and that it was not convinced this was harmless error. Finding and sentence set aside.

3. ***Term involving individual military counsel.*** *United States v. Copley*, No. 20011015 (A. Ct. Crim. App. Feb. 26, 2004) (unpub.). Increase in confinement cap from 12 to 13 months due to accused's exercise of his right to an individual military counsel which caused a delay in proceedings "inferentially implicated appellant's right to individual military counsel," and violated public policy. Court reassessed sentence and affirmed only 11 months confinement.

4. ***Waiver of clemency or parole.*** *United States v. Tate*, 64 M.J. 269 (C.A.A.F. 2007). The accused, in his PTA, agreed to decline any clemency or parole offered to him for a period of twenty years. The MJ sentenced the accused to life without parole but the PTA

limited the accused's confinement to fifty years, which, but for his PTA term, would have made him eligible for clemency in five years and parole in ten years. CAAF held that a PTA term limiting the accused's right to clemency or parole violates RCM 705(c)'s right to a complete and effective exercise of post-trial and appellate rights. Allowing such a term would improperly impede the ability of service secretaries to exercise their clemency and parole powers, "as well as ultimate control of sentence uniformity" throughout their respective service. CAAF struck the PTA's specific term but ruled the stricken term did not impair the balance of the agreement and the plea. *See also United States v. Thomas*, 60 M.J. 521 (N-M. Ct. Crim. App. 2004) (any PTA provision precluding the accused from accepting clemency violates public policy, even if accused's sentence could have included death or required a mandatory minimum of confinement for life for a premeditated murder conviction).

5. *United States v. Sunzeri*, 59 M.J. 758 (N-M. Ct. Crim. App. 2004). Term, originating with accused, that prohibited accused from presenting testimony of witnesses located outside of Hawaii either in person, by telephone, letter, or affidavit, violated public policy as it impermissibly deprived the accused of a complete sentencing proceeding. By contrast, it is permissible to waive *personal appearance* of sentencing witnesses, so long as other methods are available for presenting that evidence to the factfinder (like telephonic testimony or stipulations of expected testimony).

6. *United States v. Davis*, 50 M.J. 426 (C.A.A.F. 1999). Accused offered a PTA in which he agreed to plead not guilty and, in exchange for a sentence limitation, to enter into a confessional stipulation and present no evidence. The stipulation admitted basically all elements of the offenses except the wrongfulness of marijuana use and the intent to defraud concerning the bad check offenses. CAAF found the provision violated the prohibition against accepting a confessional stipulation as part of a pretrial agreement promising not to raise any defense. *See also United States v. Keyes*, 33 M.J. 567 (N.M.C.M.R. 1991) (improper to have accused waive in pretrial agreement military judge's disqualification after judge's impartiality is reasonably questioned).

7. *United States v. Cassity*, 36 M.J. 759 (N.M.C.M.R. 1992). Accused pled guilty in exchange for a pretrial agreement which would suspend a bad-conduct discharge, provided confinement for more than four months was adjudged. Confinement adjudged was for less than four months, and convening authority did not suspend the discharge. Agreement found to be contrary to public policy and fundamentally unfair.

8. *United States v. Thomas*, 60 M.J. 521 (N-M. Ct. Crim. App. 2004). Where an accused's sentence could include death and required a mandatory minimum of confinement for life for a premeditated murder conviction, any PTA provision precluding the accused from accepting clemency, if offered, violates public policy.

9. *United States v. Schmelzle*, No. 200400007, 2004 CCA LEXIS 148 (N-M. Ct. Crim. App. July 14, 2004) (unpub) (based on the accused's eligibility for retirement, a provision requiring the accused to not request transfer to the reserves, if a punitive discharge was not adjudged, violated public policy).

10. *United States v. Conklan*, 41 M.J. 800 (A. Ct. Crim. App. 1995). Pretrial agreement in which the quantum portion was increased if the accused raised claims of de facto immunity encumbered the accused's due process right to challenge the jurisdiction of the court-martial. The litigation of non-frivolous claims of lack of jurisdiction and immunity are not the proper subjects for plea bargaining.

H. PROBLEMATIC TERMS OR CONDITIONS.

1. ***Waive all waivable motions.*** *United States v. Gladue*, 67 M.J. 311 (C.A.A.F. 2009). Accused pled guilty pursuant to a pretrial agreement agreeing to "waive any waiveable

[sic] motions.”¹ At trial, military judge asked the defense what motions were waived by this provision; defense counsel stated the only contemplated motions were for a continuance, suppression of evidence, change of venue, and entrapment (and did not mention multiplicity or unreasonable multiplication of charges). On appeal (and for the first time), the accused argued multiplicity or, alternatively, unreasonable multiplication of charges. The CAAF found the accused waived those issues in the pretrial agreement. The court noted: “Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.” When an issue is merely forfeited, appellate courts will review for plain error; if an accused waives a right at trial, it is “extinguished” and will not be reviewed on appeal. In this case, the accused knowingly waived all waivable motions, which included multiplicity and unreasonable multiplication of charges. The CAAF held it was not relevant that the defense did not contemplate these specific motions at trial.

a. Despite the CAAF’s decision in *Gladue*, a “waive all waivable motions” provision can be problematic. Under RCM 910(f)(4), the military judge must ensure the accused understands the pretrial agreement. If the accused and counsel did not anticipate a motion at trial, yet purported to waive all motions, the waiver of the unanticipated motion was arguably unknowing. Military judges, in an abundance of caution, should ask defense counsel what specific motions are being waived under a “waive all waivable motions” provision. This practice precludes challenges on appeal that an accused was unaware of other motions or (more problematic) believed he was waiving a non-waivable motion (like speedy trial).

b. *Cf. United States v. Rivera*, 46 M.J. 52 (C.A.A.F. 1997), *affirming* 44 M.J. 527 (A.F. Ct. Crim. App. 1996) (term in PTA which required that accused waive “all pretrial motions” was too broad, and purported to deprive accused of right to make motions that could not be bargained away); *United States v. Jennings*, 22 M.J. 837, 838-39 (N.M.C.M.R. 1986) (provision in pretrial agreement to “waive any pretrial motion I may be entitled to raise” is “null and void” as “contrary to public policy”).

c. *See also United States v. Silva*, 1997 CCA LEXIS 267 (N-M. Ct. Crim. App. 1997) (unpub.). Term in PTA, which required accused to “waive all waiveable motions” not contrary to public policy and RCM 705(c)(1)(B). Such a term does not include motions that are nonwaivable under RCM 705(c)(1)(B).

2. **Conditional Requests for Delay.** *United States v. Giroux*, 37 M.J. 553 (A.C.M.R. 1993). Defense counsel submitted a post-trial “Conditional Request for Delay” to cover a portion of time between the preferral of charges and the date of trial. Defense counsel was willing to accept either 37 or 72 days of processing time in return for sentence mitigation by the convening authority. Ambiguity in convening authority’s acceptance was resolved in favor of accused. A.C.M.R. pronounced that “for obvious reasons, we strongly recommend that convening authorities and staff judge advocates not entertain agreements of this nature in the future.”

3. **Testifying without Immunity.** *See United States v. Profitt*, 1997 CCA LEXIS 117 (A.F. Ct. Crim. App. Apr. 4, 1997) (unpub.) (term “testify without a grant of immunity” should be interpreted with common sense, which dictates that the convening authority was requiring the accused testify in future trials related to the offenses in which he was involved). The court held the PTA is valid under RCM 705 in a case involving guilty plea to false official statement and use and distribution of LSD in exchange for the accused

¹ *United States v. Gladue*, 65 M.J. 903, 904 n.2 (A.F. Ct. Crim. App. 2008) (“It is well established that this provision does not per se violate either Rule for Courts-Martial 705 or public policy.”), *aff’d*, 67 M.J. 311 (C.A.A.F. 2009).

promises to: not ask convening authority to provide funding for more than three sentencing witnesses (RCM 705 (c)(2)(E)); testify without grant of immunity against any other military members (RCM 705 (c)(2)(B)); and not raise any waivable pretrial motions. The MJ questioned accused and counsel extensively during providence and all parties agreed the term did not encompass motions of a Constitutional dimension. *See also United States v. Rivera*, 46 M.J. 52 (C.A.A.F. 1997), *affirming* 44 M.J. 527 (A.F. Ct. Crim. App. 1996) (term which required accused to “testify in any trial related in my case without a grant of immunity” did not violate public policy, *under facts of this case* as accused had not yet been called to testify).

4. ***Waive any and all defenses.*** *United States v. Forrester*, 48 M.J. 1 (C.A.A.F. 1998). Term which required the accused waive his right to “any and all defenses” did not violate RCM 705 or public policy. Accused charged with attempted housebreaking, attempted larceny, violation of a lawful general regulation, and aggravated assault. Requirement to waive all defenses was not overly broad, considering that the accused failed to raise any defense during the providence inquiry or sentencing.

5. ***Vacation of suspension term.*** *United States v. Perlman*, 44 M.J. 615 (N-M. Ct. Crim. App. 1996), 48 M.J. 353 (C.A.A.F. 1998) (sum. disp.) (affirming but expressing no opinion on whether term is lawful). Government argued that term in PTA permitted SPCMCA to execute vacation of suspension without forwarding case to GCMCA for action. Court held that although PTA does not indicate that accused wanted to waive those rights; Congressional intent was to grant accused an important procedural due process right for vacation actions and it is doubtful whether such rights are waivable. *See also United States v. Smith*, 46 M.J. 263 (C.A.A.F. 1997) (holding that PTA term providing for vacation proceedings and processing under Article 72 and RCM 1109 in the event of future misconduct cannot be interpreted as waiver of the GCMCA’s authority to review and take action on vacation).

I. **REMEDY FOR UNENFORCEABLE TERMS.** *United States v. McLaughlin*, 50 M.J. 217 (C.A.A.F. 1999) (a term requiring accused to “waive the speedy trial issue” is impermissible under RCM 705(c)(1)(B) and the military judge should have declared it void and unenforceable, while upholding the rest of the agreement; judge should have also asked the accused if he wanted to raise the issue).

J. **INQUIRY INTO QUANTUM AND RESOLUTION OF AMBIGUOUS TERMS.**

1. ***Contract principles govern.*** *United States v. Grisham*, 66 M.J. 501 (A. Ct. Crim. App. 2008). ACCA provided an excellent summary of the contract principles used to interpret pretrial agreements. In *Grisham*, the approved pretrial agreement included this provision: “The government agrees not to prefer any additional charges or specifications against the accused for any potential misconduct of which the *government is aware at the time this offer is signed.*” (emphasis supplied by the court). The government became aware of misconduct in the nine days between the date the accused signed the pretrial agreement and the date the convening authority approved it: the accused and counsel signed the pretrial agreement on 1 December 2004; the accused (who was in pretrial confinement) provided a urine sample as part of a prison-wide urinalysis; on 6 December 2004, the Army’s laboratory found amphetamines in the accused’s sample; on 10 December 2004, after conducting several standard confirmatory tests, the laboratory certified the positive result; also on 10 December 2004, the convening authority approved the pretrial agreement. The accused pled guilty pursuant to his pretrial agreement in *Grisham I*. The government preferred additional charges for a second court-martial, *Grisham II*, including the wrongful use of amphetamines from December 2004. The ACCA held the pretrial agreement referred to the date *the accused* signed the pretrial

agreement (as opposed to the date the convening authority signed it) and upheld the conviction for wrongful use.

- a. **Law.** “A pretrial agreement is a contract created through the bargaining process between the accused and the convening authority. It is well established in federal and military courts that pretrial agreements will be interpreted using contract law principles.”
- b. **Military judge’s duty to resolve ambiguity.** The military judge has a duty to “resolve any ambiguities, inconsistencies, or misunderstandings between the accused and the government during the providence inquiry.” The court emphasized that if there is ambiguity, “it is the military judge’s responsibility to clarify the terms of the agreement on the record, and ensure that all parties, especially the accused, understand the terms and their implications”
- c. **Practice point.** Against this lengthy dissertation of the law, the case ultimately came down to the military judge’s discussion of the PTA with the accused. The military judge in *Grisham I* asked the accused about the effective date of the disputed provision and all parties agreed that it was 1 December 2004, the date the accused signed the offer to plead guilty. Military judges should force parties to clarify vague provisions on the record. AFCCA commended the military judge in the first trial for asking the accused if he understood the term to mean that 1 December 2004 was the effective date.

2. **Contract principles yield to Due Process protections.** *United States v. Smead*, 68 M.J. 44 (C.A.A.F. 2009). A pretrial agreement is a constitutional contract between the accused and the convening authority. In a typical agreement, the accused foregoes constitutional rights in exchange for a benefit, normally a reduction in sentence. As a result, when interpreting pretrial agreements, contract principles will be outweighed by Due Process Clause protections for an accused.

3. **Ambiguous quantum provisions.** *United States v. Craven*, 69 M.J. 513 (A.F. Ct. Crim. App. 2010), *review denied*, 69 M.J. 209 (C.A.A.F. 2010). The accused pled guilty pursuant to a pretrial agreement that included this quantum: “The approved sentence will not exceed confinement in excess of thirty-six months (36).” The convening authority approved an adjudged dishonorable discharge, 28 months of confinement², and reduction to E-1. On appeal, the accused argued the quantum portion limited the sentence that could be approved to 36 months’ confinement, which implicitly required the rank reduction and punitive discharge be disapproved. The AFCCA found the quantum was ambiguous and affirmed. “In determining the parties’ understanding on ambiguous pretrial agreement terms, this Court will give the greatest weight to the parties’ stated understanding at trial, for it is at the pretrial and trial stages where pretrial agreement disagreements can better be resolved.” In Footnote 2, the court cited *United States v. Acevedo*, 50 M.J. 169, 173 (C.A.A.F. 1999) for proposition that “trial defense counsel is under a continuing duty to reveal in open court any discrepancy between the defense understanding of the potential sentence and that adjudged by the court”

- a. **Term was ambiguous.** In dissecting the language, AFCCA noted: (1) the provision stated “the approved sentence” rather than the unambiguous “the approved sentence to confinement”; and (2) the quantum did not expressly limit the convening authority’s ability to approve other lawfully-adjudged punishments.

² The military judge had sentenced the accused to confinement for 34 months, reduction to E-1, and to be dishonorably discharged. In footnote 5, the AFCCA noted the convening authority approved 28 months’ confinement “in an exercise of clemency.”

The AFCCA then concluded, “[T]he pretrial agreement provision is ambiguous and we cannot discern the parties’ intent without examining extrinsic evidence that may shed some light on the parties’ intent.”

b. *Parties’ intent allowed for approval of adjudged sentence.* The AFCCA quickly concluded the parties intended the provision only limit the accused’s sentence to confinement without limiting other punishments. The court emphasized that the parties at trial agreed with the military judge’s interpretation that the convening authority could approve the sentence as adjudged; the AFCCA noted this factor alone would have been sufficient for the court to find the parties’ intent. The AFCCA then found its determination was “buttressed by the fact that neither the appellant nor his trial defense counsel objected to the SJAR” as well as the accused waiting until appeal to dispute the meaning of this provision.

4. *United States v. Acevedo*, 50 M.J. 169 (C.A.A.F. 1999). Accused entered into a PTA which provided that “a punitive discharge may be approved as adjudged. If adjudged and approved, a dishonorable discharge will be suspended for a period of 12 months from the date of court-martial at which time, unless sooner vacated, the dishonorable discharge will be remitted without further action.” The military judge sentenced accused to confinement for 30 months, total forfeitures, reduction to E-1, and a bad-conduct discharge. The military judge then stated regarding the BCD, “there’s nothing [in the PTA] about doing anything to a bad-conduct discharge so that is not suspended. Right?” to which both counsel agreed. The CA approved the BCD. CAAF held that it appeared that all parties had the same understanding, that an unsuspended bad-conduct discharge was envisioned as a possible approved and executed punishment.

5. *United States v. Gilbert*, 50 M.J. 176 (C.A.A.F. 1999). A companion case to *Acevedo*. The PTA had a similar provision relating to suspension of a DD, and also suspended confinement in excess of 6 months for 12 months. The military judge sentenced accused to confinement for 12 months, reduction in grade to E-2, forfeiture of all pay and allowances for 12 months, and a bad-conduct discharge. The military judge recommended suspension of the BCD. The military judge noted the impact of the PTA, on the adjudged sentence. None of the parties commented with respect to the military judge’s recommendation that the convening authority suspend the bad-conduct discharge, which would have been an empty gesture if the agreement already required it. CAAF held the provision was lawful and that the BCD could be approved.

6. *United States v. Sutphin*, 49 M.J. 534 (C.G. Ct. Crim. App. 1998). Accused entered into a PTA that described five parts of the sentence covered by the agreement. One portion was characterized as the “amount of forfeiture or fine,” and it included forfeitures of pay and allowances as being included under the agreement but did not mention the possibility of a fine; the last portion of the PTA stated “any other lawful punishment (which shall expressly include, among others, any enforcement provisions in the case of a fine).” The military judge never inquired whether the accused understood a fine could be approved and imposed. The military judge ensured the accused understood that the sentence was a limitation on what could be done with him. The military judge then instructed the members they could adjudge a fine, along with confinement and a punitive discharge; the panel’s sentence included a \$5,000 fine. The court held the portion of the sentence which included a fine must be disapproved, since the reasonable conclusion was that only forfeitures may be approved.

7. *United States v. Edwards*, 20 M.J. 439 (C.M.A. 1985). Where fine not mentioned in agreement and sentence includes total forfeitures plus a \$1,000 fine, the fine could not be approved. *See also United States v. Morales-Santana*, 32 M.J. 557 (A.C.M.R. 1991); *United States v. Gibbs*, 30 M.J. 1166 (A.C.M.R. 1990).

8. *United States v. Womack*, 34 M.J. 876 (A.C.M.R. 1992). Accused submitted agreement to plead to drunk driving if government would not go forward on related assault charge. Pretrial agreement was silent as to punishment. MJ opined (after reading this sentence and comparing it to the PTA) that the literal meaning was that the CA could only impose “no punishment.” Military judge and trial counsel “agree to disagree.” Military judge should have resolved ambiguity. Failure to resolve ambiguity resolved in favor of accused.

K. POST-TRIAL RE-NEGOTIATION OF PRETRIAL AGREEMENT.

1. *United States v. Pilkington*, 51 M.J. 415 (C.A.A.F. 1999). An accused has the right to enter into an enforceable post-trial agreement with the convening authority when the parties decide that such an agreement is mutually beneficial. Accused pled guilty to conspiracy to maltreat subordinates, maltreatment, false official statements, and assault. In a pretrial agreement, the convening authority agreed to suspend the bad-conduct discharge for 12 months. Accused and the convening authority agreed, in a post-trial agreement, that the latter could approve the punitive discharge as long as he “limited confinement to 90 days.” On appeal, the accused argued that the post-trial agreement should be invalidated because it prevented judicial scrutiny of the terms and conditions. The court refused to invalidate the agreement, noting that the accused proposed the agreement after full consultation with counsel, stated that he voluntarily entered the agreement, and the post-trial agreement was directly related to the convening authority’s obligations under the sentencing provisions of the pretrial agreement. Additionally, the court held that while the trial court did not review the post-trial agreement, the intermediate appellate court always have the opportunity to review such agreements.

2. *United States v. Dawson*, 51 M.J. 411 (C.A.A.F. 1999). Accused and CA agreed to a PTA in which the first 30 days of any adjudged punishment would be converted into 15 days’ restriction. Confinement in excess of 30 days would be suspended. The accused received 100 days confinement and a BCD. She was placed on restriction, missed a muster, and was notified of pending vacation proceedings. She went AWOL, but was later apprehended and placed in confinement. Accused entered a new agreement with the CA where she agreed to waive the right to appear at a hearing to vacate the suspension of her sentence (the SJA had opined the one held in her absence was illegal), to waive any claims she might have concerning post-apprehension confinement, and to release the CA from the prior agreement. In return, the CA would withdraw the new absence charge, and provide day-for-day credit toward her time served in “pretrial confinement” (on the new charge). The SJA advised that, based on the errors that occurred in the first trial, he should disapprove all confinement. The CA approved the BCD and disapproved the confinement. CAAF held that this was a valid post-trial agreement that did not involve post-trial renegotiation of an approved PTA. The agreement related to proceedings collateral to the original trial, and did not require the approval of a military judge.

L. STIPULATIONS OF FACT (PRETRIAL AGREEMENT CASES). RCM 811.

1. ***Government can require the accused to stipulate to aggravation evidence or refuse to accept pretrial agreement.*** *United States v. Harrod*, 20 M.J. 777 (A.C.M.R. 1985); *United States v. Sharper*, 17 M.J. 803 (A.C.M.R. 1984).

a. Government can require accused to agree to both truth and admissibility of matters contained in the stipulation of fact. The stipulation should be unequivocal that counsel and the accused agree not only to the truth of the matters stipulated but that such matters are admissible in evidence against the accused.

b. *United States v. Vargas*, 29 M.J. 968 (A.C.M.R. 1990). Defense counsel objected at trial to the inclusion of the uncharged misconduct and indicated that

the accused only agreed to the stipulation out of fear of losing the deal. Military judge gave the accused an opportunity to withdraw, but the accused elected to adhere to the stipulation; no overreaching by the Government. *See also United States v. Mezzanatto*, 513 U.S. 196 (1995) (agreement to waive evidentiary provisions are subject to waiver by voluntary agreement of the parties).

2. ***Use of confessional stipulation after “busted” providence inquiry are permissible with consent of the accused.*** Otherwise military judge not at liberty to consider matters presented in the unsuccessful attempt to plead guilty. *United States v. Matlock*, 35 M.J. 895 (A.C.M.R. 1992). Prosecution cannot receive the benefit of the stipulation without the concomitant limitations of the pretrial agreement. *See United States v. Cunningham*, 36 M.J. 1011 (A.C.M.R. 1993).

3. ***Stipulations in mixed plea cases.*** Unless otherwise agreed to by the accused, confessional stipulation in connection with guilty pleas may not be considered by military judge as to those charges to which accused has pled not guilty (contested charges). *United States v. Banks*, 36 M.J. 1003 (A.C.M.R. 1993).

a. Confessional stipulation is the equivalent of entering a guilty plea to a charged offense; accused must knowingly and voluntarily consent to any use of stipulation beyond the limited purpose of facilitating providence inquiry. *United States v. Rouviere*, No. 9200242 (A.C.M.R. Aug. 24, 1993) (unpub.).

b. *United States v. Craig*, 48 M.J. 77 (C.A.A.F. 1998). Military judge erred by advising the accused that her confessional stipulation (which contained facts substantiating both guilty and not guilty pleas to drug offenses) waived her constitutional rights against self-incrimination, to a trial of by the facts, and to confront and cross-examine witnesses against her.

c. *United States v. Dixon*, 45 M.J. 104 (C.A.A.F. 1996). Where a stipulation leaves room for the defense to reasonably contest certain elements, and the defense in fact does so, a stipulation is not confessional. Accused entered mixed pleas to stealing mail. He entered into a stipulation of fact, in conjunction with his pretrial agreement, regarding two uncontested specifications, and the Government presented evidence on the remaining two specifications. Specification 3 involved a larceny of mail matter. The stipulation established that accused removed mail matter from its lawful place and did not intend to return the parcel to the addressee. There was no requirement to do a *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977) inquiry. The stipulation was not “confessional” because it did not effectively establish an express admission that accused’s removal of mail matter was done with an intent to steal.

M. UNITARY NATURE OF PRETRIAL AGREEMENT. In absence of evidence to contrary, operation of sentence appendix to pretrial agreement on sentence of court not to be treated as divisible elements. *United States v. Brice*, 38 C.M.R. 134 (C.M.A. 1967); *United States v. Monett*, 36 C.M.R. 335 (C.M.A. 1966); *United States v. Neal*, 12 M.J. 522 (N.M.C.M.R. 1981).

1. *United States v. Barraza*, 44 M.J. 622 (N.M. Ct. Crim. App. 1996). Accused pled to sodomy and indecent acts in exchange for pretrial agreement which contained a term that all adjudged confinement in excess of 46 months was to be suspended for 12 months from date of convening authority’s action. Accused was sentenced to 10 years, total forfeiture of all pay and allowances, reduction to E-1, and a dishonorable discharge. Defense counsel requested that the convening authority reduce confinement to aid the recovery process of accused’s family. The convening authority approved the sentence and modified the punishment by suspending all confinement in excess of 14 months and 6 days for a period of 36 months. The action was lawful under the pretrial agreement

because confinement was actually reduced by 32 months and was 22 months less than the accused requested in his clemency petition, even though there was a 2 year suspension increase. The reduced confinement and increased suspension periods, taken together, did not exceed confinement period authorized by the pretrial agreement.

2. *United States v. Sparks*, 15 M.J. 895 (A.C.M.R. 1983). In pretrial agreement, convening authority agreed to approve no sentence in excess of confinement for 4 months, $\frac{2}{3}$ pay forfeitures for 4 months, reduction to E-1, and bad-conduct discharge. The adjudged sentence was confinement for 2 months, $\frac{2}{3}$ pay forfeitures for 6 months, reduction to E-1, and bad-conduct discharge. Convening authority can approve sentence as adjudged, as overall severity not increased by extra two months forfeitures.

3. *Cf. United States v. Hayes*, No. 9002521 (A.C.M.R. Aug. 29, 1991) (unpub). In pretrial agreement, convening authority would suspend for 12 months any confinement over 20 months. The adjudged sentence was confinement for 5 years, total forfeiture of all pay and allowances, reduction to E-1, and dishonorable discharge. At action, convening authority approved confinement for 36 months (confinement over 18 months suspended for 18 months), TF, reduction to E-1, and dishonorable discharge. HELD: Reducing confinement by two months and increasing the period of suspension by six months is more favorable to the accused than the pretrial agreement, so action was proper.

4. *United States v. Barratt*, 42 M.J. 734 (A. Ct. Crim. App. 1995). No PTA. Adjudged sentence was 16 months confinement, total forfeiture of all pay and allowances, and reduction to E-1. Accused requested convening authority substitute bad-conduct discharge for reduction in confinement to 6 months; at action, convening authority approved new sentence of bad-conduct discharge and 6 months confinement. HELD: CA may *not* approve a punitive discharge when punitive discharge not adjudged at trial. Punitive discharge, as a matter of law is not a LIO punishment to confinement. *See* 10 U.S.C § 3811.

N. POST-TRIAL.

1. ***Effect of pretrial agreements.*** *United States v. Griffaw*, 46 M.J. 791 (A.F. Ct. Crim. App. 1997). A sentence cap in a court-martial pretrial agreement is not a grant of clemency or true plea bargain identical to civilian practice. The cap is a ceiling (or “more like a flood insurance policy on a house”) on what would otherwise be the maximum punishment provided by law. SJA, therefore, erroneously implied that convening authority fulfilled clemency obligation by reducing the adjudged confinement from 18 to 12 months to comply with terms of pretrial agreement.

2. ***Collateral consequences of terms.*** *United States v. Lundy*, 60 M.J. 52 (C.A.A.F. 2004). Accused entered into PTA term, whereby the CA agreed to defer any and all reductions and forfeitures until the sentence was approved and suspend all adjudged and waive any and all automatic reductions and forfeitures. For sexually assaulting his children, the accused (a SSG) was sentenced to a DD, confinement for 23 years, and reduction to E-1, which subjected him to automatic reduction and forfeitures.

a. The CA attempted to suspend the automatic reduction IAW the PTA to provide the accused’s family with waived forfeitures at the E-6, as opposed to the E-1, rate. The parties, however, overlooked AR 600-8-19 which precludes a CA from suspending an automatic reduction unless the CA also suspends any related confinement or discharge which triggered the automatic reduction. ACCA stated no remedial action was required because the accused’s family was adequately compensated with transitional compensation (TC), which ACCA concluded the accused’s family was not entitled to because they were receiving waived forfeitures, albeit at the E-1 rate.

b. CAAF reversed, holding if a material term of a PTA is not met by the government three options exist: (1) the government's specific performance of the term; (2) withdrawal by the accused from the PTA, or (3) alternative relief, if the accused consents to such relief. Additionally, CAAF held an accused's family could receive TC while receiving either deferred or waived forfeitures if the receipt of TC was based on a discharge and if the receipt of TC was based only on the accused receiving forfeitures, the family could receive TC if not actively receiving the deferred or waived forfeitures. On remand, ACCA, ruled specific performance was "more appropriate because the [accused] has not indicated he would consent to any particular alternative relief." In January 2005, the Secretary of the Army (SECARMY) granted an exception to AR 600-8-19 allowing the suspension of the rank reduction and the provision of forfeitures at the E6 rate without requiring the CA to suspend the discharge or confinement triggering the automatic reduction. SECARMY did not approve interest on the E6 forfeiture amount and ACCA ruled it did not have the authority to provide the approximately \$3,000 in interest on the original amount owed to the accused and remanded the case to the SA to approve the interest payment or to otherwise return the case to ACCA to set aside the findings and sentence.

c. In Fall 2005, SECARMY made the interest payment. In Summer 2006, CAAF issued another *Lundy* opinion, holding that the accused bore the burden to show that the timing of the payment was material to his decision to plead guilty.

d. *Lundy* is a good cautionary tale. Government counsel should ensure pretrial agreements are simple.

3. ***ETS and pay issues.*** *United States v. Perron*, 58 M.J. 781 (C.A.A.F. 2003). In *Perron*, the accused agreed to plead guilty in exchange for sentence limitations that included pay and allowances going to his family. However, prior to trial the accused's term of service expired and once convicted he entered into a no-pay status. As a matter of clemency the accused's counsel asked the convening authority to release Perron from confinement "to gain immediate employment . . . to allow for the financial relief his family desperately needs." The convening authority did not grant the request, opting instead to grant alternative relief. A tortured set of appeals and remands where the adequacy of the alternative relief granted was at issue followed. The issue that finally reached CAAF was whether convening authorities and appellate courts may "fashion an alternative remedy of [their] own choosing" against the accused's wishes. CAAF said no: "It is fundamental to a knowing and intelligent plea that where an accused pleads guilty in reliance on the promises made by Government in a pretrial agreement, the voluntariness of that plea depends on the fulfillment of those promises by the Government . . . Imposing alternative relief on an unwilling [accused] to rectify a mutual misunderstanding of a material term in a pretrial agreement violates the [accused]'s Fifth Amendment Right to due process."

4. ***Timing of terms in pretrial agreement regarding pay to dependents.*** *United States v. Sheffield*, 60 M.J. 591 (A.F. Ct. Crim. App. 2004). Accused pled guilty to numerous military offenses and was sentenced to a BCD, four months confinement, and reduction to E-1. The accused's PTA contained a term that the CA would "waive automatic forfeitures in the amount of five hundred dollars, which sum was to be paid to the guardian appointed by the accused to care for his minor dependants." The SJAR failed to mention this term and the CA did not pay the five hundred dollars to the accused's dependents. On appeal, the accused requested the court to disapprove his adjudged BCD, or in the alternative, to allow him to withdraw from the plea. The government contended specific performance was appropriate. AFCCA held the government could not specifically perform because the accused could not receive the benefit of his PTA bargain (for his dependents to receive

five hundred dollars per month during his incarceration). Likewise, the court failed to approve the accused's request to disapprove his BCD because the government did not agree to the alternative relief. ***The original PTA was nullified and findings and sentence set aside.***

II. APPENDIX – PLEAS & PTAs SUMMARY

MAJOR POINT

SUMMARY

<p>PERMISSIBLE PLEAS</p>	<ul style="list-style-type: none"> • The recognized pleas are not guilty, guilty, guilty by exceptions, guilty by exceptions and substitutions, and guilty to a named lesser included offense. The plea of guilty to a named lesser included offense was created to bring pleas in line with the change to RCM 918 (gave the MJ authority to find an accused guilty of a lesser included offense). An accused can also enter a conditional plea with the consent of the GCMCA and approval of the MJ. • An accused cannot enter a plea of <i>nolo contendere</i> or plead guilty to a capital offense when there is a possibility of finally receiving a death sentence.
<p>THE EFFECT OF A GUILTY PLEA</p>	<ul style="list-style-type: none"> • A plea waives appellate review of all defects not raised at trial which are neither jurisdictional nor tantamount to a denial of due process. • Motions waived include: suppression of confessions, evidentiary motions, and speedy trial motions based on RCM 707. Motions not waived include, <i>inter alia</i>, multiplicity motions that are not facially duplicative, unlawful command influence, and ineffective assistance of counsel.
<p>MECHANICS OF CARE INQUIRY</p>	<ul style="list-style-type: none"> • MJs are responsible for ensuring the providence of a plea. The accused's plea must be knowing, intelligent, and voluntary, and have a basis in fact to survive appellate review. MJ ensures this through <i>Care</i> Inquiry. • The <i>Care</i> Inquiry consists of arraignment and the providence inquiry. During the providence inquiry, the MJ must inform the accused of the elements of the offense using the <i>Benchbook</i>, that a plea admits the elements of the offenses, that the accused knowingly waives constitutional rights, communicate the maximum sentence that could be imposed, and secure a factual basis in the accused's words to support the plea. • MJs must be careful to ask open ended questions of the accused during the providence inquiry rather than conducting a cross examination. A cross examination type inquiry might invalidate the plea on appeal on the basis that the MJ forced the guilty plea. The MJ must also be careful to clearly explain the elements from the <i>Benchbook</i> and also in plain language so the accused understands them. The MJ should also examine and discuss the stipulation of fact with the accused. An accused need not personally recollect a crime in order to successfully plead.
<p>USE OF THE PROVIDENCE INQUIRY; MIXED PLEA CASE PROCEDURE (RCM 913)</p>	<ul style="list-style-type: none"> • The MJ should inform the accused that the providence inquiry will be used to determine an appropriate sentence. This use of the inquiry is permissible as long as the accused is aware of its potential use. • The accused's providence inquiry cannot be used in a mixed plea case to prove a contested greater offense (e.g., pleads guilty to the lesser included offense of wrongful and Gov't seeks to prove larceny), nor can the providence inquiry for one charge be used to prove a separate charge. • When an accused enters mixed pleas, the accused will have the option, under RCM 913, to inform the court members of an earlier guilty plea. The exception to this rule is if the accused pleads to a lesser included offense and the Gov't intends to prove the greater offense.
<p>MILITARY JUDGE AND PTAs</p>	<ul style="list-style-type: none"> • MJs must inquire into the propriety of PTAs as part of the entire in-court plea process. A military judge must intervene when an accused asserts any degree of force or Gov't overreaching in negotiating or approving a PTA.
<p>PERMISSIBLE AND IMPERMISSIBLE TERMS OF PTAs</p>	<p>A term that deprives an accused of a constitutional due process right cannot be part of a PTA. This includes waiver of speedy trial, jurisdiction, counsel, due process, complete sentencing proceedings, and inclusion of <i>sub rosa</i> agreements. Permissible terms include waiver of a members trial, promises of restitution, reasonable probation, and waiver of accusatory stage unlawful command influence. <i>US v. Weasler</i> has spurred the introduction of novel terms that require a high degree of scrutiny.</p>

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COURT-MARTIAL PERSONNEL

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MAJ MEGAN S. WAKEFIELD
SUMMER 2012

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COURT-MARTIAL PERSONNEL

Outline of Instruction

I. COURT-MARTIAL PERSONNEL: AN OVERVIEW

A. **THE MILITARY JUSTICE PROCESS.** Congress enacted the Uniform Code of Military Justice (UCMJ) to provide a coherent, fair system of criminal justice within the military. The President was granted significant authority to craft rules of procedure for this system. Those rules are entitled Rules for Courts-Martial (RCM). The UCMJ and the RCMs are grouped together in the *Manual for Courts-Martial*, the most recent edition published in 2008.

B. **HIERARCHY OF AUTHORITY.** The hierarchy of judicial authority is as follows: Constitution, statute (including UCMJ), executive orders (including RCMs), cases, regulations, and DA Pams. See *United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992).

C. ORGANIZATION OF THE MCM:

1. Part I, Preamble.
2. Part II, Rules for Court-Martial (RCMs).
3. Part III, Military Rules of Evidence (MREs).
4. Part IV, UCMJ's punitive articles (substantive criminal law).
5. Part V, Procedures for nonjudicial punishment.
6. Appendices: Constitution (Appendix 1); full text of UCMJ as passed by Congress (Appendix 2); and additional forms, analyses, directives, executive orders etc.

D. **LEVELS OF COURTS-MARTIAL.** Congress established three levels of courts-martial: General, Special, and Summary. The levels of court differ according to the jurisdictional limitations on punishment they can impose. Punishments can include confinement, punitive discharge, forfeitures, reduction (enlisted only), hard labor without confinement (enlisted only), reprimand, a fine, and death for certain offenses. The characteristics of each type of court-martial are set out below:

1. **Summary Courts-Martial** (Arts. 20 and 24). This, the lowest level of court-martial, is accorded less procedural protection. Military judges do not preside over these proceedings, there is no right to defense counsel, and the "court" is composed of one officer, usually a non-lawyer. However, a finding of guilty at a SCM is not recognized as a federal conviction. The maximum punishment allowed is 1 month confinement, hard labor without confinement for 45 days, restriction for 2 months, or forfeiture of 2/3 pay (a Soldier above the rank of SPC may not be confined or given hard labor without confinement, or reduced except to the next pay grade). See RCM 1301 *et seq.* and DA Pam 27-7 for procedures.
2. **Special Courts-Martial** (Arts. 19 and 23). Similar to a civilian "misdemeanor" court, the maximum punishment that can be adjudged at a SPCM is a bad conduct discharge, reduction to the lowest enlisted grade (E-1), confinement for one year, and forfeiture of two-thirds pay per month for one year. A quorum consists of three members.
3. **General Courts-Martial** (Arts. 18 and 22). Reserved for the more serious offenses, a GCM may adjudge the maximum punishment allowed for a particular offense (e.g., death for murder). In a trial with panel members, at least five members must sit to constitute a quorum.

E. **TRANSITORY NATURE OF COURTS-MARTIAL.** A court-martial exists temporarily, hears only a limited number of cases, and then is permanently adjourned. The court is called into life, or “convened,” by an officer who has been given such power by Congress, usually by virtue of position (e.g., a commander of an Army division is, under Article 22, UCMJ, authorized to convene a general court-martial). These commanders are “convening authorities” and they breathe life into these impermanent courts with a “convening order.” A court may be convened for a certain period of time, or only to hear a specific case (this is often the practice in commands where only a small number of cases are tried, where there is no necessity for standing panels).

II. CONVENING AUTHORITY

A. **POWER TO CONVENE.** Article 22, UCMJ (general courts-martial); Article 23, UCMJ (special courts-martial); and Article 24, UCMJ (summary courts-martial).

1. ***Designation by Service Secretary.*** *United States v. Smith*, 69 M.J. 613 (A. Ct. Crim. App. 2010). The Acting Commander, Fort Lewis, referred charges against the accused to court-martial. On appeal, the defense argued the commander was not designated as a court-martial convening authority by the Secretary of the Army (SECARMY) and did not have jurisdiction to take action in this case. Based on the statutory authority and formal SECARMY designations, the ACCA concluded the court-martial was properly convened and had jurisdiction over the accused.

a. ***Interplay between Article 22 and Secretary designations.*** Under Article 22, UCMJ, certain commanding officers are designated as General Court-Martial Convening Authorities (GCMCAs), including commanders of an “Army Corps.” Article 22 does not give statutory authorization for an installation commander to serve as a GCMCA, though it does allow for the applicable Service Secretary to designate other commanders as GCMCAs.

b. ***SECARMY orders.*** In 1981, the SECARMY issued two General Orders designating GCMCAs. In Gen. Order No. 10 (dated 9 April 1981), the Commander, “Fort Lewis” was designated a GCMCA; in Gen. Order No. 27 (dated 13 November 1981) the “Commander, I Corps and Fort Lewis” was designated a GCMCA. In reviewing these orders, the ACCA noted the SECARMY merely took action to “designate” GCMCAs, without replacing or otherwise affecting prior orders. Hence, the two orders designated the installation commander as a GCMCA while also designating the “combined” positions of “Commander, I Corps and Fort Lewis” as a GCMCA.

2. ***Referral by GCMCA for accused in another jurisdiction.*** *United States v. Jones*, 60 M.J. 917 (N-M. Ct. Crim. App. 2005). After allegations of an improper relationship with a midshipman at the Naval Academy, accused was reassigned. The new GCMCA preferred fraternization charges which the military judge dismissed for failure to state an offense. The Naval Academy SJA, on behalf of the old GCMCA, requested the new GCMCA refer charges anew based on additional misconduct. After further investigation, the new GCMCA did not re-refer charges but stated he would make the accused available if the old GCMCA desired to refer charges. The old GCMCA referred charges which the military judge dismissed without prejudice based on an improper referral. The N-MCCA held “a command other than the one to which the accused is attached may refer charges against the accused to a court-martial” (citing RCM 601(b)).

3. ***United States v. Hardy***, 60 M.J. 620 (A.F. Ct. Crim. App. 2004). Between referral and the convening authority’s (CA) action on the case, the Secretary of the Air Force issued an order which arguable revoked the CA’s authority to convene courts-martial. AFCCA held, although the order was inartfully drafted, it did not revoke the CA’s authority and, additionally, the Secretary of the Air Force issued a clarifying order proving his intent was

to not revoke the CA's power. AFCCA held, in the alternative, even if the Secretary of the Air Force had intended to revoke the CA's authority, the commander still had statutory authority to convene courts-martial under Article 22(a)(7) as a commander of an air force. "No administrative action is required to effect convening authority on a commander once he or she is placed in a command position at a numbered air force."

4. *United States v. Hundley*, 56 M.J. 858 (N-M. Ct. Crim. App. 2002). Case upheld because the battalion was designated as "separate" by the Secretary of the Navy and therefore under Article 23(7), UCMJ, its commanding officer had authority to convene a special court-martial

5. *United States v. Brown*, 57 M.J. 623 (N-M. Ct. Crim. App. 2002). Action taken to approve the sentence by a different SPCMCA than the one who convened the accused's court-martial was error, because the action violated the terms of Article 60(c)(1), UCMJ, and RCM 1107(a). The court rejected the Government's argument that the accused needed to demonstrate material prejudice to obtain relief. The clemency stage was an accused's best opportunity to obtain sentence relief, and the Government was required to follow the statutory and regulatory scheme as written.

B. ACTING COMMANDERS/SUCCESSORS IN COMMAND. Service regulations govern, but violation of regulation may not spell defeat for Government. Court engages in a functional analysis looking to who *actually* was in command at the time the action was taken. *United States v. Yates*, 28 M.J. 60 (C.M.A. 1989).

1. **Service Regulations.** Army, AR 600-20; Navy/U.S.M.C., JAGMAN - JAGINST 5800.7C; Air Force, AFR 35-34.

2. **Functional analysis.** *United States v. Gait*, 25 M.J. 16 (C.M.A. 1987) (concern is for realities of command, not intricacies of service regulations). *See also United States v. Jette*, 25 M.J. 16 (C.M.A. 1987).

3. **Successor in command.** *United States v. Gilchrist*, 61 M.J. 785 (A. Ct. Crim. App. 2005). ACCA, in a published opinion, clarifies its position, stating "[a]bsent evidence to the contrary, adaptation can be presumed from the convening authority's action in sending the charges to a court-martial whose members were selected by a predecessor in command." No requirement exists for a convening authority or an acting convening authority to expressly adopt panel members selected by his predecessor. *See also United States v. Starks*, No. 20020224 (A. Ct. Crim. App. Mar. 10, 2004) (unpub.) (concurring with NMCCA in *Brewick* that "while there is no explicit statement of adoption of the selection of court members by the successor-in-command, we are not aware of any authority that so requires.") Contrary ACCA opinions requiring explicit selection overruled by the *Gilchrist* decision. *See United States v. Meredith*, No. 20021184 (A. Ct. Crim. App. Jan. 27, 2005) (unpub.); *United States v. Jost*, No. 20030975 (A. Ct. Crim. App. Mar. 29, 2005) (unpub.). These cases held that a successor in command must expressly select members selected by the previous commander. "By the simple expedient of including and correctly referencing the predecessor's recommended CMCO in the referral document, the SJA can ensure that the codal responsibilities of the convening authority are clearly met."

4. *See also United States v. Brewick*, 47 M.J. 730 (N-M. Ct. Crim. App. 1997) (holding "[t]o the extent an 'adoption' is required [where a successor in command refers a case to a CMCO who members were selected by a predecessor] or helpful, we can presume as much from [the successor's] action in sending the charge to that court-martial, absent evidence to the contrary.>").

C. LIMITATIONS ON JOINT COMMANDERS. *United States v. Egan*, 53 M.J. 570 (A. Ct. Crim. App. 2000). In a special court-martial convened by Air Force colonel (commander of a

EUCOM joint unit), accused Soldier was convicted of drug use and distribution. SPCMCA approved the sentence, which included a BCD. ACCA held the SPCMCA did not have the authority under the applicable joint service directive to convene a special court-martial empowered to adjudge a BCD in the case of an Army soldier. BCD set aside; case further modified on other grounds.

D. CONVENE WHAT?

1. **All SPCMs are “empowered to adjudge a Bad-Conduct Discharge.”** *United States v. Scott*, 59 M.J. 718 (A. Ct. Crim. App. 2004). Case referred to a special court-martial. GCMCA, following SJA’s advice, signed a document referring case to SPCM empowered to adjudge a BCD. However, the instructions on the charge sheet did not include the words “empowered to adjudge a bad-conduct discharge.” Based on discussion following RCM 601(e)(1), court determines that additional words in convening authority’s referral or on the charge sheet are “surplusage.” “We hold that all Army SPCMs are empowered to adjudge a BCD unless the convening authority expressly states that a particular SPCM is not so empowered. The convening authority should expressly state such a limitation in the referral signed by the convening authority, in special instructions on the charge sheet, or in both.”

2. **SPCMCA refers capital offense.** *United States v. Henderson*, 59 M.J. 350 (C.A.A.F. 2004). SPCMCA referred alleged violation of Article 110(a), UCMJ (willfully hazarding a vessel, a nonmandatory capital offense). Article 19, UCMJ provides that a SPCMCA can refer only noncapital offenses but can refer nonmandatory capital offenses as noncapital “under such regulations as the President may prescribe.” The President, in RCM 201(f)(2)(c), authorizes a SPCMCA to refer a nonmandatory capital offense only with the permission of the GCMCA. That permission was neither sought nor granted in this case. The CAAF held the referral was jurisdictional error. The CAAF rejected three Government arguments: first, that the so-called “evolution” in the law applicable to jurisdictional defects does not extend to this situation; second, that the PTA in the case was a functional equivalent of a referral of a noncapital offense; and third, that the referral of the nonmandatory capital offense was also an implicit referral of the noncapital lesser-included offense. Findings and sentence set aside. *But see* Executive Order 13387, effective 14 November 2005, amending RCM 201(f)(1)(A)(iii)(b) to read that a special instruction is needed that the case is to be tried capital to adjudge a death sentence.

E. SPCMCA AUTHORITY.

1. **Maximum punishment.** Executive Order RCM 201(f)(2)(B), effective 15 May 2002, increased the maximum punishment at a special court-martial to one year confinement. In *Taylor v. Garaffa*, 57 M.J. 645 (N-M. Ct. Crim. App. 2002), the accused used cocaine before the executive order’s effective date, 15 May 2002, but his court-martial was convened and his case was referred after 15 May 2002. Denying his motion for relief, the court held the maximum punishment at his special courts-martial included confinement for up to 12 months.

2. **AR 27-10.** Paragraph 5-28(a) authorizes Army SPCMCA’s to refer cases to BCD SPCMs. In SPCMs involving confinement in excess of six months, forfeitures of pay for more than six months, or bad-conduct discharges the “servicing staff judge advocate will prepare a pretrial advice, following generally the format of RCM 406(b).”

F. ACCUSER DISQUALIFICATION. Article 1(9), UCMJ.

1. **Rule.** A convening authority must be reasonably impartial. A convening authority who is not impartial is an “accuser.” An accuser cannot refer charge(s) to a special or a general court-martial. An accuser with a personal (or other than official) interest in a case has additional limitations on what actions may be taken.

a. Under Article 1(9), UCMJ, “accuser” means a person who (1) signs and swears to charges; (2) directs that charges nominally be signed and sworn to by another; or (3) has an interest other than an official interest in the prosecution of the accused. *See also* RCM 601(c) discussion.

b. *Cf.* RCM 1302(b). Accuser not disqualified from convening *summary* court-martial or initiating administrative measures (Article 15, memorandum of reprimand, Bar to Reenlistment, etc.).

2. *Statutory disqualification.*

a. If a convening authority signs and swears to charges or directs another to do so, she is said to be statutorily disqualified. An accuser who is statutorily disqualified may not refer a case to a general or special court-martial but may appoint an Article 32 Investigating Officer or forward the case with a recommendation as to disposition as long as the disqualification is noted.

b. *McKinney v. Jarvis*, 46 M.J. 870 (A. Ct. Crim. App. 1997). A convening authority who becomes an accuser by virtue of preferring charges in an official capacity as a commander is not, *per se*, disqualified from appointing an Article 32 officer to investigate those charges.

3. *Personal disqualification.*

a. If a person has an other than official interest in the case, that person may be disqualified as an accuser. Besides being denied the right to refer, a personal accuser may not appoint an Article 32 Investigating Officer or make a recommendation when forwarding the case for action.

b. ***Test: Whether a reasonable person could impute to the convening authority a personal interest or feeling in the outcome of the case.*** *United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992); *see also United States v. Gordon*, 2 C.M.R. 161 (1952); *United States v. Crossley*, 10 M.J. 376 (C.M.A. 1981); *United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986) (listing examples of unofficial interests that disqualified CAs).

c. *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994). Accuser concept also applies to those who forward the charges. Special court-martial convening authority’s (SPCMCA’s) girlfriend (later spouse) was acquainted with accused. Record did not establish that SPCMCA acted without improper motives. SPCMCA must disclose any potential personal interests, and if disqualified, forward without recommendation.

d. *United States v. Dinges*, 55 M.J. 308 (C.A.A.F. 2001). A convening authority who becomes an accuser by virtue of having such a close connection to the offense that a reasonable person would conclude he had a personal interest in the case is disqualified from taking further action as a convening authority. At a GCM the accused was convicted of sodomy arising out of his activities as an assistant scoutmaster with a local troop of the Boy Scouts. The Scout Executive terminated his status as an assistant, and contacted the CA (who was a district chairman of the Big Teepee District, Boy Scouts of America) about the matter. Prior to preferral of charges, the accused was assigned to the CA’s wing (a special court-martial convening authority level command). The CAAF ordered a *DuBay* hearing to determine whether the convening authority had an other than official interest that would disqualify him under Article 1(9), UCMJ, and *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994). Based on facts gathered at the *DuBay* hearing, the CAAF held the SPCMCA did not become an accuser because he did not have

such a close connection to the offense that a reasonable person would conclude he had a personal interest in the case. As such, he was not disqualified from taking action as a CA.

4. ***Accuser disqualification – violations of orders of the convening authority.***

a. ***Rule.*** *United States v. Tittel*, 53 M.J. 313 (C.A.A.F. 2000). Accused was convicted of shoplifting and several other offenses and processed for elimination when he was caught shoplifting again from the base PX. The SPCMCA signed an order barring the accused from entering any Navy PX, which the accused violated. The CAAF adopted the Navy court’s reasoning that the order was a routine administrative directive and that the CA was not an “accuser” and that, in any event, the accused waived the issue.

b. *United States v. Byers*, 34 M.J. 923 (A.C.M.R. 1992) *set aside and remanded*, 37 M.J. 73 (C.M.A. 1993), *rev’d as to sentence*, 40 M.J. 321 (C.M.A. 1994), *sent. aff’d. on remand* (A.C.M.R., 23 Jan. 1995) (unpub.). Accused charged under Article 90, UCMJ for violating commanding general’s (CG) order not to operate privately owned vehicle on post. Same CG referred the charge to a GCM. CG was not an accuser and involvement was official and not personal.

c. *See also United States v. Cox*, 37 M.J. 543 (N.M.C.M.R. 1993). Accused charged under Article 90, UCMJ for violating CA’s restriction order. Imposition of pretrial restriction is an “official act” which does not connect the CA so closely with the offense that a reasonable person would conclude he had anything other than an official interest in the matter.

d. *United States v. Shiner*, 40 M.J. 155 (C.M.A. 1994) (whether CA was disqualified because accused allegedly violated CA’s personal order was waived by failure to raise at trial). *See also United States v. Garcia*, 2003 CCA LEXIS 98 (N-M Ct. Crim. App. Apr. 9, 2003) (unpub.). Applying CAAF’s opinions in *United States v. Tittel*, 53 M.J. 313 (C.A.A.F. 2000) and *United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999), court held that accused waived the issue by failing to raise it at trial. In any event, CA was not an “accuser” prohibited from convening a court-martial where convening authority issued the order the accused is alleged to have violated. The order was not to operate POV on Camp Pendleton. Applying the standard that whether one is an accuser depends on whether, under the particular facts and circumstances . . . a reasonable person would impute to [the convening authority] a personal feeling or interest in the outcome of the litigation,” the court found that the issuance of this routine “simple, written order” did not exceed official interest

5. ***Official vs. personal involvement.***

a. ***Rule – official actions will generally not make the CA an “accuser.”*** *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009). Convening authority appointed another General Officer to conduct a command investigation board into an aircraft accident that killed 20 civilians riding a cable car in the Italian Alps. The accused was eventually court-martialed as the pilot of the aircraft. Convening authority closely monitored the investigation, calling the board on a daily basis and making recommendations about areas of further inquiry; charges were not preferred until the investigation was completed. CAAF held the convening authority not become an accuser based on his hands-on involvement in the investigation, noting the repeated contacts did not show a “personal rather than a professional interest.”

b. *United States v. Arindain*, 65 M.J. 726 (A.F. Ct. Crim. App. 2007). The convening authority, an Air Force GCMCA, referred charges of felony murder,

rape, and forcible sodomy to a GCM; the accused was only convicted of unpremeditated murder. Three months after the trial, the convening authority wrote an e-mail to the SJA saying: "My opinion, tho: this was not a sexual assault case . . . we all think they had consensual sex and she expired during their rather abnormal acts." E-mail was disclosed to the defense and they submitted it as part of their clemency. On appeal, defense argued the convening authority committed prosecutorial misconduct by referring "charges for which he did not have reasonable grounds to believe that offenses triable by a court-martial had been committed." AFCCA affirmed, reasoning that the SJA provided pretrial advice that provided the GCMCA with an "analysis of the available evidence . . . , and advised him that the evidence supported the specifications and referral was warranted." Also, the Article 32 investigating officer concluded that reasonable grounds existed to believe the accused committed the offenses. "Sufficient information existed at the time of referral for the convening authority to make his decision, and while his choice of language . . . was regrettable, we do not find that [his e-mails] cast doubt on the propriety of the referral"

c. *United States v. Diacont*, No. 200501425, 2007 CCA LEXIS 94 (N-M. Ct. Crim. App. Mar. 20, 2007) (unpublished). Convening authority was not personally disqualified when he visited the accused and several others in pretrial confinement and asked them "how they were doing, whether they had called their families recently, and what the command could have done to prevent the circumstances in which they found themselves."

d. *United States v. Voorhees*, 50 M.J. 494 (C.A.A.F. 1999). A CA is an "accuser" when the convening authority is so closely connected to the offense that a reasonable person would conclude that the CA had a personal interest in the matter - that it would affect the CA's ego, family, or personal property, or that it demonstrates personal animosity beyond misguided zeal. Here, CA did not become an accuser even though he threatened to "burn" accused if he did not enter into pretrial agreement.

e. *United States v. Fisher*, 45 M.J. 159 (C.A.A.F. 1996). CA's mid-trial statements critical of defense counsel will not invalidate previous pretrial actions of selecting members and referring case to trial when CA's statements do not indicate that he was other than objective in processing court-martial. CA appeared as a Government witness on a MRE 313 motion to suppress a urinalysis. During the recess, the CA stated that "any lawyer that would try to get the results of the urinalysis suppressed was unethical." No taint attributed to selection process.

f. ***CAs suspected of similar offenses may be disqualified.*** *United States v. Kroop*, 34 M.J. 628 (A.F.C.M.R. 1992), *aff'd*, 38 M.J. 470 (C.M.A. 1993). Officer charged with adultery. CA was suspected of similar, albeit unrelated, offenses. In an "abundance of caution over the need to preserve the appearance of propriety" court set aside prior action of CA (approved sentence) and remanded for new SJA's advice and action by different CA. *United States v. Anderson*, 36 M.J. 963 (A.F.C.M.R. 1993).

g. ***Findings and sentence did not have to be set aside on grounds the CA was himself suspected of misconduct.*** Conduct in question was unrelated to accused's misconduct. *United States v. Williams*, 35 M.J. 812 (A.F.C.M.R. 1992) *aff'd*, 41 M.J. 134 (C.A.A.F. 1994). Accused convicted of three rapes, robbery, sodomy, and aggravated assault was not entitled to disqualification of CA where CA was himself suspected of sexual misconduct. Suspected misconduct of CA was of a

non-violent nature. No danger of “psychological baggage” being carried over to prejudice the accused.

h. **Disqualification and potential UCI.** *United States v. Haagenson*, 52 M.J. 34 (C.A.A.F. 1999). Accused, a CW2, was charged with fraternization and her case initially referred to a SPCM, convened by the SPCMCA who was also the accuser. The SPCMCA later withdrew the charge, on the basis of the TC’s advice, and referred it to an Article 32 investigation, ultimately sending it forward with a recommendation for a GCM. Evidence revealed that the withdrawal from a SPCM may have been prompted by the XO of the Base Commander, the SPCMCA’s superior, who reportedly yelled “I want [accused] out of the Marine Corps” at the SPCMCA. The military judge found that there was “no support” for the defense contention that command influence tainted the referral, but the CAAF disagreed, finding insufficient evidence to rule either for or against the defense because the record was not properly developed. Case remanded for a fact-finding proceeding on issue of whether SPCMCA became an accuser.

i. **Command as secondary victims.** *United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999). Accused who was critical of Operation Uphold Democracy in Haiti attempted to “inspect” a prison in order to draw attention to the plight of its inmates. Accused was charged with a variety of offenses, to include disrespect and being absent from his place of duty. He claimed at trial that the entire command was precluded from acting in the case because his behavior so directly challenged his command’s actions that the CA, the commanders, and the members had a conflict of interest. CAAF held that the accused’s personal assertion of such a conflict was insufficient; he produced no evidence that the CA had anything other than an official interest in the case, that there was command influence under Article 37, UCMJ, or that the members were disqualified from serving.

j. **Waiver.** *United States v. Gudmundson*, 57 M.J. 493 (C.A.A.F. 2002). Convening authority testified on dispositive suppression motion. Defense did not request that convening authority disqualify himself from taking post-trial action in the case but alleged on appeal that he should have disqualified himself. The CAAF held that the defense waived the issue by failing to raise it below, in light of the fact that the defense was fully aware of the ground for potential disqualification but chose not to raise it either at trial or in its post-trial submissions. In *dicta*, CAAF reviews law in area. “A convening authority’s testimony at trial is not *per se* disqualifying, but it may result in disqualification if it indicates that the convening authority has a ‘personal connection with the case.’ However, ‘if the [convening authority’s] testimony is of an official or disinterested nature only,’ the convening authority is not disqualified.”

k. **Inelastic predisposition.** *United States v. Davis*, 58 M.J. 100 (C.A.A.F. 2003). Accused was convicted of wrongful drug use. In its RCM 1105 submission, the defense alleged that the convening authority publicly commented that “people caught using illegal drugs would be prosecuted to the fullest extent, and if they were convicted, they should not come crying to him about their situations or their families[’].” Government did not dispute that the convening authority made the statements. After reviewing the law on disqualification of convening authorities to take post-trial action, and applying a *de novo* standard of review, the CAAF held that the statements displayed an inelastic attitude toward the performance of the convening authority’s post-trial responsibilities that disqualified him from taking post-trial action on accused’s case. The comments “lacked balance and transcended a legitimate command concern for crime or

unlawful drugs.” Action set aside, record returned to the Air Force TJAG for a new review and action before a different convening authority.

6. **Why does statutory vs. personal disqualification matter?** It will affect the range of options available.

<i>Action contemplated</i>	<i>If statutorily disqualified -</i>	<i>If personally disqualified -</i>
Appointing Article 32 investigating officer (IO)	May appoint Article 32 IO	May not appoint Article 32 IO
Dismissal of charges	May dismiss	May dismiss
Disposition by other means	May dispose of case via Article 15, Letter of Reprimand, etc.	May dispose of case via Article 15, Letter of Reprimand, etc.
Convening a court martial	May convene a SCM, but not a SPCM or a GCM	May convene a SCM, but not a SPCM or a GCM
Forwarding to superior	May forward with recommendation as to disposition (must note statutory disqualification)	May forward but may not make recommendation (must note personal disqualification)

7. **The “Junior Accuser” Concept.** Commander who is subordinate to “accuser” may not convene a general or special court-martial. See RCM 504(c)(2) and Articles 22(b) and 23(b): “If . . . such an officer is an accuser, the court shall be convened by superior competent authority.” See also *United States v. Corcoran*, 17 M.J. 137 (C.M.A. 1984).

8. **Disqualification of legal officer.** *United States v. Edwards*, 45 M.J. 114 (C.A.A.F. 1996). An O-4 officer who served as the legal officer for the case in the pretrial and post-trial stages was disqualified from preparing the post-trial recommendation. Officer preferred 3 charges and 31 specifications of larceny, forgery, and false-identity offense against accused; conducted a videotaped interrogation of accused that resulted in a confession; acted as evidence custodian during the pretrial stages of the court-martial; and defense counsel only became aware of legal officer’s involvement after trial and completion of post-trial recommendation.

9. **Accuser issue is not jurisdictional – failure to raise at trial may result in waiver.** *United States v. Shiner*, 40 M.J. 155 (C.M.A. 1994) (assuming CA was an accuser, his failure to forward the charges to the next higher level of command was a nonjurisdictional error, which was waived by accused’s failure to raise it at court-martial). See also *Tittel*; *United States v. Voorhees*, 50 M.J. 494 (C.A.A.F. 1999). CA did not become an accuser by threatening to “burn” accused if he did not enter into PTA; even if he did, accused affirmatively waived issue at trial.

10. **Other Referral Issues.**

a. *United States v. Guidi*, No. 200600493, 2007 CCA LEXIS 10 (N-M. Ct. Crim. App. Jan. 30, 2007) (unpublished). The signature on the referral portion of the accused’s charge sheet was illegible, and noted next to the signature, in writing was “1st Sgt By direction.” Typed next to the signature was “For the Commanding Officer.” The additional charge sheet was executed in the same manner, except the notation “1st Sgt” was lacking. The court concluded that a Marine Corps First Sergeant must have signed the charge sheets. However, the

court held that it is not a jurisdictional defect for the convening authority to allow another to sign on his behalf. The N-MCCA stated, “[p]rovided his actions are personally made, it is not necessary that he actually take hold of a pen.”

b. *United States v. Ross*, No. 36139, 2006 CCA LEXIS 358 (A.F. Ct. Crim. App. Dec. 13, 2006) (unpublished). The accused argued that the GCMCA was improperly appointed to command and was not a proper convening authority. The GCMCA was an Air Force colonel (O-6) and was appointed as the Commander of the Third Air Force over two brigadier generals. This appointment was in violation of the applicable Air Force regulation. The GCMCA referred the case to trial by general court-martial, the accused was arraigned, and the case was recessed for 20 days. During the recess, command of the Third Air Force passed to a major general, who replaced five of the nine panel members in the case. The accused was re-arraigned and tried. At no time did the accused object to the original referral. The AFCCA held that the court-martial was properly convened, reasoning that, when an officer is in command, he may exercise the court-martial convening power that attaches to that command. Furthermore, although the appointment violated the Air Force regulation, jurisdiction still attached. “[A]ppellate courts are not justified in attaching jurisdictional significance to service regulations in the absence of their express characterization as such by Congress.” Finally, any error in the referral was cured by the successor GCMCA who took action on the sentence. *See also United States v. Stamper*, No. 36191, 2006 CCA LEXIS 364 (A.F. Ct. Crim. App. Dec. 15, 2006) (unpublished).

G. PANEL SELECTION ISSUES.

1. ***In general.*** Virtually any member of the Armed Forces is eligible to serve on a court-martial panel. However, the CA may only select those members who, in the CA’s personal opinion, are “best qualified” in terms of criteria set out in Article 25, UCMJ: ***Age, Experience, Education, Training, Length of Service and Judicial Temperament.*** *United States v. Hodge*, 26 M.J. 596 (A.C.M.R. 1988), *aff’d*, 29 M.J. 304 (C.M.A. 1989) (holding cross sectional representation of military community on court-martial panel is not required by the Constitution); *see also United States v. Carter*, 25 M.J. 471 (C.M.A. 1988) (holding no Sixth Amendment right that membership reflect a representative cross-section of the military population).

2. ***Selection process remains controversial.***

a. The National Defense Authorization Act for FY 1999, § 552, required the Secretary of Defense to develop a plan for random selection of members of courts-martial as a potential replacement for the current selection process and present the plan and views of the code committee to the Senate Committee on Armed Services and the House Committee on National Security. The Joint Service Committee unanimously concluded that, after considering alternatives, the current practice of CA selection best applies the criteria in Article 25(d) in a fair and efficient manner.

b. A Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice, sponsored by the National Institute of Military Justice and chaired by Senior Judge Walter T. Cox III of the United States Court of Appeals for the Armed Forces, was forwarded to the Secretary of Defense and Members of Congress on 5 September 2001. Observing “[t]here is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence, than the antiquated process of panel selection,” the Cox Commission recommended modifying the pretrial role of the convening authority in both selecting court-martial members and making other

pretrial legal decisions that “best rest within the purview of a sitting military judge.”

c. Guy Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three - Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998). Cf. Major Christopher Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190 (2003) (numerous articles collected and cited at footnote 25).

H. CHALLENGES TO PANEL SELECTION PROCESS – LOGISTICS.

1. *Proving the use of inappropriate criteria or command influence in panel selection.*

a. **The burden.** The defense shoulders the burden of establishing the improper exclusion of qualified personnel from the selection process. Once the defense establishes such exclusion, the Government must show by competent evidence that no impropriety occurred when selecting the accused's court-martial members. *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000).

b. **The standard of proof.** Generally, the standard on both sides is a preponderance of the evidence. RCM 905(c)(1). However, if the defense alleges that the convening authority violated not only Article 25 but also that the convening authority tried, for example, to stack the court against him, then the challenge is essentially one of command influence, and the command influence standards apply.

(1) To raise an issue under Article 37, UCMJ, the accused must show “some evidence” (i.e., facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings). *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). Once the issue is raised at the trial level, the burden shifts to the Government, which may either show that there was no unlawful command influence or show that the unlawful command influence will not prejudice the proceedings. *Id.* The court must be persuaded beyond a reasonable doubt that the findings and sentence will not be affected by command influence. *Id.* at 151.

(2) Command influence is, generally, harder to establish, but, once established, it is harder for the Government to disprove prejudice to the accused.

c. **Two general methods of proof.** First, counsel may attack the array. *See, e.g., United States v. Nixon*, 33 M.J. 433 (C.M.A. 1991) (panel of E-8s and E-9s creates an appearance of evil). Second, counsel can mount statistical attacks on the array. *See, e.g., United States v. Bertie*, 50 M.J. 498 (C.A.A.F. 1999) (disproportionate number of high-ranking panel members did not create presumption of impropriety in selection). *See also United States v. Fenwick*, 59 M.J. 737 (A.F. Ct. Crim. App. 2003) (holding “the military judge may rely upon statistical evidence to discern a ‘subconscious’ desire by the convening authority to improperly exclude certain grades, [but] such statistical evidence must clearly indicate such an exclusion”).

d. **Attacks on the nomination and selection memoranda.** *See United States v. Upshaw*, 49 M.J. 111 (C.A.A.F. 1998); *United States v. Roland*, 50 M.J. 66 (C.A.A.F. 1999); and *United States v. Kirkland*, 53 M.J. 22 (C.A.A.F. 2000).

2. **The convening authority's responsibility to personally select members cannot be delegated.** *United States v. Ryan*, 5 M.J. 97 (C.M.A. 1978); *United States v. McCall*, 26 M.J. 804 (A.C.M.R. 1988) (military judge said "it sounds like somebody has already selected a list of people to take in to the convening authority and have him just kind of stamp it;" ACMR agreed). *But see United States v. Benedict*, 55 M.J. 451 (C.A.A.F. 2001). The Chief of Staff (CoS) submitted a final list of members to the CA, who then personally signed the convening order without asking any questions or making any changes. Setting aside the decision of the Coast Guard Court of Criminal Appeals, the CAAF held that the CA personally selected the nine prospective members set forth by the CoS. See Judge Effron's dissent for a comprehensive discussion of the history of Article 25, UCMJ.

a. *United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991). The division deputy adjutant general gathered a list of court member nominees who, in his opinion, supported a command policy of "hard discipline." Staff members can violate the provisions of Article 37, UCMJ. Their errors will likely spillover to the CA.

b. **Interlopers as a jurisdictional defect.** *United States v. Peden*, 52 M.J. 622 (A. Ct. Crim. App. 1999). Where Member A was selected by CA but Member B was inadvertently placed on convening order, Member B was an "interloper" whose presence constituted jurisdictional error. Convening authority not permitted to ratify presence of Member B after the fact. Sentence set aside (accused had pleaded guilty).

3. **If members of another command are selected, they must also be personally selected by the convening authority.** *United States v. Gaspard*, 35 M.J. 678 (A.C.M.R. 1992) Accused was assigned to Fort Polk. Commanding General, Fort Polk, was disqualified after talking to victim's parents, so case convened by Commander, III Corps and Fort Hood, who referred case to a Fort Polk court-martial convening order (CMCO) with Fort Polk members. Issue on appeal was whether Corps CG personally selected the Fort Polk members. If not, court-martial was "fatally flawed." Case remanded for *DuBay* hearing.

I. CHALLENGES TO PANEL SELECTION PROCESS – CRITERIA USED BY CONVENING AUTHORITY.

1. **In general.** While the CA must use the Article 25 criteria, much litigation has revolved around the CA's supplementing the Article 25 criteria with other criteria. Some of these criteria are discussed below. *See United States v. Dowty*, 60 M.J. 163 (C.A.A.F. 2004). Accused contended that, by soliciting volunteers to serve as court members and then drafting a list of nominees for the CA's approval, the ASJA violated the letter and spirit of Article 25, UCMJ. Court upheld conviction in face of "potentially troubling" panel selection where CA personally selected members despite unorthodox nomination process. While it was error to nominate members based on an irrelevant variable, such as volunteering, the error did not prejudice the accused. Note: accused and counsel were "given full opportunity to question potential members in open court to develop any possible biases or preconceptions, and, through appropriate causal and peremptory challenges, removed any potential member who they had reason to believe would not be capable, fair, and impartial." Also, by time of accused's trial, only three "volunteers" remained on seven-member panel.

2. **Cross-Sectional Representation.** The commander may seek to have the panel's membership reflect the military community. *See, e.g., United States v. Smith*, 27 M.J. 242, 249 (C.A.A.F. 1988). "[A] commander is free to require representativeness in his court-martial panels and to insist that no important segment of the military community – such as blacks, Hispanics, or women – be excluded from service on court-martial

panels.” CMA tacitly accepted as valid the CA’s effort “to have a mix of court members with command or staff experience” to have “some female representation on the panel.”

a. **Inclusion by Race.** Convening authority may include members based upon their race so long as the motivation is compatible with Article 25, UCMJ. *United States v. Crawford*, 35 C.M.R. 3 (C.M.A. 1964) (as to black NCO, it is exclusion that is prohibited, not inclusion). *See also United States v. Smith, infra.*

b. **Inclusion by Gender.** Permissible if for proper reason.

(1) *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988). CA may take gender (or race) into account in selecting court members if seeking in good faith to select that a court-martial panel that is representative of the military population. But, evidence indicated a hidden policy of ensuring two “hardcore” females were on all sexual assault cases based on their “unique experience.”

(2) *United States v. Lewis*, 46 M.J. 338 (C.A.A.F. 1997). In a case involving attempted voluntary manslaughter and assault on the accused’s wife, the convening authority did not “stack” the panel with female members when, in response to a defense request for enlisted members, two of original five female officers were relieved and one female enlisted member was added, resulting in a panel of five male and four female members. Original panel had ten members, five of whom were females.

c. **Duty Position.** Convening authority may select based upon duty position (e.g., commanders) in a good faith effort to comply with Article 25 criteria.

(1) *United States v. White*, 48 M.J. 251 (C.A.A.F. 1998). CA issued a memorandum directing subordinate commands to include commanders, deputies and first sergeants in the court member applicant pool. Eight of ten panel members for the accused’s trial were in command positions. Court held CA did not engage in court packing absent evidence of improper motive or systematic exclusion of a class or group of candidates. Court noted “best qualified” selection for command is close to “best qualified” under Article 25. *See* Effron, J., and Sullivan, J., concurring in the result, but criticizing the majority’s willingness to equate selection for command with selection for panel duty.

(2) *United States v. Cunningham*, 21 M.J. 585 (A.C.M.R. 1985) (holding preference for those in leadership positions is permissible where CA articulates Article 25 criteria; 6 commanders and 3 XO’s who were 1 COL, 3 LTCs, 2 MAJs, 2 CPTs, 1 LT); *see also United States v. Lynch*, 35 M.J. 579 (C.G.C.M.R. 1993), *rev’d on other grounds*, 39 M.J. 223 (C.M.A. 1994) (holding selection process that limited members to those “with significant seagoing experience” met the requirements of Article 25, specifically the “experience” criterion given the charged offenses).

d. **Rank** is not a criterion listed under Article 25, UCMJ. The CA may not select members junior to an accused, but, aside from that one qualification, **the convening authority may not use rank as a device for deliberate and systematic exclusion** of otherwise qualified court members. *United States v. Daigle*, 1 M.J. 139 (C.M.A. 1975) (policy of excluding all lieutenants and WO’s); *but see United States v. Yager*, 7 M.J. 171 (C.M.A. 1979) (exclusion of persons in grades E-2 and E-1 permissible).

- (1) Despite the cases holding that the composition of the panel can create an “appearance of evil,” more recent cases have disallowed challenges to the panel based solely on its composition at trial. *United States v. Bertie*, 50 M.J. 489 (C.A.A.F. 1999) (disproportionate number of high-ranking panel members did not create presumption of impropriety in selection).
- (2) *United States v. Upshaw*, 49 M.J. 111 (C.A.A.F. 1998) (good faith administrative error resulting in exclusion of otherwise eligible members (E6s) was not error). **But see *Kirkland***, below
- (3) *United States v. Roland*, 50 M.J. 66 (C.A.A.F. 1999) (SJA’s memo soliciting nominees E-5 to O-6 was not error). **But see *Kirkland***, below.
- (4) *United States v. Kirkland*, 53 M.J. 22 (C.A.A.F. 2000), *pet. for clarification denied*, 54 M.J. 211 (C.A.A.F. 2000). Despite evidence that CA understood and applied Article 25, sentence set aside where panel selection documents appeared to exclude NCOs below E-7. Panel selection documents may give rise to an appearance of impropriety where documents make it seem that rank was a criterion in panel selection.
- (5) *United States v. Fenwick*, 59 M.J. 737 (A.F. Ct. Crim. App. 2003). Defense raised motion to dismiss for systematic and improper exclusion of lieutenants from panel membership. The GCMCA testified on the motion regarding his selection of members IAW Article 25 criteria. The military judge, however, determined the GCMCA had systematically and improperly excluded lieutenants because in the thirteen courts-martial of the fiscal year only two lieutenants were selected and none served. The military judge granted defense’s motion and ordered the GCMCA to select new panel members free from systematic exclusion of lieutenants. The GCMCA selected a new panel, without lieutenants, causing the military judge to dismiss the case with prejudice and the Government appealed. On appeal, AFCCA held “the military judge may rely upon statistical evidence to discern a ‘subconscious’ desire by the convening authority to improperly exclude certain grades, [but] such statistical evidence must clearly indicate such an exclusion.” Such clear evidence was lacking in this case where lieutenants were not excluded from the nomination process, the GCMCA testified he applied the Article 25 criteria, and the GCMCA had previously selected six lieutenants in fifteen courts-martial in the prior fiscal year. The court recognized “it is not improper, during the selection process, for a convening authority to look first to officers and enlisted members senior in rank because they are more likely to be the best qualified under Article 25.”
- (6) *United States v. Smith*, 37 M.J. 773 (A.C.M.R. 1993). In handwritten note, convening authority directed major subordinate commanders to provide “E7” and “E8” members for membership on court-martial panel. ACMR found that selection was based solely on rank in violation of Article 25, UCMJ, and that the improper selection deprived the court of jurisdiction. Findings and sentence set aside.
- (7) *United States v. Nixon*, 33 M.J. 433 (C.M.A. 1991). A panel consisting of only E-8s and E-9s creates an appearance of evil and is probably contrary to Congressional intent. The CG’s testimony, however, established that he had complied with Article 25 and did not use rank as a selection criterion. Court noted close correlation between the selection criteria for court-martial members in Article 25(d)(2), UCMJ and the

grade of a commissioned or non-commissioned officer. “Indeed, because of that correlation, there is a danger that, in selecting court members, a convening authority may adopt the shortcut of simply choosing by grade.” Resulting blanket exclusion of qualified officers or enlisted members in lower grades violates Congressional intent.

(8) *United States v. Ruiz*, 46 M.J. 503 (A.F. Ct. Crim. App. 1997), *aff’d*, 49 M.J. 340 (C.A.A.F. 1998). Convening authority did not improperly select members based on rank when, after rejecting certain senior nominees from consideration for valid reasons, he requested replacement nominees of similar ranks to keep the overall balance of nominee ranks relatively the same.

(9) *United States v. Benson*, 48 M.J. 734 (A.F. Ct. Crim. App. 1998). An Air Force convening authority violated Article 25 when, after sending a memorandum to subordinate commands directing them to nominate “officers in all grades and NCOs in the grade of master sergeant or above for service as court-members,” he failed to select members below the rank of master sergeant (E-7). The convening authority, while testifying that he had no intent to violate Article 25, also testified that he had never selected a member below the rank of E-7. The court held the CA violated Article 25 by systematically excluding ranks E-4 to E-6. The findings and sentence were set aside. *This case provides an excellent review of the case law interpreting Article 25, UCMJ, and court member selection.*

3. ***Systematic exclusion of otherwise qualified personnel.*** Generally, where the accused challenges the panel because the CA has allegedly excluded otherwise qualified people (e.g., she prefers to select only those who have command experience), we look to the *motivation* of the convening authority. If the motivation is compatible with Article 25, UCMJ, the selection may not be disturbed. Rank, however, is the one area where the convening authority’s motive is largely irrelevant (thus, the CA may have the intention of fully complying with Article 25, but Article 25 is violated where the CA uses rank as a “shortcut” in the selection process). Moreover, where the convening authority appoints members to achieve a particular result (e.g., to guarantee a conviction, or a harsh sentence), the CA has engaged in “court stacking” or “court packing.” This is not a jurisdictional challenge *per se* but rather a species of command influence, in violation of Article 37. If the accused alleges the CA has engaged in court stacking, the court will look to the motivation and intent of the CA.

a. *United States v. Melson*, No. 36523, 2007 CCA LEXIS 372 (A.F. Ct. Crim. App. Sep. 14, 2007) (unpublished). At his trial, the accused moved to dismiss the charges and specifications, alleging that the GCMCA improperly selected the panel by intentionally selecting senior members to serve. Five of the ten members were colonels (O-6s) and, although the case was tried at a different base, some of his staff were chosen as members. The GCMCA testified that he “wanted to pick members whom he knew had the best judgment and experience.” He also said it “was the most serious case he had ever handled.” Furthermore, he wanted to ensure that he had officers with the “requisite maturity and experience.” The issue was addressed at length at trial and the military judge denied the motion, finding that the CA had properly applied Article 25. The AFCCA affirmed, stating that every panel is essentially “hand-picked.” However, “[w]hat is impermissible is for the convening authority to select members with a view toward influencing the outcome of the case.” The court found that the CA gave the panel selection in the case “a great deal of time and consideration . . . [and] did so in an attempt to

ensure justice, not subvert it.” Therefore, the accused did not satisfy his burden to show that the members were improperly selected.

b. *United States v. Simpson*, 55 M.J. 674 (A. Ct. Crim. App. 2001). *aff’d*, 58 M.J. 368 (C.A.A.F. 2003). CA’s deliberate exclusion of personnel assigned to the Army’s Ordinance Center and School did not constitute unlawful “court packing” where the CA’s motive was to find an unbiased and objective panel.

c. *United States v. Brocks*, 55 M.J. 614 (A.F. Ct. Crim. App. 2001). Base legal office intentionally excluded all officers from the Medical Group from the nominee list, because all four alleged conspirators and many of the witnesses were assigned to that unit. Citing *United States v. Upshaw*, 49 M.J. 111, 113 (C.A.A.F. 1998), “[a]n element of unlawful court stacking is improper motive. Thus, where the convening authority’s motive is benign, systematic inclusion or exclusion may not be improper.” Held: Exclusion of Medical Group officers did not constitute unlawful command influence. *But see United States v. Bartlett*, 66 M.J. 426 (C.A.A.F. 2008) (invalidating Army regulation that exempted certain special branches from court-martial duty, including medical personnel).

d. In *United States v. Redman*, 33 M.J. 679 (A.C.M.R. 1991), the court found that the Government’s dissatisfaction with the panel’s unusual sentences actually meant dissatisfaction with findings of not guilty or lenient sentences. The court held the intentional manipulation of Article 25 criteria to achieve particular result in cases is a clear violation of Articles 25 and 37, UCMJ.

e. *United States v. Smith*, 27 M.J. 242 (CMA 1988) (legal office policy of placing “hardcore” female members on panel in sex cases to achieve a particular outcome was ruled inappropriate); *see also United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991) (court packing occurred where functionary prepared lists of panel members based upon notions of hard discipline).

4. **Replacing Members.**

a. *United States v. Mack*, 58 M.J. 413 (C.A.A.F. 2003). SJA memorandum to convening authority concerning operation of convening order approved by the convening authority provided that, when accused requested panel of at least one-third enlisted members, alternate enlisted members would be automatically detailed without further action by the convening authority if, among other triggering mechanisms, “before trial, the number of enlisted members of the GCM, BCD SPCM, or SPCM court-martial panel falls below one-third plus two.” Prior to trial, two officer and one enlisted members were excused, leaving five officer and five enlisted members (a total of nine members, of which one-third plus two, or five, were enlisted). At trial, two additional enlisted members sat, which appeared to be inconsistent with the above triggering mechanism. The defense did not object. ACCA remanded on its own for a *DuBay* hearing concerning the presence of the additional two enlisted members. CAAF held that, “When a convening authority refers a case for trial before a panel identified in a specific convening order, and the convening order identifies particular members to be added to the panel upon a triggering event, the process of excusing primary members and adding the substitute members involves an administrative, not a jurisdictional matter. Absent objection, any alleged defects in the administrative process are tested for plain error.” Here there was no error. Excusal of one officer and the one enlisted member prior to the excusal of the other officer would have reduced the panel to ten members, five of whom were officers and five of whom were enlisted. This triggered the one-third plus two triggering event. Even if there was error in the triggering event, so long as the members were listed on

the convening order and the panel met the one-third requirement, any error in the operation of the triggering mechanism was administrative, not jurisdictional.

b. ***Court-Martial Convening Orders and harmless error.*** *United States v. Adams*, 66 M.J. 255 (C.A.A.F. 2008) (even though amending CMCO included plain language that a new court-martial was “hereby convened,” court found mistake was a mere harmless administrative error).

J. **ENLISTED MEMBERS.** Accused may not be tried by a panel that includes enlisted members unless he makes such a request. Article 25 requires requests for enlisted court members to be made orally on the record or in writing.

1. ***Old view.*** *United States v. Hood*, 37 M.J. 784 (A.C.M.R. 1993). At Article 39(a) session, accused deferred decision forum selection. Court convened with officer and enlisted members detailed and present. Nothing in the record, oral or written, indicated the accused elected trial with enlisted members. Court found this error to be jurisdictional under RCM 903(b). Findings and sentence set aside. *See also United States v. Smith*, 41 M.J. 817 (N-M. Ct. Crim. App. 1995) (accused originally requested officer members and then pleaded guilty with replacement counsel before military judge alone; findings upheld, remanded for sentencing).

2. ***Current view – Doctrine of Substantial Compliance.*** *United States v. Alexander*, 61 M.J. 266 (C.A.A.F. 2005). Military judge advised the accused of his forum selection rights, which the accused requested to defer. During a later proceeding, the military judge stated that he was told an enlisted panel would be hearing the case and defense did not object to the statement. The accused, however, failed to state in writing or on the record his request for enlisted members in violation of Article 25, UCMJ and RCM 903(b)(1). The CAAF held that the error in the accused failing to personally select forum on the record is a procedural, as opposed to jurisdictional, issue. The court stated, “[the] right being addressed and protected in Article 25 is the right of an accused servicemember to select the forum[,] . . . [t]he underlying right is one of forum selection, not the ministerial nature of its recording.” The CAAF held that the record reflected that the accused selected court-martial by panel members and the accused failed to show that the error in recording his forum selection resulted in any prejudice.

a. *United States v. Morgan*, 57 M.J. 119 (C.A.A.F. 2002) (military judge erred by not obtaining on record defendant’s personal request for enlisted members to serve on court-martial, but error was not jurisdictional, and under circumstances, it did not materially prejudice substantial rights of defendant).

b. *United States v. Townes*, 52 M.J. 275 (C.A.A.F. 2000) (military judge had duty to obtain personal election from accused regarding the forum’s composition, but where no coercion was alleged, the error did not materially prejudice the accused’s substantial rights).

c. *United States v. Andreozzi*, 60 M.J. 727 (A. Ct. Crim. App. 2004). Accused failed to state in writing or on the record his request for enlisted members in violation of Article 25, UCMJ and RCM 903(b)(1). ACCA ordered two *DuBay* hearings to determine if the accused personally selected trial by one-third enlisted members. ACCA held, under the totality of the circumstances, that the accused personally elected an enlisted panel. These relevant circumstances included: the military judge telling the accused his forum rights, the defense counsel submitting trial by enlisted members paperwork to the military judge, the defense counsel’s testimony that his SOP was to discuss and explain forum rights to the accused and to follow the accused’s wishes, the accused’s presence in the courtroom when the panel was assembled and voir dired, and the accused’s active participation in his

own defense. ACCA stated “[b]ecause there was substantial compliance with Article 25, UCMJ, the failure to comply with the procedural requirements of Article 25, UCMJ, did not materially prejudice [the accused’s] substantial rights.”

d. *United States v. Follord*, No. 20020350 (A. Ct. Crim. App. Feb. 15, 2005) (unpub). The accused, a CW2, did not make a knowing and voluntary waiver of his statutory right to trial by five officer members because of the following errors: (1) his executed PTA erroneously listed one of his three forum options as a trial by one-third enlisted, (2) his request for military judge alone stated that any trial composed of officers would be “not of his unit,” and (3) military judge advised the accused that if he requested officer members at his general court-martial that the panel must comprise “at least three members.” The court stated the host of errors “constitutes a lack of substantial compliance with Article 16, UCMJ.” Findings and sentence set aside.

5. **Rejecting request for enlisted members.** *United States v. Summerset*, 37 M.J. 695 (A.C.M.R. 1993). Military judge abused his discretion when he denied as untimely accused’s request for enlisted members made four days prior to trial. He made no findings of fact regarding unnecessary expense, unacceptable delay, or significant inconvenience. See RCM 903(a)(1) and (e).

6. **At least one-third enlisted.** Failure to assemble court of at least one-third enlisted members is jurisdictional error necessitating setting aside panel-adjudged sentence. *United States v. Craven*, 2004 CCA LEXIS 19 (A.F. Ct. Crim. App. Jan 21, 2004) (unpub.) (following challenges for cause and peremptory strikes, enlisted members constituted only 28.6 percent (five officer and two enlisted) of membership of court).

7. **Same unit.** Article 25(c)(1), UCMJ. Enlisted members should not be from the same company-sized “unit” as the accused.

a. “Same unit” is not a jurisdictional defect. *United States v. Wilson*, 21 M.J. 193 (C.M.A. 1986). Failure to object waives the issue. *United States v. Zengel*, 32 M.J. 642 (C.G.C.M.R. 1991), *review denied*, 33 M.J. 185 (C.M.A. 1991).

b. *Cf. United States v. Milam*, 33 M.J. 1020 (A.C.M.R. 1991). Two enlisted members of the panel were assigned to the same company-sized unit as accused. A.C.M.R. holds (with defense challenge for cause) that the two members were statutorily ineligible to sit under the language of Article 25(c), UCMJ. Also relevant is the language of RCM 912(f)(1)(A). Findings and sentence set aside.

III. PANEL MEMBERS

A. **QUALIFICATIONS – ARTICLE 25 CRITERIA.** Article 25(d)(2) directs the convening authority to personally select members who are “best qualified” based on six criteria: “age, education, training, experience, length of service, and judicial temperament.” Until 2008, the Army exempted certain groups of officers from serving on court-martial panels. CAAF rejected this old rule:

1. **Old Rule:** AR 27-10, Chapter 7, exempted the following officers from duty on Army courts-martial: chaplains; medical, dental, and veterinary officers; and inspectors general.

2. **New Rule:** In *United States v. Bartlett*, 66 M.J. 426 (C.A.A.F. 2008), CAAF held the Secretary of the Army “impermissibly contravened the provisions of Article 25” by enacting provisions in AR 27-10 that exempted certain special branches from court-martial duty. CAAF held that convening authorities must consider officers in these special branches when applying Article 25 to select panel members.

3. **Law enforcement personnel.** *United States v. Swagger*, 16 M.J. 759 (A.C.M.R. 1983). “At the risk of being redundant - we say again - individuals assigned to military police duties should not be appointed as members of courts-martial. Those who are the principal law enforcement officers at an installation must not be.”

a. *United States v. Dale*, 42 M.J. 384 (C.A.A.F. 1995). Accused charged with sexual offenses against a child. Member of panel (Air Force 0-3) was Deputy Chief of Security Police and had sat in on criminal activity briefings with base commander. Focus is on the perception and appearance of fairness. Member was intimately involved day-to-day law enforcement on the base; “the embodiment of law enforcement and crime prevention.” MJ’s denial of challenge for cause reversed and case set aside.

b. *United States v. Fulton*, 44 M.J. 100 (C.A.A.F. 1996). Military judge did not abuse discretion by denying challenge for cause against member who was Chief of Security Police with Bachelor of Arts in criminal justice, where member only had contact with accused’s commander on serious matters requiring high level decisions, and member had no prior knowledge of accused’s misconduct. *Cf. Dale*, above.

c. *United States v. Berry*, 34 M.J. 83 (C.M.A. 1992). Member was command duty investigator for NAS Alameda security and knew and worked with key Government witness. Military judge said, “I don’t think he said anything that even remotely hints that he could not render a fair judgment in this case.” Abuse of discretion in the face of mere naked disclaimers by member. Reversed. *But see United States v. McDavid*, 37 M.J. 861 (A.F.C.M.R. 1993) (no “per se” rule of exclusion for security policemen).

4. **Junior in rank.** *United States v. McGee*, 15 M.J. 1004 (N.M.C.M.R. 1983). When it can be avoided, court members should not be junior in rank to the accused. Failure to object results in waiver. *United States v. Schneider*, 38 M.J. 387 (C.M.A. 1993). Defense discovered court member was junior to accused during deliberations on findings and remained silent until the morning after findings were read in open court. Issue waived. *See also* RCM 503(a) Discussion.

B. ENLISTED MEMBERS.

1. **Request.** Articles 16 and 25, UCMJ, permit requests for enlisted court members to be oral on the record or in writing. *See* discussion of doctrine of substantial compliance, *supra*.

2. **Rejecting request for enlisted members.** *United States v. Summerset*, 37 M.J. 695 (A.C.M.R. 1993). Military judge abused his discretion when he denied as untimely accused’s request for enlisted members made four days prior to trial. He made no findings of fact regarding unnecessary expense, unacceptable delay, or significant inconvenience. *See* RCM 903(a)(1) and (e).

3. **Same unit.** Article 25(c)(1), UCMJ. Enlisted members should not be from the same company-sized “unit” as the accused. *United States v. Milam*, 33 M.J. 1020 (A.C.M.R. 1991) (error where two enlisted members of the panel were assigned to the same company-sized unit as accused); *United States v. Wilson*, 21 M.J. 193 (C.M.A. 1986) (“same unit” is not a jurisdictional defect; failure to object waives the issue); *United States v. Zengel*, 32 M.J. 642 (C.G.C.M.R. 1991), *review denied*, 33 M.J. 185 (C.M.A. 1991).

4. **Jurisdictional error.** Failure to assemble court of at least one-third enlisted members is jurisdictional error necessitating setting aside panel-adjudged sentence. *United States v. Craven*, 2004 CCA LEXIS 19 (A.F. Ct. Crim. App. Jan 21, 2004) (unpub.) (following

challenges for cause and peremptory strikes, enlisted members constituted only 28.6 percent (five officer and two enlisted) of membership of court).

C. **QUORUM.** Article 29, UCMJ.

1. Three members for SPCM, five members for GCM. *Ballew v. Georgia*, 435 U.S. 223 (1978). “Jury” of less than 6 is unconstitutional (civilian). *But see United States v. Wolff*, 5 M.J. 923 (N.C.M.R. 1978), *pet. denied*, 6 M.J. 305 (C.M.A. 1979) (holding Sixth Amendment right to trial by “jury” does not apply to courts-martial); *United States v. Hutchinson*, 17 M.J. 156 (C.M.A. 1984).

2. Twelve members for capital case. Article 25a, UCMJ requires a minimum of twelve panel members in military capital cases, except in certain circumstances. The change was effective for offenses committed after 31 December 2002.

D. **EXCUSAL.**

1. Prior to assembly, RCM 505(c)(1) allows delegation to staff judge advocate or convening authority’s deputy authority to excuse up to one-third ($\frac{1}{3}$) of the members. *See* AR 27-10, para. 5-18c. *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998). The excusal of more than one-third of the members of a panel by the convening authority’s delegate rises to the level of reversible and jurisdictional error only if the defense objects to the excusals and substitutions of members at trial, and the record somehow indicates that the accused was deprived of a right to make causal or peremptory challenges. The accused was convicted of violating a lawful general regulation and possession of marijuana with intent to distribute. Prior to trial, the SJA excused five of nine members who were detailed to sit as members. The accused suffered no prejudice because he failed to object to the excusals at trial. *The CAAF skirted an issue regarding the appropriate number to determine whether one-third of the members were excused (five of nine detailed for the accused’s case or five of thirty-one total members on primary and alternate member lists).*

2. Excusal after assembly can occur only as the result of a challenge or by the military judge for good cause shown. *United States v. Latimer*, 30 M.J. 554 (A.C.M.R. 1990) (panel member’s upcoming appointment for physical examination was not “good cause”).

3. A sleeping member is good cause for excusal. *United States v. Boswell*, 36 M.J. 807 (A.C.M.R. 1993). Military judge could have rehabilitated member by reading portions of transcript. Not an abuse of discretion, however, to excuse. What if excusal dropped court below quorum? Mistrial? *See* RCM 806(d)(1).

E. **REPLACEMENT MEMBERS.**

1. *Sloppy paper trails.* *United States v. Gebhart*, 34 M.J. 189 (C.M.A. 1992). “The administration of this court-martial...can best be described as slipshod.” “Such a lack of attention to correct court-martial procedure cannot be condoned.” The amended CMCO mistakenly removed member who actually sat on panel. Order also included member who was not present without explanation for the absence. The amending order also incorrectly referred to the original order by the wrong number. Held: errors were administrative and not jurisdictional. Issue was waived by defense failure to object. *See also United States v. Sargent*, 47 M.J. 367 (C.A.A.F. 1997) and *United States v. Larson*, 33 M.J. 715 (A.C.M.R. 1991).

2. *Triggering mechanisms.* *United States v. Mack*, 58 M.J. 413 (C.A.A.F. 2003). SJA memorandum approved by convening authority concerning operation of convening order provided that, when accused requested panel of at least one-third enlisted members, alternate enlisted members would be automatically detailed without further action by the convening authority if, among other triggering mechanisms, “before trial, the number of enlisted members . . . falls below one-third plus two.” Prior to trial, two officer and one

enlisted members were excused, leaving five officer and four enlisted members (a total of nine members, of which one-third plus two, or five, were enlisted). At trial, two additional enlisted members sat, which appeared to be inconsistent with the above triggering mechanism. The defense did not object. ACCA remanded on its own for a *DuBay* hearing concerning the presence of the additional two enlisted members. CAAF held that, “When a convening authority refers a case for trial before a panel identified in a specific convening order, and the convening order identifies particular members to be added to the panel upon a triggering event, the process of excusing primary members and adding the substitute members involves an administrative, not a jurisdictional matter. Absent objection, any alleged defects in the administrative process are tested for plain error.” Here there was no error. Excusal of one officer and the one enlisted member prior to the excusal of the other officer would have reduced the panel to ten members, five of who were officers and five of whom were enlisted. This triggered the one-third plus two triggering event. Even if there was error in the triggering event, so long as the members were listed on the convening order and the panel met the one-third requirement, any error in the operation of the triggering mechanism was administrative, not jurisdictional.

F. MEMBERS CAN CALL AND QUESTION WITNESSES. Article 46, UCMJ; RCM 921(b); RCM 801(c) and Discussion. *See also United States v. Story*, No. 20061014 (A. Ct. Crim. App. Dec. 2, 2009) (unpublished). During the accused’s trial, the members were on a two-hour break after both sides had rested but before closing arguments and instructions. When the panel returned, a member asked to call an additional witness. The military judge responded, “The answer to that is, you’ve heard all the evidence in this case.” The ACCA held the military judge erred:

1. R.C.M. 921(b) expressly allows the members to “request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced” though the rule grants the military judge latitude “in the exercise of discretion” to grant or deny such request.
2. R.C.M. 801(c) similarly provides: “The court-martial may act to obtain evidence in addition to that presented by the parties. The right of the members to have additional evidence obtained is subject to an interlocutory ruling by the military judge.” The Discussion to R.C.M. 801(c) notes the members may request a witness be recalled or that a “new witness be summoned.”
3. M.R.E. 614(a) also notes the military judge may call (or recall) witnesses “at the request of the members.”
4. **Lampani factors.** In *United States v. Lampani*, 14 M.J. 22, 26 (C.M.A. 1982), the COMA provided a non-exclusive list of factors a military judge must consider before denying a member’s request for additional evidence: “Difficulty in obtaining witnesses and concomitant delay; the materiality of the testimony that a witness could produce; the likelihood that the testimony sought might be subject to a claim of privilege; and the objections of the parties to reopening the evidence are among the factors trial judge must consider.” In this case, the military judge did not consider these factors (or any other factors) on the record, which was an abuse of discretion.
5. *See also United States v. Lents*, 32 M.J. 636 (A.C.M.R. 1991). Court member questions were essentially a request to call witnesses. Court members may request witnesses be called or recalled. The military judge must weigh difficulty, delay, and materiality; consider whether a privilege exists; and whether the parties object; *United States v. Lampani*, 14 M.J. 22 (C.M.A. 1982) (even after deliberations have begun members may request additional evidence).

IV. MILITARY JUDGES.

A. QUALIFICATIONS.

1. **Article 26, UCMJ.** Military judge shall be a commissioned officer who is a member of the bar of a Federal court or the highest court of a State and who is certified to be qualified for duty as a military judge by TJAG.

2. **Member of a bar.** Military judge's "inactive status" with her state bar nevertheless equated to her being a "member of the Bar" of Pennsylvania as contemplated by Article 26(b). *United States v. Cloud*, ARMY 9800299 (A. Ct. Crim. App., Dec. 14, 2000) (unpub), *aff'd*, 55 M.J. 164 (C.A.A.F. 2001) (summary disposition); *United States v. Brown*, ARMY 9801503 (A. Ct. Crim. App. Dec. 11, 2000) (unpub), *aff'd*, 55 M.J. 366 (C.A.A.F. 2001) (summary disposition) (ACCA also considered fact that judge, although "inactive" in state bar, was a member in good standing of "this [the ACCA] Federal bar"). *See also United States v. Corona*, 55 M.J. 247 (C.A.A.F. 2001) (summary disposition).

3. **Reserve Judges.** Change to MCM.

a. Change to RCM 502; Executive Order removed holdover provision concerning qualifications for military judges.

b. MCM had mandated that military judges be commissioned officers on active duty in the armed forces. The current RCM 502(c) deletes that requirement, enabling reserve military judges to try cases while on active duty, inactive duty training, or inactive duty training and travel.

Issue: Does this mean reservists can try GCM and SPCMs? Generally, no. Only military judges assigned directly to TJAG and TJAG's delegate (Trial Judiciary) may preside at GCMs. AR 27-10, paras. 8-1(c)(2), 8-2(a).

4. **Detail.** AR 27-10, para. 5-3.

a. Detail is a ministerial function to be exercised by the Chief Trial Judge, U.S. Army Judiciary, or his or her delegate. The order detailing military judge must be in writing, included in the record of trial or announced orally on the record.

b. Detailing in a joint environment. Military judges are normally detailed according to the regulations of the "Secretary concerned." In a joint environment, there is no "Secretary concerned." *See Captains William H. Walsh and Thomas A. Dukes, Jr., The Joint Commander as Convening Authority: Analysis of a Test Case*, 46 A.F. L. REV. 195 (1999). Detailing should be agreed upon by convening authority, SJA, and defense. *Id.*

5. **Appellate Judges.** *United States v. Walker*, 60 M.J. 354 (C.A.A.F. 2004). In a capital case, the CAAF granted the accused's motion for extraordinary relief regarding the composition of judges on his N-MCCA panel. In 1995, the accused's case was assigned to the N-MCCA panel 3. Over the years the composition of panel 3 changed resulting in the presence of only one judge in the spring of 2004. Most N-MCCA judges, to include the Chief Judge, were disqualified in the case. Based on the Chief Judge's disqualification the TJAG under Article 66, UCMJ selected a new Chief Judge to handle the accused's case. Immediately prior to the TJAG's appointment, the original Chief Judge established a new court policy establishing "an order of precedence among judges on the court for the purpose of exercising the responsibility to make panel assignments in a particular case in the event of the absence or recusal of the chief judge." The problem at issue occurred when the substitute Chief Judge appointed by the TJAG retired requiring the appointment of another substitute Chief Judge to proceed over the accused's case. At that time the N-MCCA attempted to use the new policy letter to select a substitute Chief Judge with

objection from the accused. The CAAF held because the N-MCCA did not use the policy to select the first substitute Chief Judge it was not appropriate to use the policy to select the second substitute Chief Judge and a substitute appointment by the TJAG was necessary.

6. *United States v. Lane*, 64 M.J. 1 (C.A.A.F. 2006). A Member of Congress may not serve as an appellate judge for a service court because of the Ineligibility and Incompatibility Clauses of the United States Constitution. The CAAF reasoned that no Person holding any office under the United States [i.e., a service court judicial position] should simultaneously serve as a Member of either House during his Continuance in Office. In the case, Senator Lindsey Graham, a reserve military judge on the AFCCA, was challenged.

7. *Tenure/Fixed Term and Appointment.*

a. Settled issue regarding appointment of civilians to Coast Guard Court of Criminal Appeals. *Edmond v. United States*, 520 U.S. 651 (1997), *aff'g United States v. Ryder*, 44 M.J. 9 (C.A.A.F. 1996) (holding that civilian judges on Coast Guard Court of Criminal Appeals are inferior officers and do not require additional presidential appointment; therefore, the Congressional delegation of appointment authority to Secretary of Transportation to appoint judges is consistent with Appointments Clause. *See also United States v. Graf*, 35 M.J. 450 (C.M.A. 1992); *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1993), *aff'd*, 510 U.S. 163 (1994). *United States v. Grindstaff*, 45 M.J. 634 (N-M. Ct. Crim. App. 1997) (judges of courts of criminal appeals, military judges, and convening authorities are not principal officers under Appointments Clause and do not require a second appointment).

b. *United States v. Paulk*, 66 M.J. 641 (A.F. Ct. Crim. App. 2008). Accused, an Air Force officer, pled guilty to several offenses and was sentenced to confinement for 30 days and a dismissal. On appeal, the defense argued that the Equal Protection component of the Fifth Amendment's Due Process Clause was violated because the military judge and the appellate judges serve without a fixed term of office, while those in the Army and Coast Guard judiciary enjoy such protection by regulation. "Essentially, the appellant is saying that either all or none of the services should have fixed terms, but the mixed bag currently existing violates constitutional imperatives of equal protection." The court rejected the defense argument.

B. **"PRESENCE" REQUIRED.** *United States v. Reynolds*, 44 M.J. 726 (A. Ct. Crim. App. 1996), *aff'd*, 49 M.J. 260 (C.A.A.F. 1998). The physical absence of the military judge at a pretrial proceeding does not deprive an accused of the structural due process protections created by Articles 26 and 39, UCMJ, and RCM 803, 804, and 805. The military judge held arraignment proceedings by speakerphone. The military judge was at Fort Stewart while the accused, DC and TC were in a courtroom at Fort Jackson. Military judge advised the accused of all rights and the accused consented to the speakerphone procedure. The military judge was not "present" but the accused's due process rights were not violated. The speakerphone procedure lasted for just twelve minutes of a seven hour trial and the judge was physically present for the remainder of the trial. Note, RCM 804(b) has since been amended to allow for "the use of audiovisual technology" for Article 39(a) sessions, subject to authorization by the applicable Service Secretary.

C. **DISQUALIFICATION (RECUSAL) – IN GENERAL.** Under R.C.M. 902(a), "a military judge shall disqualify himself or herself in a proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(e) allows parties to waive any ground for challenge predicated on this subsection.

1. **Legal standard for recusal.** The Discussion to R.C.M. 902(d)(1) directs a military judge to “broadly construe grounds for challenge” but not to “step down from a case unnecessarily.” On appeal, a military judge’s decision regarding recusal will be reviewed for an abuse of discretion.

2. **Non-waivable grounds for recusal.** Under RCM 902(b), five non-waivable (and rare) grounds are listed, directing that a military judge should be disqualified if he or she: (1) has a personal bias or prejudice about a party or personal knowledge of “disputed” facts in the case; (2) has acted as counsel, investigating officer legal officer, SJA, or convening authority for any of the offenses; (3) has been or will be a witness in the case, was the accuser, forwarded charges with recommendations, or expressed opinion about the accused’s guilt; (4) is not qualified under RCM 502(c) or not detailed under RCM 503(b); or (5) is personally or has a family member who is a party to the proceeding, has a financial or other interest in the outcome of the proceeding, or likely to be a “material” witness.

3. **Appellate review – Liljeberg factors.** On appeal, courts apply the three factors from *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988), to determine if reversal is warranted when a military judge should have been recused: (1) risk of injustice to the parties in the case, (2) risk that the denial of relief will result in injustice in other cases, and (3) the risk of undermining public confidence in the judicial process.

D. DISQUALIFICATION -- MECHANICS.

1. **Personal Attack?** *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). Trial counsel requested military judge’s recusal based mainly on an alleged inappropriate professional and social relationship with the accused’s civilian defense counsel (CDC). Military judge denied the Government’s recusal motion and defense filed a UCI motion. During testimony on the UCI motion, the SJA alluded that the military judge lied regarding her relationship with the CDC and characterized “the [MJ] and [CDC] being seen leaving a theater together as a ‘date.’” Without ruling on the UCI motion, military judge recused herself finding that there was no basis for recusal in fact or appearance but she was unable to remain impartial “following the Government’s attack on her character.” Another military judge was detailed who *sua sponte* recused himself because “he was so shocked and appalled by the unprofessional conduct of [the TC] and [the SJA] that he was not convinced he could remain objective.” This required detailing two additional military judges to conduct various proceedings which eventually lead to a guilty plea by the accused. On appeal, the N-MCCA held that the actions of the TC and SJA were unprofessional and constituted unlawful command influence but that their actions did not prejudice the accused’s court-martial which was tried by two impartial military judges. The CAAF, however, ruled “since the appearance of unlawful influence was created by the Government, achieving its goal of removing [the MJ] without sanction, a rehearing before any [judge] other than [the detailed MJ] would simply perpetuate this perception of unfairness.” Findings and sentence set aside and charges dismissed with prejudice.

2. **Financial Interest?** *United States v. Reed*, 55 M.J. 719 (A. Ct. Crim. App. 2001). The accused pled guilty to conspiracy to commit larceny and to willfully and wrongfully damaging nonmilitary property in a scheme to defraud USAA automobile insurance company. During sentencing, a USAA claims handler talked about fraudulent claims and their effect on the company’s policyholder members. The military judge (himself a policyholder member) immediately disclosed his affiliation with USAA and stated this would not affect his sentencing decision. The military judge allowed the defense an opportunity to *voir dire*, and the DC exercised it. The military judge also offered the defense the opportunity to challenge him for cause, but the defendant declined. The court, after *sua sponte* disclosing all judges of the ACCA are also policy holders of USAA, held

there was nothing improper or erroneous in the judge's failure to disclose his policy holder status until a potential ground for his disqualification unfolded. Further, it found the military judge's financial interests were so remote and insubstantial as to be nonexistent. *See also* RCM 902(b)(5)(B) (non-waivable basis for recusal if military judge has financial interest that could be "substantially affected" by outcome of case).

3. **Potential disqualification based on background.** *United States v. Robbins*, 48 M.J. 745 (A.F. Ct. Crim. App. 1998). Military judge who was the victim of spousal abuse 13 years ago before presiding at a trial of an accused charged with battery of his pregnant wife (and intentionally inflicting grievous bodily harm on his wife and involuntary manslaughter by unlawfully causing termination of his wife's pregnancy) did not abuse her discretion in failing to recuse herself. The Air Force court directs military judges to apply a totality of the circumstances type test to resolve recusal matters involving military judges who are victims of the type of offense with which an accused is charged. The court emphasizes that our "national experience" supports a preference for "judges with real-life experiences."

4. **Military judge and accused members of same chain of command.** *United States v. Norfleet*, 53 M.J. 262 (C.A.A.F. 2000). Presence of military judge's superiors in SPCMCA chain of command did not require military judge's recusal under RCM 902. Accused was an Air Force paralegal, assigned to AF Legal Services Agency. Commander, AFLSA, served as director of Air Force judiciary and endorser on military judge's OER. Commander of AFLSA forwarded case (without recommendation) to Commander, 11th Wing (the SPMCA), for disposition. CAAF held that this did not constitute a *per se* basis for disqualification. In light of military judge's superiors taking themselves out of the decision making process, the full disclosure by the military judge, and opportunity provided to defense to voir dire the military judge, the accused received a fair trial by an impartial judge.

E. MILITARY JUDGE DISQUALIFICATION – JUDICIAL EXPOSURE.

1. **General rule.** *United States v. Soriano*, 20 M.J. 337 (C.M.A. 1985). If the military judge is accuser, witness for prosecution, or has acted as investigating officer or counsel, disqualification of military judge is automatic. But military judge need not recuse himself solely on basis of prior judicial exposure to the accused. *See also United States v. Proctor*, 34 M.J. 549 (A.F.C.M.R. 1992).

2. **Prior judicial rulings.** *Liteky v. United States*, 510 U.S. 540 (1994). Supreme Court (interpreting 28 U.S.C. § 455(b)(1)) indicates that prior judicial rulings against a moving party almost never constitute a basis for a bias or partiality recusal motion. Recusal not required except when prior rulings or admonishments evidence deep-seated favoritism or antagonism as would make a fair judgment impossible. *Cited in United States v. Loving*, 41 M.J. 213 (C.A.A.F. 1994).

3. **Contact with SJA/DSJA.** Military judges should not communicate with the SJA office about pending cases. In *United States v. Greatting*, 66 M.J. 226 (C.A.A.F. 2008), the military judge presided over three companion cases before hearing the present case. The accused's defense counsel questioned the military judge about the other cases and the judge admitted to having ex parte communications with "the staff judge advocate and probably his deputy" about the companion cases. Specifically, the military judge remembered saying that, for one co-accused, Government "sold the case too low given his culpability." For the other two cases, he "questioned the appropriateness of their being at a special court-martial." Based on the military judge's communications with the SJA and "probably his deputy," trial defense counsel made a motion for the judge to recuse himself under RCM 902(a) for implied bias. The military judge denied the request. In reversing, the CAAF noted, "[T]he ex parte discussion that took place between the military judge

and the SJA prior to Greatting's court-martial and while clemency matters and appeals in the companion cases were pending would lead a reasonable person to question the military judge's impartiality."

a. The military judge provided "case-specific criticism" to the SJA (and "probably his deputy") about companion cases, knowing that the accused's case was still pending. The court noted the SJA was "the very individual responsible for advising the convening authority," and the military judge made *ex parte* comments while clemency matters in the other cases were pending and, likely, before the accused's pretrial agreement had been finalized.

b. The military judge also commented on the accused's level of culpability as one of the "two staff NCOs." By contrast, the military judge "questioned" (his word) whether the two junior Marines should have been sent to a special court-martial at all.

4. ***Companion cases / implied bias.*** As a general rule, a military judge is not *per se* disqualified from presiding over companion cases. In *United States v. McIlwain*, 66 M.J. 312 (C.A.A.F. 2008), before the accused made forum election, the military judge stated on the record that she had presided over two companion cases (one a guilty plea and one a mixed plea). In the course of those companion cases, the military judge conducted providence inquiries and heard evidence that implicated the accused. The military judge advised defense counsel: "[I]f your client desires to go with a judge alone, then I would not sit; I would recuse myself. If your client decides to go with a panel of either all officers or officers and enlisted members, then I'm comfortable that I will be able to objectively instruct the members, rule on objections, and that sort of thing, because my role is different." The accused elected trial by member and challenged the military judge. In response, the military judge noted she had made decisions favorable to the accused regarding witness credibility in the companion cases, decisions that "would suggest to an impartial person looking in that I can't be impartial in this case" if serving as the fact finder; however, the military judge reiterated that she would be comfortable presiding over a members case. The CAAF held the military judge abused her discretion in refusing the recusal request and set aside the findings and sentence. on the military judge's concession that an "impartial person" would have questioned her impartiality, the CAAF held the military judge abused her discretion in denying the recusal motion.

a. First, the court noted it was not relevant that the military judge was not ultimately the factfinder. "It is well-settled in military law that the military judge is more than a mere referee." "Every time she ruled on evidence, asked questions, responded to member questions, or determined instructions, the military judge exercised her discretion, a discretion that she admitted an impartial person would conclude had not been exercised in an impartial manner."

b. Second, in fashioning a remedy, the court noted that "not every judicial disqualification error requires reversal" and then applied Supreme Court's three-part test from *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988). The *Liljeberg* test considers (1) the risk of injustice to the parties; (2) the risk that the denial of relief will produce injustice in other cases; and (3) the risk of undermining public confidence in the judicial process. The court focused on the first and third factors, noting that the risk of injustice to the parties is "high" when a military judge states a bias on the record yet continues to preside over the case and that the military judge's refusal to recusal herself likely had a "corrosive impact on public confidence in the military justice system."

c. The CAAF noted that sitting on companion cases, without more, does not mandate recusal (citing *United States v. Oakley*, 33 M.J. 27, 34 (C.M.A. 1991)).

d. *See also United States v. Nave*, ACM 36851, 2008 WL 5192217 (A.F. Ct. Crim. App. Dec. 10, 2008) (unpublished) (military judge not required to recuse after presiding over three companion cases, even though two of those co-accused were set to testify in this case and the military judge had ruled in a companion case about an entrapment defense the accused planned on raising).

5. ***Repeated sua sponte (and pro-Government) decisions.*** *United States v. Johnston*, 63 M.J. 666 (A.F. Ct. Crim. App. 2006). Military judge “abandoned his impartial role in th[e] case solely on the basis of his actions and rulings during the trial.” The court noted the ruling was unusual because a specific ground for dismissal did not arise under RCM 902 but that after applying an objective test, based on the standpoint of a person watching the proceedings, the judge’s rulings created the appearance of partiality in favor of the Government. The military judge twice sua sponte reversed a previous judge’s ruling and admitted evidence regarding statements made by the accused’s wife that were strongly pro-Government. The court stated that although no actual bias by the military judge was noted, the judge abused his discretion by not disqualifying himself under RCM 902. Findings and sentence reversed.

6. *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998). The military judge did not abuse his discretion in denying defense motion that he recuse himself based on the fact that he had ruled on a command influence issue similar to the accused’s in a companion case, and that he had learned that accused had offered to plead guilty. The military judge ruled in the accused’s favor on the UCI issue, and no incriminating evidence or admissions from the accused relating to the offer to plead guilty were disclosed during trial on the merits. There was no reasonable doubt about the fairness of accused’s trial.

7. *United States v. Howard*, 50 M.J. 469 (C.A.A.F. 1999). No prejudicial error occurred where military judge presided at prior case involving accused (who was tried twice, first for assault, then for AWOL). Military judge noted prior adjudication on the record and accused maintained he wished to proceed with the present judge. During the sentencing phase in the AWOL case, the defense introduced the accused’s version of the events underlying the prior conviction; military judge interrupted defense counsel and stated that, although he had awarded the accused “an unusually light sentence for a fractured jaw,” he found him guilty during that prior trial because he had kicked the victim in the head while he was on the ground. CAAF held that there was no error.

8. ***Busted providence inquiry.***

a. *United States v. Bray*, 49 M.J. 300 (C.A.A.F. 1998). The military judge is not required, *per se*, to recuse himself from further proceedings in a trial when he has conducted a providence inquiry, reviewed a stipulation of fact, and entered findings of guilty to initial pleas. Here, accused withdrew plea based on possible defense that came out during sentencing. Later, he obtained a new pretrial agreement, and returned to plead guilty. Military judge could preside over second case unless he had formed an “intractable opinion as to the accused’s guilt,” and a reasonable person who knew the facts of the case would question the appearance of impurity and have doubts as to the military judge’s impartiality.

b. *United States v. Winter*, 35 M.J. 93 (C.M.A. 1992). Military judge is not *per se* disqualified after conducting a providence inquiry and then rejecting accused’s plea of guilty to a lesser included offense. Counsel and judges should determine whether the judge should ask the accused if accused wants to continue to be tried by judge alone when the judge has rejected the plea. *But see United States v. Rhule*, 53 M.J. 647 (A. Ct. Crim. App. 2000) (stating that the Army’s preference is for the military judge to recuse himself after the withdrawal of a guilty plea).

c. *United States v. Dodge*, 59 M.J. 821 (A.F. Ct. Crim. App. 2004), *rev'd on other grounds*, 60 M.J. 368 (C.A.A.F. 2004). Accused completed the entire providence inquiry but prior to the announcement of findings the parties disagreed over the maximum punishment. The accused then requested to withdraw his plea and proceed to trial, which request the military judge granted, and the case was adjourned for sixty days. During forum selection for the now contested proceeding, the accused claimed his rights to forum were circumscribed by the continued presence of the military judge who heard his providence inquiry and that he had no practical option but to select a trial by members. Military judge allowed the accused to voir dire her regarding her potential bias and denied his challenge noting “she had not accepted [his] plea, had not formed an opinion concerning his guilt or innocence and everything she knew about the case was learned in her judicial capacity.” Subsequently, accused pled guilty to the same specifications (except for one) that he attempted to plead guilty to in the first hearing. AFCCA held the accused’s forum rights were not impinged citing RCM 903(c)(2)(B) and stated “there is no concomitant absolute right” to have a case tried by military judge alone. Further the court held the military judge is not disqualified “based simply on her participation in the first providence inquiry.” The court declined to adopt the Army’s approach in this situation stating “We are aware of the [ACCA’s] approach . . . expressing a preference for recusal after withdrawal of guilty pleas” (citing *Rhule*) but “this Court rejected that approach long ago.”

9. ***Knowledge of witnesses.***

a. ***Exposure to witnesses.*** *United States v. Davis*, 27 M.J. 543 (C.M.A. 1988) (military judge must use special caution in cases where he has heard a witness’ testimony against a co-actor at a prior trial); *United States v. Oakley*, 33 M.J. 27 (C.M.A. 1991) (exposure to motions and pleas at prior trial of co-actors did not require recusal of military judge in trial before members).

b. ***Relationship to witness.*** *United States v. Wright*, 52 M.J. 136 (C.A.A.F. 1999). Military judge announced at trial that he had a prior “close” association with NCIS agent stemming from a duty station at which the military judge, as a prosecutor, worked closely with the agent on several important criminal cases. Military judge said he felt the NCIS agent was an honest and trustworthy person and a very competent NCIS agent, but that the witness would not have a “leg up” over the credibility of other witnesses, particularly the accused. The judge said he gave all members of the Marine Corps a certain “credence.” CAAF noted that military judges have broad experiences and a wide array of backgrounds that are likely to develop ties with other attorneys, law firms, and agencies. Here, military judge’s full disclosure, sensitivity to public perceptions, and sound analysis objectively supported his decision not to recuse himself; these factors contribute to a perception of fairness.

c. *United States v. Phillipson*, 30 M.J. 1019 (A.F.C.M.R. 1990). Inadvertent exposure to sentence limitation does not require judge to recuse himself.

d. Consultations. *United States v. Baker*, 34 M.J. 559 (A.F.C.M.R. 1992). Military judge’s consultations with another judge concerning issue in a case is not improper.

e. Further actions void. *United States v. Sherrod*, 26 M.J. 30 (C.M.A. 1988) (holding when a judge is disqualified, all further actions are void). *See also United States v. Howard*, 33 M.J. 596 (A.C.M.R. 1991) (holding when military judge becomes a witness for the prosecution, he is disqualified and all further

actions, as in *Sherrod*, are void). *United States v. Wiggers*, 25 M.J. 587 (A.C.M.R. 1987) (holding when military judge recognized that his prior determination of witness' lack of credibility disqualified him from acting as fact finder, judge should have recused himself rather than direct a trial with members). *But see United States v. Burris*, 25 M.J. 846 (A.F.C.M.R. 1988) (holding presiding over earlier trial involving same urinalysis inspection did not disqualify trial judge). *See also United States v. Cornett*, 47 M.J. 128 (C.A.A.F. 1997).

f. ***Accused's waiver of disqualification under RCM 902(e)***. *United States v. Keyes*, 33 M.J. 567 (N.M.C.M.R. 1991). Military judge previously sat in a different case involving the accused. Defense had no challenge under RCM 902(b) and waived any challenge to the judge that might exist under RCM 902(a). Military judge properly recognized a *sua sponte* obligation to disqualify himself if warranted even with a defense waiver under 902(e). The military judge, however, found no basis for disqualification. Upheld by NCMCMR.

F. MILITARY JUDGE DISQUALIFICATION – EX PARTE COMMUNICATIONS & CONDUCT OUTSIDE OF COURT.

1. ***Conduct outside of court***. *United States v. Quintanilla*, 56 M.J. 37 (C.A.A.F. 2001). The military judge became involved in verbal out-of-court confrontations with a civilian witness that included profanity and physical contact. The military judge also engaged in an *ex parte* discussion with the trial counsel on how to question this civilian witness about the scuffle. The CAAF held the military judge's failure to fully disclose the facts on the record deprived the parties of the ability to effectively evaluate the issue of judicial bias. As such, the court remanded the case for a *DuBay* hearing.
2. ***Contact with trial counsel***. *United States v. Butcher*, 56 M.J. 87 (C.A.A.F. 2001). The military judge, who was presiding over a contested trial, went to a party at the trial counsel's house and played tennis with the trial counsel. The CAAF reviewed whether the military judge abused his discretion by denying a defense request that the judge recuse himself. The CAAF advised that under the circumstances the military judge should have recused himself. However, the Court held there was no need to reverse the case, because there was no need to send a message to the field, the social interaction took place after evidence and instructions on the merits, and public confidence was not in danger (the social contact was not extensive or intimate and came late in trial).
3. ***Assisting trial counsel ex parte***. *United States v. Cornett*, 47 M.J. 128 (C.A.A.F. 1997). Military judge did not abuse discretion when he denied a defense recusal request based on an *ex parte* conversation between military judge trial counsel, wherein the judge stated, "Well, why would you need that evidence in aggravation, because I've never seen so many drug offenses? Why don't you consider holding that evidence in rebuttal and presenting it, if necessary, in rebuttal?" Military judge invited voir dire concerning any predisposition toward sentence; accused selected trial by judge alone pursuant to voluntary pretrial agreement term; counsel and accused were given a recess to confer about the challenge after the accused made his forum selection; and the military judge made full disclosure on the record and disclaimed any impact on him. RCM 902(a) requirements regarding recusal and disqualification were fully met.
4. ***Comments about accused outside of court***. *United States v. Miller*, 48 M.J. 790 (N-M. Ct. Crim. App. 1998). Assuming *arguendo* that military judge stated, upon hearing that the accused suffered a drug overdose and was medically evacuated to a hospital, that the accused was a "cocaine addict and a manipulator of the system" and that "perhaps the accused would die," such comments did not establish a personal bias or prejudice on part of the judge. Rather, the remarks indicated a high level of impatience and frustration with an unplanned delay in a scheduled court-martial proceeding. The test applied by the Navy

court was whether the remarks reasonably suggests a “deep-seated and unequivocal antagonism” towards the accused as to make fair judgment impossible. *See Liteky v. United States*, 510 U.S. 540 (1994).

G. DISQUALIFICATION – CONDUCT OF TRIAL & JUDICIAL ADVOCACY.

1. **Impartial and objective stance.** *United States v. Hardy*, 30 M.J. 757 (A.C.M.R. 1990). Military judge erred in *sua sponte* initiating discussion of appropriateness of defense counsel’s sentencing argument and allowing trial counsel to introduce additional rebuttal.
2. **Praise.** *United States v. Carper*, 45 C.M.R. 809 (N.M.C.R. 1972). Improper for military judge to praise Government witness for his testimony.
3. **Examination.** Assess whether the judge’s questions assist either side of the case. The number of questions is not a significant factor, but the tenor of those questions will be. *United States v. Johnson*, 36 M.J. 866 (A.C.M.R. 1993).
 - a. *United States v. Foster*, 64 M.J. 331 (C.A.A.F. 2007). The accused, convicted of committing an indecent act against his daughter, argued on appeal that the military judge failed to remain impartial in his conduct toward their expert witness by: (1) limiting their expert’s testimony, (2) questioning their expert, (3) failing to instruct the members that their expert was an expert and inaccurately summarizing her testimony, and (4) making inappropriate comments about their expert outside the panel’s presence. The CAAF stated that a strong presumption exists that a military judge’s trial conduct is impartial and “the test is whether, taken as a whole in the context of [the] trial, [the] court-martial’s legality, fairness, and impartiality were put into doubt by the military judge’s actions.” The court held that the military judge’s conduct, especially in relation to the inappropriate comments, departed from judicial propriety but “a reasonable observer would conclude that in the context of the whole trial, his actions did not compromise the court-martial’s legality, fairness, or impartiality.”
 - b. *United States v. Acosta*, 49 M.J. 14 (C.A.A.F. 1998). Accused was convicted of wrongful distribution and use of methamphetamine. Defense case was based on entrapment. Defense cross examination resulted in Government witness stating that he put undue pressure on the accused to purchase drugs. When trial counsel failed to elicit the entrapment-negating information, military judge asked the witness 89 questions about the accused’s prior uncharged misconduct relating to a drug transaction that predated the drug offenses that were the basis of the court-martial. Held: no error. The law provides the military judge with wide latitude in asking questions of witnesses. The military judge has a right, equal to counsel’s, to obtain evidence. Here, the information was clearly rebuttal evidence that was admissible once the defense raised the entrapment defense.
 - c. **MRE 412 issues.** *United States v. Watt*, 50 M.J. 102 (C.A.A.F. 1999). The military judge abandoned his impartial role when he ruled the accused could not respond to a question from the members (he had been asked “What reason did you have to believe she would have sex with you?” His answer would have been that the complainant had a “reputation for being easy.”). The military judge then repeatedly asked the accused the question, and allowed TC to badger him with similar questions. Accused repeatedly stated that he could not answer the question asked. Counsel then implied in closing that accused knew he had no reason to believe complainant would not have sex with him, as opposed to a simply inadmissible one. Accused “was left to defend himself without assistance” from defense or military judge.

d. *Intemperate comments from the bench.* *United States v. Kirk*, No. Misc. 20100443 (A. Ct. Crim. App. July 28, 2010) (unpublished). The Government initially filed an Article 62 appeal, challenging the military judge's decision to suppress the accused's statements based on a violation of Article 31(b), UCMJ. The ACCA reversed the military judge's ruling on the suppression issue and then (on its own accord) commented on the possible recusal of the military judge from further proceedings in the case. In ruling on the motion to suppress, the military judge noted the Government could appeal his decision but added, "I do not expect to get overturned on this issue." The military judge continued:

[I]f this case does come, you know, back three or four months from now I will be the military judge in the case . . . that is going to hear the facts in the future including the [first sergeant]'s testimony if they believe the statements should be admissible. But if you want to appeal you are welcome to. Is that your final decision, Government? I just want to make sure.

The ACCA found that these "gratuitous comments" called into question the perception of fairness and impartiality of the military judge. The court noted that R.C.M. 902(a) directs recusal when a military judge's "impartiality might *reasonably* be questioned" (emphasis added by the court). While ACCA did not actually determine the military judge should be recused, the court opined "his comments suggest he prejudged the Government's evidence, and intimated the futility of appealing his decision in light of his anticipated role as ultimate fact finder." The court concluded: "We find his comments intemperate, injudicious, and inconsistent with the impartial role he is to play in the court-martial, creating at least the perception of unfairness to the parties, potentially undermining public confidence in his judicial role."

e. *United States v. Todd*, No. 200400513, 2007 CCA LEXIS 237 (N-M. Ct. Crim. App. Jul. 9, 2007) (unpublished). During the trial, the military judge made several "injudicious" comments to witnesses, counsel, and even potential panel members. The military judge even referred to the convening authority's conduct in the case as "imbecilic." The N-MCCA characterized his statements as "needless comments," "incessant sarcasm," and "pompous condescension." The N-MCCA cautioned that military judges should be "patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others . . . [and the court] will not tolerate incivility by a military judge toward any trial participant, and that includes counsel." However, the court concluded that "[w]hile we do not condone that inappropriate comments made by the military judge, in the context of the entire trial, the legality, fairness, and impartiality of the court-martial were not put in doubt." Affirmed.

f. *United States v. Sanford*, No. 200500993, 2006 CCA LEXIS 303 (N-M. Ct. Crim. App. Nov. 6, 2006) (unpublished). During a motion to suppress incriminating statements made to "Capt M," military judge did not have enough evidence to rule and notified the parties that he wanted to call three witnesses who had also given statements to Capt M in order to discern the procedures Capt M used to interview witnesses. The military judge questioned the witnesses and offered counsel an opportunity to question them. On appeal, the defense claimed that the military judge "abandon[ed] his neutral role in resolving the . . . motion to suppress." The court noted that under Article 46, UCMJ and MRE 614, the military judge is permitted to call or recall witnesses and has wide latitude in questioning witnesses. As such, the military judge did not abandon his neutral role, as his efforts in calling the witnesses were an attempt to clarify the facts pertaining to the defense motion. The court concluded that "a reasonable person

observing the . . . court-martial would not doubt its fairness or the impartiality of the military judge.” See also *United States v. Johnson*, No. 36433, 2007 CCA LEXIS 127 (A.F. Ct. Crim. App. Mar. 29, 2007) (unpublished) (the military judge did not abandon his impartial role when he questioned a defense witness (also a co-actor) about what sentence the co-actor received in his own trial when the defense did not object and the answer favored the defense).

g. *United States v. Hernandez*, No. 200501599, 2007 CCA LEXIS 183 (N-M. Ct. Crim. App. Jun. 12, 2007) (unpublished) (the military judge did not become a “partisan advocate when he ‘ask[ed] clearly incredulous impeaching questions’ of the appellant’s mother who was a defense witness” because the defense did not object or move to disqualify the military judge and “a reasonable person . . . would not have doubted the military judge’s impartiality or the legality or fairness of the trial.”).

h. *United States v. Paaluhi*, 50 M.J. 782 (N-M. Ct. Crim. App. 1999), *rev’d on other grounds*, 54 M.J. 181 (C.A.A.F. 2000). Military judge did not abandon his impartial role despite accused’s claims that the judge detached role and became a partisan advocate when his questions laid the foundation for evidence to be admitted against the accused and when he instructed the accused to assist the Government to procure the presence of the prosecutrix.

i. *United States v. George*, 40 M.J. 540 (A.C.M.R. 1994). Military judge improperly limited defense voir dire and cross-examination, extensively questioned defense witnesses, limited number of defense witnesses, assisted TC in laying evidentiary foundations, and limited DC’s sentencing argument.

j. *United States v. Morgan*, 22 M.J. 959 (C.G.C.M.R. 1986). Military judge overstepped bounds of impartiality in cross-examining accused to obtain admission of knife, which trial counsel had been unsuccessful in obtaining admission. *But see United States v. Zaccheus*, 31 M.J. 766 (A.C.M.R. 1990) (holding military judge’s assistance in laying foundation for the admission of evidence was not error; actions did not make the judge a partisan advocate.).

k. **Outer limits?** *United States v. Bouie*, 18 M.J. 529 (A.F.C.M.R. 1984) (no error on facts of case for military judge to ask 370 questions of accused).

4. *Assistance to a party.*

a. *United States v. Felton*, 31 M.J. 526 (A.C.M.R. 1990). Military judge should not have advised trial counsel on the order of challenges during voir dire.

b. *United States v. Hurst*, No. 200401383, 2007 CCA LEXIS 56 (N-M. Ct. Crim. App. Feb. 8, 2007) (unpublished) (holding that military judge did not abandon his impartial role by alerting the Government that they had failed to introduce evidence that two orders had been properly published, or by allowing Government to reopen the case over defense objection when the deficiency was a mere technical one and an earlier evidentiary ruling may have created confusion in the status of the evidence the military judge would consider).

c. **The outer limits?** *United States v. Cooper*, 51 M.J. 247 (C.A.A.F. 1999). Military judge said in front of members that defense counsel had “thank[ed] [him] for helping perfect the government’s case” through questions of a Government witness. Military judge also commented disparagingly on the poor quality of the defense counsel’s evidence, a videotape made by the accused’s wife. These comments did not plainly cause him to lose his impartiality or the appearance of his impartiality. Because the defense did not object to the comments, CAAF

applied a plain error analysis, and found the judge's questions (which led to the "perfect the government's case" comment) were not improper. Further the military judge explained to the members his neutral intent in asking questions and instructed the members to not construe his questions as favoring the Government. CAAF found the military judge's comments about his irritation with defense was inappropriate before the members, though not sufficient to divest him of the appearance of impartiality because his comments were couched within unequivocal instructions protecting the accused from prejudice. Finally, his comments upon the quality of defense evidence were not impermissible, because just as RCM 920(e)(7) Discussion permits the military judge to comment on the evidence during instructions, so should the military judge be allowed to comment on evidence during trial. While the military judge's comments "may have been improper," the trial's legality, fairness and impartiality were not put into doubt.

5. *Sentencing.*

a. *United States v. Green*, 64 M.J. 289 (C.A.A.F. 2007). Prior to announcing the sentence, military judge provided the accused an explanation for the adjudged sentence. He referenced the Bible and other religious principles. On appeal, accused claimed that the military judge demonstrated an impermissible bias by interjecting his own religious views into the sentencing process. Claims of judicial bias are evaluated to determine, "in view of the sentencing proceeding as a whole, whether a reasonable person would doubt the court-martial's legality, fairness, and impartiality." The court found that if there was any error, it was harmless based on several factors. First, the sentence did not "reflect prejudicial consideration of extraneous factors." Second, the defense first introduced the subject of religion during sentencing. Third, the military judge expressly stated that "he would not consider the [accused's] fealty to his religious tenets as a sentencing factor." Fourth, the defense did not object to the military judge's remarks. Lastly, the remarks focused primarily on proper sentencing principles and only incidentally referenced religion. Therefore, military judge's remarks did not reflect any bias in this case.

b. *United States v. Burton*, 52 M.J. 223 (C.A.A.F. 2000). None of the military judge's questions reflected an inflexible predisposition to impose a bad-conduct discharge. The military judge imposed only 30 days' confinement, well below the jurisdictional limit of the court-martial and the maximum punishment for the offense.

c. *United States v. Figura*, 44 M.J. 308 (C.A.A.F. 1996). Military judge did not become de facto witness for prosecution when during sentencing he gave members summary of accused statements during providence inquiry. Defense and Government agreed to have military judge give summary, rather than introduce evidence through transcript or witness testimony.

d. ***Racial bias or prejudice.*** *United States v. Ettinger*, 36 M.J. 1171 (N.M.C.M.R. 1993). Although remarks by military judge may demonstrate prejudice sufficient to constitute bias, accused must be a member of that class in order for comments to be disqualifying.

e. *United States v. Thompson*, 54 M.J. 26 (C.A.A.F. 2000). Military judge did not depart from his impartial role despite issuing numerous adverse rulings against defense, taking over questioning from counsel, shutting off presentations, expressions of impatience and exasperation with counsel, and the making of condescending or berating comments about counsels' performance. Defense counsel repeatedly alluded to being "ineffective" or being forced into providing

ineffective representation. CDC requested that the military judge recuse himself under RCM 902(a), 902(b)(1), 905. Military defense counsel became tearful and complained she would think twice before raising an issue. Military judge countered “you need to investigate...a new line of work.” While court noted much of the blame breakdown between parties “stems from the military judge’s inappropriate and intemperate remarks to counsel on the record,” CAAF found military judge’s actions were not so unreasonable that he abandoned his impartial role. Nevertheless, case returned to the Court of Criminal Appeals to order affidavits from both civilian and military defense counsel or to order a *DuBay* hearing on issue of ineffective assistance of counsel.

H. DISQUALIFICATION – “BRIDGING THE GAP” SESSIONS.

1. **Background.** The US Army Trial Judiciary Standard Operating Procedure encourages military judges to conduct a “post-trial critique” one-on-one with counsel after trial to improve trial skills. This practice can be problematic and judges should limit such discussions to trial advocacy tips as opposed to substantive matters. *See United States v. Copening*, 32 M.J. 512 (A.C.M.R. 1990) (suggesting “Bridging the Gap” may need reevaluation in light of issues arising concerning discussions by trial judges of legal issues that may come before them in future cases; *ex parte* discussions with counsel about the conduct of the trial; and discussions with counsel before the trial is final about rulings in the case).

2. **Improper sentencing considerations.** *United States v. McNutt*, 62 M.J. 16 (C.A.A.F. 2005). Military judge revealed during the “Bridging the Gap” session that he framed accused’s sentence to take into account good time credit. Military judge sentenced the accused to seventy days with the idea that the accused would receive ten days good time credit and would serve sixty days of confinement. CAAF reversed the sentence, finding the military judge improperly considered the collateral administrative effect of good time credit. “[S]entence determinations should be based on the facts before the military judge and not on the possibility that [the accused] may serve less time than he was sentenced to based on the Army’s policy.”

3. **Improper comments about the accused.** *United States v. Hayes*, NMCCA 200600910, 2010 WL 4249518 (N-M. Ct. Crim. App. Oct. 28, 2010). Male accused pled guilty to indecent acts with another male in the barracks. Military judge made comments during a post-trial “bridging the gap” session with counsel that suggested a bias against homosexual conduct. In a unanimous decision, the N-MCCA found the military judge’s comments created an appearance of bias that mandated disqualification; the court affirmed the findings and set aside the accused’s sentence. Based on a *DuBay* hearing convened, the court found the following about the military judge’s actions at trial and during “Bridging the Gap”:

a. **Assisting trial counsel.** The military judge reviewed the stipulation of fact, which read that the sexual contact between the accused and the other male was consensual. The military judge then asked trial counsel if the victim might contradict the stipulation of fact when he testified at sentencing. After a “lengthy” discussion with counsel, military judge told trial counsel that he would not allow the Government to go “beyond” the facts in the stipulation of fact, specifically that the trial counsel could not present evidence that the sexual interaction was non-consensual. Government then withdrew from the stipulation and the defense counsel noted on the record that both of the counsel and the accused had agreed to the stipulation and signed it, and that trial counsel only withdrew after being “prompted” by the military judge. The military judge responded he only noted a

possible conflict and notified the parties. The accused pled guilty and the victim testified during sentencing that he did not consent to their sexual interaction.

b. **“Bridging the Gap” comments.** During a post-trial “Bridging the Gap” session, the military judge made the following comments relevant to the case: (1) “Marines should not be required to live in the barracks with people like Seaman Hayes.”; (2) “[H]omosexuality has no place in our Armed Forces.”; (3) There is a rational basis for the “don’t ask, don’t tell” (DADT) policy and “homosexual acts are incompatible with the service.”; (4) Regarding DADT, homosexual conduct presents leadership challenges as males are less cautious than females, so homosexual males have a “continuing opportunity” to take advantage of other males.

c. **Held:** Relying on R.C.M. 902(a), which requires recusal when the military judge’s impartiality “might reasonably be questioned,” the court noted the appearance of bias was sufficient to warrant judicial disqualification. Military judge commented about “people like Seaman Hayes” while making other comments that homosexuality is incompatible with “our Armed Forces.” The N-MCCA reasoned the judge’s use of terms like “our” and “people like” – coupled with his comments about the possible increased rate of sexual assaults if homosexual Sailors and Marines lived in the barracks – would cause a reasonable listener to believe the judge did not properly “compartmentalize” his beliefs when adjudging the sentence. Specifically, comments suggest the military judge believed punishment in this case must include a punitive discharge. “The perception that a military judge has pre-determined a certain punishment for a certain act or crime is, simply, unacceptable.”

4. **Suggestions for military judge.** For military judges who elect to conduct “Bridging the Gap” sessions, consider the following:

a. Never conduct *ex parte*.

b. Avoid giving substantive advice (e.g., “trial counsel, here is how you lay the foundation for that exhibit that I helped you admit,” or “here’s how you properly select a panel.”).

c. Always bear in mind the trial may not be truly “over.” *United States v. Holt*, 46 M.J. 853 (N-M. Ct. Crim. App. 1997), *aff’d*, 52 M.J. 173 (C.A.A.F. 1999) (suggesting that, where trial judge provides post-trial “practice pointers” to counsel prior to the cases being finalized, recusal would be mandated if the case were sent back for some sort of rehearing).

I. IMPROPER FOR RECUSED JUDGE TO SELECT REPLACEMENT. *United States v. Roach*, 69 M.J. 17 (C.A.A.F. 2010). The accused’s case was originally affirmed by an Air Force Court of Criminal Appeals panel that included the chief judge. The case went to CAAF and was remanded back to the AFCCA. While the initial CAAF review was pending, the AFCCA chief judge commented about the case at two public events. Following a motion by the defense, the chief judge recused himself from the case. The chief judge then sent an e-mail to the executive officer for the Air Force TJAG recommending that a specific judge be appointed to replace the chief judge on the case. The Air Force TJAG appointed this judge, who then convened the panel that considered the remanded case. CAAF vacated the AFCCA decision and remanded for new Article 66 review, finding the chief judge improperly took action in the case after recusal when he recommended his replacement. CAAF noted, “[E]ither a military judge is recused or he is not.” Once recused, a judge shall not take further action in a case. If a military judge deviates from this requirement, “no matter how minimally,” it “may leave a wider audience to wonder whether the military judge lacks the same rigor when applying the law.”

J. EXPANDED POWERS AND REMEDIAL ACTION.

1. *United States v. Griffith*, 27 M.J. 42 (C.M.A. 1988). “Consistent with our conclusion ... that Congress intended for a military judge to have the power to conduct post-trial proceedings until authentication of the record has taken place, we are convinced that ... before authenticating the record of trial ... he may take remedial action on behalf of the accused without awaiting an order therefor by an appellate court.”
2. *United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989). Article 39(a) empowers judge to convene post-trial session to consider newly discovered evidence and to take remedial action. This empowers the military judge, in proper cases, to set aside findings of guilt and sentence. If the CA disagrees, the only remedy is to direct trial counsel to move for reconsideration or to initiate Government appeal.
3. *United States v. Mahoney*, 36 M.J. 679 (A.F.C.M.R. 1993). Chief Judge for Air Force sixth judiciary circuit did not usurp power by convening a post-trial session to inquire into possible improper command intervention after commander accused into confinement, contrary to order of military judge after court-martial. Chief Judge did not usurp power by reducing accused’s sentence by 18 months as remedy for commander’s intervention.
4. *United States v. Meghdadi*, 60 M.J. 438 (C.A.A.F. 2005). Military judge denied defense request for a post-trial Article 39(a) based on newly discovered evidence, specifically an audiotape. Accused’s conviction centered on distributing cocaine, based on testimony by CID agent and CID informant. Defense argued at trial that CID agent was trying to make several drug cases to advance his career and that the informant lied to obtain a sentencing deal offered by CID. After the accused’s trial and during the CID informant’s trial, an audiotape surfaced lending credence to the accused’s defense theory. CAAF held the military judge abused his discretion by denying the Article 39(a) session which resulted in prejudice to the accused because of the failure “to afford [the accused] a forum in which to make his case.” The CAAF stated “the [military judge] misapprehended the purpose of the Article 39(a) session, made factual findings that are not supported by the record, applied an erroneous legal standard, misperceived the evidentiary value of the audiotape, and made no record of any weighing of the new evidence against the evidence at trial, either on the merits or in sentencing.”
5. *United States v. Chisholm*, 58 M.J. 733 (A. Ct. Crim. App. 2003), *aff’d*, 59 M.J. 151 (C.A.A.F. 2003). Military judges, as empowered by Congress and the President, have both a duty and a responsibility to take active roles in “directing” the timely and accurate completion of court-martial proceedings. After adjournment, but prior to authentication of the record of trial, military judge must ensure that Government is proceeding with due diligence to complete the record of trial as expeditiously as possible, given the totality of the circumstances of that accused’s case. If the military judge determines that the record preparation is proceeding too slowly, he may take remedial action without awaiting an order from the intermediate appellate court. The exact nature of the remedial action is within the sound judgment and broad discretion of the military judge, but could include, among other things: (1) directing a date certain for completion of the record with confinement credit or other progressive sentence relief for each day the record completion is late; (2) ordering the accused’s release from confinement until the record of trial is completed and authenticated; or, (3) if all else fails, and the accused has been prejudiced by the delay, setting aside the findings and the sentence with or without prejudice as to a rehearing. Staff judge advocates and convening authorities who disregard such remedial orders do so at their peril.
6. *United States v. Lepage*, 59 M.J. 659 (N-M. Ct. Crim. App. 2003). Military judge committed plain error by admitting record of Article 15 into evidence. He determined that admitting the exhibit was erroneous in a post-trial 39(a) session, and that the erroneously-

admitted exhibit was considered by the court in arriving at a sentence. However, military judge failed to take corrective action during that hearing, and recommended that the convening authority disapprove the Bad-Conduct Discharge; convening authority declined to follow recommendation. Held, “This case should not even be before us for review . . . the military judge had the authority under RCM 1102(b)(2) to take corrective action.”

7. *United States v. Pulido*, No. 20011043 (A. Ct. Crim. App. Mar. 19, 2004) (unpub.) Findings and sentence set aside due to lack of properly authenticated or approved findings of guilty. Prior to authenticating the record, the military judge “corrected” her original announced findings (Of all charges and specifications: Guilty) to partially reflect the actual plea received in the case to one charge and its specification. The actual plea received on one Charge was by exceptions and substitutions. The amended findings neglected to reflect an announcement of guilt on a separate charge to which the accused had pled guilty. “Article 53, UCMJ, and RCM 922(a) require that the court-martial announce its findings to the parties promptly, **in an open court**, after they have been determined” (emphasis in original). Because the verdict was ambiguous, there was material prejudice to the accused’s substantial rights. Military judge’s options included: reviewing tapes to determine whether she announced the reported findings; if record inaccurately reported findings, she should not have authenticated it; returning record of trial to trial counsel for further examination and correction; directing proceedings in revision to correct error, so long as accused suffered no material prejudice.

8. ***Accused’s forum selection.*** Trial before military judge alone.

a. ***Request.*** RCM 903(b)(2). Trial by judge alone may be requested orally or in writing by the accused. *See also United States v. Wright*, 5 M.J. 106 (C.M.A. 1978). Accused may withdraw request for good cause.

(1) ***Doctrine of Substantial Compliance.*** *United States v. Mayfield*, 45 M.J. 176 (C.A.A.F. 1996). The absence of a written or oral request for trial by military judge alone did not establish a substantial matter leading to jurisdictional error based on the dialogue at trial, the absence of a defense objection, and accused’s post-trial Article 39(a) confirmations of his desire to be tried by judge alone. A post-trial session is permissible to cure jurisdictional errors created by the failure to obtain an accused’s request for trial by military judge alone. Conviction affirmed.

(2) *United States v. Turner*, 47 M.J. 348 (C.A.A.F. 1997). A written request for trial by military judge alone, which counsel made and submitted before trial, and then confirmed orally at an Article 39a session with the accused, present substantially complies with Article 16, UCMJ. While the military judge erred in failing to obtain an oral statement of selection of the forum from the accused, the error did not materially prejudice the accused.

(3) *United States v. Seward*, 49 M.J. 369 (C.A.A.F. 1998). An accused’s forum request from a previous court-martial that was terminated by mistrial cannot be used to support a forum request at a subsequent court-martial. However, accused suffered no prejudice under Article 59 because his request for trial by military judge alone was apparent from the pretrial agreement (forum selection was a term), and there was a written request for the same even though offered after completion of the sentencing proceedings.

(4) *United States v. Alexander*, 61 M.J. 266 (C.A.A.F. 2005). Military judge advised the accused of his forum selection rights, which accused

requested to defer. During a later proceeding, military judge stated that he was told an enlisted panel would be hearing the case and defense did not object. The accused, however, failed to state in writing or on the record his request for enlisted members in violation of Article 25, UCMJ and RCM 903(b)(1). The CAAF held that the error in the accused failing to personally select forum on the record is a procedural, as opposed to jurisdictional, issue. The court stated “[the] right being addressed and protected in Article 25 is the right of an accused servicemember to select the forum[.] . . . [t]he underlying right is one of forum selection, not the ministerial nature of its recording.” The CAAF held that the record reflected that the accused selected court-martial by panel members and the accused failed to show that the error in recording his forum selection resulted in any prejudice.

(5) *United States v. Goodwin*, 60 M.J. 849 (N-M. Ct. Crim. App. 2005). Accused failed to state in writing or orally on the record his request for a judge alone trial as required by Article 16, UCMJ. Military judge failed to advise the accused of his forum rights and the only evidence of his intent existed was a single sentence in the pretrial agreement, to request trial by judge alone (a term the military judge failed to discuss with the accused). N-MCCA held the failure to advise the accused of his forum rights did not substantially comply with Article 16, UCMJ, and found the error was not harmless. Findings and sentence set aside.

(6) *United States v. Follord*, No. 20020350 (A. Ct. Crim. App. Feb. 15, 2005) (unpub). The accused, a CW2, did not make a knowing and voluntary waiver of his statutory right to trial by five officer members because of the following errors: (1) his executed PTA erroneously listed one of his three forum options as a trial by one-third enlisted, (2) his request for military judge alone stated that any trial composed of officers would be “not of his unit,” and (3) military judge advised the accused that if he requested officer members at his general court-martial that the panel must comprise “at least three members.” The court stated the host of errors “constitutes a lack of substantial compliance with Article 16, UCMJ.” Findings and sentence set aside.

b. *United States v. Jungbluth*, 48 M.J. 953 (N-M. Ct. Crim. App. 1998). Accused pled guilty to wrongful use of marijuana on divers occasions before a properly assemble court consisting of a panel of officer members. A military judge was forced to declare a recess after the TC became ill. At the next session of court the parties presented the military judge with a PTA. Under the PTA, the military judge *dismissed the officer panel*, conducted a providence inquiry, entered findings, and adjudged a sentence. A military judge can lawfully approve a request for trial by military judge alone *after assembly* if justified by the circumstances. RCM 903 does not expressly prohibit approval of after assembly forum requests, and in this case, military judge approved the request under the terms of a pretrial agreement. The agreement was mutually beneficial to both sides and the accused suffered no prejudice.

c. ***A Right?***

(1) *United States v. Ward*, 3 M.J. 365 (C.M.A. 1977). There is no *right* to a judge alone trial. *But see United States v. Butler*, 14 M.J. 72 (C.M.A. 1982) (military judge must state reason for denial of judge alone request).

(2) *United States v. Webster*, 24 M.J. 96 (C.M.A. 1987). Denial of a timely motion for trial by judge alone cannot be based on judge's desire to discipline counsel nor to provide court members with experience.

(3) *United States v. Edwards*, 27 M.J. 504 (C.M.A. 1988). Once military judge ruled he was not disqualified from hearing case, he abused his discretion by denying accused right to trial by judge alone, as requested.

(4) *United States v. Dodge*, 59 M.J. 821 (A.F. Ct. Crim. App. 2004), *rev'd on other grounds*, 60 M.J. 368 (C.A.A.F. 2004) (holding RCM 903(c)(2)(B) does not create a "concomitant absolute right" to be tried by military judge alone).

d. **Replacement of military judges – RCM 505(e)(2).** *United States v. Kosek*, 46 M.J. 349 (C.A.A.F. 1997). The Air Force did not violate a CAAF remand order by substituting a new military judge at accused's court-martial after the CAAF ordered that the record be returned to the "military judge" for reconsideration.

V. COUNSEL.

A. QUALIFICATIONS.

1. **GCM.** Article 27(b), UCMJ. "**Trial counsel** . . . detailed for a **general court-martial** –
 - a. must be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a federal court or of the highest court of a State . . . and
 - b. must be certified as competent to perform such duties by The Judge Advocate General of the armed force of which he is a member."
2. **SPCM & GCM.** RCM 502(d). **Defense counsel** must be Article 27(b) certified.
3. Under RCM 502(d)(2), assistant trial counsel and assistant defense counsel need only be commissioned officer.
4. Summary Court-Martial. *Middendorf v. Henry*, 425 U.S. 25 (1976). The Sixth Amendment right to counsel does not extend to SCM.

B. DISQUALIFICATION OF COUNSEL.

1. **Due to defect in appointment or lack of qualifications.**
 - a. *Wright v. United States*, 2 M.J. 9 (C.M.A. 1976). Defects in appointment or qualifications of trial counsel are matters of procedure to be tested for prejudice and have no jurisdictional significance.
 - b. *United States v. Harness*, 44 M.J. 593 (N-M. Ct. Crim. App. 1996). Presence of defense counsel who was neither graduate of accredited law school nor properly admitted to practice did not constitute ineffective assistance of counsel under Sixth Amendment. Performance of defense counsel measured by combined efforts of entire defense team.
 - c. Inactive status. *United States v. Steele*, 53 M.J. 274 (C.A.A.F. 2000). Inactive status of civilian attorney in states in which he is licensed to practice does not bar practice before military courts-martial.
 - d. Not sworn. *United States v. Roach*, No. S31143, 2007 CCA LEXIS 402 (A.F. Ct. Crim. App. Sep. 13, 2007) (unpublished). The assistant trial counsel in the case had not been sworn under Article 42(a), UCMJ, prior to serving on the court-martial. The defect was not caught until after trial. The lack of qualified counsel is not a jurisdictional defect requiring reversal, so the error was tested for

prejudice. The defense did not object or raise the issue in clemency, and the accused's pleas were voluntary and provident. Therefore there was no prejudice.

2. **Accuser.** *United States v. Reist*, 50 M.J. 108 (C.A.A.F. 1999). Assistant TC signed charge sheet and was present in court, identified as "accuser" on the record, and argued at sentencing that accused's conduct was "cowardly criminal conduct of a sexual pervert." While ATC was accuser under Article 1(9), UCMJ, and clearly disqualified to act as ATC (RCM 504(d)(4)(A)), the court held defense waived the issue, and found no plain error.

3. **Due to prior duty on opposite side.** *United States v. Smith*, 26 M.J. 152 (C.M.A. 1988) (trial counsel who had been a member of the Trial Defense Service and acted as a sounding board for part of the defense case was not disqualified); *United States v. Sparks*, 29 M.J. 52 (C.M.A. 1989) (despite Article 27 violation, accused cannot complain when, "after full disclosure and inquiry by military judge," he gives informed consent to representation by defense counsel who previously acted for prosecution).

4. **Due to potential disqualification as witness.** *United States v. Baca*, 27 M.J. 110 (C.M.A. 1988). Although the accused is not fully and absolutely entitled to counsel of choice, he is absolutely entitled to retain an established relationship with counsel absent demonstrated good cause.

5. **Due to duty as an investigating officer.** *United States v. Strother*, 60 M.J. 476 (C.A.A.F. 2005). Trial counsel had served as the command SJA and, in that capacity, conducted interviews involving the accused's misconduct and discussed various aspects of the case, including procedural matters, substantive issues, and investigative options, with the officer ordered to conduct the preliminary inquiry. During this preliminary inquiry, a new SJA arrived and the trial assumed other legal duties. Upon completion of the preliminary inquiry, charges were preferred and an Article 32 investigation directed. At this time, trial counsel was detailed to the case. At trial and on appeal, defense asserted that the trial counsel was disqualified as a matter of due process and because under Article 27(a)(2) he acted as an "investigating officer." Article 27(a)(2) states that no person who has acted as an investigating officer may later act as a trial counsel. While "investigating officer" is not defined in Article 27, the CAAF, after a thorough historical discussion on the "investigating officer" disqualification, interpreted the language to apply to an Article 32 investigating officer. The CAAF then held trial counsel's involvement did not interfere with the accused's due process rights and that the accused did not "demonstrate that the [TC's] activities so departed from the normal role of prosecutor as to make him a de facto Article 32 'investigating officer.'"

6. **Due to incompetence.** *United States v. Galinato*, 28 M.J. 1049 (N.M.C.M.R. 1989). Military judge had discretion to remove accused's counsel of choice, and to appoint different counsel, where counsel of choice had effectively withdrawn from proceedings.

7. **Due to conflict of interest.**

a. *United States v. Humpherys*, 57 M.J. 83 (C.A.A.F. 2002). Assistant trial counsel (ATC) previously represented accused in legal assistance matter (child support issue). At trial, defense moved to disqualify ATC alleging that ATC used information from this prior representation while interviewing the accused's wife (a potential defense sentencing witness). Military judge denied motion to disqualify ATC because: (1) the charges did not relate to the period of time of the prior representation; (2) the subject matter of prior representation had no substantial relationship to any matter at issue in the court-martial; and (3) military judge accepted ATC's representation that she did not recall the specifics of the prior representation. When the defense called the wife as a witness, the ATC conducted cross-examination. In affirming, the court held the accused failed to

demonstrate either (1) that the subject of the prior representation was substantially related to the pending court-martial charges (adultery, sodomy, violation of lawful general regulation, and false official statements); or (2) that specific confidential information gained by ATC during the prior representation might have been used to the disadvantage of the accused in the present case. Accused could have requested military judge review legal assistance file, which still existed, or accused could have testified in closed hearing with sealed record as to the matters of prior representation. Accused's mere conclusory assertions were not sufficient.

b. *United States v. Cain*, 59 M.J. 285 (C.A.A.F. 2004). Accused alleged that his lead trial defense counsel had a coerced, homosexual relationship with him that created an actual conflict of interest and deprived him of effective assistance of counsel. At *DuBay* hearing, the military judge found the relationship was consensual and that accused desired continued representation by his counsel, despite advice from two civilian counsel to fire him. ACCA held the accused did not meet the two-pronged test to establish IAC due to an actual conflict of interest in a guilty plea: (1) that there was an actual conflict of interest; and (2) that the conflict adversely affected the voluntary nature of the guilty plea. The CAAF reversed, finding that the "volatile mixture of sex and crime in the context of the military's treatment of fraternization and sodomy as criminal offenses" resulted in a "uniquely proscribed relationship" that was "inherently prejudicial and created a per se conflict of interest in counsel's representation of the Appellant." The conflict resulted in ineffective assistance of counsel under the Sixth Amendment. Findings and sentence set aside.

c. *United States v. Beckley*, 55 M.J. 15 (C.A.A.F. 2001). At issue was the accused's right to retain civilian counsel whom the military judge determined to be disqualified because of the conflict of interest with the accused's estranged wife, who was represented by the lawyer's firm in a divorce action against the accused. After a detailed factual analysis, CAAF affirmed ACCA, holding that the civilian counsel had an actual conflict of interest and was required to withdraw.

d. *United States v. Smith*, 44 M.J. 459 (C.A.A.F. 1996). Defense counsel previously represented another airman in companion case for Article 15 proceedings. Former client did not testify at trial, but testimony presented via stipulation of expected testimony. Accused consented to representation. Court held that client could not make informed decision regarding representation, even after being advised by counsel, because counsel did not understand ramifications of conflict issue; former client was still subject to court-martial even though nonjudicial punishment had been imposed; and court was concerned that accused denied fair trial because of stipulation rather than cross-examination of important witness.

e. *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990). Accused met with legal assistance attorney who later moved to the criminal law department. The counsel disclosed to the detailed trial counsel that he had represented the accused on an unrelated matter. Court adopted three-part test to determine if trial counsel disqualified: (1) was there former representation (2) was there a substantial relationship between subject matters, and (3) was there a subsequent proceeding. In this case, legal assistance attorney did not act as trial counsel, though he did appear with trial counsel at Article 32.

f. *United States v. McClain*, 50 M.J. 483 (C.A.A.F. 1999). Accused complained his lawyers were conspiring with the trial counsel. The accused also had several

disagreements with his defense counsel, and told the military judge his counsel had lied to him. In response, one of his counsel told the military judge that the accused has told “lies here today in court.” Nevertheless, the military judge denied counsel’s request for release, and accused ultimately requested both counsel represent him. The court held the issue of a conflict of interest (because of a disagreement in strategy) was waived by the accused. The defense was entitled to respond to the accused’s assertions.

g. *United States v. Thompson*, 51 M.J. 431 (C.A.A.F. 1999). A pretrial complaint against defense counsel, made by accused’s wife, did not create a conflict of interest disqualifying him from participation in this case. Court also held that accused was not denied effective assistance of counsel when military defense counsel cautioned him about retaining civilian counsel and discouraged him from getting help from a psychologist.

h. *United States v. Johnston*, 51 M.J. 227 (C.A.A.F. 1999). Where detailed defense counsel left active duty prior to preparation of a new SJA recommendation, failure of the convening authority to detail substitute counsel for accused deprived him of his opportunity for sentence relief with the convening authority and was prejudicial to accused’s substantial rights.

i. *Sua sponte duty to explore conflicts of interest. United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998). The Government called accused’s pretrial confinement cell mate as a witness. He allegedly overheard the accused make incriminating comments to another inmate and repeated this conversation to his lawyer, who then negotiated a PTA for the witness. The witness’ counsel then withdrew from his case. The military judge in the accused’s case was the same judge who had presided over witness’ guilty plea, and the defense counsel who negotiated the witness’ PTA was part of the accused’s defense team. The defense did not impeach the witness, even though he had been convicted of several crimes involving dishonesty and deceit. Defense counsel and the military judge failed to discuss the potential conflict of interest on the record. The court held the military judge had a *sua sponte* duty to resolve conflict questions on the record and defense had a duty to discuss potential or actual conflicts of interest with accused. Such multiple representation creates a presumption that a conflict of interest existed, one that can be rebutted by the actual facts. In this case, there was a clear conflict of interest.

j. *United States v. Allred*, 50 M.J. 795 (N-M. Ct. Crim. App. 1999). A preexisting attorney-client relationship may be severed by Government only for good cause. “Good cause” did not exist where defense counsel had entered into relationship with accused concerning pending charges, charges were dismissed during the time accused was medically evacuated for evaluation of heart problems, and DC was told by SDC that, due to pending PCS, DC would not be detailed to case if charges re-preferred. Court found that DC’s commander’s finding of unavailability was abuse of discretion. Prejudice presumed and findings and sentence set aside.

8. ***Based on bar status.*** *United States v. Steele*, 53 M.J. 274 (C.A.A.F. 2000). No error where accused’s civilian DC was carried “inactive” by all state bars of which he was member (and such status prohibited him from practicing law). RCM 502(d)(3)(A) requires that a CDC be a member of a bar of a federal court or bar of the highest court of the state, or a lawyer authorized by a recognized licensing authority to practice law (and determined by military judge qualified to represent the accused). CAAF looked to federal case law holding that neither suspension nor disbarment creates a *per se* rule that

continued representation is constitutionally ineffective (CAAF also noted a Navy instruction permits military counsel to remain “in good standing” even though they are “inactive.”). Counsel are presumed competent once licensed.

VI. ACCUSED

A. ACCUSED’S FORUM SELECTION. Doctrine of substantial compliance.

1. ***Trial before military judge alone.*** RCM 903(b)(2). *United States v. Turner*, 47 M.J. 348 (C.A.A.F. 1997). Where the military judge fully explained the accused’s rights as to forum, and defense counsel stated at trial that the accused wished to be tried by military judge alone, it was error for the accused not to state his election either in writing or orally on the record. However, the facts of the case showed substantial compliance with Article 16, UCMJ, and no material prejudice to the substantial rights of the accused.

2. ***Request for trial before members.*** RCM 903(b)(1). *United States v. Alexander*, 61 M.J. 266 (C.A.A.F. 2005). Military judge advised the accused of his forum selection rights, which the accused requested to defer. During a later proceeding, the military judge stated that he was told an enlisted panel would be hearing the case and defense did not object to the judge’s statement. The accused, however, failed to state in writing or on the record his request for enlisted members in violation of Article 25, UCMJ and RCM 903(b)(1). The CAAF held that the error in the accused failing to personally select forum on the record is a procedural, as opposed to jurisdictional, issue. The court stated, “[the] right being addressed and protected in Article 25 is the right of an accused servicemember to select the forum[,] . . . [t]he underlying right is one of forum selection, not the ministerial nature of its recording.” The CAAF held that the record reflected that the accused selected court-martial by panel members and the accused failed to show that the error in recording his forum selection resulted in any prejudice.

a. *United States v. Morgan*, 57 M.J. 119 (C.A.A.F. 2002) (military judge erred by not obtaining on record defendant’s personal request for enlisted members to serve on court-martial, but error was not jurisdictional, and under circumstances, it did not materially prejudice substantial rights of defendant)

b. *United States v. Daniels*, 50 M.J. 864 (A. Ct. Crim. App. 1999). Where accused was tried by enlisted members and there was no evidence on the record reflecting personal forum selection, jurisdiction was properly found by a military judge in an ACCA-ordered *DuBay* hearing, which established that accused had discussed her forum choices with her counsel, and that, prior to the assembly of the court, she had decided to elect trial by an enlisted panel, and that her counsel had then presented a document to TC stating that the accused requested an enlisted panel. Failure to elicit forum selection on the record was a technical defect in the application of Article 25, a defect that, as was clear from the *DuBay* hearing, did not prejudice the substantial rights of the accused.

c. *United States v. Lanier*, 50 M.J. 772 (A. Ct. Crim. App. 1999), *aff’d*, 53 M.J. 220 (C.A.A.F. 2000) (summary disposition). Counsel’s consulting with the accused and announcing on the record, in response to judge’s question, “We will have a court with enlisted” substantially complied with the terms of Article 25(c)(1).

d. *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999). No error where accused, who had signed his request for enlisted members with words “Negative Reading,” was directed by military judge to elect a forum and he subsequently signed his name above the words “Negative Reading;” any confusion the accused experienced concerned his name and not his forum choices.

B. TRIAL IN ABSENTIA. RCM 804(c).

1. The accused shall be considered to have waived the right to be present if after initially present he/she (1) voluntarily absents self after arraignment, or (2) is removed for disruption. For requirements of a valid arraignment, see RCM 904.
2. *United States v. Bass*, 40 M.J. 220 (C.M.A. 1994). Accused did not return for trial after being arraigned 23 days earlier (delay for sanity board).
3. *United States v. Sharp*, 38 M.J. 33 (C.M.A. 1993). Notice to accused of exact trial date or that trial may continue in his absence, while desirable, is not a prerequisite to trial in absentia. Burden is on the defense to go forward and refute the inference of a voluntary absence. Military judge must balance public interest with right of accused to be present.
4. *United States v. Price*, 43 M.J. 823 (A. Ct. Crim. App. 1996), *rev'd*, 48 M.J. 181 (C.A.A.F. 1998). Trial in absentia is not authorized when military judge fails to conduct a proper arraignment. Reversing the ACCA, the CAAF stated that when military judge asked accused whether charges should be read, but failed to call upon the accused to plead, this constituted a defective arraignment. Waiver by voluntary absence will not operate to authorize trial *in absentia* if arraignment is defective, particularly considering that military judge failed to also inform the accused that trial would proceed in accused's absence. *See generally* RCM 904 ("Arraignment . . . shall consist of reading the charges and specifications to the accused and calling on the accused to plead.").
5. *See also United States v. Thrower*, 36 M.J. 613 (A.F.C.M.R. 1993). While giving unsworn statement during sentencing, accused succumbed to effects of sleeping pills he took earlier and remainder of statement given by defense counsel. Held to be a voluntary absence.

C. ACCUSED'S RIGHTS TO COUNSEL.

1. ***Pro se representation.*** RCM 506(d).
 - a. *United States v. Mix*, 35 M.J. 283 (C.M.A. 1992). Before approving accused's request to proceed *pro se*, RCM 506(d) requires a finding that the accused understands: (1) the disadvantages of self representation and; (2) if the waiver of counsel was voluntary and knowing. Opinion includes an appendix of suggested questions.
 - b. *Cf. Iowa v. Tovar*, 541 U.S. 77 (2004). Prior to proceeding *pro se* at a guilty plea, the Sixth Amendment is satisfied if the trial court "informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." Warnings that: "(1) advise the defendant that waiving the assistance of counsel in deciding whether to plead guilty [entails] the risk that a viable defense will be overlooked; and (2) admonish[ing] the defendant that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty" are *not* required by the Sixth Amendment.
 - c. *Godinez v. Moran*, 509 U.S. 389 (1993). Supreme Court says the standard of competence to proceed *pro se* is no different than that required for an accused to stand trial. Military appellate courts appear to imply a higher level of competence for accused to waive counsel. *See also United States v. Freeman*, 28 M.J. 789 (N.M.C.M.R. 1989) ("[H]igher standard of competence must exist for an accused to waive counsel and conduct his own defense than would be required to merely assist in his own defense"). *United States v. Streater*, 32 M.J. 337 (C.M.A. 1991) (accused was competent to "represent himself and to actually defend himself").

2. **Individual military counsel.** RCM 506(b); Article 38(b), UCMJ; AR 27-10, para 5-7; *United States v. Spriggs*, 52 M.J. 235 (C.A.A.F. 2000). If an individual military counsel request has been denied and the defense claims improper severance of attorney-client relationship, the defense bears the burden of demonstrating that the accused had a viable ongoing attorney-client relationship regarding the substance of the charges. Defense must demonstrate both an understanding as to the nature of future representation and active engagement by the attorney in preparation of the case. If the defense makes such showing, the burden shifts to the Government to demonstrate good cause for severance. If the defense cannot make such showing, the burden shifts to the Government to demonstrate that the judge advocate was not reasonably available under applicable criteria. If there was a prior attorney-client relationship that is no longer viable at the time of the request, the Government is not required to demonstrate good cause, but must demonstrate that the other criteria warrant disregarding the relationship under the circumstances. Absent Government misconduct, the routine separation of a judge advocate from active duty normally terminates any attorney-client relationship established on the basis of the attorney's military status, except when: (1) the attorney agrees to represent the client in his or her civilian capacity; or (2) the attorney enters the reserves and is ordered to represent the client to the extent permitted by applicable law based upon a determination by the appropriate official of reasonable availability.

3. **Civilian Counsel.**

a. **Delay to obtain civilian counsel.**

(1) *United States v. Wiest*, 59 M.J. 276 (C.A.A.F. 2004). Military judge abused his discretion in denying defense request for delay to obtain civilian counsel. "It should . . . be an unusual case, balancing all the factors involved, when a judge denies an initial and timely request for a continuance in order to obtain civilian counsel, particularly after the judge has criticized appointed military counsel." Applying the *Miller* factors, below, the court held that the judge erred and set aside findings and sentence.

(2) *United States v. Miller*, 47 M.J. 352 (C.A.A.F. 1997). Military judge abused his discretion by denying request for delay in post-trial hearing in order for accused to obtain civilian counsel. While the right to retain civilian counsel is not absolute, "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel." Factors used to determine whether military judge abused his discretion include: surprise, timeliness of the request, other continuance requests, good faith of moving party, and prior notice.

b. **Delay to obtain expert witness.** *United States v. Weisbeck*, 50 M.J. 461 (C.A.A.F. 1999). In 1994, accused was tried by GCM for sexually assaulting two teenaged brothers, and he was acquitted. The key to the defense case in the 1994 court-martial was a psychiatric expert. In 1995, at another installation, accused was charged with offenses relating to two other adolescent boys. The military judge ruled the two boys from the 1994 could testify under MRE 404(b). The civilian attorney from the 1994 court joined the defense team for the 1995 case in October, then requested a delay to permit attendance of the psychiatric expert used in the 1994 court. The military judge denied this request, and the CAAF held that this was error and that the defense request was not unreasonable. Findings and sentence set aside.

4. *Foreign counsel*. RCM 502(d)(3)(b); *Soriano v. Hosken*, 9 M.J. 221 (C.M.A. 1980). Military judge determines if individual foreign civilian counsel is qualified.

VII. OTHER COURT-MARTIAL PERSONNEL

A. STAFF JUDGE ADVOCATES.

1. *Disqualification – in general.*

- a. *United States v. Gutierrez*, 57 M.J. 148 (C.A.A.F. 2002). The accused pled guilty to multiple specifications of larceny, conspiracy to commit larceny, robbery, conspiracy to commit robbery and receiving stolen property. Prior to entry of pleas, the accused moved to dismiss all charges and specifications for lack of speedy trial. The Chief of Justice testified in opposition to the motion and the military judge denied the motion. Later, the COJ assumed duties as the SJA and prepared the post-trial recommendation (PTR) in the accused's case. DC responded to the PTR claiming that the COJ was disqualified from preparing the PTR because of her involvement in the case, specifically her testimony in opposition to the speedy trial motion. Since Government counsel assumed a prosecutorial role in accused's case prior to her appointment as SJA, she was disqualified from preparing the SJA post-trial recommendation which involved evaluating the prosecution. While a staff legal officer who merely gives general advice to prosecutors or investigators is not disqualified from participating in the post-trial process, when the same advisor becomes a participant in the prosecution, she is disqualified.

- b. *United States v. Taylor*, 60 M.J. 190 (C.A.A.F. 2004). Eight days after the accused's court-martial, trial counsel published an article in the base newspaper warning commanders to properly prepare adverse personnel records. The article resulted from the trial counsel's inability to admit the accused's adverse personal records, because of numerous administrative errors, which the trial counsel characterized as a disservice to justice. Based on the article, the defense sought the disqualification of the SJA. The SJA, while stating the article could be imputed to him in an addendum recommendation, took action on the case. The CAAF held where a SJA imputes a disqualification to himself his participation in the post-trial review process is error, that the accused made a "colorable showing of prejudice," and returned the case for a new post-trial review.

2. *Disqualification – performing trial counsel duties can effectively cause staff judge advocate to be "trial counsel."* *United States v. Stefan*, 69 M.J. 256 (C.A.A.F. 2010). Chief of Justice caused charges to be served on the accused (a duty reserved for detailed trial counsel under RCM 602) and then signed charge sheets as "Trial Counsel." The Chief of Justice later, in her capacity as Acting SJA, signed the addendum to the post-trial staff judge advocate's recommendation (SJAR), recommending the convening authority not grant clemency. Defense argued that under Article 6(c), no person who has acted as trial counsel may later act as SJA in the same case. CAAF held the Acting SJA was disqualified based her limited administrative actions as trial counsel. However, the court affirmed, finding the error did not prejudice the accused.

3. *Disqualification – individual cannot serve as SJA and military judge in same case.* Under RCM 1106(b) and Article 6(c), UCMJ, a person cannot serve as the SJA and military judge in the "same case." RCM 1106(b) governs the post-trial SJA recommendation. Article 6(c) more broadly governs action an SJA assisting "any reviewing authority." See *United States v. Moorefield*, 66 M.J. 170 (C.A.A.F. 2008) (per curiam). The staff judge advocate (SJA) served as a military judge in a prior, unrelated, court-martial of the accused. On appeal, the defense argued the SJA should have been

disqualified, citing RCM 1106 and Article 6, UCMJ. In a short per curiam opinion, the CAAF held the SJA was not disqualified. The two courts-martial were several years apart and involved different victims and evidence. The judge advocate properly acted as SJA and military judge in the two cases as they were “neither the same case for purposes of RCM 1106 or Article 6, UCMJ, nor the same matter, for purposes of [Navy professional responsibility rules].”

4. **Processing immunity requests.** *United States v. Ivey*, 55 M.J. 251 (C.A.A.F. 2001). At issue was whether Government failed to process the accused’s requests for immunity for four civilian witnesses. Here, the CA did not deny the defense request for immunity until after trial and chose not to forward the request to Department of Justice. In addition, military judge denied the defense request to grant immunity or to abate the proceedings to wait for CA action. The CAAF held trial counsel and SJAs do not have the authority to *de facto* deny a request for immunity by withholding it from the convening authority. All requests for immunity, from either the Government or the defense, must be submitted to the CA for a decision; the CA does not have to forward an immunity request for a civilian to DOJ if the CA intends to deny that request; and all three prongs of RCM 704(e) must be met before a military judge may overrule a CA’s decision to deny a request for immunity: (1) the witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify; (2) Government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the Government, through its own overreaching, has forced the witness to invoke the privilege against self-incrimination; and (3) the witness’ testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses. In this case, the military judge did not abuse his discretion by refusing to abate proceedings (to wait for CA action) where he found there had been no discriminatory use of immunity or Government overreaching, and proffered testimony was not clearly exculpatory.

5. **Pocket Immunity.** *United States v. Jones*, 52 M.J. 60 (C.A.A.F. 1999). Accused was charged with conspiracy to submit a false claim, larceny, and other offenses. His co-accused were offered punishment under Article 15 if they agreed to testify against the accused. When the co-conspirators invoked their rights and seemed hesitant to cooperate, the SJA called the RDC and said that the three soldiers would be court-martialed if they did not testify in accordance with their agreement. The CAAF said the informal agreements were tantamount to a grant of *de facto* immunity, that the President had not formulated rules governing such “informal immunity,” but that there was no command influence and no material prejudice to the accused.

B. ARTICLE 32 INVESTIGATING OFFICERS. *United States v. Holt*, 52 M.J. 173 (C.A.A.F. 1999). Article 32 investigating officer recommended accused’s case be referred capital for his alleged murder of a fellow biker. After referral, the Article 32 investigating officer attended a forensic evidence course and, upon returning to the command, gave trial counsel the name and phone number of a forensic expert. Ultimately, this expert testified for Government that the spatter patterns on jeans seized from the accused were consistent with a stabbing. CAAF noted that an “investigating officer is disqualified” from acting subsequently “in the same case in any other capacity” under RCM 405(d)(1), and that his provision of information solely to the assigned prosecutor may have created at least the appearance of impropriety by providing trial counsel with information that was neither transmitted to the commander who ordered the investigation nor served on the accused. Nevertheless, the court found no prejudicial error that would warrant giving the accused a new trial; the decision to submit the jeans for testing and to call the expert witness were solely the decisions of the trial counsel.

C. COURT REPORTERS. RCM 502(e). *See United States v. Yarbrough*, 22 M.J. 138 (C.M.A. 1986). Accuser improperly acted as court reporter but reversal not required where

accuser only operated microphone system and did not transcribe proceedings or prepare the record of trial.

D. **INTERPRETER.** RCM 502(e). Must be qualified and sworn.

E. **BAILIFF.** RCM 502(e). Cannot be a witness. *United States v. Martinez*, 40 M.J. 82 (C.M.A. 1994). Military judge committed prejudicial error when, during sentencing deliberations, he conducted an ex-parte communication with bailiff.

F. **DRIVERS.**

1. *United States v. Aue*, 37 M.J. 528 (A.C.M.R. 1993). Military judge's assigned driver told witnesses waiting to testify that the MJ told her that "he had already decided the case." Military judge addressed issue at post-trial Article 39(a) hearing as motion for mistrial and found that: (1) he had never made such a statement; and (2) that driver was trying to impress witnesses with her apparent "inside information." ACMR returns for *DuBay* hearing and indicates that MJ should have recused himself at the post-trial Article 39(a) session. Otherwise, no misconduct by military judge and no prejudice to accused.

2. *United States v. Knight*, 41 M.J. 867 (A. Ct. Crim. App. 1995). Three senior enlisted court members solicited daily information from driver about his opinions regarding witness veracity, medical testimony, and what transpired during Article 39(a) sessions. Defense motion for mistrial made during deliberations denied. CA grants immunity to members in post-trial Article 39(a) session. ACCA said SJA, CA, and military judge "were remiss" in failing to apply presumption of prejudice absent clear and positive showing by Government.

VIII. CONCLUSION

IX. APPENDIX – COURT-MARTIAL PERSONNEL SUMMARY

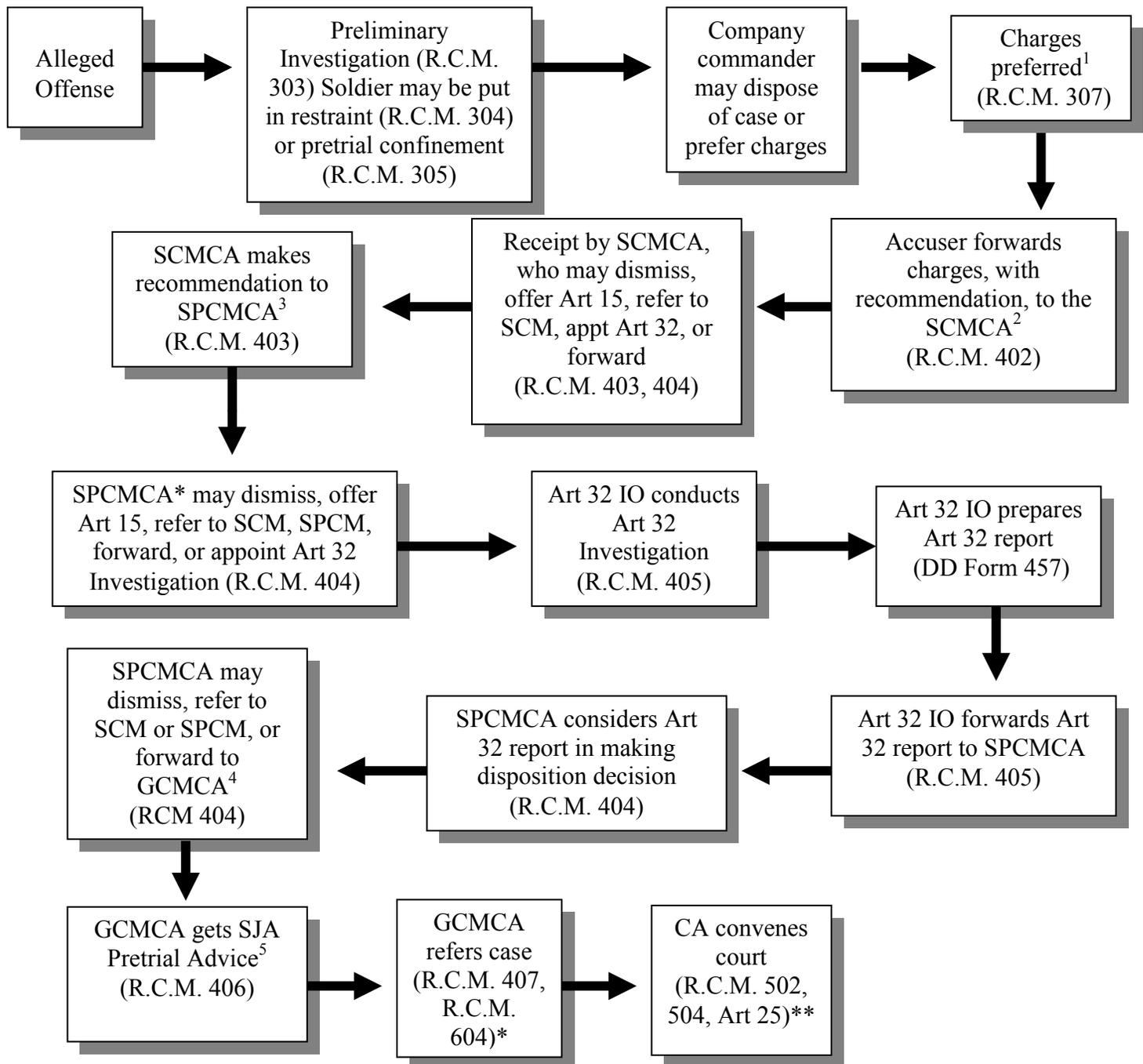
MAJOR POINT

SUMMARY

<p>THE CONVENING AUTHORITY</p>	<ul style="list-style-type: none"> • A convening authority (CA) has personal responsibility to select members and refer cases to courts-martial. Article 25(d) and Article 1(9), UCMJ. When considering selection and referral issues, look at the practical effect of the action as well as the RCMs to ensure that this is an appropriate situation for application of the practical effects test. • A convening authority with a personal interest in a case is disqualified from referring a case to trial and taking most other actions. A convening authority with a statutory disqualification is also disqualified from referral action, but can appoint the Article 32 investigator and make a recommendation on the disposition of the case.
<p>ACCUSED’S RIGHTS: COUNSEL QUALIFICATIONS AND PRO SE REPRESENTATION</p>	<ul style="list-style-type: none"> • The accused is entitled to qualified counsel at trial. When confronted with issues regarding counsel qualifications, determine whether the defect results in prejudice to the accused. Such defects are, however, nonjurisdictional. • Regarding prior representation, determine on the record whether there was former representation, whether there was a substantial relationship between the subject matters, and whether there was a subsequent proceeding. • An accused may proceed pro se if military judge makes the accused aware on the record of the disadvantages of self-representation and secures a voluntary and knowing waiver of counsel.
<p>COURT MEMBERS</p>	<ul style="list-style-type: none"> • CA may violate the law if she uses anything other than the Article 25(d) criteria (age, experience, education, training, length of service, judicial temperament) to select members. Rank may not be a sole selection criterion. Gender or race may be a criterion if the CA is seeking to include members of these categories for purposes of fairness and cross-sectional representation. The CA’s motive is crucial. • CA cannot systematically exclude otherwise qualified personnel. See <i>US v. Bartlett</i>, 66 M.J. 426 (C.A.A.F. 2008) • Enlisted members cannot be from the accused’s company-size unit. A military judge should grant a challenge against such a member. This issue, however, is waivable.
<p>THE MILITARY JUDGE</p>	<ul style="list-style-type: none"> • A military judge must carefully consider motions for recusal. The standard is: a military judge should disqualify himself when his partiality might reasonably be questioned. To ensure that such motions are properly handled, the military judge should follow RCM 902 by making full disclosure on the record of the potentially disqualifying matter, and permit voir dire and challenge. When in doubt, the military judge should grant recusal. • The MJ must be careful not to engage in judicial advocacy. The MJ should not assist one side or the other through questioning witnesses or praising witnesses. • The MJ must be mindful not to discuss cases with other court personnel. Such contact or discussion may lead to situations where drivers, bailiffs and court reporters communicate to others their interpretation of MJ comments about findings or sentence, raising issues of partiality and unfairness. • If the MJ engages in a “Bridging the Gap” session, he should scrupulously keep the core of the deliberative process privileged.
<p>TRIAL BY JUDGE ALONE OR BY A PANEL OF 1/3 ENLISTED MEMBERS</p>	<ul style="list-style-type: none"> • Article 16 requires that the accused make a forum request in writing or orally on the record. To eliminate the possibility of error, the MJ should obtain an oral or written forum request on the record, especially in trials with multiple pretrial proceedings. Other means <i>might</i> substantially comply with Article 16 (counsel makes request in accused presence; request made after assembly). • The doctrine of substantial compliance applies to requests for trial by one-third enlisted members as well. Such requests are controlled by Article 25, UCMJ.
<p>TRIAL IN ABSENTIA PRESENCE ▶ ▶ ▶</p>	<ul style="list-style-type: none"> • Trial in absentia is only possible after an effective arraignment. <i>The MJ must ensure that the accused is given an opportunity to have the charges read, and then call upon the accused to plead.</i> Arraignment does not include entry of the plea. See RCM 904 for requirements of arraignment. • The UCMJ and RCMs require that all parties to a trial be <i>physically</i> present in one occasion to conduct valid court-martial proceedings. This ensures that the MJ is able to preside over the trial, and evaluate whether the accused genuinely desires to proceed with a particular forum or waive or pursue rights under the Constitution and UCMJ.

X. APPENDIX – PRETRIAL FLOWCHART

(Typical Court-Martial Case Processing from Offense to Referral)



¹Usually the company commander (the accused's immediate commander) prefers charges, becoming the Accuser; forwards charges (once forwarded, charges may be disposed of only by a convening authority (CA)).

²Summary Court-Martial Convening Authority

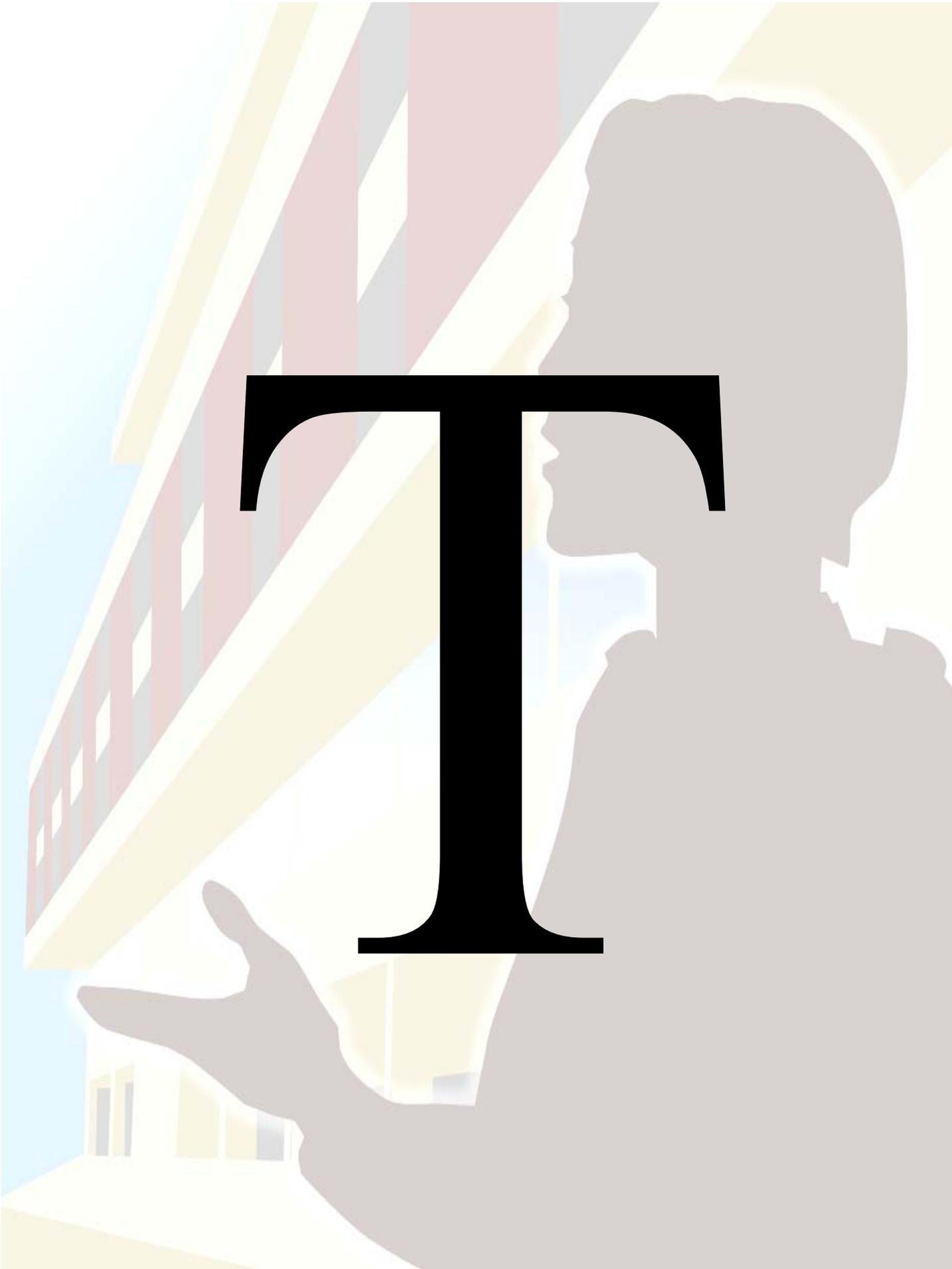
³Special Court-Martial Convening Authority

⁴General Court-Martial Convening Authority

⁵The SJA will normally "bundle" the subordinate commanders' recommendations with his Pretrial Advice.

*GCMCAs and SPCMCA's who are accusers may not act as CAs. Art 1(9), Art 22(b), Art 23(b). If statutorily disqualified (because she signed charge sheet), CA may dismiss, offer Art 15, appnt Art 32, forward with rec. for GCM (must note disqualification). If personally disqualified (e.g., personal interest in case), may not appnt Art 32, must forward with no rec. (only SCMCA may be accuser and a CA).

**Usually CA will have previously convened court, e.g., by creating a "standing panel."



DISCOVERY AND PRODUCTION

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**MAJ PHILIP STATEN
SPRING 2012**

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DISCOVERY AND PRODUCTION

I. REFERENCES

- A. UCMJ art. 46 (2008).
- B. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 701, 702, 703, 914 [hereinafter MCM, RCM].
- C. MCM, MIL. R. EVID. 301, 304, 311, 321, 404(b), 412, 413, 414, 807 [hereinafter, MRE].
- D. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 June 1992) [hereinafter, AR 27-26].
- E. RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL, UNITED STATES ARMY TRIAL JUDICIARY (15 Sept. 2009) [hereinafter, RULES OF PRACTICE].
- F. JOSHUA DRESSLER AND ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE, VOL. 2: ADJUDICATION (4th ed. 2006) [hereinafter, UNDERSTANDING CRIMINAL PROCEDURE].
- G. James W. McElhaney, *Hunt for the Winning Story*, A.B.A. J., July 2006, at 22.
- H. James W. McElhaney, *Discovery is the Trial*, A.B.A. J., Aug. 2007, at 26.
- I. Lieutenant Colonel Eric R. Carpenter, *Simplifying Discovery and Production: Using Easy Frameworks to Evaluate the 2009 Term of Cases*, Army Law., Jan. 2011, at 31.

II. INTRODUCTION

- A. How to use this outline.
 1. This outline is set up so that you can go to your respective section (government or defense) and see what you must disclose (even without the other party asking for anything); what you must disclose if the other party asks; and what discovery you can seek from the other party. Look to the other party's section on mandatory disclosures to see what that party owes you even if you do not ask for anything.
 2. This outline contains those discovery requirements that are found in the RULES OF PRACTICE that relate to the exchange of information between the parties. The RULES OF PRACTICE contain other requirements for the exchange of information between the parties and the military judge, to include the exchange of information related to motions. Chapter 5, AR 27-10 also contains requirements for information exchanges with the military judge.
 3. This outline does not cover Article 32 investigations; however, the Article 32 investigation should be an integrated part of your discovery plan.
- B. Discovery basics.
 1. The rules for discovery establish how each party will help the *other* party to develop the *other* party's case. Fundamentally, these rules govern how the parties will exchange information.
 - a) Discovery is a broad term. It means attaining that which was previously unknown. BLACK'S LAW DICTIONARY 322 (6th ed. 1991). It includes "the pre-trial devices that can be used by one party to obtain facts and

information about the case from the other party in order to assist the party's preparation for trial." *Id.*

- b) Generally, one party requests *discovery*, to which the other party provides *disclosure* of the material. Disclosure means to bring into view or to make known. *Id.* at 320. The terms "disclosure" and "allowing to inspect" are often used interchangeably. The difference is really just a question of which party has to press the button on the copy machine.
 - c) Discovery includes *disclosure* of something tangible or *notice* of something intangible, like a party's intent to do something.
2. The discovery rules in the military are very liberal and are designed to encourage an efficient system. Requiring parties to exchange information early in the process reduces pretrial motions practice; reduces surprise and gamesmanship; reduces delay at trial when delay is especially costly because the court is assembled; leads to better-informed decisions about the merits of the case; and encourages early decisions concerning withdrawal of charges, motions, pleas, and composition of court-martial. RCM 701 analysis, app. 21, at A21-33.
 - a) Showing your cards encourages realistic settlements. James W. McElhaney, *Discovery is the Trial*, A.B.A. J., Aug. 2007, at 26.

C. Production basics.

1. Production and discovery are different concepts. Discovery deals with case development. Information learned during the discovery process may or may not ultimately be introduced at trial.
2. Production is where one party (typically, the defense) requests that the other party (typically, the government) be responsible for ensuring a witness or item of evidence makes it to the courthouse on the date scheduled for a motions hearing or trial. The party seeking production intends to call this witness or introduce this evidence at the hearing or trial. If the accused is denied production, or does not want to request that the government produce a witness or some evidence, the accused can always arrange for the production of that witness or evidence at his own expense (having family members drive in on sentencing but not seek reimbursement from the government, for example).
3. In the federal system, the judiciary is responsible for processing witness and evidence requests. In the military, the command which convened the court-martial is responsible for those duties. The production rules found in RCM 703 explain what the defense must include in its requests; that the trial counsel can grant the requests; and if the trial counsel denies the request, that the military judge will rule on the production of the witness or evidence. RCM 703 analysis, app. 21, at A21-36.

III. GENERAL

- A. UCMJ art. 46 (2008) is the root source for much of the military's discovery and production rules: "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence."
 1. For discovery, this statute is embodied in RCM 701(e), Access to Witnesses and Evidence: "Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence."

- a) Generally speaking, the government cannot require that a government representative be present during defense interviews of government witnesses, although in certain circumstances a third party observer may be permissible. *United States v. Irwin*, 30 M.J. 87 (C.M.A. 1990). If a third party observer is required, that requirement would need to apply to both defense and government interviews. *Id.* at 93. *See also United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980).
 - b) If the government analyzes the evidence, then the defense can analyze it too. *United States v. Walker*, 66 M.J. 721 (N-M. Ct. Crim. App. 2008) (in a capital trial, the military judge erred when he refused to allow the defense experts to conduct independent testing of physical evidence admitted a trial).
2. For production, this statute is embodied in RCM 703(a): “The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process.”
- B. Ethical considerations. AR 27-26, para. 3.4.
1. It is unethical to unlawfully obstruct another party’s access to evidence, to make a frivolous discovery request, or fail to make a reasonably diligent effort to comply with a proper discovery request from an opposing party. Rule 3.4(a) and (d).
 2. “Subject to evidentiary privileges, the right of an opposing party, including the Government, to obtain evidence through discovery or subpoena is an important procedural right.” (Comment to rule).
 3. The ABA Standards for Criminal Justice, which apply to Army lawyers to the extent that they do not conflict with AR 27-26, contains additional ethical considerations. For example, the Standards contain guidance on how to deal with a witness that asks a party whether or not she should communicate with the other party (see Standard 3-3.1 and accompanying commentary) and whether a trial counsel should read a witness her rights for the purpose of influencing whether that witness should testify (Standard 3-3.2).
- C. Continuing Duty to Disclose. If, before or during the court-martial, a party discovers additional evidence or material previously requested or required to be produced, which is subject to discovery or inspection under this rule, that party shall promptly notify the other party or the military judge of the existence of the additional evidence or material. RCM 701(d). *See United States v. Eshalomi*, 23 M.J. 12 (C.M.A. 1986); *United States v. Jackson*, 59 M.J. 330 (C.A.A.F. 2004).
- D. Information not subject to disclosure. RCM 701(f). Disclosure is not required if the information is protected under the Military Rules of Evidence or if the information is attorney work product (notes, memoranda, or similar working papers prepared by counsel or counsel’s assistants or representatives).
1. *United States v. Vanderwier*, 25 M.J. 263, 269 (C.M.A. 1987) (“Even though liberal, discovery in the military does not ‘justify unwarranted inquiries into the files and the mental impressions of an attorney.’”)
 2. *United States v. King*, 32 M.J. 709 (A.C.M.R. 1991), *rev’d on other grounds*, 35 M.J. 337 (C.M.A. 1992). A defense expert is subject to a pretrial interview by TC, but a defense “representative” under MRE 502 is not. It was improper for TC to communicate with defense representative concerning interview with appellant.

3. *United States v. Vanderbilt*, 58 M.J. 725 (N-M. Ct. Crim. App. 2003) (holding that a civilian witness' agreement to testify pursuant to a pretrial agreement with the U.S. Attorney's Office does not waive that witness' attorney-client privilege regarding statement made to his attorney during the course of pretrial negotiations).

IV. GOVERNMENT DISCOVERY RESPONSIBILITIES AND REQUESTS

A. Mandatory disclosure or notice requirements for trial counsel.

1. Evidence that reasonably tends to negate guilt, reduces the degree of guilt, or reduces punishment (disclose as soon as practicable).
 - a) Sources.
 - (1) RCM 701(a)(6). The trial counsel shall disclose evidence which reasonably tends to:
 - (a) Negate guilt;
 - (b) Reduce the degree of guilt; or
 - (c) Reduce the punishment.
 - (2) *Brady v. Maryland*, 373 U.S. 83 (1963). In a death penalty case, the government did not disclose a statement where the codefendant admitted to being the actual killer. The Court stated that the government must disclose evidence that is favorable to the accused and material to either guilt or punishment.
 - (3) AR 27-26, para. 3.8(d). Trial counsel will disclose all evidence that tends to:
 - (a) Negate guilt;
 - (b) Mitigate the offense; or
 - (c) Mitigate the sentence.
 - (d) *See United States v. Kinzer*, 39 M.J. 559, 562 (A.C.M.R. 1994); *United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002).
 - b) Favorable.
 - (1) Impeachment information. *Banks v. Dretke*, 124 S. Ct. 1256 (2004); *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667 (1985); *Giglio v. United States*, 405 U.S. 150 (1972).
 - (2) This impeachment information may include:
 - (a) Any promise of immunity or leniency offered to a witness in exchange for testimony. *See, e.g., Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959).
 - (b) Specific instances of conduct of a witness for the purpose of attacking the witness's credibility or character for truthfulness. *See, e.g., United States v. Watson*, 31 M.J. 49 (C.M.A. 1990) (finding evidence that witness had monetary interest in outcome of case could have been

favorable); *United States v. Mahoney*, 58 M.J. 346 (C.A.A.F. 2003) (holding that trial counsel's failure to disclose a letter impeaching government's expert witness was reversible error).

- (c) Evidence in the form of opinion or reputation as to a witness's character for truthfulness.
 - (d) Prior inconsistent statements. *See, e.g., United States v. Romano*, 46 M.J. 269 (C.A.A.F. 1997); *Graves v. Cockrell*, 351 F. 3d 156 (5th Cir. 2003). *See also* MRE 613(a)
 - (e) Information to suggest that a witness is biased. *See, e.g., Bagley*, 473 U.S. at 667; *Banks*, 124 S. Ct. 1256 (2004) (finding that the State's failure to disclose that key state witness in capital sentencing proceeding was a paid government informant and played an important role in setting up Banks' arrest was error).
 - (f) *United States v. Romano*, 46 M.J. 269 (C.A.A.F. 1997). The trial counsel had a duty to disclose statements by witnesses at the Art. 32 investigation of co-accuseds, where the prior statements were inconsistent with the government's main witness' testimony at trial.
- c) Scope of the government's duty.
- (1) The prosecutor does *not* have to have actual knowledge of the evidence to commit a *Brady* violation. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Mahoney*, 58 M.J. 346 (C.A.A.F. 2003); *Bailey v. Rae*, 339 F.3d 1107 (9th Cir. 2003).
 - (2) The government may be required to look beyond its files for exculpatory evidence. *United States v. Williams*, 50 M.J. 436 (C.A.A.F. 1999). The scope of the government's duty to search with beyond the prosecutor's own files generally is limited to:
 - (a) The files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses. *Id.* at 441.
 - (i) *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989) (the "prosecutor will be deemed to have knowledge of and access to anything in the possession, custody, or control of any federal agency participating in the same investigation of the defendant.")
 - (ii) *United States v. Simmons*, 38 M.J. 376 (C.M.A. 1993) (holding that trial counsel must exercise due diligence in discovering the results of exams and tests which are in possession of CID).
 - (iii) *United States v. Sebring*, 44 M.J. 805 (N-M. Ct. Crim. App. 1996) (holding that trial counsel had a duty to discover quality control investigation

into problems at Navy drug lab that tested the accused's urine sample).

- (iv) *Kyles v. Whitley*, 514 U.S. at 437 (“the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police”).
- (b) Investigative files in a related case maintained by an entity closely aligned with the prosecution. *United States v. Williams*, 50 M.J. at 441.
 - (i) *United States v. Hankins*, 872 F. Supp. 170, 173 (D.N.J. 1995) (“when the government is pursuing both a civil and criminal prosecution against a defendant stemming from the same underlying activity, the government must search both the civil and criminal files in search of exculpatory material.”)
- (c) Investigative files of tangential or unrelated investigations if specifically requested by the defense. *Williams*, 50 M.J. at 441; *United States v. Veksler*, 62 F.3d 544 (3d Cir. 1995) (the request provides constructive notice to the prosecution about the existence of the files). (These requests should also be analyzed under RCM 701(a)(2).)
 - (i) *United States v. Green*, 37 M.J. 88, 89 (C.M.A. 1993). The defense requested “[a]ny record of prior conviction, and/or nonjudicial punishment of” any government witness. The trial counsel responded without comment. The CID agent had an Art. 15 for fraternization, false claim, and larceny. Error was harmless beyond a reasonable doubt because the CID agent was only used to authenticate physical evidence.
- (3) The *Brady* rule is designed to ensure the defendant learns of exculpatory evidence that is known only to the government. If the defendant knows or should know the essential facts permitting him to take advantage of the exculpatory evidence (like the witness’ identity), then the government does not have a duty to disclose the information. *United States v. Grossman*, 843 F.2d 78, 85 (2d Cir. 1988) (no *Brady* violation when the defense knew the witness’ name; that he might have testified before a grand jury; and that the testimony might have been favorable).
- d) Understanding and applying RCM 701(a)(6) and *Brady* at trial.
 - (1) Applying RCM 701(a)(6) and *Brady* at trial is not that difficult. Typically, these issues arise when the government makes a late disclosure or the defense discovers this evidence on its own late in the process. Everyone knows about the evidence (they are, after all, litigating about it). The real problem is that the defense needs more time to prepare for trial based on this newly

discovered evidence. The military judge just needs to fashion a just action in response under RCM 701(g), which will probably be to grant a continuance.

- (a) Whether disclosure is sufficiently complete or timely to satisfy *Brady* can only be evaluated in terms of “the sufficiency, under the circumstances, of the defense’s opportunity to use the evidence when disclosure is made.” *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001). “The opportunity for use under *Brady* is the opportunity for a responsible lawyer to use the information with some degree of calculation and forethought.” *Id.* at 103.
 - (2) The key point is that, in the military, under RCM 701(a)(6) (and for Army attorneys, under AR 27-26, para. 3.8(d)), the trial counsel *must always disclose favorable matter*, whether or not that matter may later be found to be material or not.
 - (3) The RCM 701(a)(6) language uses the phrase “reasonably tends” rather than the *Brady* term “material.” Under *Brady*, if the government fails to disclose favorable information, that non-disclosure violates due process only if the matter was material. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Cone v. Bell*, 129 S.Ct. 1769 (2009). If a local jurisdiction has not implemented rules like RCM 701(a)(6) or AR 27-26, para. 3.8(d), then the prosecutor might consider whether favorable evidence is material before disclosing. That is not the case in our practice.
 - (4) The phrase “reasonably tends” can be readily applied at during trial proceedings, where the parties are arguing *prospectively*. The term “material” is essentially a test for prejudice that is applied *retrospectively*, on appeal, where the defense has only now learned of the evidence. The issue on appeal is whether the first trial should be set aside based on this discovery violation. As such, much of the case law related to the term “material” may not translate well to litigation at trial. At trial, use “reasonably tends.”
 - (5) The case law that has developed around the term “favorable” does have application at trial litigation, but again, if the issue is being litigated at trial, then the defense knows about the evidence and the real issue is whether the defense has enough time to prepare based on that new knowledge. And, if the defense has made a discovery request under RCM 701(a)(2), the defense does not have to make a showing that the evidence is “favorable.” Under that rule, the information only needs to be “material.”
- e) Understanding and applying RCM 701(a)(6) and *Brady* on appeal.
- (1) Applying RCM 701(a)(6) and *Brady* on appeal is more complex. The issue now is whether the matter was favorable; whether the government failed to properly disclose; and whether the defendant suffered prejudice as a result (the “material” inquiry). *See generally, Strickler v. Greene*, 527 U.S. 263 (1999).
 - (2) Favorable. Discussed above.

- (3) Scope of government’s duty to disclose. Discussed above.
- (4) If there is no specific request by the defense, use *material*.
 - (a) A failure to disclose is material if there is a reasonably probability that there would have been a different result at trial had the evidence been disclosed. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). The Supreme Court in *Banks v. Dretke*, 540 U.S. 668 (2004), reiterated that the touchstone of materiality is the *Kyles* case.
 - (b) “The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Kyles*, 514 U.S. at 434.
 - (c) In cases of knowing use of perjured testimony by the prosecutor, the failure to disclose favorable evidence is material unless the failure to disclose is harmless beyond a reasonable doubt. *United States v. Bagley*, 473 U.S. 667 (1985).
- (5) If there is a specific defense request under RCM 701, then use harmless beyond a reasonable doubt.
 - (a) Where the defense makes a specific discovery request under RCM 701 and the government fails to disclose that evidence, the standard of review is *harmless beyond a reasonable doubt*. *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004). This heightened standard is often incorrectly confused with *Brady* material analysis (reasonable probability of different result). See *United States v. Figueroa* 55 M.J. 525 (A.F. Ct. Crim. App. 2001).
 - (b) The source of the “harmless beyond a reasonable doubt” standard is Article 46 and RCM 701, not *Brady*. *United States v. Eshalomi*, 23 M.J. 12 (C.M.A. 1986); *United States v. Hart*, 29 M.J. 407 (C.M.A. 1990); *Roberts*, 59 M.J. 323.
- f) Comparison to RCM 701(a)(2). (For more discussion of RCM 701(a)(2), see section B.1 below).
 - (1) If the defense makes a specific discovery request under RCM 701(a)(2) (discussed below), the government must provide the information if, among other things, it is *material to the preparation of the defense*. Unlike RCM 701(a)(6) and *Brady*, there is no requirement that the information be *favorable*. It can be unfavorable and still be material to the preparation of the defense.

- (2) Unlike RCM 701(a)(6) and *Brady*, the government only has to disclose RCM 701(a)(2) information if requested by the defense.
 - (3) Where the defense makes a specific discovery request under RCM 701 and the government fails to disclose that evidence, or where there is prosecutorial misconduct, the standard of review is *harmless beyond a reasonable doubt*. *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004). This heightened standard is often incorrectly confused with *Brady* material analysis (reasonable probability of different result). *See United States v. Figueroa* 55 M.J. 525 (A.F. Ct. Crim. App. 2001).
 - (4) The scope of the government’s duty to locate the evidence is different under RCM 701(a)(2) than under RCM 701(a)(6) and *Brady*. Under RCM 701(a)(2), the trial counsel must search that which is within the “possession, custody, or control of military authorities,” which includes non law-enforcement authorities. Under RCM 701(a)(6) and *Brady*, the trial counsel must search her files, files of other law enforcement agencies that have been involved in the investigation, files of related cases maintained by an entity closely aligned with the prosecution.
- g) Miscellaneous.
- (1) The duty to disclose favorable evidence exists even without a request by the accused. *United States v. Agurs*, 427 U.S. 97, 107 (1976).
 - (2) Bad faith on the part of the government not required. *Brady v. Maryland*, 373 U.S. 83 (1963).
 - (3) The Constitution does not require the pre-guilty plea disclosure of impeachment information. The Court noted that disclosure of impeachment information relates to the fairness of a *trial*, as opposed to the voluntariness of a plea. Impeachment information, the Court declared, is particularly difficult to characterize “as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant.” *United States v. Ruiz*, 536 U.S. 622 (2002).
2. Charges (as soon as practicable). RCM 308(a).
- a) Within 24 hours to both accused and defense counsel. RULES OF PRACTICE, at 1.
3. Allied papers (as soon as practicable after service of charges). 701(a)(1):
- a) Any papers that accompanied the charges when referred;
 - b) The convening orders.
 - c) Also, ERB/ORB. RULES OF PRACTICE, at 1.
4. Sworn or signed statements (as soon as practicable after service of charges). RCM 701(a)(1):
- a) Any sworn or signed statement relating to an offense charged which is in the possession of the trial counsel.

5. Report of Article 32 investigation (promptly). RCM 405(j)(3).
6. Merits witnesses (before the beginning of the trial on the merits). RCM 701(a)(3).
 - a) The trial counsel shall notify the defense of the names and addresses of the witnesses the trial counsel intends to call:
 - (1) In the prosecution case-in-chief; and
 - (2) To rebut a defense of alibi, innocent ingestion, or lack of mental responsibility, when the trial counsel has received timely notice of such a defense.
 - b) The RULES OF PRACTICE, at 21, requires notice ten days prior to trial.
7. Prior convictions of the accused (before arraignment). RCM 701(a)(4).
 - a) The trial counsel shall notify the defense of any records of prior civilian or court-martial convictions of the accused of which the trial counsel is aware and which the trial counsel may offer on the merits for any purpose, including impeachment.
8. "Section III" disclosures under the Military Rules of Evidence.
 - a) Grants of immunity or leniency (prior to arraignment or within a reasonable time before the witness testifies). MRE 301. The grant must be reduced to writing. *See also Giglio v. United States*, 405 U.S. 150 (1972).
 - b) Accused's statements (prior to arraignment). MRE 304(d)(1). The prosecution shall disclose all statements of the accused, oral or written, that are relevant to the case *irrespective of intent to use at trial*. "All statements:"
 - (1) Includes remarks made during informal conversations. *United States v. Callara*, 21 M.J. 259, 262 (C.M.A. 1986).
 - (2) Is not limited to those made to military superiors or law enforcement. *United States v. Trimper*, 28 M.J. 460, 468 (C.M.A. 1989).
 - (3) Provide timely notice of an intent to offer a statement that was not disclosed prior to arraignment. MRE 304(d)(2).
 - c) Evidence seized from the accused or property owned by the accused (prior to arraignment). MRE 311(d)(1). The prosecution shall disclose all evidence seized from the accused or property owned by the accused, that it *intends to offer* into evidence against the accused at trial.
 - (1) Provide timely notice of an intent to offer this evidence that was not disclosed prior to arraignment. MRE 311(d)(2)(B).
 - d) Identifications (prior to arraignment). MRE 321(c)(1). The prosecution shall disclose all evidence of prior identifications of the accused that it *intends to offer* into evidence against the accused at trial.
 - (1) Provide timely notice of an intent to offer lineup evidence that was not disclosed prior to arraignment. MRE 321(c)(2)(B).
 - e) The RULES OF PRACTICE, at 3, requires disclosure not later than two duty days after the trial date is set if arraignment is the day of trial.

9. Similar sex assault or molestation crimes (5 days prior to trial). MRE 413 and 414.
 - a) If the government intends to offer evidence of similar crimes (sexual assault or child molestation), the trial counsel must notify the defense of its intent and disclose the evidence.
 10. Testing may consume only available samples of evidence. *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986). Inform the accused when testing may consume the only available samples and permit the defense an opportunity to have a representative present.
 11. Residual hearsay (sufficiently in advance of trial to provide fair opportunity to respond). MRE 807.
 - a) The proponent of residual hearsay must give the opponent notice of the intent to offer out-of-court statements as residual hearsay. *See United States v. Holt*, 58 M.J. 227 (C.A.A.F. 2003) (holding that Air Force Court of Criminal Appeals abused its discretion when it affirmed the introduction of residual hearsay statement when there was no indication in the record as to whether the required notice was given and by misapplying the foundational requirement of necessity).
 12. Aggravating circumstances in capital cases (before arraignment). RCM 1004(b)(1)(B).
 13. Judicial notice of a foreign law (reasonable time). MRE 201A(b).
 14. Original writing in possession of other party. MRE 1004(3).
 15. Evidence of a conviction more than 10 years old (sufficient advance notice as to provide a fair opportunity to contest the use). MRE 609(b).
 16. Notice of intent to employ an expert at government expense (in advance of employment). RCM 703(d).
- B. Disclosures and notices made upon defense request.
1. Documents and tangible objects (after service of charges). RCM 701(a)(2)(A).
 - a) Books, papers, documents, photographs, tangible objects, buildings, or places, AND
 - b) In the possession, custody, or control of military authorities, AND
 - c) Either *intended for use* by the trial counsel as evidence in the case-in-chief OR *material* to the preparation of the defense;
 - (1) Unlike RCM 701(a)(6) and Brady, this matter does not have to be favorable – just material to the preparation of the defense. Unfavorable matter can be material to the preparation of the defense. *See United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002).
 - (a) The definition of “material” in Black’s Law Dictionary includes matter that is of “such a nature that knowledge of the item would affect a person’s decision-making process.” BLACK’S LAW DICTIONARY 1066 (9th ed. 2009).

- (b) The decisions might how to plead (*see generally United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002); *United States v. Trigueros*, 69 M.J. 604, 611 (A. Ct. Crim. App. 2010)) or to pursue lines of investigation, defenses, or trial strategies (*United States v. Eshalomi*, 22 M.J. 12, 27 (C.M.A. 1986); *United States v. Webb*, 66 M.J. 89 (C.A.A.F. 2008)).
 - (c) Evidence might be material if the defense could use it to persuade the convening authority not to refer the case. *United States v. Eshalomi*, 22 M.J. 12, 28 (C.M.A. 1986)).
 - (d) There is no requirement that “material” matters be known to be admissible at trial or that the government intend to introduce it. See *United States v. Luke*, 69 M.J. 309 (C.A.A.F. 2011).
- (2) Where the defense makes a *specific* discovery request and the government fails to disclose that evidence, or where there is prosecutorial misconduct, the standard of review is harmless beyond a reasonable doubt. *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004).
 - (a) Some of the military judge’s decisions are reviewed under the abuse of discretion standard. A military judge abuses her discretion when her factual findings are clearly erroneous or she applies the wrong law. Next, the appellate courts review the decision that the matter is “material to the preparation of the defense” under a *de novo* standard. If the appellate court finds that the material should have been disclosed, then the appellate courts apply “harmless beyond a reasonable doubt” to test for prejudice. *Roberts*, 59 M.J. at 326.
 - (3) Courts often incorrectly confuse this analysis with *Brady* analysis. See *United States v. Figueroa* 55 M.J. 525 (A.F. Ct. Crim. App. 2001). The obligations under RCM 701(a)(2) are in addition to the obligations found under *Brady*.
 - (4) Trial counsel’s duty to search. The government must make good faith efforts to comply with the requests. *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999). “The government cannot intentionally remain ignorant and then claim it exercised due diligence.” *United States v. Trigueros*, 69 M.J. 604, 611 (A. Ct. Crim. App. 2010).
 - (5) Trial counsel’s rebuttal evidence on the merits.
 - (a) Government must disclose evidence that is “material to preparation of defense” under R.C.M. 701(a)(2) regardless of “whether the government intends to offer the evidence in its case-in-chief, in rebuttal, or not at all.”

United States v. Adens, 56 M.J. 724 (Army Ct. Crim. App. 2002).

- (b) In *Adens*, the government knew the defense theory of the case and knew of evidence that was *unfavorable* to that defense; did not present that evidence during a direct examination but instead waited for the defense to cross-examine a government witness based on the defense theory; then the government introduced the evidence in re-direct examination of that witness. While stating that RCM 701(a)(2) includes rebuttal evidence, the court noted that technically this evidence was introduced in the government case-in-chief. Because this failure to disclose was pursuant to a specific request, court reviewed under the harmless beyond a reasonable doubt standard, found material prejudice existed, and reversed.
- (c) “[A] trial counsel who holds back material evidence for possible use in rebuttal to ambush the defense runs a risk . . . In the exercise of that control, a military judge is entitled to exclude prosecution evidence in rebuttal, if the judge concludes that it should have been offered in the prosecution case-in-chief . . .” *United States v. Murphy*, 33 M.J. 323 (C.M.A. 1991).

2. Reports (after service of charges). RCM 701(a)(2)(B).

- a) Results or reports of physical or mental examinations, and of scientific tests or experiments, AND
- b) In the possession, custody, or control of military authorities, AND
- c) Either *intended for use* by the trial counsel as evidence in the case-in-chief OR *material* to the preparation of the defense;
- d) *United States v. Jackson*, 59 M.J. 330 (C.A.A.F. 2004). Defense counsel specifically requested “any reports, memos for record or other documentation relating to Quality Control and/or other documentation relating to Quality Control and/or inspections pertaining to quality control at the Brooks Lab for the three quarters prior to [the accused]’s sample being tested, and the available quarters since [the accused]’s sample was tested.” The lab failed to identify a blind quality control sample by reporting a negative sample as a positive less than four months after the accused’s sample was tested and less than three months after the defense’s request. The trial counsel failed to discover and disclose the report to the defense. That failure violated the accused’s rights under RCM 701(a)(2)(B). The CAAF found prejudice because had the information been disclosed, the defense could have used the information to demonstrate the existence of quality control problems.

3. Sentencing information (upon request). RCM 701(a)(5).

- a) Written material that will be presented by the prosecution during the presentencing proceedings.
 - (1) Trial counsel are not required to written matters intended to be offered in *rebuttal* of an accused’s presentencing case where the matter *could not have been offered* during government’s

presentencing case. *United States v. Clark*, 37 M.J. 1098 (N.M.C.M.R. 1993).

- b) Names and addresses of witnesses the trial counsel intends to call during the presentencing proceedings.
 - (1) The RULES OF PRACTICE, at 21, requires notice ten days prior to trial and do not require a defense request for this information.
- 4. Notice of uncharged misconduct (reasonable notice in advance of trial). MRE 404(b).
 - a) Upon defense request, the government must provide pretrial notice of the general nature of evidence of other crimes, wrongs, or acts which it intends to introduce at trial.
- 5. Statements by a witness that has testified (after testimony). RCM 914.
 - a) A witness, not the accused, testifies. Upon a motion by the party who did not call the witness, the judge shall order disclosure of any “statement” by the witness that relates to the subject of his testimony.
 - b) RCM 914 is a counterpart to the Jencks Act, 18 U.S.C. § 3500. Much of what the government would have to disclose to the defense under RCM 914 will also fall under other discovery rules like RCM 701(a)(1, 2, 6) and *Brady*.
 - (1) Under RCM 701(a)(1), for example, the government must disclose all sworn or signed statements relating to a charged offense.
 - c) A statement is a “written statement by the witness that is signed, adopted or approved by the witness.”
 - (1) Includes a substantially verbatim account of an oral statement made by the witness that is recorded contemporaneously with the oral statement. *See United States v. Holmes*, 25 M.J. 674 (A.F.C.M.R. 1987).
 - (2) CID Agent investigator notes. If the agent testifies or if a witness who has reviewed and approved the agent’s notes testifies, the notes must be produced under this rule. *See Goldberg v. United States*, 425 U.S. 94 (1976) and *United States v. Smaldone*, 484 F. 2d 311 (10th Cir. 1973). If the agent does not testify, then the defense will have to look to another rule to seek discovery.
 - (3) Article 32 testimony.
 - (a) *United States v. Lewis*, 38 M.J. 501 (A.C.M.R. 1993). CID agent testifies at trial. Defense motion to strike because tape recordings of his Article 32 testimony erased by legal clerk. The trial judge correctly denied the motion when the accused failed to show that the government acted in bad faith causing the destruction or loss of the Article 32 tapes and the agent’s testimony was internally consistent and corroborated by other witnesses.
 - (b) *United States v. Marsh*, 21 M.J. 445 (C.M.A. 1986). The Jencks Act applies to courts-martial and to statements made by witnesses at an Article 32 Investigation.

Negligent loss of Article 32 tapes, without any intent to suppress, does not require the court to strike the testimony of the witness.

(4) Administrative board hearings. *United States v. Staley*, 36 M.J. 896 (A.F.C.M.R. 1993). Military judge found that statements made by witnesses before an administrative discharge board were within the general mandate of RCM 914. Destruction of the tape recording of the testimony was in good faith; thus, exclusion of the witnesses' testimony was not required.

(5) Confidential informant's notes.

(a) *United States v. Guthrie*, 25 M.J. 808 (A.C.M.R. 1988). No Jencks Act violation when a handwritten statement was destroyed after a typed version was created and adopted by the witness.

(b) *United States v. Douglas*, 32 M.J. 694 (A.F.C.M.R. 1991). An informant did not keep his notes about an investigation. Lesson to be learned: "Whenever military law enforcement agents request that an informant prepare written notes regarding an on-going investigation, those notes should be obtained from the informant and included in the investigative case file." *Id.* at 698 n.2.

d) Remedy for non-disclosure. "The military judge shall order that the testimony of the witness be disregarded by the trier of fact and that the trial proceed, or, if it is the trial counsel who elects not to comply, shall declare a mistrial if required in the interest of justice." RCM 914(e).

6. Writings used to refresh memory (while testifying, or before testifying if the judge determines it is necessary in the interest of justice). MRE 612.

a) Remedy for non-disclosure. "The military judge shall make any order justice requires, except that when the prosecution elects not to comply, the order shall be one striking the testimony . . . or a mistrial."

7. Inconsistent prior statements (on request). MRE 613(a).

C. Government requests.

1. Names and addresses of sentencing witnesses. RCM 701(b)(1)(B)(i). Due upon request.

2. Written sentencing materials. RCM 701(b)(1)(B)(ii). Due upon request.

3. Reciprocal discovery. If the defense requests discovery under RCM 701(a)(2), upon compliance with such request by the government, the defense, on request of the trial counsel, shall permit the trial counsel to inspect:

a) Papers, documents, photographs, objects within the possession, custody and control of the defense and which the defense *intends to introduce as evidence* in the defense case-in-chief. RCM 701(b)(3). Due upon government request and government compliance with defense request.

b) Reports of physical or mental examinations and scientific tests or experiments within the possession, custody and control of the defense and which the defense *intends to introduce as evidence* in the defense case-in-chief or which were prepared by a defense witness who will be called at

trial. RCM 701(b)(4). Due upon government request and government compliance with defense request.

4. Statements by a witness that testifies (after testifying, upon motion). RCM 914.
 - a) A witness, not the accused, testifies. Upon a motion by the party who did not call the witness, the judge shall order disclosure of any “statement” by the witness that relates to the subject of his testimony.
 - b) RCM 914 is a counterpart to the Jencks Act, 18 U.S.C. § 3500.
 - c) For a complete discussion of RCM 914 and the Jencks Act, see paragraph IV.b.5 above.
 5. Writings used to refresh memory (while testifying, or before testifying if the judge determines it is necessary in the interest of justice). MRE 612.
 - a) Keep track of what your witness looks at in preparation for testifying.
 6. Inconsistent prior statements (on request). MRE 613(a).
 7. Full contents of the sanity board (upon motion). MRE 302(c).
 - a) If the defense offers expert testimony concerning the mental condition of the accused, the military judge shall order the release of the full contents (except for statements made by the accused).
 - b) If the defense also offers the statements made by the accused at the sanity board, the military judge may also order the disclosure of those statements.
- D. Practice tip. Note that if the trial counsel does not ask for certain information, the defense is under no obligation to provide it – so ask for it.

V. DEFENSE DISCOVERY RESPONSIBILITIES AND REQUESTS

- A. Mandatory disclosure or notice requirements for defense counsel.
1. Merits witnesses (before beginning of trial on the merits). RCM 701(b)(1)(A).
 - a) The defense shall notify the trial counsel of the names and addresses of all witnesses, other than the accused, whom the defense intends to call during the defense case-in-chief.
 - b) The RULES OF PRACTICE, at 21, requires notice ten days prior to trial.
 2. Merits witnesses’ sworn or signed statements (before beginning of trial on the merits). RCM 701(b)(1)(A).
 - a) The defense shall provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.
 - b) The RULES OF PRACTICE, at 21, requires notice ten days prior to trial.
 3. Notice of certain defenses (before the beginning of trial on the merits). RCM 701(b)(2). The defense shall give notice before the beginning of trial on the merits of its intent to offer the defense of:
 - a) Alibi, to include the place or places at which the defense claims the accused to have been at the time of the alleged offense.
 - b) Innocent ingestion, to include the place or places where, and the circumstances under which the defense claims the accused innocently ingested the substances in question.

- (1) *United States v. Lewis*, 51 M.J. 376 (C.A.A.F. 1999). The trial judge erroneously prevented the accused from presenting an innocent ingestion defense because the defense could not give notice of places where the innocent ingestion occurred and witnesses to be relied upon. The judge prevented the accused from raising this defense herself by her testimony alone. CAAF reversed holding that RCM 701(b)(2) does not require corroborative witnesses or direct evidence as a condition for raising innocent ingestion.
 - c) Lack of mental responsibility.
 - d) Notice shall include places, circumstances, and witnesses to be relied upon for these defenses.
 - e) The RULES OF PRACTICE, at 4, requires notice at least ten days before trial.
 4. Notice of intent to introduce expert testimony as to the accused's mental condition (before beginning of trial on the merits). RCM 701(b)(2).
 - a) Note the relationship to MRE 302(c). If the defense does then offer this testimony, the defense may have to disclose the full contents of the sanity board report.
 5. Evidence of the victim's sexual behavior or predisposition (5 days prior to entry of plea). MRE 412.
 6. Residual hearsay (sufficiently in advance of trial to provide a fair opportunity to respond). MRE 807.
 - a) *See United States v. Holt*, 58 M.J. 227 (C.A.A.F. 2003) (holding that Air Force Court of Criminal Appeals abused its discretion when it affirmed the introduction of residual hearsay statement when there was no indication in the record as to whether the required notice was given and by misapplying the foundational requirement of necessity).
 7. Notice of intent to disclose classified or government information. MRE 505(h)(1), 506(h).
 8. Judicial notice of a foreign law (reasonable time). MRE 201A(b).
 9. Testimony of accused for limited purpose regarding a confession, MRE 304(f); seizures, MRE 311(f); or lineups, MRE 321(c)(2)(B).
 10. Original writing in possession of other party. MRE 1004(3).
 11. Evidence of a conviction more than 10 years old (sufficient advance notice as to provide a fair opportunity to contest the use). MRE 609(b).
 12. Notice of plea and forum. Unless the judge sets a different deadline, defense counsel will notify the trial counsel and judge, in writing, at least ten duty days before the date of trial (whichever is earlier), of the forum and pleas. RULES FOR PRACTICE, at 3.
- B. Disclosures or notices made upon government request (not based on reciprocity).
1. Sentencing witnesses (no time given). RCM 701(b)(1)(B)(i). Provide the trial counsel with the names and addresses of any witness whom the defense intends to call at the presentencing proceeding.

2. Written presenting material (no time given). RCM 701(b)(1)(B)(ii). Permit the trial counsel to inspect any written material that will be presented by the defense at the presentencing proceeding.
 3. Statements by a witness that testifies (after testifying, upon motion). RCM 914.
 - a) A witness, not the accused, testifies. Upon a motion by the party who did not call the witness, the judge shall order disclosure of any “statement” by the witness that relates to the subject of his testimony.
 - b) RCM 914 is a counterpart to the Jencks Act, 18 U.S.C. § 3500. Some of what the defense would have disclose is also covered by RCM 701(b)(1)(A): merits witnesses’ sworn or signed statements.
 - c) For a complete discussion of RCM 914 and the Jencks Act, see paragraph IV.b.5 above.
 4. Writings used to refresh recollection (while testifying, or before testifying if the judge determines it is necessary in the interest of justice). MRE 612.
 - a) Keep track of what your witness looks at in preparation for testifying.
 5. Prior inconsistent statements by a witness (on request). MRE 613(a).
 6. Full contents of the sanity board report (upon the granting by the military judge of a motion to compel disclosure). MRE 302(c).
 - a) If the defense offers expert testimony concerning the mental condition of the accused, the military judge shall order the release of the full contents (except for statements made by the accused).
 - b) If the defense also offers the statements made by the accused at the sanity board, the military judge may also order the disclosure of those statements.
- C. Disclosures made upon government requests (based on reciprocity). If the defense requests discovery under RCM 701(a)(2), upon compliance with such request by the government, the defense, on request of the trial counsel, shall permit the trial counsel to inspect:
1. Papers, documents, photographs, objects within the possession, custody and control of the defense and which the defense *intends to introduce as evidence* in the defense case-in-chief. RCM 701(b)(3).
 - a) Defense not required to disclose surrebuttal evidence. *United States v. Stewart*, 29 M.J. 621 (C.G.C.M.R. 1989).
 2. Reports of physical or mental examinations and scientific tests or experiments within the possession, custody and control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief or which were prepared by a defense witness who will be called at trial. RCM 701(b)(4).
- D. Defense requests.
1. Documents and tangible objects. RCM 701(a)(2)(A).
 - a) Where the defense makes a specific discovery request and the government fails to disclose that evidence, or where there is prosecutorial misconduct, the standard of review is harmless beyond a reasonable doubt.
 - b) “Where an appellant demonstrates that the Government failed to disclose discoverable evidence in response to a specific request or as a result of

prosecutorial misconduct, the appellant will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt.” *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004). *See also United States v. Green*, 37 M.J. 88, 90 (C.M.A. 1993) (Wiss, J., concurring); *United States v. Stone*, 37 M.J. 558 (A.C.M.R. 1993) (finding nondisclosure harmless beyond a reasonable doubt).

- c) For more, see the RCM 701(a)(2) discussion in section IV above.
 2. Reports. RCM 701(a)(2)(B)
 3. Sentencing materials and witnesses. RCM 701(a)(5):
 4. Notice of uncharged misconduct (reasonable notice in advance of trial). MRE 404(b).
 5. Statements by a witness that has testified (after testimony). RCM 914.
 - a) A witness, not the accused, testifies. Upon a motion by the party who did not call the witness, the judge shall order disclosure of any “statement” by the witness that relates to the subject of his testimony.
 - b) RCM 914 is a counterpart to the Jencks Act, 18 U.S.C. § 3500.
 - c) For more, see the RCM 914 in section IV above.
 6. Writings used to refresh memory (while testifying, or before testifying if the judge determines it is necessary in the interest of justice). MRE 612.
- E. Practice tips.
1. Note that if the defense counsel does not ask for certain information, the government is under no obligation to provide it unless another rule or due process separately requires disclosure – so ask for it.
 2. If defense counsel can identify what they are looking for and make a specific discovery request and the government does not disclose that evidence, then the accused will benefit from a higher standard of review on appeal.
 3. Defense counsel should generally make an RCM 701(a)(2) request. Note that after making that request, if the government makes a reciprocal request, the defense only has to disclose that evidence that it *intends to introduce* in its case-in-chief. Defense counsel do not usually introduce damaging evidence during its case-in-chief. They only introduce positive information – and this positive information may further negotiations. If the circumstances of your case weight against making an RCM 701(a)(2) request, remember to request the other items in this section.

VI. REGULATION OF DISCOVERY

- A. General. The basic rules for discovery, to include the basic remedies available for noncompliance, come from RCM 701(g). However, many discovery rules contain their own remedies for noncompliance. *See* RCMs 308(c), 405(j)(4), 914(e), 1004(b)(1)(A); MREs 301(c)(2), 302(d), 304(d)(2)(B), 311(d)(2)(B), 321(c)(2)(B), 505, 506, 507, 612.
- B. Pretrial orders.
 1. The military judge may issue pretrial orders that regulate when the parties will provide notices and make disclosures to the other party.

- a) “The military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just.” RCM 701(g)(1)
 - b) The judiciary “may make rules of court not inconsistent with these rules for the conduct of court-martial proceedings.” RCM 108.
- C. Protective and modifying orders.
- 1. A party may seek relief from a discovery obligation by providing the military judge with a sufficient showing that relief is warranted. RCM 701(g)(2). *See generally* RCM 906(b)(7) (motion for appropriate relief – discovery).
 - 2. The military judge may order that discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. RCM 701(g)(2).
 - 3. *In camera* review.
 - a) Rules.
 - (1) Upon motion, the military judge may permit a party to make such showing, in whole or in part, in writing to be inspected only by the judge. RCM 701(g)(2).
 - (2) If the military judge withholds some or all of the reviewed material, the entire text of the material must be sealed and attached to the record of trial as an appellate exhibit RCM 701(g)(2).
 - (a) Failure of military judge to seal and attach military records of government's key witness, after denying defense request for their disclosure for impeachment purposes, made proper appellate review impossible. *United States v. Abrams*, 50 M.J. 361 (C.A.A.F. 1999).
 - b) The framework for deciding (1) whether to conduct an *in camera* review in first place, and (2) whether to then grant the request to prevent disclosure of certain information is not entirely clear. The cases on this issue tend to move between RCM 701 and 703 without much precision even though there are significant differences between the two rules (see subparagraph d below). A suggested framework for *in camera* reviews of discovery requests under RCM 701(a)(2) (*see generally United States v. Abrams*, 50 M.J. 361 (C.A.A.F. 1999); *United States v. Trigueros*, 69 M.J. 604 (A. Ct. Crim. App. Mar. 29, 2010)) is:
 - (1) Does the party allege with a sufficient showing that some of what is being requested is not subject to disclosure under RCM 701(f) (privileged) or is otherwise confidential? If yes, then the court should grant *in camera* review.
 - (2) Is the matter protected from disclosure under the Military Rules of Evidence (privileges)? If yes, then do not disclose but attach to the record.
 - (a) MRE 506. *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998).
 - (3) Is the matter otherwise confidential? Potentially confidential matters include:

- (a) Medical records, mental health records, therapist notes. *United States v. Cano*, 61 M.J. 74 (C.A.A.F. 2005); *United States v. Abrams*, 50 M.J. 361 (C.A.A.F. 1999); *United States v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998); *United States v. Kelly*, 52 M.J. 773 (Army Ct. Crim. App. 1999); *United States v. Trigueros*, 69 M.J. 604 (Army Ct. Crim. App. Mar. 29, 2010).
 - (b) Personnel records. *United States v. Kelly*, 52 M.J. 773 (Army Ct. Crim. App. 1999).
 - (c) Inspector General’s Report of Inquiry. *United States v. Sanchez*, 50 M.J. 506 (A.F. Ct. Crim. App. 1999).
- (4) If no, end the *in camera* review. If yes, is the matter material to the preparation of the defense?
- (a) Military judges can allow the defense counsel to perform a review for materiality under a protective order to enable them to make informed arguments about discoverability. *United States v. Abrams*, 50 M.J. 361, 364 (C.A.A.F. 1999).
 - (b) When trial judges consider whether the information is material to the preparation of the defense they should remember that they may not be in the best position to judge what is relevant and what is not: “An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances.” *Alderman v. United States*, 394 U.S. 165, 182 (1969).
- (5) If yes, disclose with a protective order. If no, do not disclose but attach to the record.
- c) The military judge should perform the *in camera* review rather than having a trial counsel state that sought after records do not contain exculpatory material. *United States v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998); *United States v. Kelly*, 52 M.J. 773 (Army Ct. Crim. App. 1999).
 - d) Comparison with RCM 703(f) *in camera* analysis (see RCM 703(f) discussion in section VII below).
 - (1) Timing. Under RCM 701(g), a party has a disclosure obligation. The party tells the military judge that it believes the matter is not subject to disclosure and asks for an *in camera* review. The military judge grants *in camera* review before deciding on the importance of the information (whether the matter is material to the preparation of the defense). Under RCM 703(f), the government has already issued a subpoena for the evidence (the “relevant and necessary” decision has already been made) and now the custodian of the evidence requests relief from the

subpoena. The *in camera* review comes *after* the decision on the importance of the information. The military judge is now dealing with how to enforce that subpoena.

- (2) Person seeking relief. Under RCM 701(g), the person seeking relief is a party to the trial. Under RCM 703(f), the person seeking relief is the custodian of the evidence (not one of the parties).
- (3) Remedy. Under RCM 701(g), once the military judge has ruled, the party that was denied discovery has no relief until appeal. Under RCM 703(f)(4), the party denied production of the evidence then seeks relief under RCM 703(f)(2) (unavailable evidence). Remember, at this point, the evidence has already been determined to be relevant and necessary. Now, the threshold for relief is raised to “such central importance to an issue that is essential to a fair trial and no adequate substitute.”

D. Remedies for Nondisclosure. RCM 701(g)(3). At any time during the court-martial, if a party has failed to comply with RCM 701, the military judge can take one or more of the following actions:

1. Order discovery. RCM 701(g)(3)(A).
2. Grant a continuance (common remedy). RCM 701(g)(3)(B);
 - a) *United States v. Trimper*, 28 M.J. 460 (C.M.A. 1989). Defense counsel moved to preclude use of a urinalysis report that was disclosed by the government just before trial. The military judge denied the request for exclusion, but granted a continuance, which was an appropriate remedy.
 - b) *United States v. Murphy*, 33 M.J. 323 (C.M.A. 1991). The Government did not disclose its sole witness (an eyewitness accomplice) that they learned of the night before trial, but used the witness on rebuttal. Exclusion of testimony was not necessary. Violation of disclosure was adequately remedied by military judge’s actions in granting accused a continuance for several hours to allow the defense to interview the witness, read her statement, interview the investigator that interviewed the witness, and conduct background checks of the witness.
3. Prohibit introduction of the evidence, calling a witness, or raising a defense not disclosed. RCM 701(g)(3)(C).
 - a) The discussion to RCM 701(g)(3) includes factors to consider in determining whether to grant this remedy:
 - (1) The extent of disadvantage that resulted from a failure to disclose;
 - (2) The reason for the failure to disclose;
 - (3) The extent to which later events mitigated the disadvantage caused by the failure to disclose;
 - (4) Any other relevant factors.
 - b) Excluding defense evidence.
 - (1) RCM 701(g)(3) discussion.
 - (a) Only use this sanction upon finding that the defense counsel’s failure to comply was willful and motivated by

a desire to obtain tactical advantage or to conceal a plan present fabricated testimony.

- (b) Only use if alternative sanctions could not have minimized the prejudice to the Government.
 - (c) Before imposing the sanction, the military judge must weigh the defendant's right to compulsory process against the countervailing public interests, including:
 - (i) The integrity of the adversarial process;
 - (ii) The interest in the fair and efficient administration of justice;
 - (iii) The potential prejudice to the truth-determining function of the trial process.
- (2) The Sixth Amendment right to present witnesses is not absolute. The sword of compulsory process cannot be used irresponsibly. Excluding testimony is allowable; however, alternative sanctions will be adequate and appropriate in most cases. *Taylor v. Illinois*, 484 U.S. 400, 414 (1988).
- (3) *United States v. Nobles*, 422 U.S. 225 (1975). Defense expert testimony excluded because expert refused to permit discovery of a "highly relevant" report. "The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *Id.* at 241.
- (4) *Michigan v. Lucas*, 500 U.S. 145 (1991). The Court held that the state court of appeals erred in holding that the exclusion of evidence for the violation of a notice requirement under a state rape-shield law always violates the Sixth Amendment. The preclusion may be appropriate where willful misconduct is designed to gain a tactical advantage over the prosecution.
- (5) *United States v. Pomarleau*, 57 M.J. 352 (C.A.A.F. 2002). The military judge erred by excluding defense evidence as a discovery sanction without conducting a fact-finding hearing or otherwise ascertaining the cause for untimely disclosure by the defense, and by not making findings of fact on the record as to whether less restrictive measures could have remedied any prejudice to the government.
- (6) *United States v. Preuss*, 34 M.J. 688 (N.M.C.M.R. 1991). Applying the RCM 703(g)(3) discussion factors, the court found that the military judge abused his discretion by excluding the defense's alibi witness because the defense counsel failed to give notice of its intent to offer the alibi defense before the beginning of the trial.
4. Such other order as is just under the circumstances.
- a) Mistrial. RCM 915.
 - b) Order a deposition.

- (1) Depositions are primarily used to preserve testimony for later use at trial; however, depositions can be used for discovery when the government has improperly impeded defense access to a witness. RCM 702(c)(3)(A) discussion; RCM 702(a) analysis, app. 21, at A21-35.
 - (2) Where the government substantially impaired the defense counsel’s ability to interview a witness, the defense could have sought a deposition. *United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980).
 - (3) Where the government substantially impaired the defense’s ability to interview witnesses, “timely use of the deposition process would provide the defense with meaningful discovery of these witnesses’ testimony . . .” *United States v. Cumberledge*, 6 M.J. 203, 206 n.13 (C.M.A. 1979).
- c) Count the delay caused by the noncompliance against the government when calculating speedy trial. *United States v. Tebsherany*, 32 M.J. 351, 354 (C.M.A. 1991) “[T]ime requested by counsel to examine material not disclosed until the pretrial investigation might, under facts showing bad faith, be charged to the United States in accounting for pretrial delay.”
 - d) *United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002). The government failed to disclose unfavorable but material evidence to the defense. A government witness then testified early on in the trial regarding this undisclosed evidence. The remedies fashioned by military judge for the government’s failure to disclose the evidence included making the assistant trial counsel lead counsel for the remainder of the case, with the “quiet assistance” of the lead counsel, and exclusion of the undisclosed evidence and some related evidence. The military judge failed, however, to instruct the members to disregard the testimony from the government witness, given five days earlier, about the evidence. The court held that while the decision not to instruct the members was “understandable under the circumstances,” the failure to instruct negated the validity of the other remedies.
- E. Post-Trial: A military judge has the authority under Article 39(a), UCMJ to convene a post-trial session (but before authentication of the record) to consider a discovery violation and to take whatever remedial action is appropriate to include ordering a new trial. *United States v. Webb*, 66 M.J. 89 (C.A.A.F. 2008).

VII. PRODUCTION

A. General.

1. RCM 703 provides that “[t]he prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process.” This rule is based on Article 46, UCMJ and implements the accused’s Sixth Amendment right to compulsory process.
 - a) Merits witnesses. Each party is entitled to production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary. RCM 703(b)(1).
 - (1) Necessary means the evidence is not cumulative and would contribute to a party’s presentation of the case in some positive

way on a matter in issue. RCM 703(b)(1) discussion. A matter is not in issue when it is stipulated as a fact.

- b) Sentencing witnesses. Each party is entitled to the production of any witness whose testimony on sentencing is required under RCM 1001(e). RCM 703(b)(2).
 - (1) There is much greater latitude during the presentencing proceeding to receive information from means other than the testimony of witnesses in the courtroom. RCM 1001(e)(1).
- c) Evidence. Each party is entitled to production of evidence that is relevant and necessary. RCM(f)(1).
 - (1) Necessary means the evidence is not cumulative and would contribute to a party's presentation of the case in some positive way on a matter in issue. RCM 703(f)(1) discussion. A matter is not in issue when it is stipulated as a fact.

2. How the process works.

- a) The parties identify the witness or evidence that they want produced.
- b) The defense submits its requests to the trial counsel.
- c) If the trial counsel contends that some defense witnesses or evidence do not satisfy the production standards, the trial counsel tells the defense. The defense may file a motion for production with the military judge.
- d) The military judge rules on production.
- e) The trial counsel then arranges for the presence of those required witnesses and that evidence, to include prosecution witnesses and evidence. The trial counsel arranges for orders or subpoenas of witnesses, depending on the witnesses' status, and arranges for requests or subpoenas for evidence, depending on who controls the evidence.

B. Production standards for the prosecution.

1. Witnesses.

- a) The trial counsel shall obtain the presence of witnesses for the prosecution whose testimony the trial counsel considers relevant and necessary. RCM 703(c)(1).

2. Evidence

- a) The trial counsel shall obtain evidence that the trial counsel considers relevant and necessary. RCM 703(f)(3), relating back to RCM 703(c)(1).

C. Production standards for the defense.

1. Witnesses. RCM 703(c)(2). The defense shall submit to the trial counsel a written list of the witnesses that the defense wants the government to produce.

- a) Merits and interlocutory questions. Requests shall include:
 - (1) A synopsis of the expected testimony sufficient to show its relevance and necessity.
 - (2) The contact information found in RCM 703(c)(2)(B)(i). *See, e.g., United States v. Barreto, 57 M.J. 127 (C.A.A.F. 2002).*

- b) Sentencing. Requests shall include:
 - (1) A synopsis of the expected testimony and why personal appearance is necessary under the standards set forth in RCM 1001(e). Personal appearance is required only if all of the below are satisfied:
 - (a) The testimony is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence.
 - (b) The weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence.
 - (c) The other party refuses to enter into a stipulation of fact.
 - (d) Other forms of evidence (depositions, interrogatories, former testimony, testimony by remote means) would not be sufficient in the determination of an appropriate sentence.
 - (e) The significance of the personal appearance to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production.
 - (i) See RCM 1001(e)(2)(E) for a list of factors related to this balancing test.
 - (2) The contact information found in RCM 703(c)(2)(B)(ii).

2. Evidence. RCM 703(f)(3).

- a) Defense requests for evidence shall:
 - (1) List the items of evidence to be produced, and
 - (2) Must include a description of each item sufficient to show its relevance and necessity.
 - (3) Must include a statement of where it can be obtained; and, if known, the name, address, and telephone number of the custodian of the evidence.
- b) Generally, the government has no responsibility to create records to satisfy demands for them. *United States v. Birbeck*, 35 M.J. 519, 522 (A.F.C.M.R. 1992) (military judge did not err in denying defense request for the government to create laboratory reports on two negative urinalysis). The court used “discovery” language rather than “production” language. If the government will not produce a report, the defense can seek the employment of an expert witness, who can then test the evidence and produced a report. *See, e.g., United States v. Walker*, 66 M.J. 721 (N-M. Ct. Crim. App. 2008).

D. Regulation of production.

- 1. If the trial counsel contends that the defense requests for production are not required by the rules, then the defense may file a motion for production. RCM 703(c)(2)(D); RCM 906(b)(7).

2. Whether a witness shall be produced to testify during the presentencing proceeding is a matter within the discretion of the military judge, subject to the production rules. RCM 1001(e)(1).
3. If the military judge grants a motion for production, the trial counsel shall produce the witness or evidence or the proceedings shall be abated. RCM 703(c)(2)(D), 703(f)(3).
4. The standard of review for the denial of a request for production is abuse of discretion. *United States v. Powell*, 49 M.J. 220, 225 (C.A.A.F. 1998); *United States v. Mosley*, 42 M.J. 300, 303 (C.A.A.F. 1995). If the military judge abused her discretion, then the test for prejudice is harmless beyond a reasonable doubt. *Powell*, 49 M.J. at 225.
5. Remote testimony. RCM 703(b)(1).
 - a) With the consent of both the accused and the Government, the military judge may authorize any witness to testify via remote means.
 - b) Over a party's objection, the military judge may authorize any witness to testify on *interlocutory questions* (not on issues of ultimate guilt) via remote means or similar technology if:
 - (1) The practical difficulties of producing the witness outweigh the significance of the witness' personal appearance.
 - (2) Factors include: costs of producing the witness; the timing of the request for production; potential delay caused by production; willingness of the witness to testify in person; the likelihood of significant interference with military operations; and for child witnesses, the traumatic effect of providing in-court testimony.
6. Unavailable witnesses and evidence.
 - c) A party is not entitled to the presence of a witness who is unavailable under MRE 804(a) or evidence that is destroyed, lost, or otherwise not subject to compulsory process. RCM 703(b)(3) and (f)(2).
 - d) However, if the testimony or the evidence is of such central importance to an issue that is essential to a fair trial, and there is no adequate substitute, the military judge shall:
 - (1) Grant a continuance or other relief in order to attempt to secure the witness or evidence; or
 - (2) Shall abate the proceedings.
 - e) A party cannot seek a remedy under this rule if they are the reason that the evidence is unavailable. RCM 703(f)(2). Otherwise, there is no "bad faith" requirement, unlike the constitutional jurisprudence regarding preservation and destruction of evidence (discussed below). The defense can seek a remedy under this rule even if the government was not at fault when destroying the evidence, or was simply negligent in losing the evidence.
 - f) Lost or destroyed evidence instruction.
 - (1) "If you find that the State has . . . allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer

that the true fact is against the State's interest." *Arizona v. Youngblood*, 488 U.S. 51, 59-60 (1988) (Stevens, J., concurring).

- (2) "An adverse inference instruction is an appropriate curative measure for improper destruction of evidence." *United States v. Ellis*, 57 M.J. 375 (C.A.A.F. 2002).

g) Cases.

- (1) *United States v. Terry*, 66 M.J. 514 (A.F. Ct. Crim. App. 2008). After the first trial, the government lost or destroyed almost all of the physical evidence in a rape case. The second trial judge dismissed the related charges. The appellate court found that there were adequate substitutes and the evidence did not go to an issue of central importance.
- (2) *United States v. Barreto*, 57 M.J. 127 (C.A.A.F. 2002). Appellant caused a car accident, killing a passenger and injuring himself. The government was unable to locate two unknown witnesses to the fatal traffic accident whom the defense requested, despite efforts that included running ads in German and U.S. newspapers. The defense moved to compel their production, or, in the alternative, abate the proceedings until the witnesses could be produced. The court found that these witnesses were unavailable and that other eyewitnesses with unobstructed views of the accident who testified at trial were an adequate substitute for the potential testimony of the unknown witnesses.
- (3) *United States v. Eiland*, 39 M.J. 566 (N.M.C.M.R. 1993). Military judge abated the proceedings when the government failed to produce two critical witnesses requested by the defense in a rape case. One witness was the doctor who examined the alleged victim and the other witness was another employee of the hospital who observed her demeanor. Defense refused to stipulate. No abuse of discretion in abating trial when testimony is "of such central importance to an issue that it is essential to a fair trial." *Id.* at 568.
- (4) *United States v. Ellis*, 57 M.J. 375 (C.A.A.F. 2002). Appellant convicted of involuntary manslaughter and assault upon a child. After an autopsy was performed on the victim, the brain and its meninges were stored pursuant to laboratory regulations. Several months later, the specimen container was accidentally discarded when the laboratory was moved to a new location. The defense expert was never able to examine the specimens. At trial, the military judge never gave an adverse inference instruction relating to the lost specimen, and did not stop the trial counsel from commenting on the defense's inability to examine it. The court did not reach the RCM 703(f)(2) analysis, finding any error was harmless.

E. Duty to preserve evidence.

1. Due process test. Unless the government acts in bad faith, failure to preserve potentially useful evidence does not constitute a denial of due process

- a) *Arizona v. Youngblood*, 488 U.S. 51 (1988). The Government did not preserve clothes or perform certain tests on physical evidence taken from a child victim who had been sexually assaulted. The Government did not make use of any of the materials in its case-in-chief. The Court stated “that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process.” *Id.* at 58.
- (1) *See also Illinois v. Fisher*, 540 U.S. 544 (2004) (bad faith is the issue, even when the government destroys evidence for which the defense has submitted a discovery request).
 - (2) *Youngblood* clarified *California v. Trombetta*, 467 U.S. 479, 488-89 (1984), which stated that absent bad faith, any constitutional duty to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect's defense; that is, the evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Some military cases from the period 1984-1988 refer to *Trombetta* as the controlling source.
 - (3) Seventeen years after his conviction, DNA testing on some remaining evidence cleared Youngblood. UNDERSTANDING CRIMINAL PROCEDURE § 7.04.
- b) Military cases.
- (1) *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986). Blood stained fabric was consumed during testing. The court applied the *Trombetta* test which applied at the time and found no constitutional violation. However, the court stated, “Under Article 46, the defense is entitled to equal access to all evidence, whether or not it is apparently exculpatory. . . . Thus, the better practice is to inform the accused when testing may consume the only available samples and permit the defense an opportunity to have a representative present.”
 - (2) *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990). Crime scene processors took evidence (including swatches) from a car and then released the car to the owners before the defense had an opportunity to examine the car. At trial, the defense made a due process objection. The court found no bad faith, and the evidence collected from the car was still available for testing.
 - (3) *United States v. Gill*, 37 M.J. 501 (A.F.C.M.R. 1993). The accused is not entitled to relief on due process grounds for the government’s failure to preserve evidence.
 - (4) *United States v. Terry*, 66 M.J. 514 (A.F. Ct. Crim. App. 2008). After the first trial, the government lost or destroyed almost all of the physical evidence in a rape case. The court conducted due process analysis, finding no bad faith. (The court also conducted separate, R.C.M. 703(f)(2) analysis).

2. Contrast with RCM 703(f)(2).

- a) The rules for unavailable evidence in RCM 703(f)(2) are consistent with but broader than the due process jurisprudence related to the preservation of evidence. Many states declined to follow *Youngblood* and either enacted rules for production or made rulings under state constitutions that provided the same protections that are found under RCM 703(f)(2): no requirement for bad faith, and a “critically important to a fair trial” test. *See generally* UNDERSTANDING CRIMINAL PROCEDURE § 7.04.
 - b) At trial, counsel and military judges should generally apply the RCM 703(f)(2) analysis. *See generally United States v. Kern*, 22 M.J. 49 (C.M.A. 1986). If the government did act in bad faith, then shift analysis to the due process jurisprudence.
 - c) RCM 703(f)(2) is also a prospective rule – the parties at trial know that the evidence is unavailable. The question on appeal is whether the military judge correctly applied the rule. If the accused did not know at trial that that some evidence had been destroyed, and so could not litigate under RCM 703(f)(2), then the question on appeal would be whether due process was violated and so that analysis would be used. Appellate courts can conduct separate analysis under both tests. *See United States v. Terry*, 66 M.J. 514 (A.F. Ct. Crim. App. 2008).
3. Service regulations may provide further rights and remedies.
- a) *United States v. Manuel*, 43 M.J. 282 (C.A.A.F. 1995). Destruction of accused’s positive urine sample one month after testing violated Air Force regulation and DoD directive. Lower court’s suppression of positive results not an abuse of discretion where court concluded that standards for preserving samples conferred a substantial right on the accused.
 - b) *United States v. Madigan*, 63 M.J. 118 (C.A.A.F. 2006). An Air Force Institute of Pathology regulation required that positive urine samples be kept for two years. The lab inadvertently destroyed the accused’s sample before the two years were up. The defense did not request access to the sample during this period. Later, the defense discovered the sample was destroyed. The court found that applicable regulations concerning retention of drug testing samples conferred a right on servicemembers to discover evidence, and suppression is an appropriate remedy for lost or destroyed evidence in those cases. If the defense does not make a request to preserve the evidence before the period ends, they have essentially become the reason that the evidence is unavailable and so cannot seek a remedy under RCM 703(f)(2).
 - c) Department of Defense policy requires retention for one year. Dep’t of Defense, Instr. 1010.16, Technical Procedures for the Military Personnel Drug Abuse Testing Program para. E1.9.2 (Dec. 9, 1994)

F. Procedures.

- 1. Witnesses.
 - a) Military Personnel: Request that the witness’ commander issue any necessary orders. RCM 703(e)(1).
 - b) Civilian Witnesses: Subpoena. RCM 703(e)(2).
 - (1) Use for trial or depositions but not for pretrial interviews or Article 32 investigations. RCM 703(e)(2)(B) discussion.

- (2) Issued by the trial counsel. RCM 703(e)(2)(C).
- (3) Use DD Form 453. See the content requirements of RCM 703(e)(2)(B) and follow the requirements of RCM 703(e)(2).

2. Evidence.

- a) Evidence is under the control of the government. Trial counsel notifies the custodian of the evidence of the time, place, and date evidence is required and requesting custodian to send or deliver the evidence. RCM 703(f)(4)(A).
- b) Evidence not under control of the government. Subpoena. RCM 703(f)(4)(B).

G. Enforcement.

1. Witnesses. Article 47, RCM 703(e)(2)(G).

- a) If the witness neglects or refuses to appear, a military judge (or the convening authority if there is no military judge), may issue a warrant of attachment. RCM 703(e)(2)(G)(i).
 - (1) A warrant of attachment is issued only upon probable cause to believe that the witness was duly served with the subpoena, that fees and mileage were tendered, that the witness was material, that the witness refused or willfully neglected to appear, and that no valid excuse exists. RCM 703(e)(2)(G)(ii).
 - (2) Only non-deadly force may be used to bring the witness to before the court-martial. RCM 703(e)(2)(G)(iv).
- b) Refusal to appear or testify is a separate offense under Article 47.
- c) Cases.
 - (1) *United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989). The military judge ordered a post-trial Article 39(a) to hear allegedly newly discovered evidence to be offered by defense witness. Trial counsel issued a subpoena to the defense witness, but the convening authority refused to pay expenses on the basis of bad advice from his SJA. The Court of Military Appeals determined that since the record of trial wasn't authenticated, the judge could order the government to show cause why the findings and sentence should not be set aside or the judge could order accused released from confinement pending the motion for new trial.

2. Evidence. RCM 703(f)(4)(C).

- a) If the person who has the evidence believes that compliance with the subpoena or order of production is unreasonable or oppressive, the person may seek relief from the military judge.
- b) The military judge can withdraw or modify the subpoena or order of production.
 - (1) *United States v. Rodriguez*, 57 M.J. 765 (N-M. Ct. Crim. App. 2002). Law enforcement agents invited NBC for a "ride along" where an NBC videographer may have taped the scene of the traffic stop and search of appellant's vehicle. The accused filed a motion to suppress based on violations of his Fourth Amendment

rights and believed that the video may contain evidence in support of his motion. NBC provided a videotape of the broadcast material of the traffic stop but stated that it relied on its First Amendment privilege regarding the production of the video “outtakes” and reporter’s notes. The trial defense counsel requested the military judge to order production of any remaining videotape. The military judge denied the defense request to compel production. The appellate court stated that, essentially, the accused ask for production; NBC asked for relief; and the trial counsel supported that with a motion to quash the subpoena. The court found that the accused never met his burden for production: relevance and necessity. Even if it was, and assuming the evidence was unavailable under RCM 703(f)(2) because it was not subject to compulsory process, the evidence was not of central importance to an issue that was essential to a fair trial. The military judge should have at least reviewed the material *in camera*, though.

- c) *In camera*. The military judge may direct an *in camera* review in order to determine whether relief should be granted.
 - (1) Note how this *in camera* review differs from the *in camera* review found in RCM 701(g). This review comes after a subpoena has been issued, which means someone has decided that the matter is relevant and necessary. Now, the custodian of the evidence does not want to give the matter to the court. The military judge now does an *in camera* review. If the military judge agrees, the matter now has become “unavailable,” and the parties shift to the unavailable evidence analysis found in RCM 703(f)(2). See the discussion in section VI above.
- d) Types of potentially oppressive or unreasonable subpoenas.
 - (1) First Amendment claims.
 - (a) *United States v. Rodriguez*, 57 M.J. 765 (N-M. Ct. Crim. App. 2002) (discussed above).
 - (b) *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008). The accused gave an interview to CBS. CBS broadcast a portion of the interview and the government issued a subpoena for the remainder. The military judge did not conduct an *in camera* review and ordered the subpoena quashed. The court remanded for an *in camera* review and suggested that if the outtakes were not cumulative, then production and a subpoena would be appropriate.
 - (2) Medical treatment and disciplinary records of minors. *United States v. Reece*, 25 M.J. 93 (C.M.A. 1987). The military judge should have conducted an *in camera* inspection of the victims’ treatment and disciplinary records. The defense counsel “made as specific a showing of relevance as possible, given that he was denied all access to the documents.” Witness credibility would be central in this case because there were no eyewitnesses. The court held that the military judge abused his discretion in failing to

order production of the requested records for an *in camera* review.

- (3) *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006) Defense counsel requested production of a rape victim's medical records during discovery. Trial counsel subpoenaed the requested records; however the custodian, a private social worker who had counseled the victim, refused to produce the records. Defense counsel filed a motion asking the military judge to order production of the records, which he agreed to do after a hearing where he considered M.R.E. 513 and decided an *in camera* review would be appropriate. When the social worker still declined to produce the records, the military judge issued a warrant of attachment IAW R.C.M. 703(e)(2)(G). The warrant of attachment authorized the United States Marshal Service to seize the records and deliver them to the judge. The U.S. Marshal Service failed to seize the records, instead merely asking the social worker to produce the records, and gave up when she declined to do so. Faced with the government's failure to enforce the warrant of attachment, and deciding that the case could not proceed without *in camera* consideration of the records, the military judge abated the proceedings with regard to the rape charge. The appellate courts upheld the military judge.

VIII. APPOINTMENT AND PRODUCTION OF EXPERT ASSISTANTS AND WITNESSES

A. Expert Assistance.

1. General.

- a) An expert assistant is someone detailed to the defense team to assist the accused and defense counsel during the investigative stage of the trial process, although expert assistance can be requested for any stage. In this sense, expert assistance issues are more like *discovery* issues than production issues.
- b) Expert assistants most commonly assist defense counsel in the evaluation of scientific or technical evidence that the government intends to offer at trial. Expert assistants can also be helpful in the areas of mitigation, member selection, evaluation of physical evidence, or in providing a psychological evaluation of the accused.
- c) Even if the defense is successful in obtaining an expert assistant, that does not necessarily mean that the defense will be entitled to have that assistant testify as an expert *witness*. Ordinarily the two will merge but such merger is not automatic. The distinction matters, particularly with respect to privileges.
 - (1) If the defense successfully obtains expert assistance, then the expert becomes a part of the defense team. Therefore, communications between the expert and the defense counsel or the expert and the accused are privileged under M.R.E. 502. *United States v. Turner*, 28 M.J. 487 (C.M.A. 1989). The government may not interview a defense expert assistant without the approval of the defense counsel.

- (2) However, once the defense lists the expert as a witness, the government is free to contact and interview the witness. *United States v. Langston*, 32 M.J. 894 (A.F.C.M.R 1991).
- d) The limited right to expert assistance is guaranteed by the Due Process Clause, federal case law, and military case law, provided certain circumstances exist.
 - (1) *Ake v. Oklahoma*, 470 U.S. 68 (1985). In a capital case, the accused asked for a court-appointed psychiatrist to assist with the defense. The trial court denied the request. The Supreme Court held when an indigent accused makes a showing that expert assistance is needed on a substantial issue in the case both during case-in-chief and at sentencing, Due Process requires that the government provide that assistance.
 - (2) *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986). The court held that as a matter of military due process, servicemembers are entitled to investigative or other expert assistance when necessary for an adequate defense, without regard to indigence.
- e) Unlike the production of expert witnesses, the appointment of expert assistants does not have a source in the R.C.M.s.

2. Requests.

- a) The defense is entitled to expert assistance if the services are necessary. *Garries*, 22 M.J. 288; *United States v. Robinson*, 39 M.J. 88 (C.M.A. 1994).
- b) The standard on appeal is abuse of discretion, tested for prejudice with something like a materiality standard: the findings were substantially swayed by the error or would have changed the evidentiary posture of the case. *United States v. McAllister*, 55 M.J. 270, 276 (2001)
- c) In order to determine necessity, courts apply a two pronged test: “[T]he accused has the burden of establishing that a *reasonable probability* exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial.” *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2006) (emphasis added).
 - (1) The defense must show more than just a mere possibility that the expert would be of assistance. *United States v. Lloyd*, 69 M.J. 95 (2010) (the defense’s desire to “explore all possibilities” did not reach the “reasonable probability” threshold).
- d) Toward that first prong, courts use the three-pronged test adopted in *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1991).
 - (1) Why is the expert assistance needed?
 - (a) The issue must be central to the defense theory of the case. *United States v. Lloyd*, 69 M.J. 95 (2010). In *Lloyd*, the C.A.A.F. used the word “necessary” instead of “needed.”
 - (2) What would expert assistance accomplish for the accused?
 - (3) Why is the defense unable to gather and present the evidence that the expert assistant would be able to develop?

- (a) Defense counsel are expected to educate themselves to attain competence in defending the issues in a particular case. *United States v. Kelley*, 39 M.J. 235, 238 (C.M.A. 1994).
 - (b) The rapid growth in forensic science techniques at trial may make cases more complex than general practitioners can handle on their own. *United States v. McAllister*, 55 M.J. 270, 275 (2001); *United States v. Warner*, 62 M.J. 114, 118 (C.A.A.F. 2005).
 - (c) In *United States v. Lee*, 64 M.J. 213 (2006), CAAF commented on *Warner* and Article 46, saying that the playing field is uneven when the government benefits from scientific evidence and expert testimony and the defense is denied a necessary expert to prepare for and respond to the government's expert.
 - (d) Absent a showing that his case was unusual, when the government offered CID laboratory experts in a child sexual assault case, the military judge did not abuse his discretion when denying the request. *United States v. Ndanyi*, 45 M.J. 315 (C.A.A.F. 1996).
 - (e) However, the military judge cannot deny a defense request for an expert assistant by telling the defense to use the government's own expert to prepare for trial. *United States v. Lee*, 64 M.J. 213 (2006).
 - (f) Where the defense counsel had already tried 15-20 urinalysis cases; had previously worked with an expert assistant on two urinalysis cases; had telephonic access to an expert consultant during trial; knew of the appropriate sources in the field; and did not raise irregularities in the handling of the urine specimen, the military judge did not err in not requiring the physical presence of the expert assistant during trial. *United States v. Kelley*, 39 M.J. 235, 238 (C.M.A. 1994).
- (4) Adequate substitute.
- (a) The government cannot secure for itself the top expert in the field and then provide the defense with a generalist: "Article 46 is a clear statement of congressional intent against government exploitation of its opportunity to obtain an expert vastly superior to the defense's." *United States v. Warner*, 62 M.J. 114 (C.A.A.F. 2005). To do so violates the letter and spirit of Article 46.
 - (b) However, giving the defense a generalist but then having the government call a specialist in rebuttal is not *per se* unfair. *United States v. Anderson*, 68 M.J. 378 (C.A.A.F. 2010). The disparity must cause some prejudice to the accused.

- e) Defense counsel may have to provide evidence that the favorable evidence they are seeking actually exists. *United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005).
- f) For cases involving requests for expert assistance in false confessions and interrogation techniques, *see United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005); *United States v. Freeman*, 65 M.J. 451 (C.A.A.F. 2008) (defense counsel may be capable of developing the expertise in this area without expert assistance).

B. Expert Witnesses.

1. General.

- a) Under M.R.E. 702, an expert witness is someone who possesses particular knowledge, skill, experience, training or education and can offer scientific, technical, or other specialized knowledge testimony that will assist the trier of fact to understand the evidence or to determine a fact in issue. An expert witness is allowed to testify in the form of an opinion.
- b) As with an expert assistant, an accused has the right to obtain an expert witness and produce her for trial at his own expense. If an accused intends to do so, all the notice and disclosure requirements outlined in R.C.M. 701(b) concerning witnesses must be observed.

2. Process.

- a) The production and employment of expert witnesses is governed by R.C.M. 703(d).
 - (1) If the defense *or the government* is seeking to have an expert witness produced and to have the convening authority cover the expense of the witnesses, counsel must:
 - (a) Submit a request to the convening authority to authorize employment and fix compensation before employment;
 - (i) Nothing in the Manual for Courts-Martial permits the government to ratify previous employment of a defense expert.
 - (b) Provide notice to the other party.
 - (2) The request must include a complete statement of reasons why the expert is *necessary*, and an estimate of costs.
 - (a) This list of reasons should include a synopsis of testimony as required by R.C.M. 703(c)(2). *United States v. Ndanyi*, 45 M.J. 315 (C.A.A.F. 1996).
 - (3) If the convening authority denies the request, the defense can raise the issue with the military judge.
 - (a) The military judge will determine whether the testimony of the expert is *relevant* and *necessary*. *United States v. Ndanyi*, 45 M.J. 315, 319 (C.A.A.F. 1996).
 - (b) If so, whether the government has provided an *adequate substitute*.

- (4) The defense may be entitled to an ex parte hearing to justify their request for a defense expert. This is not an absolute right and is only for unusual situations. *United States v. Garries*, 22 MJ 288, 291 (C.M.A. 1986); *United States v. Kaspers*, 47 MJ 176 (C.A.A.F. 1997).
 - (5) If the military judge finds that a defense expert is needed, she may order the government to provide the expert. If the government fails to comply, the military judge may abate the proceedings. R.C.M. 703(d).
- b) Relevant and necessary. Courts may use the *Houser* factors, *United States v. Houser*, 36 M.J. 392 (C.M.A. 1993), when determining whether the expert's testimony would be necessary and relevant. *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998).
 - c) Adequate substitute.
 - (1) The defense is not entitled to its named expert. If the government decides an expert is needed, or if the military judge orders the government to produce an expert, the government may provide a reasonable substitute. *United States v. Burnette*, 29 M.J. 473 (C.M.A. 1990).
 - (2) Except in unusual circumstances, the military judge does not have authority to appoint a specific expert. *United States v. Thorpe*, 38 M.J. 8 (C.M.A. 1993).
 - (3) If the defense requests an expert and the government provides an expert that has a divergent view from the one held by the defense requested expert, then the substitute might not be adequate. *United States v. Robinson*, 43 M.J. 501 (A.F.C.C.A. 1995).
 - (4) The defense is not entitled to an eminent expert in a particular field. The defense is only entitled to receive a qualified expert. *United States v. Gray*, 37 M.J. 730 (A.C.M.R. 1993).

IX. CONCLUSION AND PRACTICE TIPS

- A. The gaps between discovery and production can lead to Catch-22 scenarios. Say the defense counsel believes his client suffered an adverse reaction from a new medication. The defense counsel wants to review reports made to the Food and Drug Administration to see if others have had similar reactions. Can the defense counsel get these reports under RCM 701 or 703? Probably not.
 1. RCM 701(a)(6) and *Brady* do not provide a mechanism. Even if there were exculpatory material in the reports, the trial counsel is not obligated to disclose them – the reports are not in the files of a law enforcement agency that is somehow related to the case.
 2. RCM 701(a)(2) does not provide a mechanism. The reports are not in the possession, custody, or control of *military* authorities.
 3. The defense counsel has to rely on the production rules in RCM 703. While the files are subject to production without subpoena (they are under the control of the Government), the defense counsel may not be able to make a good argument about why the matter is relevant and necessary – because the defense counsel has not seen them yet.

4. The defense counsel's only remedy may be to ask the Article 32 officer to produce the reports at the Article 32 hearing (RCM 405(g)(1)(B)) or ask for the reports under the Freedom of Information Act and then wait patiently for them to arrive, asking the military judge for continuances until they do.
- B. Knowing the difference between the various discovery rules and between the discovery rules and similar production rules is important. Be precise in your analysis. When conducting research, note whether the appellate court is using RCM 701 or 703 as the basis for its reasoning (and whether the appellate court incorrectly applied one or the other). For example:
1. Scope of government duty to locate. Under RCM 701(a)(2), the trial counsel must search what is in the possession, custody, or control of *military* authorities, which includes non law-enforcement authorities. Under RCM 701(a)(6) and *Brady*, the trial counsel generally must search law enforcement files. Under RCM 703, the government may have to issue a subpoena to *anyone*, military or government or not.
 2. The kind of information. Under RCM 701(a)(2), the threshold is low: the matter only needs to be *material to the preparation of the defense*. Under RCM 701(a)(6) and *Brady*, the matter needs to be *favorable and material*. Under RCM 703, the matter needs to be *relevant and necessary*. These are all different standards.
 3. When. Under RCM 701(a)(2), the government only has to provide the information when asked. Under RCM 701(a)(6) and *Brady*, the government must disclose the matter without being asked. Under RCM 703, the government must produce the witness or evidence if the government determines that it is relevant and necessary, or the military judge tells the government to produce it.
 4. *In camera*. Under RCM 701(g), the military judge grants *in camera* review before deciding on the importance of the information (whether the matter is material to the preparation of the defense); the person seeking relief is a party to the trial; and the party that is denied discovery has no relief until appeal. Under RCM 703(f), the *in camera* review comes *after* the decision on the importance of the information (relevant and necessary); the person seeking relief is the custodian of the evidence; and the party denied production of the evidence then seeks relief under RCM 703(f)(2) (unavailable evidence).
 5. Standard on review. For specific requests under RCM 701(a)(2), the standard for prejudice is harmless beyond a reasonable doubt. Under RCM 701(a)(6) and *Brady*, the standard for prejudice is material (reasonable probability of different result) unless government bad faith, when it is harmless beyond a reasonable doubt. Under RCM 703, the standard for prejudice is harmless beyond a reasonable doubt.
- C. Discovery and trial advocacy.
1. After trial advocates have framed their problem by identifying the elements at issue in the case and have constructed basic arguments that support their positions on those elements, the advocates need to develop the evidence that supports those arguments.
 2. Before you can find something, you need know what you are looking for. Develop a plan for finding what you need. Brainstorm. See ALBERT J. MOORE, ET AL., TRIAL ADVOCACY: INFERENCES, ARGUMENTS, AND TECHNIQUES (1996).

- a) If my claim is true, what evidence indicates a motive or reason for why my claim is accurate? What should we expect to have happened before and after? What actually did happen before and after? If my claim is true, what else is likely to have occurred?
 - b) How do people typically act? How do institutions typically behave? How do mechanical devices operate? How do people typically think? How do people typically react in emotional situations?
 - c) What is the custom and practice? Were less restrictive alternatives available? What positive or negative consequences resulted or could have resulted from the conduct?
 - d) What was the person's physical ability to observe? Is there a reason they would or would not have seen the event? Is there a reason why they would or would not remember the event? Are there internal inconsistencies (if they did this, they would not have done that)? Are there external inconsistencies (they said they did this, but someone else says that did not happen)? Did the person have the authority to do what they said they did? Are there reasons the person would be neutral or biased?
3. Discovery is just a part of that plan. "[T]he role of discovery is not just to get your case into or out of court. It's to find the facts – the human elements – that tell the winning story." James W. McElhaney, *Hunt for the Winning Story*, A.B.A. J., July 2006, at 22.
 4. The starting point for developing evidence is to apply a liberal amount of elbow grease. If you want it, go get it. If there is an obstacle between you and the evidence that you cannot get around, but the other party can get around the obstacle, then seek discovery.
 5. While not discussed in this outline, the Article 32 is an integral part of both party's discovery plans.

X. APPENDIX

Discovery in the Military Justice System

Preferral, Article 32 Investigation, Referral (Until Arraignment)

***This document is intended to give a general framework to help counsel understand how discovery works in court-martial practice. It is only a starting point and is not a substitute for the rules and cases actually governing discovery.*

I. Preferral

After the accused is informed of the charges against him or her, the trial counsel should provide a copy of the charge sheet and associated documents (sworn statements etc.) to the defense counsel. If the accused does not have a defense counsel assigned, this is the time to get one detailed (work with your Chief of Justice). This will foster good working relations with the Trial Defense Service, streamline the process, and make it work better for all concerned.

Authority	Burden On	Trigger/Deadline	What is Required
R.C.M. 308	Government	As soon as practicable after preferral	Identification of accuser

II. Article 32 Investigation

There is no formal requirement for disclosure under RCM 701 before the Article 32 hearing. However, RCM 405 does require that witnesses and evidence against the accused be produced. From a practical standpoint, the defense counsel should be provided with a packet that includes all charge sheets, sworn statements, evidence custody documents, and copies of pictures. This will streamline the process. You should always use a tracking document when you turn something over to the defense so that there is a paper trail.

Authority	Burden On	Trigger/Deadline	What is Required
R.C.M. 405(j)(3)	Government	Promptly after report is completed	Article 32 Investigating Officer's Report

III. Referral

Note that many of these rules have different triggers. In practice, all evidence should be disclosed before arraignment, according to the dates set by the Military Judge. The Military Judge regulates discovery once a case is referred to trial.

Authority	Burden On	Trigger/Deadline	What is Required
R.C.M. 701(a)(1)	Government	As soon as practicable after service of charges	Papers accompanying the charges; convening orders; & statements
R.C.M. 701(a)(6)/Brady	Government	As soon as practicable	Evidence that reasonably tends to be favorable to the defense
Trombetta, Youngblood, and Garries	Government	Before evidence used up in testing	Inform accused that testing may consume all available samples of

			evidence (even if that evidence is apparently not exculpatory)
R.C.M. 701(a)(2)	Government	Defense Request	Documents, tangible objects and reports etc.
R.C.M. 701(a)(3)(B)	Government	Defense notice under RCM 701(b)((1) or (2); Before start of trial	Witnesses to rebut certain defenses
R.C.M. 701(a)(5)	Government	Defense Request	Information to be used at sentencing
M.R.E. 404(b)	Government	Defense Request	Uncharged misconduct
M.R.E. 505	Government and Defense	Defense request or government claim of privilege	Classified Information
M.R.E. 506	Government	Defense Request	Privileged information other than classified information
M.R.E. 507	Government (claim of privilege); Defense (motion to disclose)		Identity of informant
M.R.E. 609	Proponent	Sufficient advance notice	Notice of intent to impeach w/ > 10 year old conviction

Authority	Burden On	Trigger/Deadline	What is Required
R.C.M. 706(c)(3)(B)	Government	Completion of sanity board	Mental examination of accused – distribution of the report
R.C.M. 701(b)(1)(B)	Defense	Government request	Pre-sentencing witnesses and evidence
R.C.M. 701(b)(3)	Defense	Reciprocal Discovery (once government has responded to earlier defense discovery request, <i>and</i> has affirmatively requested this information pursuant to this rule)	Documents and tangible objects
R.C.M. 701(b)(4)	Defense	Reciprocal Discovery (once government has responded to earlier defense discovery request, <i>and</i> has affirmatively requested this information pursuant to this rule)	Reports of results of mental examinations, tests, and scientific experiments

Discovery in the Military Justice System

Arrestment

Authority	Burden On	Trigger/Deadline	What is Required
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R.C.M. 701(a)(4)	Government	Before arraignment	Prior convictions of accused to be offered on the merits for any reason, including impeachment
M.R.E. 301	Government	Before arraignment or within reasonable time before witness testifies	Immunity
M.R.E. 304(d)	Government	Before arraignment	Statements of accused relevant to case, <i>regardless</i> of whether government intends to use them
M.R.E. 311(d)	Government	Before arraignment	Property seized from accused
M.R.E. 321(c)	Government	Before arraignment	Identifications of accused
R.C.M. 1004(b)(1)	Government	Before arraignment	Capital cases – notice of aggravating factors under RCM 1004(c)
M.R.E. 311(f)	Defense	Accused to testify in motion to suppress evidence seized from accused	Notice that accused will testify for limited purposes of the motion
M.R.E. 321(e)	Defense	Accused to testify in motion to suppress out of court identification	Notice that accused will testify for limited purposes of the motion

Discovery in the Military Justice System

Trial

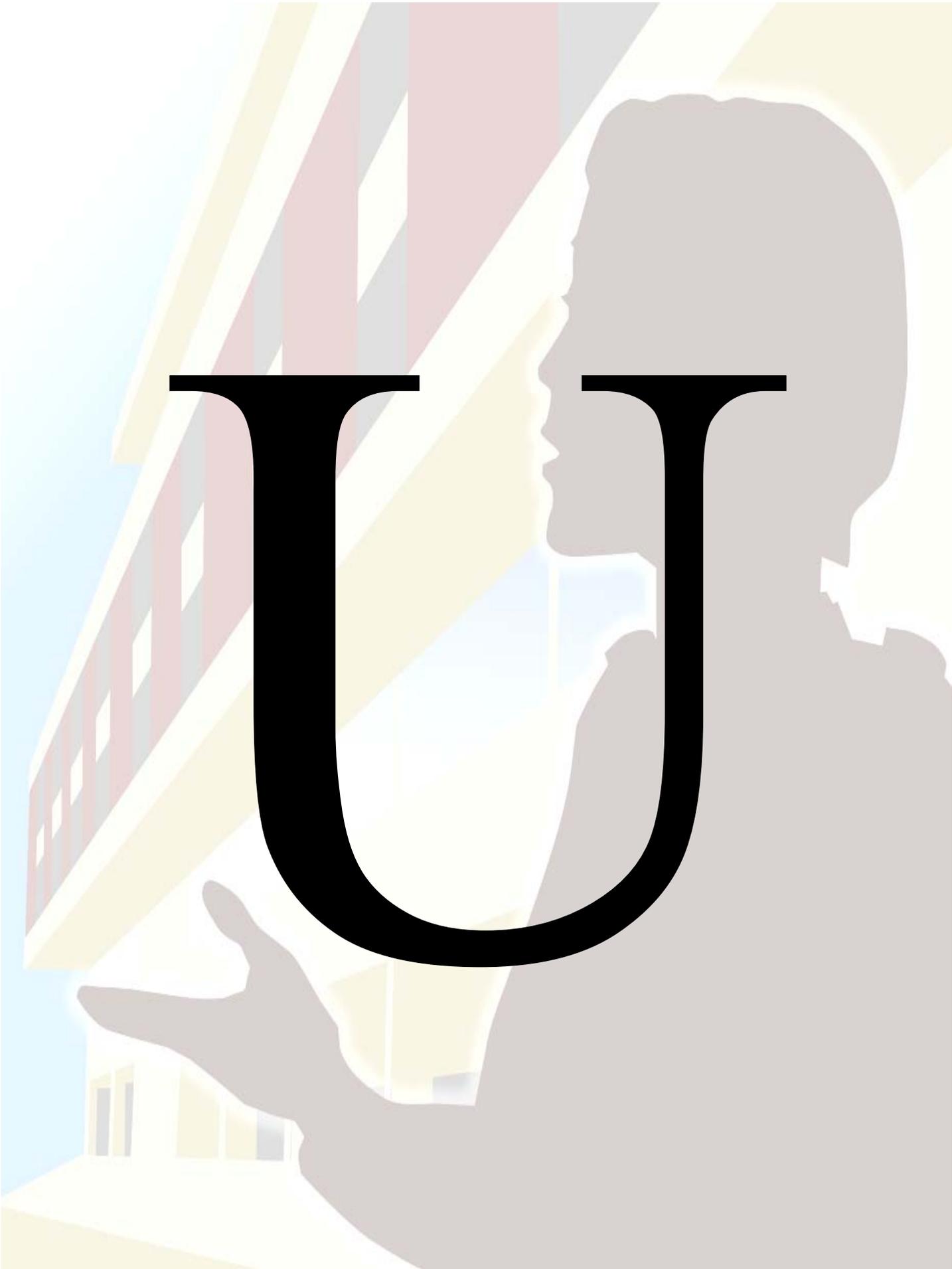
Authority	Burden On	Trigger/Deadline	What is Required
R.C.M. 701(a)(3)(A)	Government	Before start of trial	Witnesses in case-in-chief
M.R.E. 412(c)	Proponent (normally defense)	Minimum of 5 days before entry of pleas	Rape shield
M.R.E. 413/414	Government	Minimum of 5 days before scheduled date of trial	Evidence of similar crimes (child molestation and sexual assault cases)
R.C.M. 914 (Jencks Act)	Proponent of witness	After witness testifies on direct, on motion of opposing party	Production of statements concerning which witness testified (could be CID Agent Activity Summaries; Article 32 tapes; witness interview notes; Administrative board proceedings; confidential informant's notes, etc.

R.C.M. 701(b)(1)(A)	Defense	Before trial on the merits	Names of witnesses and statements
R.C.M. 701(b)(2)	Defense	Before trial on the merits	Notice of certain defenses (alibi; lack of mental responsibility; innocent ingestion, etc.)

Post-Trial

Remember that the duty to disclose is a continuing duty. Even if something covered by these rules is discovered after trial, it must be disclosed.

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PLEAS

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PLEAS AND PRETRIAL AGREEMENTS

Outline of Instruction

I. PLEAS- BASICS.

A. Five Recognized Pleas. RCM 910(a)(1).

1. **Not Guilty:** “Your honor, the accused, SGT Archie, pleads, to all Charges and Specifications, Not Guilty.”

* **Not Guilty Only by Reason of Lack of Mental Responsibility:** Not recognized in RCM 910(a)(1); treated as irregular plea under RCM 910(b), which equates to a plea of not guilty. “The accused , SGT Archie, pleads as follows: To the Specification: Not Guilty only by reason of lack of mental responsibility.”

2. **Guilty:** “Your honor, the accused, SGT Archie, pleads as follows: To the Specification and to The Charge: Guilty.”
3. **Guilty by Exceptions:** (example of AWOL terminated by apprehension) “Your honor, the accused, SGT Archie, pleads as follows: To the Specification: Guilty, except the words, ‘he was apprehended.’ To the excepted words: Not Guilty. To the Charge: Guilty.”
4. **Guilty by Exceptions and Substitutions:** (pleading to wrongful appropriate rather than larceny, using Exceptions and Substitutions) “Your honor, the accused, SGT Archie, pleads as follows: To the Specification: Guilty, except the word ‘steal,’ substituting therefor the words ‘wrongfully appropriate.’ To the excepted word: Not Guilty; to the substituted words: Guilty. To the Charge: Guilty.”
5. **Guilty to a Named Lesser Included Offense:** (pleading to wrongful appropriation as a lesser included offense of larceny) “Your honor the accused, SGT Snuffy, pleads as follows: To the Specification: Not Guilty, but Guilty to the lesser included offense of wrongful appropriation.”
 - a) Remember, that in order to plead to an LIO, the specification to which the accused is pleading guilty must actually be an LIO- just because the Manual says it is an LIO does not make it so- you must conduct an elements test.

B. How to Enter Pleas.

1. Step 1: Plead to the Specification;
2. Step 2: Plead to the excepted words or figures (if applicable);
3. Step 3: Plead to the substituted words or figures (if applicable); AND
4. Step 4: Plead to the Charge.

C. Effect of Pleas.

1. **Government's burden of proof.** Plea of not guilty places burden upon government to prove elements of the charges offense(s). A guilty plea relieves government of burden to prove elements of offense(s).
2. **Waiver.** By pleading **Guilty** (unconditionally) the accused waives certain things:
 - a) Factual issues of guilt.
 - (a) Objections: under RCM 910(j), a plea of guilty that results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt.
 - b) Defects not raised at trial that are neither jurisdictional nor tantamount to a denial of due process.
 - c) Motion to suppress confession. M.R.E. 304(d)(5) *See United States v. Hinojosa*, 33 M.J. 353 (C.M.A. 1991) (guilty plea waived right to contest motion denying suppression of confession).
 - d) Speedy Trial. *See United States v. Tippit*, 65 M.J. 69 (C.A.A.F. 2007)
 - (1) Speedy trial rights provided under the 6th Amendment and RCM 707 are waived. RCM 707(e)
 - (2) Article 10 challenges not waived at trial are waived.
 - (3) Properly litigated Article 10 challenges are not waived.
 - e) Trial counsel disqualification. *See United States v. Bradley*, 68 M.J. 279 (C.A.A.F. 2010)
3. **No Waiver.** The following issues are not waived by an unconditional guilty plea:
 - a) Unlawful command influence. *United States v. Johnston*, 39 M.J. 242 (C.M.A. 1994).
 - b) Jurisdiction. *United States v. Coffey*, 38 M.J. 290 (C.M.A. 1993)
 - c) Ineffective assistance of counsel.

- d) Properly litigated Article 10 motion. *United States v. Mizgala*, 61 M.J. 122 (C.A.A.F. 2005).
 - (1) *United States. V. Mizgala*, 61 M.J. 122 (C.A.A.F. 2005) (“A fundamental, substantial, personal right... should not be diminished by applying ordinary rules of waiver and forfeiture associated with guilty pleas.”)

- e) Multiplicious charging.
 - (1) An unconditional guilty plea, ordinarily, waives multiplicity issues, unless those issues constitute plain error. *United States v. Rhine*, 67 M.J. 646 (A.F.Ct.Crim.App. 2009) (citing *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998).

- f) Statute of limitations.
 - (1) Accused can, though, on the record, voluntarily and expressly waive the statute of limitations as a bar to trial. *United States v. Province*, 42 M.J. 821 (N-M. Ct. Crim. App. 1996).

- g) Selective prosecution- not waived in situations in which facts necessary to make the claim were not fully developed at the time of plea. *United States v. Henry*, 42 M.J. 231 (C.A.A.F. 1995).

II. CONDITIONAL GUILTY PLEA. RCM 910(A)(2).

A. Overview- RCM 910(a)(2).

RCM 910. Pleas

(a)(2) *Conditional pleas.* With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty. The Secretary concerned may prescribe who may consent for Government; unless otherwise prescribed by the Secretary concerned, the trial counsel may consent on behalf of the Government.

B. Coordination with OTJAG.

1. In the Army, SJAs *should* consult with the Criminal Law Division, OTJAG, prior to the government’s consent to an accused entering a conditional plea of guilty.
 - a) AR 27-10, para. 5-26b (“Because conditional guilty pleas subject the government to substantial risks of appellate reversal and the expense of retrial, SJAs should consult with the Chief, Criminal Law Division, ATTN: DAJA–CL, Office of The Judge Advocate General, HQDA, prior to the government’s consent regarding an accused entering a conditional guilty plea at court-martial”)
 - b) Once this coordination is complete, the Trial Counsel may consent, on behalf of the government, to the entering of the conditional guilty plea by the accused in accordance with R.C.M. 910(a)(2).”). *See generally* RCM 910(a)(2) (“The Secretary concerned may prescribe who may consent for the Government...”).

C. Issue Should be Case Dispositive.

1. The motion or issue in question should be case dispositive. (Analysis R.C.M. 910).
 - a) But note, only the Air Force *requires* that the issue be case dispositive. (See AFI 51-201, para 8.3).
2. Practice Tip: where a conditional guilty plea is NOT case dispositive as to either the issue preserved for appeal or to all of the charges in a case, the military judge should address as part of the providence inquiry the understanding that the accused and the parties as to the result of the issue prevailing on appeal.
3. Additionally, even if the conditional plea issue is not case dispositive, it might be best to narrowly tailor the conditional plea.
 - a) *United States v. Mapes*, 59 M.J. 60 (C.A.A.F. 2003). Accused convicted of involuntary manslaughter and various other offenses arising from his injection of a fellow soldier with a fatal dose of heroin. Accused entered into a pretrial agreement that permitted him to enter a conditional plea pursuant to RCM 910(a)(2) that preserved his “right to appeal all adverse determinations resulting from pretrial motions.” At trial, accused moved to dismiss all charges due to improper use of immunized testimony and evidence derived from that immunized testimony in violation of *Kastigar v. United States*, 406 U.S. 441 (1972). Although the CAAF dismissed most of the charges and specifications due to the *Kastigar* violation, accused was permitted to withdraw his plea to those remaining

offenses which were not directly tainted by that violation, as the violation caused or played a substantial role in the GCM referral of those offenses. In so doing, CAAF noted that although military practice, unlike its federal civilian counterpart, does not limit conditional pleas to issues that are dispositive, there should be “cautious use of the conditional plea when the decision on appeal will not dispose of the case.” *See also United States v. Proctor*, 58 M.J. 792 (A.F. Ct. Crim. App. 2003)

D. Military Judge and Government Counsel Must Consent.

1. RCM 910 Analysis at A21-60 (“There is no right to enter a conditional guilty plea. The military judge and the government each have complete discretion whether to permit or consent to a conditional guilty plea.”)

E. Issue Must be Raised at Trial.

1. *United States v. Forbes*, 19 M.J. 953 (A.F.C.M.R. 1985)(accused’s failure to make motion to suppress drug test waived issue despite conditional plea).

III. PLEADING PROCEDURE- GUILTY PLEA AND PROVIDENCE INQUIRY

A. In general.

1. After the accused is arraigned under RCM 904, the military judge will call on accused and counsel to enter a plea. If the accused pleads guilty to any offense, the military judge will follow this procedure to ensure the plea is voluntary and accurate. An accused must admit his own guilt in court (RCM 910(d)-(e)). *Alford* pleas or *nolo contendere* pleas are not allowed.

RCM 910. Pleas

....
(d) *Ensuring that the plea is voluntary.* The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under R.C.M. 705. The military judge shall also inquire whether the accused’s willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.

(e) *Determining accuracy of plea.* The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.

2. The origin and purpose of the providence (*Care*) inquiry.

- a) “The record must reflect not only that the elements of each offense charge have been explained to the accused, but also that the military trial judge or the president has questioned the accused about what he did or did not do, and what he intended (where this is pertinent) to make clear the basis for a determination by the military trial judge or president whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty.”
United States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969).

B. Elements of the Providence Inquiry- RCM 910(c)-(e)

1. Military judge must explain the offenses to the accused and ensure the accused understands:
 - a) Waiver of rights (with respect to the charges/specifications to which he has pled guilty)
 - (1) The right against self-incrimination, trial of the facts by the court, and right of confrontation
 - b) Elements of the offense(s) to which has pled guilty
 - c) And agrees that the plea admits every element, act, or omission and relevant intent
 - d) That he may be convicted on the plea alone without any further proof
 - e) The maximum sentence available based on the plea alone
 - f) His opportunity to consult with counsel
 - g) That he is entering the plea knowingly and voluntarily.
2. Military judge must advise the accused of his rights on the record. RCM 910(c).
3. Military judge must advise the accused of the elements of the offense. RCM 910(c)(1) and Discussion.
 - a) Where there is a challenge in defining a term of an element, there are three sources to find the meaning of terms not defined in statute: “(1) the plain meaning of the term; (2) the manner in which Article III courts have construed the term; and (3) the guidance gleaned

from any parallel UCMJ provisions.” *United States v. Craig*, 67 M.J. 742 (N-M Ct. Crim. App. 2009)(citing *United States v. Kuemmerle*, 67 MJ 141 (C.A.A.F. 2009).

- b) When the military judge has to define a term of art (like attempt), appellate courts will ascertain whether the plea was knowing and voluntary by looking at the record of trial and deciding whether it is clear from the entire record that the accused knew the elements, admitted them freely, and pled guilty because he was guilty. *See United States v. Redlinski*, 58 M.J. 117 (C.A.A.F. 2003).

C. **Factual Predicate for Plea**

1. The accused shall be questioned under oath about the offense(s) as part of the guilty plea inquiry. RCMs 910(c)(5), 910(e)
 - a) The military judge must ascertain why the accused believes he is guilty and advise the accused of the elements of the offense.
 - (1) Leading questions by the military judge are generally disfavored. *United States v. Nance*, 67 M.J. 362 (C.A.A.F. 2009)
 - (2) If the military judge conducts too little of an inquiry, the case may be set aside. *United States v. Bailey*, 20 M.J. 703 (A.C.M.R. 1985) and *United States v. Frederick*, 23 M.J. 561 (A.C.M.R. 1986)(military judge’s inquiry requiring simple yes or no answers when asked whether he did that which the specification alleged was inadequate).
 - (3) The colloquy is between the Military Judge and the accused—not between the Military Judge and counsel. *See United States v. Hartman*, 69 M.J. 467 (C.A.A.F. 2011)(where military judge asked the trial counsel questions regarding the accused’s conduct within the confines of the *Marcum* factors in a consensual sodomy case, the court held the plea improvident because the Military Judge failed to discuss those factors with the accused).
2. Factual Predicate for the Plea- appellate review and the “Substantial Basis” test
 - a) In reviewing a military judge’s acceptance of a plea under the abuse of discretion standard, appellate courts apply a “substantial basis” test: Does the record as a whole show a substantial basis in law *or*

fact for questioning the guilty plea? *United States v. Inabinette*, 66 M.J. 320 (C.A.A.F. 2008)

- (1) Questions of Fact: “The standard for reviewing a military judge’s decision to accept a plea of guilty is an abuse of discretion.” A military judge abuses his discretion “if he accepts a guilty plea without an adequate factual basis to support the plea.
 - (a) Example of “substantial basis in fact”: where the factual predicate of the guilty plea falls short.

- (2) Questions of Law: “The military judge’s determinations of questions of law arising during the plea inquiry are reviewed de novo.”
 - (a) Example of “substantial basis” in law: an accused who knowingly admitted the facts necessary to prove he or she met all the elements of an offense, but was not advised of an available defense.

- (3) Military Judge Must Resolve Potential Defenses
 - (a) If any potential defense is raised by the accused or by any other matter presented, the military judge should explain such a defense to the accused and should not accept the plea unless the accused admits facts which negate the defense. RCM 910 Discussion.
 - (b) If a potential defense is raised after findings are entered, then the military judge must reopen the inquiry. RCM 910(h)(2).

- (4) ***Lack of personal recollection not a bar to pleading guilty.*** *United States v. Moglia*, 3 M.J. 216 (C.M.A. 1977). Accused need not describe from personal recollection all the circumstances necessary to establish a factual basis for the plea.
 - (a) Nevertheless the accused must be convinced of, and able to describe all the facts necessary to establish guilt. See also RCM 910(e) Discussion; *United States v. Wiles*, 30 M.J. 1097 (N.M.C.M.R. 1989).

D. Inquiry into the Pretrial Agreement (PTA).

1. The military judge must fully explore the terms of the PTA with the accused to ensure he understands them. This includes both the offer portion and the quantum (though the judge does not see the quantum until after sentence is announced).
 - a) *United States v. Soto*, 69 M.J. 304 (C.A.A.F. 2011) (where a term in the quantum whereby the accused agreed to ask for a BCD was not discussed with the accused on the record, there was a substantial basis in law to question the plea. The plea was deemed improvident.)
 - b) *United States v. Green*, 1 M.J. 453 (C.M.A. 1976) (military judge must establish “on the record that the accused understands the meaning and effect of each provision in the pretrial agreement”).
 - c) *United States v. Felder*, 59 M.J. 444 (C.A.A.F. 2004). Military judge did not inquire into a term of the PTA regarding defense’s waiver of any motions for sentence credit based on Article 13 and/or restriction tantamount to confinement. Defense counsel did inform the MJ that no punishment under Article 13 or restriction tantamount to confinement had occurred. While the MJ’s failure to discuss the term was error, the accused failed to show the error materially prejudiced a substantial right.
2. ***Military judge cannot expand PTA terms.*** *United States v. Brehm*, ARMY 20070688, [not available on Westlaw] (A. Ct. Crim. App. May 13, 2009) (unpublished). Accused pled guilty to indecent liberties with a child for an offense committed in 1999; charges were not forwarded until October 2006. At that time, the CAAF had not released its opinion in *United States v. Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008), which held that the 2003 amendment to Article 43, UCMJ (excepting child abuse offenses from the five-year statute of limitations) did not apply retroactively. At the guilty plea, the military judge asked the accused if he intended to waive a possible statute of limitations challenge from “any hypothetical ruling” by the CAAF. The ACCA ruled that the military judge exceeded his authority by adding an additional term to the pretrial agreement (specifically, waiver of a potential statute of limitation defense). The court noted it would have “less concern” if the pretrial agreement expressly discussed a “bargained-for waiver of a hypothetical future defense.”

E. Inquiry into the Stipulation of Fact

1. The military judge must conduct an inquiry into the stip of fact (if there is one) to ensure that the accused understands the stip of fact and has agreed to its contents knowingly and voluntarily.
2. **Stipulations of fact and polygraphs.** *United States v. Clark*, 53 M.J. 280 (C.A.A.F. 2000). Accused submitted a false claim, then took a polygraph (which he failed). He was charged and elected to plead guilty. Accused and convening authority agreed to PTA which included a promise to enter into a “reasonable stipulations concerning the facts and circumstances” of his case. MJ at trial noticed the polygraph in the stipulation, noted that accused had agreed to take a polygraph test and that the “test results revealed deception.” There was no objection to the stipulation and he admitted the stipulation into evidence. Applying M.R.E. 707 and *United States v. Glazier*, 26 M.J. 268, 270 (C.M.A. 1988), CAAF held it was plain error for military judge to admit the evidence of the polygraph, even via a stipulation.

IV. USE OF GUILTY PLEA IN MIXED PLEA CASES

A. Panel Not Notified of Guilty Plea.

1. Generally, panel will not be informed when the accused enters mixed pleas. RCM 910(g) Discussion; RCM 913(a) (if mixed pleas have been entered, the military judge should ordinarily defer informing the members of the offenses to which the accused pled guilty until after the findings on the remaining contested offenses have been entered). Thus, where an accused pleads guilty to offense A, but not guilty to offense B, military judge should defer informing court members of the plea to offense A until *after* findings are announced on contested offense B. *United States v. Smith*, 23 M.J. 118, 120 (C.M.A. 1987). *See also United States v. Hamilton*, 36 M.J. 723 (A.C.M.R. 1993) (reversible error to advise members that accused had pled guilty to other offenses).

B. Entering Findings.

1. Typically, the military judge will enter findings immediately after acceptance of a plea. RCM 910(g). However, where the accused pleads guilty to a lesser included offense and the prosecution intends to go forward on the contested charge: (1) the military judge should *not* enter findings after the accused pleads pursuant to RCM 910(g)(2); and (2) prior to commencement of trial on the merits, military judge will instruct the members that they should “accept as proved the matters admitted in the plea, but must determine whether the remaining elements are established” pursuant to RCM 920(e) Discussion.

C. Exceptions

1. If the accused requests members be informed of guilty pleas; or
2. If guilty plea is to a lesser included offense and the trial counsel intends to prove the greater offense. RCM 913(a), Discussion. *United States v. Irons*, 34 M.J. 807 (N.M.C.M.R. 1992) (military judge committed error in not cleaning up flyer, which reflected greater offense to which the accused pled not guilty and which the government did not intend to pursue, was not waived by accused's failure to object; sentence set aside).
3. In cases of multiple offenses, however, the military judge should instruct the panel that it may not use the plea of guilty to one offense to establish the elements of a separate offense. RCM 920(e) Discussion. *Cf. United States v. Hamilton*, 36 M.J. 723 (A.C.M.R. 1993).

D. Use of providence inquiry admissions in mixed pleas.

1. Use of providence inquiry during merits phase in mixed plea.

- a) *United States v. Grijalva*, 55 M.J. 223 (C.A.A.F. 2001). Accused shot his wife. At trial, MJ rejected the accused's plea of guilty to attempted premeditated murder, but accepted his plea to the lesser-included offense of aggravated assault by intentional infliction of grievous bodily harm. On the merits (of the greater offense) the MJ used not only the accused's plea to the lesser offense, but also his admissions during the GP inquiry. The MJ then convicted the accused of attempted premeditated murder. Following settled case law, CAAF held the MJ properly used the accused's plea to the lesser-included offense, but erred by considering statements made by the accused during the plea inquiry.
- b) *United States v. Ramelb*, 44 M.J. 625 (A. Ct. Crim. App. 1996). Providence inquiry can be used only to establish common elements between LIO and greater offenses. After accused pled guilty to LIO of wrongful appropriation, TC proved greater offense of larceny through testimony about what accused said in providence inquiry concerning intent. TC must obtain independent evidence to prove greater offense.

2. Use of providence inquiry admissions on sentencing.

- a) **Rule.** *United States v. Holt*, 27 M.J. 57 (C.M.A. 1988). Sworn testimony given by accused during providence inquiry may be received as admission at sentencing hearing and can be provided either by properly authenticated transcript or by testimony of court reporter or other persons who heard what accused said during providence inquiry.
- b) *United States v. Dukes*, 30 M.J. 793 (N.M.C.M.R. 1990). Court indicated that *Holt* permits the trial counsel to offer an accused's responses during the providence inquiry into evidence, "but that

such responses are not automatically in evidence . . . an accused must be given notice of what matters are being considered against him . . . opportunity to object . . . on grounds of improper aggravation, undue prejudice, or whatever.” *See also United States v. Irwin*, 42 M.J. 479 (C.A.A.F. 1995) (accused’s description of his misconduct—AWOL, rape, sodomy, indecent acts, kidnapping, threats, and unlawful entry—was so detailed and graphic that trial counsel played tape to members; tape was proper aggravation under RCM 1001(b)(4) and not cumulative because there was no stipulation of fact).

c) *United States v. Figura*, 44 M.J. 308 (C.A.A.F. 1996). CID agent charged with forgery. Trial counsel sought to use providence inquiry to establish the dates of checks, where written, and where the checks were cashed because information did not appear in stipulation of fact. Parties agreed to have MJ summarize for court members the information stated during providence inquiry, rather than have a written stipulation of spectator testify. Court held there is no demonstrative right or wrong way to introduce evidence taken during providence inquiry, and that MJ giving summary to members was probably to accused’s advantage.

d) **Exclusion of witnesses from providence inquiry.**

(1) *United States v. Langston*, 53 M.J. 335 (C.A.A.F. 2000).

Defense requested exclusion of witnesses from courtroom during providence inquiry. Military judge refused the request, ruling incorrectly that M.R.E. 615 did not apply to providence inquiry. CAAF held the accused was not prejudiced, however, as the bulk of the witnesses’ testimony went to victim impact.

(2) *See* M.R.E. 615 on excluding “victims” from trial proceedings.

V. ACCEPTANCE OF PLEAS AND ENTERING FINDINGS.

A. Findings Entered Upon Acceptance of Plea

1. Ordinarily, a military judge will enter findings upon acceptance of the accused’s guilty plea, but not if the trial counsel intends to “prove up” a greater offense. *See United States v. Baker*, 28 M.J. 900 (A.C.M.R. 1989) (military judge who knew that trial counsel intended to prove rape improperly entered findings pursuant to pleas of guilty to lesser included offense of carnal knowledge).

B. Refusal of Military Judge to Accept Pleas

1. Improvident Pleas.

- a) For a plea to be inconsistent with factual and legal guilt, there must be more than the possibility of a defense; however, if the accused raises an inconsistency the MJ must resolve it. *United States v. Johnson*, 25 M.J. 553 (C.M.A. 1987). If accused's comments or any other evidence reasonably raises a defense, military judge must explain elements of defense to accused. It is not relevant that comments are not credible; the sole question is whether accused made a statement during the trial that was in conflict with his plea.

- (1) **Confusion about maximum sentence may render plea improvident.** *United States v. Castrillion-Moreno*, 7 M.J. 414 (C.M.A. 1979). *But see United States v. Hunt*, 10 M.J. 222 (C.M.A. 1981) (all factors are examined to determine if misapprehension of maximum punishment affected guilty plea, or whether the factor was insubstantial in accused's decision). *See also United States v. Poole*, 26 M.J. 272 (C.M.A. 1987); *United States v. Kyle*, 32 M.J. 724 (A.F.C.M.R. 1991); *United States v. Hemingway*, 36 M.J. 349 (C.M.A. 1993).

2. Irregular Pleas. RCM 910(b)

- a) **Plea that does not admit guilt.** *Alford* and nolo contendere pleas are not recognized under the UCMJ. If the accused attempts to enter such a plea (which purports to be a guilty plea without admitting guilt) military judge is required to enter a plea of not guilty on the accused's behalf.
- b) **Guilty plea in capital case.** *United States v. Fricke*, 53 M.J. 149 (C.A.A.F. 2000). Military judge did not err in accepting accused's plea to premeditated murder where there was no written record of CA withdrawing capital referral and re-referring as non-capital case. Military judge noted noncapital referral on record with no objection of parties.

C. **Effect of Refusal to Accept Guilty Plea.**

1. Plea(s) of not guilty entered on behalf of accused.

- a) No automatic recusal of military judge; however in a trial by military judge alone, refusal of the request for trial by military judge alone will normally be necessary when a plea is rejected or withdrawn after findings. RCM 910(h)(2)Discussion. *United*

States v. Rhule, 53 M.J. 647 (A. Ct. Crim. App. 2000) (finding the Army preference is for the MJ to recuse himself)

2. Use of testimony gained from “busted” (unsuccessful) providence inquiry.
 - a) RCM 910(e) allows for accused to be prosecuted for making false statements during a providence inquiry.
 - b) M.R.E. 410(a) addresses the “Inadmissibility of Pleas, Plea Discussions, and Related Statements” made during the course of “any judicial inquiry” regarding a plea of guilty which is later withdrawn. M.R.E. 410(a) goes on to state, however, that such statement(s) are admissible “in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.” See *United States v. Doran*, 564 F.2d 1176 (5th Cir. 1977), *cert. denied*, 435 U.S. 928 (1978). See also *United States v. Mezzanato*, 513 U.S. 196 (1995) (statements made during plea negotiations admissible where accused decided to plead not guilty and understood the nature of agreement).

D. **Accused’s Withdrawal of Guilty Plea.** RCM 910(h)(1).

1. Prior to acceptance by military judge—A matter of right.
2. Prior to announcement of sentence—For good cause only.



POST-TRIAL PROCEDURES AND APPEALS

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POST-TRIAL PROCEDURES AND APPEALS

Outline of Instruction

“It is at the level of the convening authority that an accused has his best opportunity for relief.” *United States v. Boatner*, 43 C.M.R. 216, 217 (C.M.A. 1971).

“The essence of post-trial practice is basic fair play – notice and an opportunity to respond.” *United States v. Leal*, 44 M.J. 235, 237 (C.A.A.F. 1996).

“[T]he following is [the] process for resolving claims of error connected with a convening authority’s post-trial review. First, an appellant must allege the error. . . . Second, an appellant must allege prejudice. . . . Third, an appellant must show what he would do to resolve the error if given such an opportunity.” *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998).

“All this court can do to ensure that the law is being followed and that military members are not being prejudiced is to send these cases back for someone TO GET THEM RIGHT.” *United States v. Johnston*, 51 M.J. 227, 230 (C.A.A.F. 1999).

I. REFERENCES.

- A. UCMJ, Articles 55-76a.
- B. Manual for Courts-Martial (2008 Edition), United States; Rules for Courts-Martial, Chapters XI, XII; and Appendices 13-20.
- C. U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 5 (3 Oct. 2011) [hereinafter AR 27-10].
- D. Francis A. Gilligan and Frederic I. Lederer, *Court-Martial Procedure*, 2006 (vol. 2), Chapter 24.
- E. United States Army Court of Criminal Appeals, Office of the Clerk of Court, Post Trial Handbook (3 Jan. 2012).

II. GOALS OF THE PROCESS.

- A. Prepare a timely record of trial adequate for appellate review.
- B. Identify, correct, curtail or kill incipient appellate issues.
- C. Accused’s best chance for clemency.
- D. Defense notice and opportunity to be heard before convening authority (CA) takes initial action on a case.
- E. Help CA make informed decision when taking initial action on a case.

III. SUMMARY OF THE PROCESS.

- A. Trial counsel (TC) coordinates with unit *before* trial to coordinate transportation to confinement facility.
- B. Sentence is announced and the court is adjourned.
- C. Trial counsel prepares report of result of trial, confinement order.
- D. Request for deferment of confinement, if any.
- E. Request for deferment of reduction, if any.

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- F. Request for deferment and/or waiver of forfeitures, if any.
- G. Exhibits accounted for and reproduced.
- H. Post-trial sessions, if any.
- I. Record of trial (ROT) created, reproduced.
- J. Trial counsel / defense counsel (DC) review ROT for errata.
- K. Military judge (MJ) authenticates ROT (or substitute authentication if required).
- L. Staff Judge Advocate (SJA) signs the Staff Judge Advocate's Recommendation (SJAR).
- M. SJAR and authenticated ROT served on accused / DC.
- N. Accused / DC submits clemency petition (RCM 1105 matters) and response to SJAR (RCM 1106 matters) – often done simultaneously.
- O. SJA signs addendum.
- P. Addendum served on DC and accused if contains “new matter.”
- Q. CA considers DC / accused submissions, takes initial action.
- R. Promulgating order signed.
- S. Record reproduced and mailed.
- T. Appellate review.
- U. Final action.

IV. DUTIES OF COUNSEL. ARTICLE 38, UCMJ; RCM 502(d)(5)-(6); RCM 1103(b)(1).

- A. RCM 502(d)(5), discussion, para. (F), addresses the trial counsel's (TC's) post-trial duties.
 - 1. Prepare Report of Result of Trial. “[P]romptly provide written notice of the findings and sentence adjudged to the convening authority or a designee, the accused's immediate commander, and (if applicable) the officer in charge of the confinement facility.”
 - 2. Supervise preparation, authentication and distribution of the ROT. RCM 1103(b)(1).
 - 3. Review ROT for errata. *United States v. Ayers*, 54 M.J. 85 (C.A.A.F. 2000). On appeal, appellant alleged that the ROT was not truly authenticated since the assistant trial counsel (ATC) executed the authentication. The ATC signed the authentication document that stated, “I have examined the record of trial in the forgoing case.” The ATC also made several corrections to the ROT. The defense claimed that for the authentication to be proper, the authenticating individual must state that the ROT accurately reports the proceedings. Also, defense claimed that an ATC cannot authenticate a ROT unless he is under the supervision of the TC (as required by RCM 502(d)(2)). The court disagreed, holding that by signing the authentication document, the ATC was stating that the ROT was correct. Also, since the defense did not allege any error in the ROT, or prejudice from having the ATC authenticate the ROT, no relief was appropriate.
 - 4. Ensure the record of trial is served on the accused and counsel, as appropriate. RCM 1104(b)(1), 1106(f)(3). *See generally* RCM 502(d)(5), discussion, para. (F).
- B. RCM 502(d)(6), discussion, para. (E) addresses the defense counsel's (DC's) post-trial duties.
 - 1. Advise the accused of post-trial and appellate rights (not technically post-trial – RCM 1010).
 - 2. Deferment of confinement / reduction / forfeitures. RCM 1101(c).

3. Examination of the record of trial. RCM 1103(b)(3)(c).
4. Submission of matters: RCM 1105; 1106(f)(4), (7); and, 1112(d)(2). *See also* UCMJ, Article 38(c).
5. Right to appellate review and waiver thereof, in writing, within specified time period. RCM 1110.
6. Examine Staff Judge Advocate's Recommendation (SJAR). RCM 1106(f).
7. *See also United States v. Palenius*, 2 M.J. 86, 93 (C.M.A. 1977). "The trial defense attorney . . . should maintain the attorney-client relationship with his client subsequent to the [trial] . . . until substitute trial [defense] counsel or appellate counsel have been properly designated and have commenced the performance of their duties"
 - a) Advice on the right to appellate review and appellate process.
 - b) Raising appellate issues. *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
 - c) Act in accused's interest. *See United States v. Martinez*, 31 M.J. 524 (A.C.M.R. 1990).
 - d) Maintain an attorney-client relationship. RCM 1106(f)(2) (for substitute counsel); *United States v. Schreck*, 10 M.J. 226 (C.M.A. 1981), *supplemented by*, 10 M.J. 374 (C.M.A. 1981); *United States v. Titsworth*, 13 M.J. 147 (C.M.A. 1982); *United States v. Jackson*, 34 M.J. 783 (A.C.M.R. 1992) (some responsibility placed on the SJA).

C. Effectiveness of counsel in the post-trial area is governed by *Strickland v. Washington*, 466 U.S. 668 (1984), and *United States v. Lewis*, 42 M.J. 1 (C.A.A.F. 1995). *See also United States v. MacCulloch*, 40 M.J. 236 (C.M.A. 1994); *United States v. Brownfield*, 52 M.J. 40 (C.A.A.F. 1999); and, *United States v. Lee*, 52 M.J. 51 (C.A.A.F. 1999). *See also* Section XXVIII *infra*.

1. *United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001). Defense counsel ineffective by submitting, as part of the accused's clemency matters, a letter from the accused's mother that "undercut [his] plea for clemency," a separate letter from the father that was "acerbic" and a "scathing diatribe directed toward trial counsel, trial defense counsel, the members, the judge, and the convening authority," and an e-mail from the accused's brother that "echoed the theme of appellant's father." *Id.* at 124. Returned for a new clemency submission, PTR, and action.
2. *United States v. Key*, 57 M.J. 246 (C.A.A.F. 2002). The CAAF, without ruling, hints that defense counsel might be ineffective if counsel fails to advise the client on waiver of forfeitures and the right to request waiver. The CAAF avoids the issue in *Key* because appellant could not recall if his counsel advised him. Appellant's equivocal statement re: his recollection was insufficient to overcome the presumption that counsel's performance was competent.
3. *United States v. Gunderman*, 67 M.J. 683 (A. Ct. Crim. App. 2009). The appellant claimed that his defense counsel did not inform him that he could request disapproval of the adjudged forfeitures, deferral under Article 57, and waiver of automatic forfeitures under Article 58b. Based upon the facts, the court finds that there was sufficient advice given about forfeitures and the ability to request waiver and deferral after trial. Three factors weighed in favor of the decision: 1) the appellant signed a post-trial advice form that informed him of his ability to request waiver and deferral; 2) the appellant agreed on the record that he had been properly informed of his post-trial rights; and, 3) the appellant

submitted a letter to the convening authority pursuant to RCM 1105 void of any indication that he wanted deferral or waiver.

4. *United States v. Fordyce*, 69 M.J. 501 (A. Ct. Crim. App. 2010) (en banc). The ACCA did not reach the issue of whether defense counsel was ineffective for submitting clemency matters to the convening authority without the input from appellant and for failing to submit a request to defer and waive forfeitures for the benefit of the accused's wife and five children. However, the ACCA held that appellant made the requisite showing of prejudice because defense counsel admitted she did not cover waiver since the standardized post-trial and appellate rights form she had used did not include that provision. Case remanded for new SJAR and action. The ACCA also recommends two things:

- a) Defense counsel should have an accused co-sign RCM 1105/1106 submissions, or sign an acknowledgement that the matters submitted are all that the accused wishes to submit; and,
- b) A practice that would demonstrate on the record that the appellant received both proper written advice on post-trial rights and the opportunity to submit post-trial matters to the convening authority. The ACCA notes with approval the amendments to the Military Judges' Benchbook, DA Pam 27-9, paras. 2-4-2 and 2-6-14 (1 Jan. 2010), which includes in inquiry into the accused's knowledge of what he can submit to the convening authority.

V. NOTICE CONCERNING POST-TRIAL AND APPELLATE RIGHTS. RCM 1010.

A. Before adjournment of any general and special court-martial, the MJ shall ensure that the DC has informed the accused orally and in writing of:

1. The right to submit post-trial matters to the CA;
2. The right to appellate review, as applicable, and the effect of waiver or withdrawal of such rights;
3. The right to apply for relief from TJAG if the case is neither reviewed by a Court of Criminal Appeals nor reviewed by TJAG under RCM 1201(b)(1); and,
4. The right to the advice and assistance of counsel in the exercise or waiver of the foregoing rights.

B. The written advice to the accused concerning post-trial and appellate rights shall be signed by the accused and DC and inserted in the record as an appellate exhibit. Absent a post-trial Article 39(a) session, the written advice will usually be the last Appellate Exhibit (AE) in the record of trial.

C. The Military Judge should:

1. Examine the form submitted by the defense counsel and used to advise the client.
2. Confirm on whom the record of trial is to be served – the accused or counsel. If more than one defense counsel is on the case, she should determine, on the record, who is responsible for post-trial matters.

D. See also amendments to the Military Judges' Benchbook, DA Pam 27-9, paras. 2-4-2 and 2-6-14 (1 Jan. 2010).

VI. REPORT OF RESULT OF TRIAL; POST-TRIAL RESTRAINT; DEFERMENT OF CONFINEMENT, FORFEITURES AND REDUCTION; WAIVER OF FORFEITURES. ARTICLES 57, 57a, 58, 58a, 58b, AND 60, UCMJ; RCM 1101.

A. Result of Trial and Post-Trial Restraint.

1. TC notifies accused's immediate commander, CA or designee, and confinement facility of results (DA Form 4430, Department of the Army Report of Result of Trial). See RCM 502(d)(5). See also AR 27-10, para. 5-30.
2. The accused's commander may order the accused into post-trial confinement. The accused's commander may delegate to TC authority to order accused into post-trial confinement. RCM 1101(b)(2). Note: Summary Court Martial Officer (SCMO) may NOT order a servicemember into post-trial confinement.

B. Deferment of confinement.

1. Accused may request, in writing, deferment of confinement.
2. Accused burden to show "the interests of the accused and the community in deferral outweigh the community's interest in imposition of the punishment on its effective date."
3. Factors CA may consider include, "where applicable: the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; [and] the accused's character, mental condition, family situation, and service record." RCM 1101(c)(3).
4. CA's action on deferment request MUST be in writing and a copy provided to the accused.
5. CA's written action on deferment request is subject to judicial review for abuse of discretion. The request and action thereon MUST be attached to the record of trial. RCM 1103(b)(3)(D).
6. CA must specify why confinement is not deferred.
 - a) *United States v. Schneider*, 38 M.J. 387 (C.M.A. 1993). The CA refused to defer confinement "based on seriousness of the offenses of which accused stands convicted, amount of confinement imposed by the court-martial and the attendant risk of flight, and the adverse effect which such deferment would have on good order and discipline in the command." Accused alleged abuse of discretion in refusing to defer confinement. Held – even though explanation was conclusory, it was sufficient. The court noted other matters of record supporting decision to deny deferment.
 - b) *United States v. Dunlap*, 39 M.J. 1120 (A.C.M.R. 1994). Remedy for failure to state reasons for denying deferment request is petition for extraordinary relief. The court reviewed facts and determined that deferment was not appropriate.
 - c) *United States v. Edwards*, 39 M.J. 528 (A.F.C.M.R. 1994). Accused not entitled to relief where deferment would have expired before appellate review. The court recommended that the DC ask for "statement of reasons" or petition for redress under Article 138.
 - d) *United States v. Sebastian*, 55 M.J. 661 (A. Ct. Crim. App. 2001). One week prior to his trial, accused submitted a deferment request requesting that any confinement be deferred until after the upcoming Easter holiday. He also asked for deferral and waiver of forfeitures. The CA never acted on first request. One week after trial (which included confinement as part of the adjudged sentence),

the accused submitted a second request regarding forfeitures. Approximately six weeks later (five weeks after the forfeitures went into effect), the SJA responded recommending disapproval. Contrary to the SJA's advice, the CA granted the forfeitures request. "While there is no requirement for a convening authority to act 'instantaneously' on a deferment request, there is also no authority for a convening authority to fail to act at all when a deferment request is submitted in a timely manner." *Id.* at 663. The court found prejudice both in the failure to respond to the first deferment request and in the untimely response to the second request. The court reduced the accused's confinement from nine months to five months and set aside the adjudged forfeitures.

e) *United States v. McClary*, 68 M.J. 606 (C.G. Ct. Crim. App. 2010). At the end of trial, the appellant submitted a request to the convening authority requesting deferment of confinement "until at least" four days after trial. The convening authority responded the same day by writing, "Considered and denied." Forty days later, the convening authority signed a memorandum to the appellant providing his reasons for the denial. The appellant alleged error for failure to provide the rationale at the time of denial. The CGCCA agreed, and held that "[c]ertainly there was error at the time of denial." However, even though the court found error, the court was not able to provide relief since the rationale had eventually been provided. The court denied relief.

C. Deferment of forfeitures.

1. Accused may request, in writing, deferment of forfeitures. RCM 1101(c)(2).
2. Accused burden to show "the interests of the accused and the community in deferral outweigh the community's interest in imposition of the punishment on its effective date [e.g., forfeitures]." RCM 1101(c)(3).
3. Applies to adjudged forfeitures (Article 57(a)(2), UCMJ; RCM 1101(c)) AND automatic forfeitures (Article 58b(a)(1), UCMJ). *United States v. Lundy*, 60 M.J. 52 (C.A.A.F. 2004); *United States v. Adney*, 61 M.J. 554 (A. Ct. Crim. App. 2005).
4. Factors CA may consider include, "where applicable: the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; [and] the accused's character, mental condition, family situation, and service record." RCM 1101(c)(3).
5. CA's action on deferment request MUST be in writing and a copy provided to the accused. RCM 1101(c)(3).
6. CA's written action on deferment request is subject to judicial review for abuse of discretion. The request and action thereon MUST be attached to the record of trial. RCM 1103(b)(3)(D).
7. CA must specify why forfeitures are not deferred. *United States v. Zimmer*, 56 M.J. 869 (A. Ct. Crim. App. 2002). Error for the CA to deny the defense deferment request in a one-sentence action without providing reasons for the denial. Four months of confinement and the adjudged forfeitures were set aside. *See also United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992).

8. *United States v. Brown*, 54 M.J. 289 (C.A.A.F. 2000). CA denied accused's deferment request. The SJA memorandum to CA recommending denial was never served on the accused who argued prejudice because he was not afforded the opportunity to rebut the memorandum. The CAAF found no prejudice; however, they strongly suggested that new rules be created regarding deferment and waiver requests – rules could require an SJA recommendation with deferment and waiver requests with a corresponding notice and opportunity to respond provision.

9. *United States v. Key*, 55 M.J. 537 (A.F. Ct. Crim. App. 2001), *aff'd*, 57 M.J. 246 (C.A.A.F. 2002). Nine days after being sentenced, the accused submitted a request asking for deferment of forfeitures and reduction. The SJA's written response recommended disapproval, advice the CA followed. The SJA's advice was never served on the accused. He argued prejudice claiming deferment requests should be processed like a clemency request. Although the Air Force requires that waiver requests be treated like clemency requests (*United States v. Spears*, 48 M.J. 768 (A.F. Ct. Crim. App. 1998) (overruled in part on other grounds)) subject to the requirements of Article 60, deferment of forfeitures and reductions in rank do not have to be treated similarly. No requirement that an SJA recommendation regarding deferment be served on defense. Note: the CAAF affirmed without reaching the issue of whether service of the SJA's memo is a *per se* requirement. The court noted the absence of "new matter" and the non-inflammatory nature of the SJA's memo in affirming.

10. *United States v. Moralez*, 65 M.J. 665 (A. Ct. Crim. App. 2007). Forfeitures were adjudged at trial. After trial, the accused submitted request to the CA to (1) defer adjudged and automatic forfeitures until action, and (2) disapprove adjudged forfeitures and waive automatic forfeitures at action. The SJA advised the CA to grant the deferrals, but postpone any decision on disapproval or waiver until action. The SJAR, the defense clemency submission, and the addendum were silent to the requested disapproval/waiver request. At action, the CA approved the adjudged sentence (including forfeitures). The ACCA held that SJA should have further advised the CA on his options regarding the disapproval of adjudged and waiver of automatic forfeitures at action.

D. Waiver of forfeitures.

1. Accused may request waiver of automatic forfeitures (Article 58b, UCMJ) or the CA may waive *sua sponte*. The accused's request should be in writing.

2. Waiver is allowed for a period not to exceed six months and is for the purpose of providing support to the accused's dependents, as defined in 37 U.S.C. § 401.

3. Factors CA may consider include: "the length of the accused's confinement, the number and age(s) of the accused's family members, whether the accused requested waiver, any debts owed by the accused, the ability of the accused's family members to find employment, and the availability of transitional compensation for abused dependents permitted under 10 U.S.C. 1059." RCM 1101(d)(2).

4. Unlike the CA's action on a deferral of forfeitures, there is no requirement that a similar decision on waiver of forfeitures be in writing or that it be served on the accused. *United States v. Zimmer*, 56 M.J. 869, 872 n.4 (A. Ct. Crim. App. 2002). According to *Zimmer*, such a decision is also not subject to judicial review. *Id.*

5. Waiver of forfeitures is authorized as soon as they become effective; need not wait until action.

6. *United States v. Nicholson*, 55 M.J. 551 (A. Ct. Crim. App. 2001). SJA advice stating that waiver request prior to action is premature and must be submitted as part of the RCM

1105 submissions was incorrect. The convening authority may waive and direct payment of any automatic forfeitures when they become effective by operation of Article 57(a) – the earlier of fourteen days after sentence is adjudged or date the sentence is approved by the CA. *See also United States v. Kolodjay*, 53 M.J. 732 (A. Ct. Crim. App. 1999) (noting that the CA’s action apparently would not achieve his objective of a six month waiver because the waiver dated back to the date the sentence was adjudged rather than fourteen days thereafter; a waiver is valid only when there are forfeitures to waive).

E. Deferment of reduction in rank. Processed like a request for deferment of confinement or forfeitures. *See supra* Sections VI.B. and VI.C.

VII. POST-TRIAL SESSIONS. ARTICLE 39, UCMJ; RCM 905, 1102.

A. Types of post-trial sessions.

1. Proceedings in revision. “[T]o correct an apparent error, omission, or improper or inconsistent action by the court-martial which can be rectified by reopening the proceeding without material prejudice to the accused.” RCM 1102(b)(1).

2. Article 39(a) sessions. “[To inquire] into, and, when appropriate, [resolve] any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or the sentence. The military judge may also call an Article 39(a) session, upon motion of either party or *sua sponte*, to reconsider any trial ruling that substantially affects the legal sufficiency of any findings of guilty or the sentence.” RCM 1102(b)(2). “The military judge shall take such action as may be appropriate, including appropriate instructions when members are present. The members may deliberate in closed session, if necessary, to determine what corrective action, if any, to take.” RCM 1102(e)(2); *United States v. Jackson*, 34 M.J. 1145 (A.C.M.R. 1992).

B. Timing.

1. The MJ may call a post-trial session before the record is authenticated. The CA may direct a post-trial session any time before taking initial action or at such later time as the convening authority is authorized to do so by a reviewing authority, except that no proceeding in revision may be held when any part of the sentence has been ordered executed. RCM 1102(d).

2. *United States v. Scuff*, 29 M.J. 60, 65 (C.M.A. 1989). Until MJ authenticates the ROT, MJ may conduct a post-trial session to consider newly discovered evidence, and in proper cases, may set aside findings of guilty and the sentence.

3. MJ need not wait for guidance or directive from reviewing authority or CA. “The military judge may also call an Article 39(a) session, upon motion of either party or *sua sponte*, to reconsider any trial ruling that substantially affects the legal sufficiency of any findings of guilty or the sentence.” RCM 1102(b)(2).

C. Format. Rule essentially adopts the *DuBay* “hearing” concept but it expands the jurisdiction of the MJ into post-trial proceedings. Article 39(a) requires that “these proceedings shall be conducted in the presence of the accused.” *See also United States v. Caruth*, 6 M.J. 184 (C.M.A. 1979) (holding that a post-action hearing held in accused’s absence found “improper and . . . not a part of the record of trial”).

D. Limitations. RCM 1102(c). *See United States v. Boland*, 22 M.J. 886 (A.C.M.R. 1986).
Post-trial sessions cannot:

1. Reconsider a finding of not guilty as to a specification, or a ruling which amounts to a finding of not guilty.

2. Reconsider a finding of not guilty as to a charge unless a finding of guilty to some other Article is supported by a finding as to a specification.
3. Increase the severity of a sentence unless the sentence is mandatory.

E. Cases.

1. *United States v. Webb*, 66 M.J. 89 (C.A.A.F. 2008). Prior to authentication of the record of trial the defense moved for a new trial based upon the government's failure to disclose impeachment evidence of one of the government's key witness. The judge granted a new trial and on appeal, the government argued that Article 73 and RCM 1210 only allowed new trial petitions after the CA's action. The CAAF agreed that Article 73 does not allow a military judge to order a new trial – but Article 39(a) does. The CAAF declared unequivocally that military judges have authority under Article 39(a) to convene post-trial sessions to consider newly discovered evidence and to take whatever remedial action the military judge finds appropriate (to include a new trial).
2. *United States v. Meghdadi*, 60 M.J. 438 (C.A.A.F. 2005). After trial, appellant requested an Article 39(a) session seeking to inquiry into alleged witness misconduct, or, alternatively, a mistrial or a new trial. A different military judge than who presided over the trial heard evidence at the post-trial session and denied the motion. The defense based its motion on allegations that the primary CID investigator lied at trial when he testified that: he had not promised the informant who testified against the appellant that the informant would not go to jail if he helped CID; that he had not told the informant that CID would assist him with his case if the informant went to work for CID; and, that he had not met with the informant after CID terminated the informant as a registered source. An audio tape surreptitiously recorded by the informant in a conversation with the agent shed light on each of these allegations. The CAAF noted that the MJ failed to recognize the purpose of the requested inquiry, which was to examine the request for a mistrial or a new trial, rather than to establish a basis for correction or discipline of the witnesses themselves. The CAAF also criticized the findings made by the MJ. With respect to the evidentiary value of the tape, which the MJ discounted, the CAAF held that the appellant "firmly established" the potential impeachment value of the tape. The CAAF noted that the MJ denied himself the opportunity for meaningful assessment of whether the investigator's trial testimony was perjured, and if so, whether the effect of the perjury substantially contributed to the sentence.
3. *United States v. Humpherys*, 57 M.J. 83 (C.A.A.F. 2002). Post-trial 39(a) session held by MJ to question two panel members about a rater-ratee relationship that they failed to disclose during *voir dire*. After making extensive findings of facts and conclusions of law, the MJ indicated he would not have granted a challenge for cause based on the relationship had it been disclosed. Petition for a new trial denied. The CAAF noted the following regarding the MJ's post-trial responsibilities:

The post-trial process empowers the military judge to investigate and resolve allegations, such as those in this case, by interviewing the challenged panel members. It allows the judge to accomplish this task while the details of trial are still fresh in the minds of all participants. The judge is able to assess firsthand the demeanor of the panel members as they respond to questioning from the bench and counsel.
4. *United States v. Jones*, 46 M.J. 815 (N-M. Ct. Crim. App. 1997). In mixed-plea case, MJ failed to announce findings of guilty of offenses to which accused had pled guilty, and as to which MJ had conducted providence inquiry. Upon realizing failure to enter

findings, MJ convened post-trial Article 39(a) hearing and entered findings consistent with pleas of accused. Though technically a violation of RCM 922(a), MJ commended for using post-trial session to remedy oversight.

5. *United States v. Perkins*, 56 M.J. 825 (A. Ct. Crim. App. 2001). MJ's failure to properly announce guilty finding as to Spec 3 of Charge II (MJ announced Guilty to Spec 3 of Charge III) did not require court to set aside appellant's conviction of Specification 3 of Charge II when it was apparent from the record that the MJ merely misspoke and appellant had actually plead guilty to Specification 3 of Charge II. The court notes that a proceeding in revision UP of RCM 1102 would have been an appropriate course of action had the MJ or SJA caught the mistake.

6. *United States v. Kulathungam*, 54 M.J. 386 (C.A.A.F. 2001). Proceeding in revision to correct erroneous omission of findings from the record and to formally announce findings was appropriate. Omission was the only procedural deviation by the MJ during the court-martial. Note: upon discovery of the omission, the TC and court reporter "inserted" the findings in the record. DC was aware of the omission during trial but for tactical reasons chose to remain silent. On appeal, the CAAF advised counsel, in the future, to seek the advice of the MJ or a more senior counsel to avoid the "train wreck" that occurred in that case.

7. *United States v. Mayfield*, 45 M.J. 176 (C.A.A.F. 1996). Accused's written judge alone (JA) request never signed by parties and made part of the record. Additionally, no timely oral request for judge alone was made on the record. Before authentication, MJ realized omission and called a post-trial Article 39(a), during which accused acknowledged he had made request in writing and that JA trial had been his intent all along. The CAAF reversed the NMCCA, which had found the failure to formally request JA to be a jurisdictional error.

8. *United States v. Avery*, No. 9500062 (A. Ct. Crim. App. May 17, 1996) (unpublished). Post-trial 39(a) session held to inquire into allegations that a sergeant major (SGM) slept through part of the trial. Testimony of MAJ H, panel president, about "SGM A's participation during deliberations . . . was relevant and admissible." MJ "properly stopped appellant's trial defense counsel from asking MAJ H about any opinions expressed by SGM A during deliberations."

9. *United States v. Gleason*, 43 M.J. 69 (C.A.A.F. 1995). Proceeding in revision is inappropriate to correct erroneous sentencing instruction. Proper procedure is a rehearing. Article 63 prohibits members who sat in original proceeding from sitting on a rehearing. No such prohibition exists for a proceeding in revision. There is no problem in having the same members for a proceeding in revision. *See also United States v. Roman*, 46 C.M.R. 78, 81 (C.M.A. 1972).

10. *United States v. Crowell*, 21 M.J. 760 (N.M.C.M.R. 1985). Post-trial 39(a) appropriate procedure to repeat proceedings to reconstruct portions of a record of trial resulting from loss of recordings.

11. *United States v. Jordan*, 32 M.J. 672 (A.F.C.M.R. 1991). MJ erred in entering findings of guilty on two specifications. After authentication he noticed error and notified SJA, who advised CA to only approve proper findings, but to approve sentence as adjudged. "If the error were detected before authentication, the better method of handling this type of error would have been for the military judge to direct a post-trial session under RCM 1102(d)." Such a post-trial session could have been used to reconsider the erroneous findings of guilty and re-determine the sentence. *See RCM 1102(b), (c), and*

(e). As requested by the trial defense counsel, the CA could have also ordered a rehearing on sentence and avoided this issue. *See* RCM 1107(e)(1).” *Id.* at 673-4 n.1.

12. *United States v. Wallace*, 28 M.J. 640 (A.F.C.M.R. 1989). MJ became aware of possible extraneous information received by the panel on the “ease of converting a BCD to a general discharge.” MJ had an obligation to *sua sponte* convene a post-trial Article 39(a) session to assess facts and determine any possible prejudice. Findings affirmed; sentence set aside and rehearing authorized.

13. *United States v. Wilson*, 27 M.J. 555 (C.M.A. 1988). TC failed to administer oath to two enlisted panel members. MJ held a proceeding in revision to correct the “substantial omission, to wit: a sentence and a sentencing proceeding.” Ministerial act of swearing court members is essential to legal efficacy of proceedings but not a matter affecting jurisdiction.

14. *United States v. Baker*, 32 M.J. 290 (C.M.A. 1991). MJ held a post-trial Article 39(a) session to correct the omission in sentence announcement (the president of the panel failed to announce the adjudged DD). Held – Error; presents the appearance of UCI. *See also United States v. Dodd*, 46 M.J. 864 (A. Ct. Crim. App. 1997) (holding that it was error for court to re-convene two minutes after adjourned to state they had also adjudged a bad-conduct discharge).

15. *United States v. Jones*, 34 M.J. 270 (C.M.A. 1992). MJ held proceeding in revision two months after adjournment to correct “erroneous announcement of sentence” (failure to announce confinement). Held – Error. “Article 69(e)(2)(c) disallows such corrective action, to assure the integrity of the military justice system.” *Id.* at 271.

16. *United States v. Jackson*, 34 M.J. 1145 (A.C.M.R. 1992). MJ held post-trial Article 39(a) session one month after adjournment, declared mistrial as to sentence based on procedural error (court members used improper voting procedures), and ordered new session with same members. Held – post-trial session was actually a proceeding in revision, and since the error was substantive, was inappropriate; even if not error, inappropriate to use same sentencing authority. *See also United States v. Roman*, 46 C.M.R. 78, 81 (C.M.A. 1972).

17. *United States v. Miller*, 47 M.J. 352 (C.A.A.F. 1997). MJ abused his discretion when he denied the accused’s request for delay of a post-trial Article 39(a) session in order to obtain civilian defense counsel. MJ was more concerned with expediency and convenience to government than protecting rights of the accused.

18. *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984). Unlawful command control for president to order a re-vote after a finding of not guilty had been reached. MJ should build a factual record at a post-trial Article 39(a) session.

19. *United States v. Steck*, 10 M.J. 412 (C.M.A. 1981). Proceeding in revision, directed by CA, appropriate to conduct a more thorough inquiry into the terms of the pretrial agreement and accused’s understanding thereof.

20. *United States v. LePage*, 59 M.J. 659 (N-M. Ct. Crim. App. 2003). MJ erroneously admitted NJP record and considered evidence in arriving at a punitive discharge. At a post-trial Article 39(a) session, the MJ held that he erred and that the error prejudiced appellant. He further held, erroneously, that he lacked authority to correct the defect, citing to RCM 1009, which addresses reconsideration of sentences. Held – MJ could have corrected the error under RCM 1102 at a post-trial Article 39(a) session since the erroneous admission of the evidence “substantially affect[ed] the sufficiency of the sentence.”

21. *United States v. Lofton*, 69 M.J. 386 (C.A.A.F. 2011). A convening authority abused his discretion in denying a request for a post-trial Article 39(a) session after an email surfaced from an Air Force victim advocate claiming witnesses were texting each other the contents of testimony from the courtroom. However, the court addressed the testimony of the witnesses and found that there was no “basis for concluding that shaping of testimony or collusion occurred,” and that the appellant was not prejudiced as a result.

22. MJ may, any time until authentication, “reconsider any ruling other than one amounting to a finding of not guilty.” RCM 905(f).

VIII. PREPARATION OF RECORD OF TRIAL. ARTICLE 54, UCMJ; RCM 1103; MCM, APPENDIX 13 AND 14.

A. Requires every court-martial to keep a record of proceedings.

B. RCM 1103(b)(2)(B). In a GCM, TC shall, under the direction of the MJ, cause the ROT to be prepared and the reporters’ notes, however compiled, to be retained. The ROT must be verbatim if:

1. Any part of the sentence exceeds six months confinement, forfeiture of pay greater than two-thirds pay per month, any forfeiture of pay for more than six months, or other punishments which may be adjudged by a SPCM.

2. A BCD has been adjudged.

3. *United States v. Embry*, 60 M.J. 976 (A. Ct. Crim. App. 2005). Appellant spoke with social work assistant prior to trial. The intake notes of that assistant were litigated before trial. The intake notes were not marked or attached to the record as an appellate exhibit. The notes could not be located when asked for by the ACCA. The court determined that the MJ erred in not marking and attaching the intake notes to the record. Because the MJ considered them, the notes must be included in the ROT to effect appellate review of a ruling affecting the rights of the accused at trial. The court found that the government failed to rebut the presumption of prejudice arising from the incomplete ROT.

4. *United States v. Madigan*, 54 M.J. 518 (N-M. Ct. Crim. App. 2000). Appellant asserted (among other allegations of error) that the ROT was incomplete because the Article 32 investigation was not included and the Article 34 SJA advice was also missing. Both allegations were without merit. The appellant waived his allegation of error regarding the Article 34 advice because no objection had been made, before, during or after trial. Also, the appellant alleged no prejudice from this error. The Article 32 was missing because the appellant had pled guilty and waived the Article 32 investigation.

C. RCM 1103 and the discussion list what must be included in or attached to the ROT. The rule is supplemented by AR 27-10.

D. For a special court-martial, a verbatim transcript is required if a BCD is adjudged, confinement is greater than six months, or any forfeiture is for more than six months.

E. Summary court-martial records are governed by RCM 1305. *See* Appendix 15, MCM, and DD Form 2329.

F. Acquittals still need a ROT (summarized).

G. If an Article 39(a) session is called to order by the court a ROT is required. *See* RCM 1103(e). For example, accused is arraigned and subsequent to arraignment, the charges are withdrawn and dismissed – prepare a summarized ROT.

H. What if a verbatim ROT cannot be prepared? *See* RCM 1103(f). *But see United States v. Crowell*, 21 M.J. 760 (N.M.C.M.R. 1985) (can reconstruct the record of trial to make it “verbatim”).

I. How verbatim is verbatim? No substantial omissions.

1. Verbatim does not mean word-for-word. *See United States v. Gray*, 7 M.J. 296 (C.M.A. 1979); *United States v. Behling*, 37 M.J. 637 (A.C.M.R. 1993). Insubstantial omissions do not make a record non-verbatim, but substantial omissions create a rebuttable presumption of prejudice that the government must rebut. *United States v. McCullah*, 11 M.J. 234 (C.M.A. 1981).
2. The government can reconstruct the record of trial to rebut the presumption of prejudice. *United States v. Lashley*, 14 M.J. 7 (C.M.A. 1982); *United States v. Eichenlaub*, 11 M.J. 239 (C.M.A. 1981); *United States v. Crowell*, 21 M.J. 760 (N.M.C.M.R. 1985).
3. *United States v. Cudini*, 36 M.J. 572 (A.C.M.R. 1992). Failure to attach copy of charges and specifications as appellate exhibit not substantial omission; where omission is insubstantial, accused must show specific prejudice.
4. *United States v. Washington*, 35 M.J. 774 (A.C.M.R. 1992). Pretrial conferences under RCM 802 need not be recorded; matters agreed upon, however, must be made a part of the record.
5. *United States v. Marsh*, 35 M.J. 505 (A.F.C.M.R. 1992). Off-the-record discussion of administrative discharge not a substantial omission where issue had been raised on the record and military judge ruled on the record that trial would proceed.
6. *United States v. Clemons*, 35 M.J. 767 (A.C.M.R. 1992). ROT qualified as verbatim record although it included three off-the-record pauses; sessions involved purely administrative matters, what took place was not essential substance of trial, and sessions were not recorded for legitimate purposes.
7. *United States v. Kyle*, 32 M.J. 724 (A.F.C.M.R. 1991). After reviewing documents *in camera*, MJ must seal the documents and attach them to the ROT. *See* RCM 702(g)(2) and Article 54(c)(1). “A military judge must make a record of every significant *in camera* activity (other than his legal research) adequate to assure that his decisions are reviewable on appeal.” *Id.* at 726.
8. *United States v. Harmon*, 29 M.J. 732 (A.F.C.M.R. 1989). Tape recorder failed. MJ attempted to reconstruct. Because of substantial omission, burden on government to rebut presumption of prejudice. In this case, an almost impossible task.
9. *United States v. Sneed*, 32 M.J. 537 (A.F.C.M.R. 1990). DC argued *ex parte* motion telephonically to MJ. Defense complained that record was not verbatim because the *ex parte* telephone conversation was not recorded and was not made a part of the required verbatim ROT. Held: “Although the omission may have sufficient ‘quantitative’ substance to raise the presumption of prejudice . . . we have no hesitancy in finding that presumption effectively rebutted, not so much by affirmative government action (*e.g.*, reconstruction of the record) as by the totality of circumstances.” *Id.* at 540.
10. *United States v. Alston*, 30 M.J. 969 (N.M.C.M.R. 1990). Omission of testimony relating to offenses of which accused was acquitted was a substantial omission.
11. *United States v. Chollet*, 30 M.J. 1079 (C.G.C.M.R. 1990). Several bench conferences had “inaudible” sections. “We believe that these inaudible portions were

substantial omissions which, along with other non-transcriptions, render the record non-verbatim.” BCD disapproved.

12. *United States v. Seal*, 38 M.J. 659 (A.C.M.R. 1993). Omission of videotape viewed by MJ before imposing sentence renders ROT “incomplete,” resulting in reversal.

13. *United States v. Maxwell*, 2 M.J. 1155 (N.M.C.M.R. 1975). Two audiotapes were inadvertently destroyed, resulting in loss of counsel’s arguments, a brief Article 39(a) session on instructions, and announcement of findings. All but DC argument reconstructed. “We do not view the absence of defense counsel’s argument as a substantial omission to raise the presumption of prejudice . . . [and] no prejudice has been asserted.” *Id.* at 1156.

14. *United States v. Sylvester*, 47 M.J. 390 (C.A.A.F. 1998). ROT did not contain RCM 1105/1106 submissions from CDC and request for deferment or the CA’s action thereon. Held: No error for failing to include the RCM 1105/1106 submissions (CDC did not submit written matters, but made an oral presentation to the CA). The CAAF refused to create a requirement that all such discussions be recorded or memorialized in the ROT, but made it clear they prefer written post-trial submissions. The CAAF did find error, although harmless, for not including the deferment request and action in the ROT (the accused was released six days after the request).

15. *United States v. Simmons*, 54 M.J. 883 (N-M. Ct. Crim. App. 2001). During appellant’s trial, there were two gaps in which the government had technical difficulty with its recording devices. An Article 39(a) session had to be reconstructed due to a tape malfunction and approximately fifty minutes of testimony were lost due to the volume being too low. Article 54(a) requires the preparation of a complete ROT in a general court-martial where the accused receives a discharge. A complete ROT should include a verbatim transcript. If the government cannot provide a verbatim ROT, it can either establish the accused suffered no prejudice or only approve the sentence that could be adjudged if the accused had been tried by a straight special court-martial. The court did a line-by-line analysis of the portions of the ROT that were missing and concluded that no prejudice occurred. The court agreed that the ROT was not verbatim, but the government had overcome the presumption of prejudice applied by the court.

16. *United States v. Henthorn, Jr.*, 58 M.J. 556 (N-M. Ct. Crim. App. 2003). ROT omitted approximately twenty-four pornographic images considered by the MJ on sentencing. Held: “such presumed prejudice [was] adequately rebutted” and any error stemming from the omission was harmless beyond a reasonable doubt. *Id.* at 559. Factors considered by the court: the case was a guilty plea; the omitted evidence did not go to guilt or innocence; the appellant did not question the validity of his plea; the images were adequately described in the ROT; the DC was aware of the MJ’s proposed handling of the images (i.e., ordered sealed in NCIS case file); and neither DC or appellate DC questioned the nature of the omitted documents.

17. *United States v. Usry*, 68 M.J. 501 (C.G. Ct. Crim. App. 2009). There was a fifty-second gap during the inquiry into the appellant’s competence. The CGCCA holds that this was not a substantial omission. Even though that fifty-second gap occurred when the military judge was inquiring into the appellant’s competence to stand trial, which is an important issue, the court holds that a decision on competence is “unlikely to turn on the precise words being spoken during a fifty-second period.” The military judge had an opportunity to observe the appellant’s behavior during trial, which was more probative of the appellant’s competence than his answers to a few questions.

18. *United States v. Miller*, No. 20090826, 2010 WL 3620471 (A. Ct. Crim. App. May 20, 2010) (unpublished). The ROT did not include a DVD showing the accused at work that was played at trial during sentencing. The ACCA, finding prejudice, approved non-verbatim ROT punishment (six months confinement and a reduction to E-1).

19. *United States v. Gaskins*, 69 M.J. 569 (A. Ct. Crim. App. 2010) (en banc). During sentencing, the appellant admitted into evidence his “Good Soldier Book,” which allegedly contained “a compilation of . . . awards, certificates, letters of commendation and character letters from family and friends, as well as a number of photographs.” The exhibit was not included in the record of trial. The trial defense counsel noted this omission in the post-trial submissions. The SJAR addendum responded to this by stating that the exhibit “could not be located.” The SJA provided a memorandum describing the exhibit, written by the senior court reporter (not the court reporter that sat in on appellant’s trial). The SJA also provided the appellant’s Official Military Personnel File (OMPF) for the convening authority to review. The post-trial submissions from the defense included twenty-one letters of support. The adjudged sentence was approved. In this case, the ACCA held that, despite the efforts to include a substitute memorandum, there is still an omission from the record of trial. However, the court was unable to determine whether or not this omission is substantial or not. The description provided by the government did not include “adequate detail” for the court to analyze whether or not it was a substantial omission. The court then turned to the three options available and found that approving a sentence below the threshold for a verbatim record (like the dissent encourages), would be a particularly harsh remedy “[i]n light of the seriousness of appellant’s offenses, the substantial sentence he received, and the fact that the omission in this case relates only to sentencing” rather than guilt. Over a rigorous dissent, the court sent the case back for a *DuBay* hearing to determine the contents of the exhibit, and any prejudice. The CAAF granted an extraordinary writ of prohibition to prevent this *DuBay* hearing and sent the case back to the ACCA. *See Gaskins v. Hoffman, Conn, Johnson, Cook, Baime, and United States Army*, Misc. No. 11-8004, 69 M.J. 452 (C.A.A.F. Dec. 9, 2010).

a) *United States v. Gaskins*, No. 20080132, 2011 WL 498371 (A. Ct. Crim. App. Feb. 10, 2011) (unpublished) (en banc). On remand, the majority opinion at the ACCA affirmed the findings and remanded the case for a sentencing rehearing. The opinion is terse, less than a page of text. Six judges were in the majority opinion (J. Hoffman, S.J. Conn, S.J. Johnson, J. Gallagher, J. Baime, and J. Burton). Four of the judges from the original opinion are still in the majority, while Judge Cook has since left the court. Two new judges, J. Gallagher and J. Burton, joined the majority for this opinion. There were two separate opinions that concurred in part and dissented in part. Both of these opinions agreed with the majority that the findings were unaffected by the missing sentencing exhibit. However, both would approve a nonverbatim record of trial punishment. J. Gifford also wrote to state that a rehearing is inappropriate because it “unfairly places the onus on appellant to present a sentencing case.”

b) The CAAF granted a petition to stay this rehearing. *See Gaskins v. Hoffman, Conn, Johnson, Gallagher, Baime, and Burton*, Misc. No. 11-8017, 70 M.J. 37 (C.A.A.F. Mar. 31, 2011).

c) Two months later, the CAAF reversed their decision and denied the petition, paving the way for the sentencing rehearing to take place. *See Gaskins v. Colonel John B. Hoffman, USA, et al.*, Misc. No. 11-8017, 70 M.J. 207 (C.A.A.F. June 1, 2011).

J. Additional TC duties.

1. Correct number of copies of ROT specified.
2. Security classification of ROT.
3. Errata. Examine the ROT before authentication and make corrections. RCM 1103(i)(1)(A).

K. Unless unreasonable delay will result, DC will be given an opportunity to examine the ROT before authentication. RCM 1103(i)(1)(B). *United States v. Bryant*, 37 M.J. 668 (A.C.M.R. 1993). Review by DC before authentication is preferred, but will not result in return of record for new authentication absent showing of prejudice. *See also United States v. Smith*, 56 M.J. 711 (A.F. Ct. Crim. App. 2001).

L. Videotaped ROT procedures. Authorized in exceptional circumstances by the RCM. Not authorized in AR 27-10.

M. Military Judges Duties / Responsibilities. *United States v. Chisholm*, 58 M.J. 733 (A. Ct. Crim. App. 2003), *aff'd*, 59 M.J. 151 (C.A.A.F. 2003) (holding that lower court's decision was not "advisory" in nature; issue of whether a Trial Judge has the authority noted by the lower court not reached by the court). Both Article 38(a), UCMJ, and RCM 1103(b)(1)(A) make the military judge responsible for overseeing and ensuring that the record of trial is prepared. The court, after noting that preparation of the record of trial is a "shared responsibility" between the SJA and military judge, found that military judges "have both a duty and responsibility to take active roles in 'directing' the timely and accurate completion of court-martial proceedings." 58 M.J. at 737. The court highlighted a military judge's "inherent authority to issue such reasonable orders as may be necessary to enforce that legal duty," noting that the manner in which he or she directs completion of the record is a matter within his or her "broad discretion." Having said that, the court suggested several "remedial actions" available to a military judge:

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

Id. at 737-38. Jurisdictions that choose to ignore a military judge's order regarding preparation of the record of trial "do so at their peril." *Id.* Note: although the CAAF found that the lower court decision was NOT advisory, the CAAF also noted that "the parties in a subsequent case are free to argue that specific aspects of an opinion . . . should be treated as non-binding dicta." 59 M.J. at 152.

IX. RECORDS OF TRIAL; AUTHENTICATION; SERVICE; LOSS; CORRECTION; FORWARDING. ARTICLE 54, UCMJ; RCM 1104.

A. Authentication by MJ or judges in GCM or SPCM with adjudged BCD. Authentication IAW service regulations for SPCM (same as GCM in AR 27-10). Substitute authentication rules provided (*Cruz-Rijos* standard).

1. Dead, disabled or absent: only exceptions to MJ authentication requirement. Article 54(a). *United States v. Cruz-Rijos*, 1 M.J. 429 (C.M.A. 1976).
2. TC may authenticate the ROT only if the military judge is genuinely unavailable for a lengthy period of time.

- a) PCS to distant place may qualify as absence. *United States v. Lott*, 9 M.J. 70 (C.M.A. 1980). Reduced precedential value in light of spread of technology (facsimiles, overnight delivery, etc.). Also justification for substitute authentication is less given the demise of the 90-day post-trial/confinement *Dunlap* rule. See *United States v. Banks*, 7 M.J. 92 (C.M.A. 1979).
- b) An extended leave may be sufficient. *United States v. Walker*, 20 M.J. 971 (N.M.C.M.R. 1985) (leave of thirty days is prolonged absence). *But see United States v. Batiste*, 35 M.J. 742 (A.C.M.R. 1992) (fifteen day leave does not equal prolonged absence); RCM 1104(a)(2)(B), discussion (substitute authentication only for emergencies; the brief, temporary absence of the MJ is not enough).
- c) Military judge's release from active duty authorizes substitute authentication UP of RCM 1104(a)(2)(B). See *United States v. Garman*, 59 M.J. 677 (A. Ct. Crim. App. 2003); *United States v. Gibson*, 50 M.J. 575, 576 (N-M. Ct. Crim. App. 1999).
- d) A statement of the reasons for substitute authentication should be included in the ROT. *United States v. Lott*, 9 M.J. 70 (C.M.A. 1980).
- e) *United States v. Allende*, 66 M.J. 142 (C.A.A.F. 2008). Trial counsel made corrections to the record of trial, authenticated the record of trial "because of absence of the military judge," and served it on the defense counsel. Absent objection from the defense counsel, the CAAF held that this was insubstantial or non-prejudicial.

B. If more than one MJ, each must authenticate his portion. *United States v. Martinez*, 27 M.J. 730 (A.C.M.R. 1988).

C. TC shall cause a copy of ROT to be served on the accused after authentication. Substitute service rules provided. RCM 1104(b).

- 1. UCMJ, Article 54(c) requires such service as soon as the ROT is authenticated.
- 2. In *United States v. Cruz-Rijos*, 1 M.J. 429 (C.M.A. 1976), the CMA added the requirement that this be done well before CA takes action.
- 3. Substitute service on the DC is a permissible alternative. See *United States v. Derksen*, 24 M.J. 818 (A.C.M.R. 1987).

D. What to do if the authenticated ROT is lost? Produce a new ROT for authentication.

- 1. *United States v. Garcia*, 37 M.J. 621 (A.C.M.R. 1993). Holding that SJA-prepared certification that all allied documents were true copies of originals was sufficient substitute for original documents.
- 2. *United States v. Godbee*, 67 M.J. 532 (N-M. Ct. Crim. App. 2008). The original ROT was lost. The copy of the ROT submitted for appellate review was internally consistent and contained all numbered pages and exhibits. The ROT also contained a copy of the authentication page signed by the military judge. As a result, the NMCCA applies a presumption of regularity to its creation, authentication, and distribution. Harmless error.

E. Rules for correcting an authenticated ROT. Certificate of correction process. Correction to make the ROT conform to the actual proceedings. RCM 1104(d).

F. The authenticated ROT will be forwarded to the CA for action or referred to the SJA for a recommendation before such action. SJA recommendation required prior to taking action in a GCM or SPCM in which a punitive discharge or confinement for one year was adjudged. RCM 1106(a).

G. If defense time for errata is unreasonable, MJ can authenticate without errata. RCM 1103(i)(1)(B).

X. MATTERS SUBMITTED BY THE ACCUSED. ARTICLE 60, UCMJ; RCM 1105.

“[W]hile the case is at the convening authority . . . the accused stands the greatest chance of being relieved from the consequences of a harsh finding or a severe sentence.” *United States v. Dorsey*, 30 M.J. 1156 (A.C.M.R. 1990) (quoting *United States v. Wilson*, 26 C.M.R. 3, 6 (C.M.A. 1958)).

A. After being sentenced, the accused has the right to submit matters for the CA’s consideration.

1. See *United States v. Davis*, 20 M.J. 1015 (A.C.M.R. 1985) (holding that DC’s failure to submit matters under RCM 1105 and failure to mention under RCM 1106(f) that MJ strongly recommended suspension of the BCD was ineffective assistance). See RCM 1106(d)(3)(B) that now requires the SJA to bring to the CA’s attention recommendations for clemency made on the record by the sentencing authority. See also *United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001) (holding that DC’s submission of three enclosures which reduced the accused’s chances for clemency was ineffective).

2. *United States v. Harris*, 30 M.J. 580 (A.C.M.R. 1990). DC is responsible for determining and gathering appropriate post-trial defense submissions.

3. *United States v. Martinez*, 31 M.J. 524 (A.C.M.R. 1990). DC sent the accused one proposed RCM 1105 submission. When the defense counsel received no response (accused alleged he never received it), DC submitted nothing; ineffective assistance found.

4. *United States v. Tyson*, 44 M.J. 588 (N-M. Ct. Crim. App. 1996). Substitute counsel, appointed during 15-month lapse between end of the SPCM and service of the PTR, failed to generate any post-trial matters (in part because accused failed to keep defense informed of his address). No government error, but action set aside because of possible IAC.

5. *United States v. Sylvester*, 47 M.J. 390 (C.A.A.F. 1998). Written submissions are preferred, even if only to document an oral presentation.

B. Accused can submit anything, but the CA need only consider written submissions. See RCM 1105.

1. The material may be anything that may reasonably tend to affect the CA’s action, including legal issues, excluded evidence, previously unavailable mitigation evidence, and clemency recommendations. See *United States v. Davis*, 33 M.J. 13 (C.M.A. 1991).

2. Query: How much must he “consider” it? Read it entirely? Trust SJA’s (realistically COJ’s or TC’s) summary? As DCs, what are your options here? DC should provide a complete summary of the accused’s RCM 1105 matters – highlight for the CA the key documents/submissions.

C. Time periods.

1. GCM or SPCM – due on later of ten days after service of SJAR on BOTH DC and the accused and service of authenticated ROT on the accused.

2. SCM – within seven days of sentencing.

3. The failure to provide these time periods is error; however, the accused must make some showing that he would have submitted matters. *United States v. DeGrocco*, 23 M.J. 146 (C.M.A. 1987). See also *United States v. Sosebee*, 35 M.J. 892 (A.C.M.R. 1992). “A staff judge advocate who discourages submissions to the convening authority after the

thirty-day time limit but prior to action creates needless litigation and risks a remand from this Court.” *Id.* at 894.

D. Waiver rules. The accused may waive the right to make a submission under RCM 1105 by:

1. Failing to make a timely submission.

a) *United States v. Maners*, 37 M.J. 966 (A.C.M.R. 1993). CA not required to consider late submission, but may do so with view toward recalling and modifying earlier action.

b) *But see United States v. Carmack*, 37 M.J. 765 (A.C.M.R. 1993). Government “stuck and left holding the bag” when defense makes weak or tardy submission, even though no error or haste on part of the government.

c) *United States v. Doughman*, 57 M.J. 653 (N-M. Ct. Crim. App. 2002). Failure to submit matters in a timely manner constitutes a waiver of the right to submit matters.

Article 60, UCMJ, 10 U.S.C. § 860, affords an accused the right to submit matters for the convening authority’s consideration, prior to the convening authority taking action on the case With this statutory right . . . also comes a responsibility: to submit matters in a timely fashion. Both Article 60, UCMJ, and RCM 1105 clearly require that matters in clemency be submitted within 10 days of the service of the record of trial or the staff judge advocate’s recommendation (SJAR), whichever is later, unless an extension is sought or granted.

Id. at 654. Held: absent evidence of an approved extension, the appellant waived the right to submit matters. Despite finding waiver, a review of the record revealed no prejudice since the appellant’s submissions were in the proper place in the record and the action post-dated the appellant’s submission. Citing *United States v. Stephens*, 56 M.J. 391 (C.A.A.F. 2002), the court noted that nothing requires the CA to list everything considered prior to taking action; in the absence of evidence to the contrary, the presumption is that the CA considered clemency matters submitted by the appellant prior to taking action.

2. By making a partial submission without expressly reserving in writing the right to submit additional matters. *United States v. Scott*, 39 M.J. 769 (A.C.M.R. 1994).

3. Filing an express, written waiver.

4. Being AWOL so that service of the ROT on the accused is impossible and no counsel is qualified or available under RCM 1106(f)(2) for service of the ROT. This circumstance only waives the right of submission during the ten day period after service of the ROT.

5. *United States v. Travis*, 66 M.J. 301 (C.A.A.F. 2008). Defense requested two short delays after the initial ten day response period to gather a letter from LtGen Mattis (now Gen Mattis, Commander, USCENTCOM). Addendum served and three days later, CA took action. Defense submitted letter from LtGen Mattis; filed writ to NMCCA claiming prejudice because no clemency matters were considered by CA. Denied. The CAAF held that there was no material prejudice to the appellant because CA purported to withdraw his action later, and approve the sentence as adjudged after considering the letter from LtGen Mattis. Note: CA had no authority to withdraw his first action because case had been forwarded to NMCCA. Also, because SJA was in Iraq and defense counsel was at Camp Pendleton, much of this was communication related. Take affirmative action to ensure matters are received before action taken.

6. *United States v. Rosenthal*, 62 M.J. 261 (C.A.A.F. 2005). Waiver of submission of matters in first post-trial process does not automatically mean appellant waives submission of matters in second or subsequent post-trial process. Appellant must be afforded the opportunity to submit matters.

E. Submission of matters contrary to client's directive. *United States v. Williams*, 57 M.J. 581 (N-M. Ct. Crim. App. 2002). Error for the defense counsel to submit a Memorandum for Record that documented his advice to his client and his client's decision not to submit clemency matters; however, the appellant suffered no harm as a result of the error. *See also United States v. Blunk*, 37 C.M.R. 422 (C.M.A. 1967).

F. Claims of post-trial cruel and unusual punishment.

1. *United States v. Roth*, 57 M.J. 740 (A. Ct. Crim. App. 2002), *aff'd*, 58 M.J. 239 (C.A.A.F. 2003) (summary disposition). Claims of post-trial cruel and unusual punishment in violation of the Eighth Amendment or Article 55, UCMJ, are within a CCA's Article 66, UCMJ, review authority. In order to succeed on his claim of injury to his testicle while at the DB, injury resulting from improper frisks without "penological justification," the appellant must satisfy both an objective and subjective test regarding the alleged injury. Objectively, the appellant must show that the "alleged deprivation or injury was 'sufficiently serious' to warrant relief." *Id.* at 742. Second, the appellant must show that the person causing the injury had a "culpable state of mind and subjectively intended to maliciously or sadistically harm [him] through the use of wanton or unnecessary force, and that the injury was not caused by a good faith effort to maintain or restore discipline." *Id.* Held: although appellant satisfied the objective test, he failed to present any subjective evidence of culpability or use of wanton or unnecessary force.

2. *United States v. Brennan*, 58 M.J. 351 (C.A.A.F. 2003), *aff'd after remand*, 60 M.J. 119 (C.A.A.F. 2004) (summary disposition). The test for post-trial claims of cruel and unusual punishment is two pronged with an objective component and subjective component: "whether there is a sufficiently serious act or omission that has produced a denial of necessities . . . [and] whether the state of mind of the prison official demonstrates deliberate indifference to inmate health or safety," respectively. *Id.* at 353. Additionally, "to sustain an Eighth Amendment violation, there must be a showing that the misconduct by prison officials produced injury accompanied by physical or psychological pain." *Id.* at 354. During the post-trial processing of the appellant's case, the appellant's counsel requested clemency based on seven separate grounds, one of which was an allegation that while confined at the USACFE, Mannheim, Germany, she was subjected to cruel and unusual punishment in violation of the Eighth Amendment and Article 55, UCMJ (i.e., sexual harassment and assaults by an E-6 cadre member over a two-month period). In responding to the allegations, the government argued that the appellant failed to establish harm and additionally, relief was not warranted because the CA already granted clemency. The CAAF disagreed with both assertions. First, the court found that it was clear that the appellant suffered harm at the hands of the cadre member. Next, although the CA granted some clemency (reducing confinement by three months), the CA's action was unclear as to why he granted the clemency. The appellant's counsel raised seven separate bases for relief and the SJAR was silent regarding the allegation of cruel and unusual punishment. Held: the decision of the service court was affirmed as to findings and set aside as to sentence. The case was remanded to the service court with the option of either granting relief at their level for the Article 55, UCMJ, violation (i.e., Eighth Amendment) or to remand back to the CA for remedial action.

3. *United States v. Ney*, 68 M.J. 613 (A. Ct. Crim. App. 2010). The appellant asserted that the command failed to follow AR 190-47 by not transferring him to a military

confinement facility within seven working days after trial (it took thirty-four days). This Eighth Amendment and Article 55, UCMJ, claim was denied because: 1) administrative remedies, such as an Article 138 complaint, must be exhausted first; and, 2) regulatory violations alone are normally not enough for an Eighth Amendment or Article 55 violation.

G. Appellate counsel access to defense files. *United States v. Dorman*, 58 M.J. 295 (C.A.A.F. 2003). Error for military defense counsel and the CCA to deny civilian defense counsel access to the appellant's case file after civilian defense counsel obtained a signed release from the client. "[T]rial defense counsel must, upon request, supply appellate defense counsel with the case file, but only after receiving the client's written release." *Id.* at 298.

XI. RECOMMENDATION OF THE SJA OR LEGAL OFFICER AND DC SUBMISSION. ARTICLE 60, UCMJ; RCM 1106.

A. RCM 1106 requires a written SJA recommendation (SJAR) before the CA takes action on a GCM with any findings of guilty or a SPCM with an adjudged BCD or confinement for a year.

B. Disqualification of persons who have previously participated in the case.

1. Who is disqualified? The accuser, investigating officer, court members, MJ, any TC, DC, or anyone who "has otherwise acted on behalf of the prosecution or defense." Article 46, UCMJ.

a) *United States v. Taylor*, 60 M.J. 190 (C.A.A.F. 2004). SJA of TC who authored article in base newspaper stating that the interests of justice were not met in a recent court-martial because of administrative errors resulting in the inadmissibility of counseling documents was disqualified from participating in the post-trial process. The SJA could have disclaimed the article, but instead said that the article could be imputed to him. His failure to disqualify himself was error.

b) *United States v. Gutierrez*, 57 M.J. 148 (C.A.A.F. 2002). Chief of Justice who testified on the merits in opposition to a defense motion to dismiss for lack of speedy trial and who later became the SJA, is disqualified from participating in the post-trial process. Therefore, it was error for that officer to prepare the SJAR and the subsequent addendum. The court noted, "Having actively participated in the preparation of the case against appellant, [that officer] was not in a position objectively to evaluate the fruits of her efforts." *Id.* at 149.

c) *United States v. Johnson-Saunders*, 48 M.J. 74 (C.A.A.F. 1998). The Assistant TC, as the Acting Chief of Military Justice, prepared the SJAR. The SJA added only one line, indicating he had reviewed and concurred with the SJAR. The DC did not object when served with the SJAR. The court held that the ATC was disqualified to prepare the SJAR. The court went on to hold that there was no waiver and there was plain error. The court returned the case for a new SJAR and action. The court created the test for non-statutory disqualification: whether the trial participation of the person preparing the SJAR "would cause a disinterested observer to doubt the fairness of the post-trial proceedings."

d) *United States v. Sorrell*, 47 M.J. 432 (C.A.A.F. 1998). CoJ wrote the SJAR. Dispute developed between the accused and the CoJ over whether the CoJ promised the accused he would recommend clemency if the accused testified against other soldiers (which he did). The court avoided the issue; if there was error, it was harmless because the PTR recommended six months clemency, which the CA approved.

e) *United States v. Stefan*, No. 20081097 (A. Ct. Crim. App. Jan. 29, 2010) (unpublished), *review granted*, 69 M.J. 171 (C.A.A.F. 2010). This case was submitted on its merits. The majority affirmed the findings and the sentence without comment. The dissent found that a disqualified officer advised the convening authority. The officer at issue first appeared in the record of trial as “Chief, Military Justice,” by signing the referral of both the charges and additional charges. Next, she appeared as trial counsel and served the referred charges and additional charges on appellant. Third, she acted again as “Chief, Military Justice” by granting the defense request for extension of time to submit post-trial matters. Next, she signed the promulgating order and the chronology sheet as “Acting Staff Judge Advocate.” Then, on the same day, she signed the court-martial data sheet as three separate persons: “Trial Counsel,” “Convening Authority or His/Her Representative,” and “Staff Judge Advocate of General Court-Martial Convening Authority or Reviewing Staff Judge Advocate.” Finally, on that same day, she signed the addendum to the SJAR as “Acting SJA.” The dissent spent time discussing the roles of the chief of military justice and the fact that the “modern chief of military justice in the Army is in no way, shape, or form—not in concept or execution—‘neutral,’ and has no business advising the convening authority in the post-trial process.” As a result, the dissent would have found prejudice by the numerous roles played by the chief of military justice in this case, and granted relief.

f) *United States v. Stefan*, 69 M.J. 256 (C.A.A.F. 2010). The CAAF agreed with the dissent from the court below and found that the Chief of Justice was statutorily disqualified under Article 6(c), UCMJ, primarily because she served the referred charges and the additional charges on the accused, a “task traditionally reserved for detailed trial counsel, see R.C.M. 602.” However, the CAAF held that the appellant was not prejudiced and granted no relief. Of particular note to the CAAF was the fact that anyone who acts as a trial counsel is disqualified under the plain reading of Article 6(c), UCMJ, and not just those who are specifically detailed as trial counsel under Article 27, UCMJ.

g) *United States v. Ramos*, No. 20090099, 2010 WL 3946329 (A. Ct. Crim. App. July 19, 2010) (unpublished), *aff’d*, 69 M.J. 475 (C.A.A.F. Jan. 11, 2011) (summary disposition). This case was submitted on its merits. The majority affirmed the findings and the sentence without comment. The dissent found that a disqualified officer advised the convening authority. The facts here are very similar to the *Stefan* case above, because the same office of the staff judge advocate and the same officer were involved. The dissent held that this case is very similar to the *Stefan* case above, except for the fact that the main document at issue in this case was the SJAR. In *Stefan*, the main document at issue was the addendum. As a result, the defense counsel had an opportunity to object to the disqualified officer acting in this case, whereas in *Stefan*, the defense counsel had no opportunity to object to the disqualified officer acting on the addendum. As a result, the dissent would have remanded the case for at least “a new review and action.”

2. Also disqualified is the SJA who must review his own prior work (*United States v. Engle*, 1 M.J. 387 (C.M.A. 1976)); or his own testimony in some cases (*United States v. Rice*, 33 M.J. 451 (C.M.A. 1991)); *United States v. Choice*, 49 C.M.R. 663 (C.M.A. 1975). *United States v. McCormick*, 34 M.J. 752 (N.M.C.M.R. 1992) (holding that PTR insufficient if prepared by a disqualified person, even if filtered through and adopted by the SJA). See RCM 1106(b) discussion.

3. “Material factual dispute” or “legitimate factual controversy” required. *United States v. Lynch*, 39 M.J. 223, 228 (C.M.A. 1994). See *United States v. Bygrave*, 40 M.J. 839 (N.M.C.M.R. 1994) (holding that PTR must come from one free from any connection with a controversy); *United States v. Edwards*, 45 M.J. 114 (C.A.A.F. 1996). Legal officer (non-judge advocate) disqualified from preparing PTR because he preferred the charges, interrogated the accused, and acted as evidence custodian in case. Mere prior participation does not disqualify, but involvement “far beyond that of a nominal accuser” did so here.
4. Who is not disqualified?
 - a) The SJA who has participated in obtaining immunity or clemency for a witness in the case. *United States v. Decker*, 15 M.J. 416 (C.M.A. 1983).
 - b) Preparation of pretrial advice challenged at trial not automatically disqualifying; factual determination. *United States v. Caritativo*, 37 M.J. 175 (C.M.A. 1993).
 - c) *United States v. McDowell*, 59 M.J. 662 (A.F. Ct. Crim. App. 2003). SJA whose initial SJAR was deemed defective on appeal is not *per se* disqualified when the error is a result of a change in the law as opposed to bad or erroneous advice. Changes in the law affecting the validity of an SJAR do not create a “personal interest” in the case; however, erroneous or bad advice in an SJAR, returned to the same SJA for a second review and action may disqualify that SJA if it is shown he or she has an other than official interest in the case.
5. How do you test for disqualification outside the scope of the rules? Do the officer’s actions before or during trial create, or appear to create, a risk that the officer will be unable to evaluate the evidence objectively and impartially? *United States v. Newman*, 14 M.J. 474 (C.M.A. 1983). See *United States v. Kamyal*, 19 M.J. 802 (A.C.M.R. 1984) (“a substantial risk of prejudice”). *United States v. Johnson-Saunders*, 48 M.J. 74 (C.A.A.F. 1998) (whether the involvement by a disqualified person in the PTR preparation “would cause a disinterested observer to doubt the fairness of the post-trial proceedings”)
6. RCM 1106(c). When the CA has no SJA or SJA is disqualified (unable to evaluate objectively and impartially), CA must request assignment of another SJA, or forward record to another GCMCA. Make sure documentation is included in the record.
 - a) Informal agreement between SJAs is not sufficient. *United States v. Gavitt*, 37 M.J. 761 (A.C.M.R. 1993).
 - b) *United States v. Hall*, 39 M.J. 593 (A.C.M.R. 1994). SJA used incorrect procedure to obtain another SJA to perform post-trial functions. Court holds that failure to follow procedures can be waived.
 - c) Deputies cannot sign SJARs. *United States v. Crenshaw*, No. 9501222 (A. Ct. Crim. App. 1996) (unpublished). Fact that Deputy Staff Judge Advocate (DSJA) improperly signed PTR as “Deputy SJA” rather than “Acting SJA” did not require corrective action where PTR “contained nothing controversial” and where SJA signed addendum that adhered to DSJA’s recommendation.
 - d) Who should author the SJAR? The SJA. *United States v. Finster*, 51 M.J. 185 (C.A.A.F. 1999), where a non-qualified individual signed the SJAR, the court concluded there was manifest prejudice. *United States v. Gatlin*, 60 M.J. 804 (N-M. Ct. Crim. App. 2004) (refusing to apply a presumption of regularity to a PTR signed by a LT Stampher (not the SJA) when there was no explanation in the record as to why he prepared and signed the PTR; holding, however, that appellant did not make a showing of any prejudice).

C. Form and content: “The staff judge advocate or legal advisor shall provide the [CA] with a copy of the report of results of trial, setting forth the findings, sentence, and confinement credit to be applied, a copy or summary of the pretrial agreement, if any, any recommendation for clemency by the sentencing authority, made in conjunction with the announced sentence, and the staff judge advocate’s recommendation.” RCM 1106(d)(3). EFFECTIVE: 23 AUGUST 2008.

1. Findings and sentence. *United States v. Russett*, 40 M.J. 184 (C.M.A. 1994). Requirement for the SJA to comment on multiplicity question arises when DC first raises the issue as part of the defense submission to the CA.

a) Accuracy most critical on charges and specs. *United States v. Diaz*, 40 M.J. 335 (C.M.A. 1994) (the CMA disapproved findings on two specs omitted from PTR). *See also United States v. Sanchez*, 54 M.J. 874 (A. Ct. Crim. App. 2001) (error in PTR alleging a finding of guilty to larceny as opposed to wrongful appropriation, however, no prejudice – finding of guilty to larceny set aside and replaced with a finding of guilty to wrongful appropriation and sentence affirmed after reassessment). *United States v. Lindsey*, 56 M.J. 850 (A. Ct. Crim. App. 2002). Finding of not guilty to specification reported in PTR as guilty. DC failed to comment on the error. Applying a waiver and plain error analysis, court held plain error; therefore, waiver did not apply. Unsure on the issue of prejudice, the court reduced the sentence by two months. “We are unsure of the impact of the error on appellant’s request for clemency. To moot any possible claim of prejudice . . . and for the sake of judicial economy, we will take appropriate remedial action.” *Id.* at 851. *But see United States v. Ross*, 44 M.J. 534, 536 (A.F. Ct. Crim. App. 1996) (improper dates for offense in PTR – July vs. Sept. – not fatal when CA action reflected original, correct date of charge sheet; “we are reluctant to elevate ‘typos’ in dates to ‘plain error’” *especially* when waived).

b) Some errors indulged, especially when defense does not notice or point them out. *See, e.g., United States v. Royster*, No. 9400201 (A. Ct. Crim. App. 1995) (unpublished); *United States v. Bernier*, 42 M.J. 521 (C.G. Ct. Crim. App. 1995); *United States v. Zaptin*, 41 M.J. 877 (N-M. Ct. Crim. App. 1995). *United States v. Gunkle*, 55 M.J. 26 (C.A.A.F. 2001). The PTR failed to reflect that the judge granted motions for a finding of not guilty and/or modification of charges. Defense failed to mention these errors in their RCM 1105/6 submissions, but did mention the judge’s favorable rulings. The court found no error.

c) Maximum punishment. Not a required element; if done, ensure accuracy. *See United States v. Hammond*, 60 M.J. 512 (A. Ct. Crim. App. 2004) (reducing confinement by thirty days when the PTR misstated the maximum punishment (life w/o possibility for parole when maximum was only six years)).

2. Any clemency recommendations by the MJ or panel. RCM 1106(d)(3) [2008 change].

a) *United States v. Paz-Medina*, 56 M.J. 501 (A. Ct. Crim. App. 2001). Plain error for the SJA to *omit* member’s clemency recommendation regarding waiver of forfeitures from the PTR. CA action set aside; returned for new PTR and action. Court also commented on the slow post-trial processing stating, “[b]ecause we are already returning the case for a new SJAR and action, the new SJA and convening authority will also be provided a discretionary opportunity to fashion an appropriate remedy for the untimely processing.” *Id.* at 505.

b) *United States v. Williams*, 57 M.J. 1 (C.A.A.F. 2002). Error found where government failed to serve DC with PTR prior to action when PTR omitted clemency recommendation from sentencing authority.

3. Summary of accused's service record. Required by the old, pre-23 August 2008, R.C.M. 1106(d)(3)(C), but not the new R.C.M. 1106. Under the new R.C.M. 1106(d)(1), the SJA "shall use the record of trial in preparation of the recommendation, and may also use the personnel records of the accused or other matters in advising the [CA] whether clemency is warranted." (emphasis added).

a) *United States v. DeMerse*, 37 M.J. 488 (C.M.A. 1993). Failure to note Vietnam awards and decorations was plain error, requiring that action be set aside.

b) *United States v. Czekala*, 38 M.J. 566 (A.C.M.R. 1993). Error in omitting JSCM waived by failure to comment.

c) *United States v. McKinnon*, 38 M.J. 667 (A.C.M.R. 1993). Failure to comment on omission of several awards and decorations equals waiver.

d) *United States v. Thomas*, 39 M.J. 1078 (C.G.C.M.R. 1994). SJA not required to go beyond ROT and accused's service record in listing medals and awards in PTR.

e) *United States v. Perkins*, 40 M.J. 575 (N.M.C.M.R. 1994). SJA may rely on accused's official record in preparing PTR. No need to conduct inquiry into accuracy of record, particularly where accused does not question.

f) *United States v. Brewick*, 47 M.J. 730 (N-M. Ct. Crim. App. 1997). SJA PTR failed to list SW Asia service awards. Held – waived by DC, and no plain error. Distinguishes *DeMerse*, because those were combat awards, and old, which set DeMerse apart from other soldiers (so few remaining on active duty).

g) *United States v. Osuna*, 56 M.J. 620 (C.G. Ct. Crim. App. 2001). SJA PTR summarized accused's service record by reference to enclosures. For example, accused's awards are at enclosure 2, performance summary at enclosure 3, and nonjudicial punishment at enclosure 4. Held: summary was sufficient. Note: PTR erroneously stated that accused was sentenced, in a judge alone trial, by members. Court found error but not plain error, no prejudice and waiver by failing to timely object to the error. *See also United States v. Kittle*, 56 M.J. 835 (A.F. Ct. Crim. App. 2002) (no error in SJAR by inclusion of complete nonjudicial punishment actions in lieu of summarizing them).

h) *United States v. Mack*, 56 M.J. 786 (A. Ct. Crim. App. 2002). SJAR need not include awards and decorations which are not supported by accused's service record admitted at trial (e.g., ORB) or established by stipulation of the parties. Failure to mention accused's Purple Heart was not error, "plain or otherwise." *Id.* at 790. Additionally, SJA's characterization of accused's service as "satisfactory" was not error. Finally, SJA need not comment on accused's clemency submission absent allegation of legal error. "The appellant suggests that we equate the SJA's decision not to comment on the appellant's extensive clemency matters as tantamount to disagreeing with or disputing matters in the appellant's RCM 1105 submission. We are aware of no authority to support the appellant's position, and we decline to establish such authority." *Id.*

i) *United States v. Wellington*, 58 M.J. 420 (C.A.A.F. 2003). Prejudicial error for the SJAR in an indecent assault, attempted rape, and attempted forcible sodomy to misstate the appellant's prior disciplinary actions. The SJAR indicated

the appellant received two prior Field Grade Article 15s when in fact he had never received NJP. Additionally, the SJAR indicated no pretrial restraint when in fact the appellant was restricted prior to trial. Applying a plain error analysis (RCM 1106(f)(6)) because the defense counsel failed to comment on the erroneous SJAR, the court found that the errors were both “clear” and “obvious.” Next the court found prejudice from the error which, despite a service record lacking in any disciplinary action, “portrayed [the appellant] as a mediocre soldier who had twice received punishment from a field grade officer . . . Appellant’s ‘best hope for sentence relief’ was dashed by the inaccurate portrayal of his service record.” Held: the erroneous SJAR amounted to plain error and the court would not speculate on what the CA would do if accurately advised by the SJA; the case was remanded for a new SJAR and action.

j) *United States v. Sanchez*, 69 M.J. 679 (C.G. Ct. Crim. App. 2010). The SJAR contained the fact that the appellant had no previous convictions, information about a prior nonjudicial punishment, and a list of four negative administrative remarks. There was no mention of the appellant’s awards and decorations or positive marks. The court found this to be prejudicial error and remanded the case for a new SJAR and action. Even though there is no requirement to summarize the accused’s service records under the amendment to R.C.M. 1106(d), any summary must be “balanced” and “a fair portrayal.”

4. Nature and duration of any pretrial restraint.

a) “The accused was under no restraint;” or

b) “The accused served 67 days of pretrial confinement, which should be credited against his sentence to 8 years confinement.”

5. *United States v. Scalo*, 60 M.J. 435 (C.A.A.F. 2005). SJAR erroneously advised the CA that there had been no pretrial restraint in appellant’s case. In fact, the appellant had been restricted to the limits of Fort Stewart, Georgia for forty-four days until his court-martial. The court determined that the SJA’s failure to advise the CA regarding appellant’s pretrial restraint was not inherently prejudicial and that appellant failed to make a colorable showing of possible prejudice. The appellant failed to make a reference, direct or indirect, in his clemency petition. Further, the length alone of the restraint, was not of an unusual length to attract the convening authority’s attention for clemency purposes.

a) *United States v. Weber*, 56 M.J. 736 (C.G. Ct. Crim. App. 2002). Error for SJA to omit from PTR that accused was subject to over three months of pretrial restriction; however, applying *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998), accused failed to “make some colorable showing of possible prejudice” that would warrant relief.

b) *United States v. Miller*, 56 M.J. 764 (A.F. Ct. Crim. App. 2002). SJAR failed to mention three days of pretrial confinement. Held: attachments to SJAR (e.g., Report of Result of Trial and Personal Data Sheet) both stated three days of PTC; therefore, no error. Even if error, applying *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998), accused failed to make a “colorable showing of prejudice” that would warrant relief. Finally, court noted that accused waived the issue by failing to raise a timely objection in the absence of plain error.

6. CA’s obligation under any pretrial agreement. See *United States v. Green*, 58 M.J. 855 (A. Ct. Crim. App. 2003); *United States v. Sheffield*, 60 M.J. 591 (A.F. Ct. Crim. App. 2004) (failure of the SJAR to notify the CA of his obligations regarding waiving

automatic forfeitures was error). The 2008 amendment to RCM 1106(d)(3) requires a “copy or summary of the pretrial agreement.”

7. The SJAR. RCM 1106(d)(3). The pre-2008 RCM 1106 only required a “specific recommendation as to the action to be taken by the [CA] on the sentence.” Pre-23 August 2008 RCM 1106(D)(3)(F).

8. Nothing else should be included!

9. Legal sufficiency need not be reviewed. Exceptions:

- a) If the SJA deems it appropriate to take corrective action on findings or sentence; or
- b) If the accused alleges a legal error in the RCM 1105 submission.
- c) *United States v. Drayton*, 40 M.J. 447 (C.M.A. 1994). Weighing of evidence supporting findings of guilt limited to evidence introduced at trial.
- d) *United States v. Haire*, 40 M.J. 530 (C.G.C.M.R. 1994). Legal issues raised in RCM 1105 submission not discussed in SJA recommendation; addressed for first time in addendum. No proof that addendum was served on DC. Action set aside.

10. Additional appropriate matters may be included in the recommendation even if taken from outside the record. RCM 1106(d)(5). *See United States v. Due*, 21 M.J. 431 (C.M.A. 1986). *See also United States v. Drayton*, 40 M.J. 447 (C.M.A. 1994). Key – service on accused and counsel and opportunity to comment!

D. Two additional tips.

1. Use a certificate of service when providing the defense with the SJAR. *United States v. McClelland*, 25 M.J. 903 (A.C.M.R. 1988). This logic should be extended to service of the accused’s copy of the SJAR. *See* RCM 1106(f).

2. List each enclosure (petitions for clemency, etc.) that goes to the CA on the SJAR/addendum and/or have the convening authority initial and date all documents. *United States v. Hallums*, 26 M.J. 838 (A.C.M.R. 1988); *United States v. Craig*, 28 M.J. 321 (C.M.A. 1989).

- a) Query: What if the CA forgets to initial one written submission, but initials all the others? Have you just given the DC evidence to argue that the CA “failed to consider” a written defense submission?
- b) *United States v. Blanch*, 29 M.J. 672 (A.F.C.M.R. 1989) (government entitled to enhance “paper trail” and establish that accused’s RCM 1105 matters were forwarded to and considered by the CA); *United States v. Joseph*, 36 M.J. 846 (A.C.M.R. 1993) (SJA’s affidavit established that matters submitted were considered by CA before action).
- c) *United States v. Briscoe*, 56 M.J. 903 (A.F. Ct. Crim. App. 2002). Failure of SJA to prepare addendum to PTR advising CA to consider all matters (i.e., written matters) submitted by accused cured through post-trial affidavit from CA and SJA swearing that all clemency matters were considered by CA prior to action.
- d) *United States v. Stephens*, 56 M.J. 391 (C.A.A.F. 2002). CA’s action stated that he “specifically considered the results of trial, the record of trial, and the recommendation of the [SJA].” *Id.* at 392. The CA’s action did not list the accused’s clemency matters. Held: no error since the evidence revealed the CA

considered the addendum which included the accused's clemency materials. "We decline to hold that a document embodying the [CA's] final action is defective simply because it refers to the SJA's recommendation without also referring to the attachments, such as an addendum or clemency materials." *Id.*

e) *United States v. Gaddy*, 54 M.J. 769 (A.F. Ct. Crim. App. 2001). The appellant submitted a single letter from his pastor in his RCM 1105 matters. The SJA did not do an addendum accounting for the letter nor did the PTR advise the CA he had to consider all written submissions made by the appellant. According to the court, it can assume the CA considered all defense submissions when the SJA prepares an addendum which includes mention of the defense submissions, advises the CA that he must consider the matters submitted, and the addendum actually lists the matters submitted. If no addendum is prepared, the record must reflect that the CA was advised of his obligation to consider all written submissions from defense and there must be some evidence that the defense matters were actually considered. The AFCCA found prejudice and reduced the appellant's sentence by two months.

f) *United States v. Baker*, 54 M.J. 774 (A.F. Ct. Crim. App. 2001). There was no evidence in the record that the CA had considered the defense RCM 1105 matters. SJA did not do an addendum to his PTR despite lengthy letter from accused requesting clemency. Affidavits obtained to establish that the CA considered the appellant's letter. Although the court found no prejudicial error, they decry the waste of appellate assets caused by the SJA failing to follow standard Air Force post-trial process. The court stated that they will be sending information to their TJAG about SJAs who commit egregious post-trial errors.

E. Errors in the recommendation.

1. Corrected on appeal without return to CA for action.
2. Returned for new recommendation and new action. *See United States v. Craig*, 28 M.J. 321 (C.M.A. 1989). "Since it is very difficult to determine how a convening authority would have exercised his broad discretion if the staff judge advocate had complied with RCM 1106, a remand will usually be in order." *Id.* at 325 (quoting *United States v. Hill*, 27 M.J. 293, 296 (C.M.A. 1988)). *See also United States v. Reed*, 33 M.J. 98 (C.M.A. 1991); *United States v. Hamilton*, 47 M.J. 32 (C.A.A.F. 1997). "This court has often observed that the convening authority is an accused's last best hope for clemency [citation omitted]. Clemency is the heart of the convening authority's responsibility at that stage of a case. If an SJA gives faulty advice in this regard, the impact is particularly serious because no subsequent authority can adequately fix that mistake." *Id.* at 35. *See also United States v. Ord*, 63 M.J. 279 (C.A.A.F. 2006). When the CA did not act expressly on the findings and the SJAR omitted a finding of guilty adjudged by the court-martial, the ACCA could not presume that the CA approved the omitted findings, but could return the record for a new SJAR and action.

a) *United States v. Pate*, 54 M.J. 501 (A. Ct. Crim. App. 2000). Accused was convicted at trial of several charges which were the basis of a prior Article 15. The SJA advised the CA of the Article 15 in his PTR and erroneously stated the Article 15 was set aside. Defense noted the error in the RCM 1105/6 submissions and the SJA agreed with the defense in an addendum, which advised the CA he could not consider the Article 15 for any purpose other than granting *Pierce* credit to the appellant. Defense claimed that under *Pierce*, an Article 15 of this nature cannot be used for any purpose, administrative or otherwise, and thus it was error for the SJA to mention it in the PTR. The court disagreed, stating that *Pierce* does

not require withholding this information from the CA. The court went on to state that even if it did, the defense had failed to make a colorable showing of possible prejudice.

b) *United States v. Williams*, 54 M.J. 626 (A.F. Ct. Crim. App. 2000). SJA signed the PTR three days before the military judge authenticated the ROT. Defense claimed PTR was invalid because it was based on an unauthenticated record of trial (ROT) thus invalidating the CA's action. The court disagreed – ROT had only received minor, non-substantive errata from the military judge and defense failed to raise any objection in the RCM 1105/6 submissions. Court found no prejudice to the accused and noted that the issue was waived. *See also United States v. Smith*, 54 M.J. 783 (A.F. Ct. Crim. App. 2001) (cautioning that when PTR dated nine days before authentication of the ROT, “this sort of inattention to detail far too often creates unnecessary issues on appeal.”). *Id.* at 788.

c) *United States v. Farence*, 57 M.J. 674 (C.G. Ct. Crim. App. 2002). Despite erroneous SJAR that advised the CA that the appellant was convicted of two offenses dismissed for sentencing purposes by the MJ, no corrective action was required when the appellant failed to make “some colorable showing of possible prejudice.”

3. Waived absent plain error. RCM 1106(f)(6) provides that “[f]ailure of counsel for the accused to comment on any matter in the recommendation or matters attached to the recommendation in a timely manner shall waive later claim of error with regard to such matter in the absence of plain error.”

a) In cases where neither the appellant nor his counsel raises any error in the SJAR either as an RCM 1106(f)(4) matter or on appeal, the reviewing court will apply a *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998), plain error analysis: (1) was there an error; (2) was the error plain and obvious; and, (3) did the error materially prejudice a substantial right. *United States v. Scalo*, 59 M.J. 646 (A. Ct. Crim. App. 2003) (en banc), *aff'd*, 60 M.J. 435 (C.A.A.F. 2005). The reviewing court will not apply the lesser *Wheelus* standard of “some colorable showing of possible prejudice” to establish plain error in cases where the issues is not raised by the appellant either at or before action or on appeal. *Id.* at 650.

b) In cases where neither the appellant nor his counsel raises an allegation of error in the SJAR as an RCM 1106(f)(4) matter, but raises the error on appeal, the reviewing court will apply a *Powell-Wheelus* analysis (appellant need only show a “colorable showing of possible prejudice”). *United States v. Hartfield*, 53 M.J. 719, 720 (A. Ct. Crim. App. 2000).

F. No recommendation is needed for total acquittals or other final terminations without findings. This now includes findings of not guilty only by reason of lack of mental responsibility. *See* RCM 1106(e).

G. Service of SJAR on DC and the accused. RCM 1106(f)(1).

1. Before forwarding the recommendation and the ROT to the CA for action, the SJA or legal officer shall cause a copy of the SJAR to be served on counsel for the accused. A separate copy will be served on the accused.

a) *United States v. Hickok*, 45 M.J. 142 (C.A.A.F. 1996). Failure to serve PTR on counsel is prejudicial error, even though counsel submitted matters before authentication of record and service of PTR. Original counsel PCS'd, new

counsel never appointed, and OSJA never tried to serve PTR. The CAAF found accused “was unrepresented in law and in fact” during this stage. Fact that RCM 1105 clemency package was submitted at an early stage (and, all conceded, considered by CA at action) cannot compensate for the separate post-trial right to respond to the PTR under RCM 1106. *United States v. Williams*, 57 M.J. 1 (C.A.A.F. 2002) (finding error for failing to serve DC with PTR prior to action when PTR omitted clemency recommendation from sentencing authority).

b) *United States v. Siler*, 60 M.J. 772 (N-M. Ct. Crim. App. 2004). When the SJA served the PTR on appellant, the substitute DC put the SJA on notice that the DC did not have an attorney-client relationship with the appellant. The CA took action without any comment by appellant or his substitute DC. Once on notice of a potential problem concerning post-trial representation, the government has the responsibility to ensure adequate representation.

c) *United States v. Cornelious*, 41 M.J. 397 (C.A.A.F. 1995). The SJA should have realized that service of the PTR was inadequate because it was not served “on counsel for the accused” as required by RCM 1106(f)(1). In this case the court held that service was tantamount to no service at all and ordered a new PTR and CA action. The court took pains to explain that because the SJA affirmatively inquired into the existence of the attorney-client relationship, he could not ignore the results of his inquiry.

d) *United States v. Klein*, 55 M.J. 752 (N-M. Ct. Crim. App. 2001). Failure to serve PTR on DC until five days after CA’s action constituted error, but accused failed to make “some colorable showing of possible prejudice.” However, relief was granted on another basis.

e) *United States v. Williams*, 57 M.J. 1 (C.A.A.F. 2002). Action set aside because PTR which omitted required clemency recommendation from the MJ at sentencing served on DC day after action in the case.

f) *United States v. Smith*, 59 M.J. 604 (N-M. Ct. Crim. App. 2003). Failure to produce evidence of service of the SJAR on the appellant prior to action does not preclude approval of a punitive discharge despite language to the contrary in RCM 1107(d)(4) and 1103(c)(1). The court, after noting that RCM 1107(d)(4) was “inartfully drafted,” applied a “‘whole statute’ principle of statutory interpretation . . . considering the drafter’s intent . . . and [considering] case law,” rejected a literal reading of RCM 1107(d)(4) and 1103(c)(1) that would require disapproval of a punitive discharge. Finally, the court noted that the appellant failed to make a colorable showing of possible prejudice from the alleged error.

2. Although normally submitted simultaneously, RCM 1105 and RCM 1106 submissions serve different purposes. RCM 1105 submissions are the accused’s submissions where RCM 1106 focuses on submission by the accused’s counsel.

3. RCM 1106(f)(1). “If it is impracticable to serve the recommendation on the accused for reasons including but not limited to the transfer of the accused to a distant place, the unauthorized absence of the accused, or military exigency, or if the accused so requests on the record at court or in writing, the accused’s copy shall be forwarded to the accused’s defense counsel. A statement shall be attached to the record explaining why the accused was not served personally.”

a) *United States v. Ayala*, 38 M.J. 633 (A.C.M.R. 1993). Substitute service of ROT and PTR on DC authorized where accused is confined some distance away.

b) *United States v. Smith*, 37 M.J. 583 (N.M.C.M.R. 1993). Mailing of recommendation is not impracticable where all parties are located in CONUS and the accused has provided a current mailing address.

c) *United States v. Lowery*, 37 M.J. 1038 (A.C.M.R. 1993). Real issue in this area is whether accused and defense counsel have had an opportunity to submit post-trial matters.

d) *United States v. Ray*, 37 M.J. 1052 (N.M.C.M.R. 1993). Mere failure to serve does not warrant relief; accused did not offer evidence to rebut presumption that SJA had properly executed duties, did not submit matters that would have been submitted to CA, and did not assert any inaccuracies in the recommendation.

e) *United States v. Ybarra*, 57 M.J. 807 (N-M. Ct. Crim. App. 2002). Failure to serve ROT and SJAR on appellant as specifically requested by appellant does not warrant relief (i.e., no prejudice) when the appellant submitted a waiver of clemency and he failed, under *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998), to cite to any errors or omissions in the SJAR that he would have brought to the CA's attention had he been given the opportunity to do so.

4. RCM 1106(f)(2). The accused may designate at trial which counsel shall be served with the SJAR or may designate such counsel in writing to the SJA before the SJAR is served. Absent such a designation, the priority for service is: civilian counsel, individual military counsel, and then detailed counsel. *But see United States v. Johnson*, 26 M.J. 509 (A.C.M.R. 1988) (holding that service on detailed defense counsel, even when accused was represented by civilian counsel, was sufficient. Accused "must have acquiesced" in the response filed by detailed defense counsel because his letter to the CA was included in the detailed defense counsel's response to the SJAR).

5. RCM 1106(f)(2). If no civilian counsel exists and all military counsel have been relieved or are not reasonably available, substitute counsel shall be detailed by an appropriate authority. AR 27-10, para. 6-9, says the Chief, USATDS, or his delegee will detail defense counsel.

a) Substitution of counsel problems. RCM 1106(f)(2).

(1) *United States v. Iverson*, 5 M.J. 440 (C.M.A. 1978). Substituted counsel must form attorney-client relationship with the accused; absent extraordinary circumstances, only the accused may terminate an existing relationship. *See also United States v. Miller*, 45 M.J. 149 (C.A.A.F. 1996). Substitute defense counsel's failure to formally establish attorney-client relationship with accused found harmless, despite substitute counsel's failure to consult accused or submit clemency package. Detailed counsel (who later ETS'd) had submitted clemency materials before service of PTR, and government was not on any reasonable notice that substitute counsel and accused failed to enter attorney-client relationship. In such circumstances, the test is for prejudice.

(2) *United States v. Howard*, 47 M.J. 104 (C.A.A.F. 1997). Rejecting an invitation to overrule *Miller*, the CAAF restated that failure of the substitute DC to contact the client post-trial will be tested for prejudice. "Prejudice" does not require the accused to show that such contact and the resulting submission would have resulted in clemency; it only requires a showing that the accused would have been able to submit something to counter the SJA's PTR.

(3) *United States v. Antonio*, 20 M.J. 828 (A.C.M.R. 1985). Accused may waive the right to his former counsel by his acceptance of substitute counsel and his assent to representation.

(4) *United States v. Hood*, 47 M.J. 95 (C.A.A.F. 1997). Even if the substitute counsel does form the required attorney-client relationship, failure to discuss the accused's clemency packet with him prior to submission is deficient performance under the first prong of the *Strickland* analysis.

(5) *United States v. Johnston*, 51 M.J. 227 (C.A.A.F. 1999). The convening authority must ensure that the accused is represented during post-trial. Submission of RCM 1105 and 1106 matters is considered to be a critical point in the criminal proceedings against an accused.

b) If the accused alleges ineffective assistance of counsel (IAC) after trial, that counsel cannot be the one who is served with the SJAR.

(1) *United States v. Cornelious*, 41 M.J. 397 (C.A.A.F. 1995). Government on notice of likely IAC. Court remanded to determine whether accused substantially prejudiced.

(2) *United States v. Carter*, 40 M.J. 102 (C.M.A. 1994). No conflict exists where DC is unaware of allegations.

(3) *United States v. Alomarestrada*, 39 M.J. 1068 (A.C.M.R. 1994). Dissatisfaction with outcome of trial does not always equal attack on competence of counsel requiring appointment of substitute counsel.

(4) *United States v. Sombolay*, 37 M.J. 647 (A.C.M.R. 1993). Substitute counsel not required where allegations of ineffective assistance are made after submission of response to PTR.

6. RCM 1106(f)(3). Upon request, a copy of the ROT shall be provided for use by DC. DC should include this boilerplate language in the Post-Trial and Appellate Rights Forms.

H. Defense Counsel Submissions. RCM 1106(f)(4). "Counsel for the accused may submit, in writing, corrections or rebuttal to any matter in the recommendation believed to be erroneous, inadequate, or misleading, and may comment on any other matter."

1. *United States v. Goode*, 1 M.J. 3 (C.M.A. 1975). Service of PTR on the DC is required before the CA can take action. DC's failure to object to errors in PTR response normally waives such errors. *See also United States v. Narine*, 14 M.J. 55 (C.M.A. 1982).

2. Response due within 10 days of service of SJAR on both DC and accused and service of authenticated ROT on accused, whichever is later.

3. SJA may approve delay for RCM 1105 (not RCM 1106) matters for up to 20 days; only CA may disapprove. Note the distinction between the timelines and approval and/or disapproval authority when dealing with RCM 1105 vs. RCM 1106 matters. *See* RCM 1105(c)(1) and RCM 1106(f)(3). Key: serve accused and counsel the authenticated ROT and SJAR at the same time.

I. Staff Judge Advocate's Addendum. RCM 1106(f)(7). "The staff judge advocate or legal officer may supplement the recommendation after the accused and counsel for the accused have been served with the recommendation and given an opportunity to respond."

1. Must address allegations of legal error. Rationale not required; "I have considered the defense allegation of legal error regarding _____. I disagree that this was legal error.

In my opinion, no corrective action is necessary.” *See also United States v. McKinley*, 48 M.J. 280, 281 (C.A.A.F. 1998) (Judge Cox’s interpretation of RCM 1106(d)(4) and how to respond to an allegation of legal error).

a) *See United States v. Keck*, 22 M.J. 755 (N.M.C.M.R. 1986). *See also United States v. Broussard*, 35 M.J. 665 (A.C.M.R. 1992) (addendum stating “I have carefully considered the enclosed matters and, in my opinion, corrective action with respect to the findings and sentence is not warranted” was an adequate statement of disagreement with the assertions of accused). Need not give rationale or analysis – mere disagreement and comment on the need for corrective action sufficient.

b) *United States v. Welker*, 44 M.J. 85 (C.A.A.F. 1996). Although error for SJA not to respond to defense assertions of legal errors made in post-trial submissions, the CAAF looked to record and determined there was no merit to the allegation of error raised by the defense in the RCM 1105/6 submissions. Consequently, the court held that there was no prejudice to the accused by the SJA’s failure to comment on the allegation of error raised by the defense. The court also reaffirmed the principle that a statement of agreement or disagreement, without statement of rationale, is OK. Court will test for prejudice. When (as here) the court finds no trial error, it will find no prejudice. *See also United States v. Jones*, 44 M.J. 242 (C.A.A.F. 1996) (comments on preparation of ROT were “trivial”); *United States v. Hutchison*, 56 M.J. 756 (A. Ct. Crim. App. 2002).

c) *United States v. Sojfer*, 44 M.J. 603 (N-M. Ct. Crim. App. 1996). Seven page addendum recited alleged errors and said, “*My recommendation remains unchanged: I recommend that you take action to approve the sentence as adjudged*” . . . He [SJA] made no other comment regarding the merit of the assigned errors.” *Id.* at 611. Government argued that “only inference . . . is that the [SJA] disagreed with all of the errors that were raised. We agree.” *Id.*

d) *United States v. Zimmer*, 56 M.J. 869 (A. Ct. Crim. App. 2002). It was error for SJA not to respond to allegation of error regarding improper deferment denial.

2. Ambiguous, unclear defense submission. If the submission arguably alleges a legal error in the trial, the SJA must respond under RCM 1106 and state whether corrective action is needed.

a) *United States v. Williams-Oatman*, 38 M.J. 602 (A.C.M.R. 1993). “Consideration of inadmissible evidence” is sufficient allegation of legal error.

b) *United States v. Hutchison*, 56 M.J. 756 (A. Ct. Crim. App. 2002). Unsupported claim of onerous and illegal pretrial punishment which was not raised at trial after specific Article 13 inquiry by MJ and raised for the first time in clemency submission does NOT allege legal error requiring comment by the SJA. Likewise, alleged undue, non-prejudicial post-trial delay does not raise an allegation of legal error requiring comment by the SJA.

3. RCM 1106(f)(7). Addenda containing “new matter” must be served on the defense.

a) *United States v. Leal*, 44 M.J. 235 (C.A.A.F. 1996). If the additional information is not part of the record, *i.e.*, transcript, consider it to be new matter. Not enough that the information is contained “between the blue covers,” because that would permit government to highlight and smuggle to CA evidence offered but not admitted. Here, the addendum referred to a letter of reprimand; the failure to serve the addendum required a new PTR and action by a new CA. *But see*

- United States v. Brown*, 54 M.J. 289 (C.A.A.F. 2000). New action not required where defense, on appeal, fails to proffer a possible response to the un-served addendum that “could have produced a different result.” *Id.* at 293.
- b) *United States v. Cook*, 43 M.J. 829 (A.F. Ct. Crim. App. 1996), *aff’d*, 46 M.J. 37 (C.A.A.F. 1997). In two post-trial memos, the SJA advised the CA about the MJ’s qualifications and experience, the likelihood of the accused waiving an administrative separation board, and minimizing effects of BCD. The AFCCA disapproved the BCD because all of this was obviously outside the record and should have been served on accused with opportunity to comment.
- c) *United States v. Harris*, 43 M.J. 652 (A. Ct. Crim. App. 1995). Addendum mentioned for the first time that the accused had received three prior Article 15s; new review and action required.
- d) *United States v. Sliney*, No. 9400011 (A. Ct. Crim. App. 1995) (unpublished). The inclusion of letters from victim and victim-witness liaison required re-service; new action required. *Accord United States v. Haire*, 40 M.J. 530 (C.G.C.M.R. 1994).
- e) *United States v. McCrimmons*, 39 M.J. 867 (N.M.C.M.R. 1994). Reference in addendum to three thefts that formed basis for court-martial (“demonstrated by his past behavior that he is not trustworthy”), not “new matter.”
- f) *United States v. Heirs*, 29 M.J. 68 (C.M.A. 1989). The SJA erred by erroneously advising the CA in the addendum that Heirs’ admissions during the rejected providence inquiry could be used to support the findings of guilty once the accused challenged the sufficiency of the evidence post-trial.
- g) *United States v. Jones*, 44 M.J. 242 (C.A.A.F. 1996). Addendum explained post-trial delays and an Air Force Regulation on the Return to Duty Program (RDP). The CAAF held this information to be new matter under R.C.M. 1106(f)(7). However, error was harmless since many of the reasons for the delay were in the Record of Trial, and the contents of the regulation were clearly known to the defense since the defense asked for entry into the RDP.
- h) *United States v. Catalani*, 46 M.J. 325 (C.A.A.F. 1997). The addendum stated, “All of the matters submitted for your consideration in extenuation and mitigation were offered by the defense at trial; and the seniormost military judge in the Pacific imposed a sentence that, in my opinion, was both fair and proportionate to the offense committed.” This was held to be new matter under R.C.M. 1106(f)(7). The case was returned for submission to a different convening authority for action.
- i) *United States v. Trosper*, 47 M.J. 728 (N-M. Ct. Crim. App. 1997). The Division Sergeant Major attached a memorandum to the addendum that stated that “taking responsibility means he accepts the punishment awarded. . . . He has earned his brig time and his BCD.” The court found this to be unremarkable because commanders “seek the counsel of his or her trusted advisors in such a weighty matter.” Even if this was new matter, the appellant did not state how he would respond to the memorandum, so there was no prejudice.
- j) *United States v. Cornwell*, 49 M.J. 491 (C.A.A.F. 1998). CG asked the SJA whether the command supports the accused’s request for clemency. The SJA called the accused’s commanders, then verbally relayed their recommendations against clemency for the accused to the CG. The SJA then signed an MFR to that

effect, and attached it to the ROT. The CAAF held the SJA's advice to the CG is not new matter in the addendum under R.C.M 1106(f)(7), but may be new matter under RCM 1107(b)(3)(B)(iii) of which the accused's is not charged with the knowledge thereof. However, even if such, the CAAF says the defense did not indicate what they would have done in response, so no relief.

k) *United States v. Anderson*, 53 M.J. 374 (C.A.A.F. 2000). A paper-clipped, small (3 x 3 ½), hand-written note attached to the last page of the SJAR from the chief of staff to the convening authority that stated, "Lucky he didn't kill the SSgt. He's a thug, Sir." was new matter requiring service on the accused and an opportunity to respond.

l) *United States v. Gilbreath*, 57 M.J. 57 (C.A.A.F. 2002). Error for SJA, after a Judge Alone trial, not to serve addendum on defense which stated in part, "After hearing all matters, the jury determined a bad conduct discharge was appropriate and as such, I recommend you approve the sentence as adjudged." *Id.* at 59. Defense could have pointed out that: (1) the trial was judge alone, and (2) the sentencing authority did NOT consider the clemency submissions. Note – the court also questioned whether the statement by the SJA was improper. "She [DC] also could have made a persuasive argument that the SJA's recommendation that the CA defer to the judgment of the members was also legally improper." *Id.* at 62.

m) *United States v. Gilbreath*, 58 M.J. 661 (A.F. Ct. Crim. App. 2003), *aff'd*, 59 M.J. 400 (C.A.A.F. 2004) (summary disposition). After remand from the case above, the insertion in the SJA's addendum of a statement of inability to locate appellant to serve her with post-trial documents constituted "new matter" requiring service on the appellant's defense counsel and an opportunity to respond. The government could have avoided this issue by complying with the substitute service provisions of RCM 1106(f)(1), which simply require a statement in the record of trial explaining "why the accused was not served personally." Applying the standard for relief enunciated in *United States v. Chatman*, 46 M.J. 321 (C.A.A.F. 1997) (appellant must "demonstrate prejudice by stating what, if anything, would have been submitted to 'deny, counter, or explain' the new matter."), the AFCCA noted that the inability to locate appellant could be perceived by the CA as evidence of appellant's disobedience of orders because she failed to provide a valid leave address while on appellate leave. Additionally, the CA could view the comment as an indication of how little she cared about her case because she failed to provide a proper mailing address for issues associated with her case. In light of the potential adverse impact of the SJA's comments, the AFCCA found prejudice and determined that its charter to "do justice" mandated a new SJAR and action in the case. *Id.* at 665.

n) *United States v. Scott*, 66 M.J. 1 (C.A.A.F. 2008). SJA's lengthy rebuttal to defense assertions that the accused's sentence was overly harsh was not a new matter. Unlike *Catalani* and *Gilbreath*, the SJA's comments did not misinform the CA as to the matters contained in the accused's clemency submissions or misstate the sentencing authority in the accused's case.

o) *United States v. Frederickson*, 63 M.J. 55 (C.A.A.F. 2006). The DSJA prepared the addendum, which was endorsed by the SJA. It was not served on the defense, despite all of the DSJA's observations about the defense submissions. The CAAF held that the addendum constituted new matter, and should have been served on the defense. However, in this case, they held that the defense counsel

could not demonstrate prejudice since the proffered defense response was the same.

p) *United States v. Tuscan*, 67 M.J. 592 (C.G. Ct. Crim. App. 2008). Addendum contained the following: “I also disagree with the defense counsel’s statement that the accused is ‘remorseful for the events that transpired.’ . . . As you may recall, the pretrial offers, taken as a whole were unreasonable and on their face did not reflect a willingness on the part of the accused to fully accept responsibility.” The CGCCA finds that this comment, while not a complete picture of the pretrial negotiations, was not error. The CGCCA warns against doing this in the future, since the SJAR Addendum is not intended to be a “document of advocacy for the government. An SJA should not only be objective, as noted above, but also should maintain the appearance of objectivity.”

4. Addendum should remind CA of the requirement to review the accused’s post-trial submissions. *United States v. Pelletier*, 31 M.J. 501 (A.F.C.M.R. 1990); *United States v. Ericson*, 37 M.J. 1011 (A.C.M.R. 1993).

a) *United States v. Foy*, 30 M.J. 664 (A.F.C.M.R. 1990). Appellate courts will presume post-trial regularity if the SJA prepares an addendum that:

- (1) Informs the CA that the accused submitted matters and that they are attached;
- (2) Informs the CA that he *must consider* the accused’s submissions; and,
- (3) Lists the attachments.

b) *United States v. Taylor*, 67 M.J. 578 (A.F. Ct. Crim. App. 2008). In her clemency submissions to the convening authority, the appellant asked to enter the Return-To-Duty Program (RTDP). The addendum made no mention of this request, nor did it advise the convening authority of his options regarding the RTDP. The addendum did specifically list the appellant’s submissions and advised the convening authority that he had to consider them prior to taking action. No error.

5. Who should sign the addendum? The SJA.

a) *United States v. Hudgins*, 69 M.J. 630 (A. Ct. Crim. App. 2010). If the Deputy Staff Judge Advocate signs the addendum, then he or she should sign it as the Acting SJA. Signing it as the Deputy Staff Judge Advocate or “for” the SJA is improper under Article 60(d), UCMJ, and RCM 1106(a). No prejudice in this case because “the Deputy Staff Judge Advocate was an officer and experienced judge advocate who was statutorily qualified to sign the addendum as the Acting SJA in the SJA’s absence.”

J. What if the accused submitted matters but there is no addendum?

1. *United States v. Godreau*, 31 M.J. 809 (A.F.C.M.R. 1990). Two conditions for a presumption of post-trial regularity:

- a) There must be a statement in the SJAR informing the CA that he must consider the accused’s submissions.
- b) There must be some means of determining that the CA in fact considered all post-trial materials submitted by the accused. Ideal: (1) list all attachments; (2) have the CA initials and dates all submissions in a “clearly indicated location.”

2. If *United States v. Foy*, 30 M.J. 664 (A.F.C.M.R. 1990), requirements are not met, or if no addendum and the two *Godreau* conditions are not met, the government must submit an affidavit from the CA. See *United States v. Joseph*, 36 M.J. 846 (A.C.M.R. 1993).
3. “The best way to avoid a *Craig* [28 M.J. 321 (C.M.A. 1989)] problem is to prepare an addendum using the guidance in *Foy* and *Pelletier* to ensure compliance with *Craig* and UCMJ, Article 60(c). If this method is used, there will be no need to have the convening authority initial submissions or prepare an affidavit.” *Godreau*, 31 M.J. at 812.
4. *United States v. Buller*, 46 M.J. 467 (C.A.A.F. 1997). “[L]itigation can be avoided through the relatively simple process of serving the addendum on the accused in all cases, regardless whether it contains ‘new matter’.” *Id.* at 469 n.4.
5. *United States v. Briscoe*, 56 M.J. 903 (A.F. Ct. Crim. App. 2002). Failure of SJA to prepare addendum to PTR advising CA to consider all matters (i.e., written matters) submitted by accused cured through post-trial affidavit from CA and SJA swearing that all clemency matters were considered by CA prior to action.

K. Common SJAR and addendum errors:

1. Inaccurately reflect charges and specifications (especially dismissals, consolidations).
2. Inaccurately reflect the maximum punishment.
3. Omit, misapply pretrial confinement (*Allen*, RCM 305(k) credit).
4. Omit, misapply Article 15 (*Pierce*) credit.
5. Recommend approval of greater than 2/3 forfeitures for periods of no confinement.
6. Recommend approval (in special courts-martial) forfeitures and fines (cumulatively) in excess of the court-martial’s jurisdictional limit.
7. Add extraneous (and often erroneous) information.

XII. ACTION BY CONVENING AUTHORITY. ARTICLE 60, UCMJ; RCM 1107.

A. Who may act: the CA. See *United States v. Delp*, 31 M.J. 645 (A.F.C.M.R. 1990) (the person who convened the court).

1. *United States v. Fernandez*, 24 M.J. 77 (C.M.A. 1987). CA wrote a drug-abuse policy memorandum that characterized illegal drugs as a “threat to combat readiness,” among other things. This strongly worded memo did not suggest an inelastic attitude that would prohibit the convening authority from taking action under Article 60, UCMJ.
2. *United States v. Solnick*, 39 M.J. 930 (N.M.C.M.R. 1994). Rule requiring CA to take action unless impractical requires that there be practical reason for transferring case from control of officer who convened court to superior after trial, and precludes superior from plucking case out of hand of CA for improper reason.
3. *United States v. Rivera-Cintrón*, 29 M.J. 757 (A.C.M.R. 1989). Acting Commander not disqualified from taking action in case even though he had been initially detailed to sit on accused’s panel.
4. *United States v. Cortes*, 29 M.J. 946 (A.C.M.R. 1990). After considering the Assistant Division Commander’s affidavit, the court determined that the acting CA, who approved accused’s sentence as adjudged, was not affected by the editorial written by the CA about the “slime that lives among us.”
5. *United States v. Vith*, 34 M.J. 277 (C.M.A. 1992). Commander did not lose impartiality by being exposed to three pages of accused’s immunized testimony in

companion case; commander had no personal interest in the case and there was no appearance of vindictiveness.

6. *United States v. Mack*, 56 M.J. 786 (A. Ct. Crim. App. 2002). Installation Chaplain and staff officer to the CA stole over \$73,000 from the Consolidated Chaplains' Fund (CCF). Although CA had a personal and professional relationship with accused, he was not disqualified from acting as CA absent evidence that he had a "personal interest in the outcome of the [accused's] case." *Id.* at 794. The ACCA found that the CA was not an "accuser" as alleged by the accused and there was no error, plain or otherwise, by the CA taking action. Additionally, the ACCA found accused waived the issue of CA as accuser absent plain (clear and obvious) error.

7. *United States v. Walker*, 56 M.J. 617 (A.F. Ct. Crim. App. 2001). CA's comments during visit to confinement facility established an "arbitrary and inflexible refusal to consider clemency," thus disqualifying him from acting in accused's case. According to accused, CA, during a confinement visit, stated the following: "I have no sympathy for you guys, you made your own decisions and you put yourself in this situation. I'm not sympathetic, and I show no mercy for you. I hope you guys learn from this, but half of you will go on and try to cheat civilian laws and end up in a worst [sic] place than this." *Id.* at 618. Allegation by appellant went uncontested by the CA. Relief – action of CA set aside and returned to another SJA and CA for a new PTR and action. Court noted that its opinion did not mean that the CA in question was forever disqualified from taking action in other cases. *See also United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992); *United States v. Voorhees*, 50 M.J. 494 (C.A.A.F. 1999).

8. *United States v. Barry*, 57 M.J. 799 (A. Ct. Crim. App. 2002). Absent a proper transfer of authority from one GCMCA to another, a transfer based on impracticability, a commander who did not convene the court lacks authority to act on the case. The appellant, assigned to the 10th Mountain Division (Light Infantry) at all times relevant, was convicted at a GCM convened by the Commander, 10th Mountain Division (Light Infantry); however, action in his case was taken by the Commander, 10th Mountain Division (Light Infantry) (Rear), who signed as Commander, 10th Mountain Division (Light Infantry). Because of the action by an improper convening authority, as well as concerns whether the SJA in the case was disqualified from providing legal advice, the case was returned for a new SJAR and action. *See also United States v. Newlove*, 59 M.J. 540 (A. Ct. Crim. App. 2003).

9. *United States v. Gudmundson*, 57 M.J. 493 (C.A.A.F. 2002). CA who testified on a controverted matter in a case was NOT *per se* disqualified from acting on the case. BG Fletcher, the CA, authorized "Operation Nighthawk," the "inspection" that resulted in appellant's positive urinalysis result, and testified on the motion to suppress. Testimony by a CA indicating a "personal connection with the case" may result in disqualification whereas testimony of "an official or disinterested nature only" is not disqualifying. Where an appellant is aware of potential grounds for disqualification and fails to raise them, the issue is waived on appeal. *Id.* at 495. In the case at bar, the appellant's clemency submissions, while reminding the CA of the fact that he previously testified in the appellant's court-martial, did not ask the CA to disqualify himself.

10. *United States v. Davis*, 58 M.J. 100 (C.A.A.F. 2003). CA disqualification falls into two categories: (1) involves cases where the CA is an accuser, has a personal interest in the outcome of the case, or has a personal bias toward the accused; and (2) involves instances where the CA exhibits or displays an inelastic attitude toward the performance of his or her post-trial duties or responsibilities. Comments by the CA in the appellant's drug case that "people caught using illegal drugs would be prosecuted to the fullest extent,

and if they were convicted, they should not come crying to him about their situations or their families[’], or words to that effect” fall into category 2. Although CAs “need not appear indifferent to crime,” they must maintain a “flexible mind” and a “balanced approach” when dealing with it. *Id.* at 103. The CA’s comments reflected an inelastic or “inflexible” attitude toward his post-trial duties when dealing with drug cases and as such, he was disqualified from acting on the appellant’s case. The decision of the lower court was reversed, the action set aside and the case remanded for a new review and action by a different CA. *United States v. Taylor*, 60 M.J. 190 (C.A.A.F. 2004) involved an allegation in category 1. The DC requested the CA’s disqualification because an article authored by a TC and imputed to SJA amounted to a prejudgment as to clemency. The CA signed an affidavit stating that he was not aware of the article until the DC pointed it out and that he had no role in the article’s preparation or publication. He also stated that the article did not influence his decision to not grant clemency. The CAAF held that the record established that the article could not be imputed to the CA, so disqualification was not appropriate.

11. *United States v. Brown*, 57 M.J. 623 (N-M. Ct. Crim. App. 2002). Error for one SPCMCA to act on a case convened by another SPCMCA. Held – although Article 60, UCMJ, and RCM 1107(a) allow for a different CA than that who convened a case to act on a case, this is the exception rather than the rule, and is allowed in situations where it is impracticable for the convening authority to act. Furthermore, in situations of impracticability, the transfer of the case should be to an officer exercising general court-martial jurisdiction (OEGCMJ), not to another special court-martial convening authority. In the case at bar, there was no showing of impracticability, the record of trial failed to contain any statement of impracticability as required by RCM 1107, and the transfer of the case was not to an OEGCMJ; therefore, the action was set aside and the case remanded for a new action by a proper convening authority.

B. CA not automatically disqualified simply because prior action set aside. *United States v. Rabovsky*, 32 M.J. 921 (A.F.C.M.R. 1991). Test: Does CA have other than an official interest or was he a member of the court-martial?

C. When to Act?

1. Cannot act before RCM 1105(c) time periods have expired or submissions have been waived.

2. *United States v. Lowe*, 58 M.J. 261 (C.A.A.F. 2003). Prejudicial error for the CA to act on the case prior to service of the SJAR on the appellant’s defense counsel as required by RCM 1106(f)(1). The plain language of RCM 1106(f)(1) as well as Article 60, UCMJ establish, as a matter of right, the requirement for service of the SJAR prior to action. The court noted:

The opportunity to be heard before or after the convening authority considers his action on the case is simply not qualitatively the same as being heard at the time a convening authority takes action, anymore than the right to seek reconsideration of an appellate opinion is qualitatively the same as being heard on the initial appeal. “The essence of post-trial practice is basic fair play – notice and an opportunity to respond.” *United States v. Leal*, 44 M.J. 235, 237 (C.A.A.F. 1996).

Id. at 263. The appellant established some “colorable showing of possible prejudice” by showing that he was denied the opportunity to advise the CA of his gunshot wound and his future prognosis. Finally, the court provided some common sense guidance to military practitioners:

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

Id. at 264.

D. General considerations.

1. Not required to review for legal correctness or factual sufficiency. Action is within sole discretion of CA as a command prerogative.
2. RCM 1107(b)(3)(A). *Must consider*:
 - a) Result of trial;
 - b) SJA recommendation; and,
 - c) Accused's written submissions.
 - d) *United States v. Davis*, 33 M.J. 13 (C.M.A. 1991). How "detailed" must the consideration be? "Congress intended to rely on the good faith of the convening authority in deciding how detailed his 'consideration' must be."
 - e) *United States v. Dvonch*, 44 M.J. 531 (A.F. Ct. Crim. App. 1996). Failure to consider two letters submitted by DC requires new review and action.
 - f) *United States v. Osuna*, 56 M.J. 620 (C.G. Ct. Crim. App. 2001). Record of trial returned to CA where there was no evidence that the CA considered clemency letter by DC.
 - g) *United States v. Mooney*, No. 9500238 (A. Ct. Crim. App. June 10, 1996) (unpublished). Court determined that fax received "in sufficient time to forward it . . . through the Staff Judge Advocate to the convening authority." "[A]ppellant's articulate and well-reasoned RCM 1105 clemency letter *through no fault of his own* was not submitted to the convening authority on time. We do not have sufficient information to determine [whose fault it was] . . . as our function is . . . not to allocate blame. The quality of the clemency letter . . . gives rise to the reasonable possibility that a [CA] would grant clemency based upon it. Thus . . . the appellant has been prejudiced . . ." (emphasis in original). Action set aside and returned to CA for new PTR and action.

Practice Pointer: Even if the government is not at fault, accused may get new SJAR and action. Send back to CA if record not yet forwarded for appeal.
 - h) *United States v. Roemhildt*, 37 M.J. 608 (A.C.M.R. 1993). CA and SJA not required to affirmatively state they considered recommendation of Family Advocacy Case Management Team (FACMT). *Accord United States v. Corcoran*, 40 M.J. 478 (C.M.A. 1994).
 - i) *United States v. Ericson*, 37 M.J. 1011 (A.C.M.R. 1993). There must be some tangible proof that CA saw and considered clemency materials before taking action. *United States v. Briscoe*, 56 M.J. 903 (A.F. Ct. Crim. App. 2002) (post-trial affidavits from SJA and CA suffice, although not the preferred method – use an addendum).
3. RCM 1107(b)(3)(B). *May consider*:

a) Record of trial, personnel records of accused, and anything deemed appropriate, but if adverse to accused and from outside the record, then accused must be given an opportunity to rebut. See *United States v. Mann*, 22 M.J. 279 (C.M.A. 1986); *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984).

b) *United States v. Harris*, 56 M.J. 480 (C.A.A.F. 2002). CA properly considered accused's pre-enlistment criminal history, some of which occurred while the accused was a juvenile, history documented in the accused's enlistment waiver document contained within his Service Record Book (SRB), a personnel record of the accused which he had access to and could review during the clemency process. No requirement to provide the accused with prior notice that the CA would consider the document since the SRB was part of the accused's personnel records and not "other matters."

4. CA need not meet with accused – or anyone else. *United States v. Haire*, 44 M.J. 520 (C.G. Ct. Crim. App. 1996). CA not required to give a personal appearance appointment to the accused. Even truer now, as this case relied on *Davis*, in which court had held that CA must consider videotape (no longer good law in light of 1998 statutory change). Requirement to "consider" only pertains to "'inanimate' matter that can be appended to a clemency request. We specifically reject the contention that a petitioner for clemency has a non-discretionary right to personally appear before the convening authority." *Id.* at 526.

5. RCM 1107(b)(4). No action on not guilty findings.

6. RCM 1107(b)(5). No action approving a sentence of an accused that lacks the capacity to understand or cooperate in post-trial proceedings.

E. Action on findings not required but permissible. See MCM, Appendix 16. Absent specific action on findings, the CA implicitly approves the findings reported in the SJAR.

1. *United States v. Diaz*, 40 M.J. 335 (C.M.A. 1994). "In the absence of contrary evidence, a convening authority who does not expressly address findings in the action impliedly acts in reliance on the statutorily required recommendation of the SJA, see Article 60(d) (1983), and thus effectively purports to approve implicitly the findings as reported to the convening authority by the SJA." *Id.* at 337. See also *United States v. Henderson*, 56 M.J. 911 (A. Ct. Crim. App. 2002) (when faced with ambiguous or erroneous findings not expressly addressed by CA in his action, the court can either return the case to the CA for clarification (i.e., new PTR and action) or affirm only those findings of guilty that are correct and unambiguous in the PTR).

2. *United States v. Lindsey*, 56 M.J. 850 (A. Ct. Crim. App. 2002). SJAR erroneously stated findings and CA implicitly approved the findings as reported by the SJA. SJAR reported a guilty finding to Specification 4 of the Charge when in fact the accused was found not guilty of this offense. The court only affirmed the proper findings and reduced the accused's period of confinement from twelve months to ten months. The court commented on the lack of attention to detail in the post-trial processing:

This case presents the court with yet another incident in which an SJA has failed to provide complete and accurate information to the convening authority, as required by RCM 1106. The regularity of these post-trial processing errors is alarming and occurs in many jurisdictions. Most SJAR errors are the direct result of sloppiness and a lack of attention to detail exhibited by the SJA, Deputy SJA, and the Chief of Criminal Law. Likewise, diligent trial defense counsel should identify and correct such errors whenever possible. See RCM 1106(f)(4), (f)(6). These errors reflect poorly on our military justice system and on those individuals who implement that system. They should not occur!

Id. at 851. In a footnote in the above-quoted language, the court referred to thirty-five cases out of nineteen jurisdictions, covering a 15-month period, with erroneous SJARs.

3. *United States v. Saunders*, 56 M.J. 930 (A. Ct. Crim. App. 2002). The SJAR erroneously advised the CA that the appellant was convicted of six specifications of violating a no-contact order, as opposed to five, and adultery (i.e., Specification 1 of Charge I and Specification 2 of Additional Charge I respectively). Applying *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998), the court found that despite the erroneous SJAR, the appellant failed to make a “colorable showing of possible prejudice to his substantial rights concerning the approved sentence.” *Id.* at 936. The erroneous findings of guilty were set aside and the affected specifications dismissed; the sentence was affirmed.

4. *United States v. Ord*, 63 M.J. 279 (C.A.A.F. 2006). Appellant was convicted of seven different offenses. However, the SJAR omitted one of the seven. The CA approved the SJA’s recommendation on the sentence. The ROT was then forwarded to ACCA for appellate review. Subsequently, the command issued a “corrected” promulgating order that included the missing findings. The ACCA set aside the CA’s action and returned the record for a new SJAR and CA’s action. The ACCA then affirmed the findings and sentence as approved in the new CA’s action, including the forgery offense. The CAAF held that, when the CA did not act expressly on the findings, and the SJAR omitted a finding of guilty adjudged by the court-martial, the ACCA could not presume that the CA approved the omitted findings, but could return the record for a new SJAR and action.

5. *United States v. Alexander; United States v. Vanderschaaf*, 63 M.J. 269 (C.A.A.F. 2006) (joint case). The ACCA found that action taken by the CA in separate, unrelated cases did not approve findings reached by a GCM, and in both cases it ordered that language which appeared in the CMO be deleted. The Judge Advocate General of the Army sought review. The CAAF found that the ACCA erred. Although the UCMJ and the MCM require the CA to take express action when he disapproved a finding, neither the UCMJ nor the MCM required a CA to take express action to approve findings. The record in both cases was consistent with the presumption that the CA approved the findings adjudged at trial.

F. Action on sentence must:

1. Explicitly state approval or disapproval.

a) *United States v. Wilson*, 65 M.J. 140 (C.A.A.F. 2007). The Court will not look for ambiguity where there is none. Action said:

“In the case of . . . that part of the sentence extending to confinement in excess of 3 years and 3 months is disapproved. The remainder of the sentence, with the exception of the Dishonorable Discharge, is approved and will be executed.”

SJAR and addendum recommended approval of the adjudged DD and that is what the CA intended to do, but CAAF found the language of the action unambiguous in its disapproval of the DD. The court refused to look at surrounding documents to find an ambiguity where the action appeared clear on its face.

b) *United States v. Schiaffo*, 43 M.J. 835 (A. Ct. Crim. App. 1996). Action did not expressly approve the BCD, though it referred to it in “except for” executing language. Sent back to CA for new action. Action said:

“In the case of . . . only so much of the sentence as provides for reduction to Private E1, forfeiture of \$569.00 pay per month for six months, and

confinement for four months is approved and, except for the part of the sentencing extending to bad-conduct discharge, will be executed.”

See also United States v. Reilly, No. 9701756 (A. Ct. Crim. App. June 12, 1998) (unpublished); *United States v. Scott*, No. 9601465 (A. Ct. Crim. App. June 12, 1998) (unpublished); *United States v. Politte*, 63 M.J. 24 (C.A.A.F. 2006); and, *United States v. Gosser*, 64 M.J. 93 (C.A.A.F. 2006).

c) *United States v. Klein*, 55 M.J. 752 (N-M. Ct. Crim. App. 2001). Action by CA stated: “In the case of . . . the sentence is approved, but the execution of that part of the sentence extending to confinement in excess of 28 days was suspended for a period of 4 months from the date of trial . . . The part of the sentence extending to the bad conduct (sic) discharge will be suspended for a period of 12 months from the date of trial, at which time, unless the suspension is sooner vacated, it will be remitted without further action.” After the appellate court acquired jurisdiction, CA attempted to withdraw the first action and replace a second wherein the punitive discharge was not suspended, stating he never intended to suspend the discharge. Held: “administrative oversight” as opposed to “clerical error” in CA’s action does not warrant return to the CA for a corrected action. Additionally, any purported action by the CA after an appellate court acquires jurisdiction is a nullity. The NMCCA distinguishes this case from *United States v. Smith*, 44 M.J. 788 (N-M. Ct. Crim. App. 1996), stating “[u]nlike *Smith*, there is nothing ‘illegal, erroneous, incomplete or ambiguous’ in the original action.” *Id.* at 756.

d) *United States v. Mendoza*, 67 M.J. 53 (C.A.A.F. 2008). Lower court (NMCCA) had sent the case back for a new Action because the language was ambiguous and not susceptible to interpretation. First Action stated: “only such part of the sentence as provides for a reduction to the grade of pay E-1, confinement for 90 days, is approved and except for the part of the sentence extending to a bad conduct [sic] will be executed.” CA who signed original action had moved on. His successor in command took a new action that approved the BCD. No new SJAR was prepared, and there was no evidence the CA consulted with the original CA before action. The CAAF holds that a “new, as opposed to a corrected” action requires a new SJAR and the opportunity for the accused to submit additional matters under RCM 1105.

2. Cannot increase adjudged sentence.

a) *United States v. Jennings*, 44 M.J. 658 (C.G. Ct. Crim. App. 1996). MJ announced five month sentence, but did not expressly include pretrial confinement (PTC) credit. After issue raised, MJ said on record that he had “considered” the eight days PTC before announcing the sentence, and the SJA recommended that the CA approve the sentence as adjudged (he did).

“Further clarification by the judge was needed to dispel the ambiguity . . . created by his remarks.” SJA “should have returned the record to the judge for clarification pursuant to RCM 1009(d), rather than attempt to dispel the ambiguity of intent himself.” “In any event, there is no authority whatsoever for a staff judge advocate to make an upward interpretation of the sentence, as was done in this case.”

Id. at 662.

b) *United States v. Kolbjornsen*, 56 M.J. 805 (C.G. Ct. Crim. App. 2002). Appellant was sentenced to a DD, twelve months confinement, and reduction to

E-1. The pretrial agreement required the CA to suspend any confinement in excess of ten months. At action, the CA approved “only so much of the sentence as provides for a BCD, confinement for 3 months, and reduction to E-1.” On appeal, the court noted the ambiguity of the action and stated it had two options: (1) return the case to the CA for a new SJAR and action to clarify the ambiguity, or (2) to construe the ambiguity itself and resolve any inconsistencies in favor of the appellant. The court chose the latter and affirmed only so much of the sentence as provided for a BCD, confinement for three months, and reduction to E-1.

c) *United States v. Shoemaker*, 58 M.J. 789 (A.F. Ct. Crim. App. 2003). At action the first time, the CA approved only thirty days confinement of a three month sentence. On appeal, the action was set aside and the case returned for a new SJAR and action. In the subsequent action, the CA approved a sentence of one month. Unfortunately, seven months out of the year contain thirty-one days resulting in a potential sentence greater than that originally approved, in violation of RCM 810(d). Rather than return the case for a third SJAR and action, the court only approved thirty days confinement.

d) *United States v. Mitchell*, 58 M.J. 446 (C.A.A.F. 2003). Appellant was sentenced to a BCD, ten years confinement, total forfeitures, and reduction to E-1. On appeal, the ACCA ordered a rehearing on sentence. On rehearing, the appellant was sentenced to a DD, six years confinement, and reduction to E-1. The ACCA affirmed the rehearing sentence finding that under an objective standard, a reasonable person would not view the rehearing sentence as “in excess of or more severe than” the original sentence; therefore, Article 63, UCMJ, and RCM 810(d)(1) were not violated. The CAAF reversed as to sentence, finding that a DD is more severe than a BCD and no objective equivalence is available when comparing a punitive discharge with confinement. The CAAF reduced the sentence to a bad-conduct discharge, six years confinement, and reduction to E-1.

e) *United States v. Burch*, 67 M.J. 32 (C.A.A.F. 2008). Appellant was sentenced to confinement for one year, reduction to E-1, and a bad-conduct discharge. The CA suspended all confinement in excess of 45 days. Subsequent to his release, but before the suspension period was over, or the CA took action, appellant committed additional misconduct. His suspension was properly vacated and he was returned to confinement. The CA took action, which stated: “execution of that part of the sentence adjudging confinement in excess of 45 days is suspended for a period of 12 months.” Appellant served approximately 223 days of confinement before being released. The CAAF held that this was illegal confinement. “If the CA’s action is to be given effect, as required by R.C.M. 1107, attendant circumstances preceding the action may not be utilized to undermine it.” The vacation of the suspension should have been noted in the action.

3. RCM 1107(d)(1). May disapprove all or any part of a sentence for any or no reason.

a) *United States v. Bono*, 26 M.J. 240 (C.M.A. 1988). Reduction in sentence saved the case when DC found to be ineffective during sentencing.

b) *United States v. Smith*, 47 M.J. 630 (A. Ct. Crim. App. 1997). At a GCM, the accused was sentenced to total forfeitures (TF), but no confinement. Neither the DC nor the accused submitted a request for waiver or deferment, nor complained about the sentence. Accused did not go on voluntary excess leave. Fourteen days after sentence, TF went into effect. At action, the CA tried to suspend all

forfeitures beyond 2/3 until the accused was placed on involuntary excess leave. Held: CA's attempt to suspend was invalid, because the TF was executed (at 14 days) prior to the attempted suspension. The ACCA found the time the accused spent in the unit (5 Jul to 19 Aug) without pay was cruel and unusual punishment and directed the accused be restored 1/3 of her pay. *See also United States v. Warner*, 25 M.J. 64 (C.M.A. 1987).

4. RCM 1107(d)(2). May reduce a mandatory sentence adjudged.
5. May change a punishment to one of a different nature if less severe. *United States v. Carter*, 45 M.J. 168 (C.A.A.F. 1996). CA lawfully converted panel's BCD and twelve month sentence to twenty-four *additional* months' confinement and no BCD, acting in response to request that accused be permitted to retire. Commutation must be clemency, "not 'merely a substitution'" of sentences, but clearly was proper here; BCD was disapproved and accused got his wish to retire, and where, importantly, he neither set any conditions on the commutation (*e.g.*, setting a cap on confinement he was willing to endure), nor protested the commutation in his submission to the CA. But consider the discussion to RCM 1107(d)(1) that a BCD could be converted to confinement for up to one year at a special court-martial.
6. May suspend a punishment. *United States v. Barraza*, 44 M.J. 622 (N-M. Ct. Crim. App. 1996). Court approved CA's reduction of confinement time from PTA-required forty-six months (suspended for twelve months) to fourteen months, six days (suspended for thirty-six months). Sentence was for ten years. Court emphasized the "sole discretionary power" of CA to approve or change punishments "as long as the severity of the punishment is not increased" (*citing* RCM 1107(d)(1)). Also significant that approved confinement was twenty-two months less than accused sought in his clemency petition.
7. *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002). Error for SJAR to advise CA that in order to waive automatic forfeitures at action he would have to disapprove the adjudged forfeitures. CA could have modified the monetary amount of adjudged forfeitures and/or suspended the forfeitures for the period of waiver. Case returned to the CA for a new SJAR and action.
8. May reassess sentence. If a CA reassesses sentence after, for example, dismissing guilty findings, the CA must do so in conformity with the requirements of *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). *United States v. Harris*, 53 M.J. 86 (C.A.A.F. 2000). The CA may purge any prejudicial effect if it can determine that the sentence would have been of a certain magnitude. Further, the SJAR must provide guidance to the CA as the standard to apply in reassessing the sentence. *United States v. Reed*, 33 M.J. 98 (C.M.A. 1991).
 - a) *United States v. Bonner*, 64 M.J. 638 (A. Ct. Crim. App. 2007). The SJAR recommended that the CA disapprove one specification without giving a reason. The CA did so and approved the adjudged sentence. Appellate defense alleged error and pointed to the lack of any *Sales* guidance on sentence reassessment in the SJAR or addendum. The ACCA found no reason to believe the specification was disapproved because of legal error (no such allegation in RCM 1105/1106 submissions) and concluded that the disapproval was an act of clemency not requiring sentence reassessment. *See United States v. Kerwin*, 46 M.J. 588 (A.F. Ct. Crim. App. 1996) (holding that a pure act of clemency does not require sentence reassessment). In a footnote, the ACCA conceded that there may be "middle ground" between pure sentence clemency and clemency recommended as a form of relief from "possible legal error" and recommended that SJAs advise CAs of the standard for sentence reassessment.

b) *United States v. Taylor*, 47 M.J. 322 (C.A.A.F. 1997), *aff'd after remand*, 51 M.J. 390 (C.A.A.F. 1999). Discusses how to reassess a sentence if some charges are dismissed by the CA. Disregarding the findings is not enough; must disregard the evidence too. Remanded to the AFCCA to correctly reassess or order a rehearing.

c) *United States v. Griffaw*, 46 M.J. 791 (A.F. Ct. Crim. App. 1997). SJA incorrectly stated that the sentence reduction based on the terms of the pre-trial agreement was equal to a form of clemency.

d) *United States v. Bridges*, 58 M.J. 540 (C.G. Ct. Crim. App. 2003). Appellant was sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for twenty-two years, and a DD. At action, the CA disapproved two specifications and approved only so much of the sentence as provided for reduction to E-1, forfeiture of all pay and allowances, confinement for twenty years, and a DD. The CGCCA held that the CA erred in attempting to reassess the sentence after dismissing two very serious specifications (indecent acts and forcible sodomy). Although the maximum punishment for the offenses both before and after action remained the same (i.e., reduction to E-1, forfeiture of all pay and allowances, confinement for life, and a DD), the issue was whether the CA or the court could “accurately determine the sentence which the members would have adjudged for only those charges and specifications approved by the convening authority.” *Id.* at 545. The court determined that neither the CA nor the court could properly reassess the sentence in light of the modified findings, set aside the sentence and authorized a rehearing.

e) *United States v. Meek*, 58 M.J. 579 (C.G. Ct. Crim. App. 2003). Appellant was sentenced to reduction to E-1, seventy-five days confinement, and a BCD. At action, the SJA recommended disapproval of one charge based upon the PTA. The SJA further recommended “I do not recommend that you adjust the accused’s sentence as a result of setting aside the military judge’s findings as to Charge I and its specification. The two remaining charges to which the accused pled guilty adequately support the sentence awarded.” *Id.* at 580. The CGCCA held that the SJA erred by giving the above guidance and by failing to advise the CA that he must reassess the sentence, approving only so much of the sentence as would have been adjudged without the dismissed specification. The CGCCA approved only so much of the sentence as provided for reduction to E-1, sixty days confinement, and a BCD.

f) *United States v. Perez*, 66 M.J. 164 (C.A.A.F. 2008). Shortly after trial, rape victim recants. During post-trial Article 39(a) session, military judge finds that he would not have found appellant guilty of rape, nor would he have sentenced him to anything more than six months confinement, reduction and forfeitures. CA modified findings and sentence by approving the BCD, reduction to E-1, and confinement for 206 days. The CAAF held that CA did not properly reassess sentence. Under no circumstances can the CA approve a sentence greater than the sentencing authority would have adjudged absent the error.

9. *United States v. Rollins*, 61 M.J. 338 (C.A.A.F. 2005). Appellant was sentenced to a BCD, confinement for eight years, and reduction to E-5. The convening authority revised the findings to address issues involving the application of the statute of limitations under Article 43, UCMJ. The SJA recommended that the convening authority approve the adjudged sentence, subject to reducing the period of confinement from eight to five years to cure the prejudice from the erroneous findings. The convening authority revised the

findings but only reduced the sentence to seven years. The AFCCA affirmed the findings and sentence as modified by the convening authority. The CAAF held that “[t]he convening authority’s action in this case did not cure the prejudice from the military judge’s failure to focus the attention of the members on the appropriate period of time under the circumstances of this case. *See Kotteakos v. United States*, 328 U.S. 750, 765 (1946). Accordingly, we shall set aside the affected findings and authorize a rehearing.”

G. Sentence Credits.

1. *United States v. Minyen*, 57 M.J. 804 (C.G. Ct. Crim. App. 2002). Although the court recommends stating all sentence credits in the CA’s action, it is not required. *See also United States v. Gunderson*, 54 M.J. 593, 594 (C.G. Ct. Crim. App. 2000) (recommending that a CA expressly state all applicable credits in the action).

2. AR 27-10, para. 5-32a, states that “the convening authority will show in his or her initial action all credits against a sentence to confinement, either as adjudged or approved, regardless of the source of the credit (automatic credit for pretrial confinement under U.S. v. Allen, 17 M.J. 126 (CMA 1984), or judge-ordered additional administrative credit under U.S. v. Suzuki, 14 M.J. 491 (CMA 1983)), R.C.M. 304, R.C.M. 305, or for any other reason specified by the judge.”

H. Original signed and dated action must be included in the record. *See* RCM 1107(f)(1) and 1103(b)(2)(D)(iv).

I. RCM 1107(f)(1). Contents of action. *See also* Appendix 16, MCM, Forms for Actions.

J. If confinement is ordered executed, “the convening authority shall designate the place . . . in the action, unless otherwise prescribed by the Secretary concerned.” RCM 1107(f)(4)(C).

1. AR 27-10, para. 5-32a states that the CA does not designate a place of confinement. AR 190-47 controls.

2. AFI 51-201, para. 9.4. “HQ AFSFC/SFC, not the convening authority, selects the corrections facility for post-trial confinement and rehabilitation for inmates gained by HQ AFSFC/SFC [inmates not ordered to serve sentences in local correctional facilities].”

K. What if an error is discovered after action is taken? RCM 1107(f)(2) provides that:

1. Before publication or official notice to the accused, CA may recall and modify any aspect of action (including modification less favorable to the accused, such as adding the discharge approval language, as was required in *United States v. Schiaffo*, 43 M.J. 835 (A. Ct. Crim. App. 1996)).

2. If either publication or official notice has occurred, CA may only make changes that do not result in action less favorable to the accused.

3. CA must personally sign the modified action.

4. Action after appellate court has the case is a nullity unless subsequent action is directed or case is returned to the CA for further action. *United States v. Klein*, 55 M.J. 752 (N-M. Ct. Crim. App. 2001).

L. Action potpourri.

1. *McCray v. Grande*, 38 M.J. 657 (A.C.M.R. 1993). Sentence, for purposes of commutation, begins to run on date announced.

2. *United States v. Foster*, 40 M.J. 552 (A.C.M.R. 1994). Court does not have to treat ambiguous action (\$214 per month) as forfeiture for one month; may return to CA for clarification of intent.

3. *United States v. Muirhead*, 48 M.J. 527 (N-M. Ct. Crim. App. 1998). Accused sentenced to “forfeit all pay and allowances, which is \$854.40 for 2 years,” and CA approved the same. Held: ambiguous sentence. CA under RCM 1107(d)(1) can return case to court for clarification of ambiguous sentence; if he does not, he can only approve a sentence no more severe than the unambiguous portion. Rather than return to CA, the NMCCA simply affirmed the unambiguous dollar amount.

M. Post-trial deals. *United States v. Olean*, 59 M.J. 561 (C.G. Ct. Crim. App. 2002). CA authorized to enter into post-trial deals where a rehearing is impracticable. In the case at bar, the CA agreed to approve a sentence of no punishment, dismiss the specifications which were set aside and returned for a rehearing, process the appellant for administrative discharge, and recommend a general discharge. In exchange, the appellant agreed to waive personal appearance before the separation board, remain on appellate leave, and waive any right to accrued pay, allowances, or travel entitlements.

XIII. POST-TRIAL PROCESSING TIME.

A. Service courts have two distinct responsibilities when reviewing allegations of post-trial and appellate delay. First, service courts may grant relief to appellants for excessive post-trial delay under their broad authority to determine sentence appropriateness under Article 66(c), UCMJ. Second, as a matter of law, both the service courts and the CAAF may review claims of untimely review and appeal under the Due Process Clause of the Constitution using the principals announced in the case of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

B. From sentence to action. An accused has a right to timely review during the post-trial process. *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003).

1. The old, old rule: *Dunlap v. Convening Authority*, 48 C.M.R. 751 (C.M.A. 1974) (when an accused is continuously under restraint after trial, the convening authority must take action within ninety days of the end of trial or a presumption of prejudice arises).

2. The old rule: if prejudice, relief mandated. *United States v. Banks*, 7 M.J. 92 (C.M.A. 1976).

3. Back to the future: the evolution to *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

a) *United States v. Tardif*, 55 M.J. 666 (C.G. Ct. Crim. App. 2001), *rev'd and remanded*, 57 M.J. 219 (C.A.A.F. 2002), *on remand*, 58 M.J. 714 (C.G. Ct. Crim. App. 2003), *aff'd*, 59 M.J. 394 (C.A.A.F. 2004) (summary disposition). The appellant was sentenced to forfeiture of all pay and allowances, reduction to E1, three years confinement and a DD (the CA only approved two years of confinement). It took the government one year to process the record from sentencing to action and forwarding to the appellate court. Despite the delay, the CGCCA could find no prejudice that flowed to the accused from the post-trial delay and therefore did not grant any relief. Although the CGCCA did discuss the Army's *Collazo* opinion, it concluded it was bound by the CAAF's precedent regarding undue post-trial delay. On appeal, the CAAF noted that relief under Article 66(c), UCMJ, unlike Article 59(a), UCMJ, does not require a predicate showing of “error materially [prejudicial to] the substantial rights of the accused” and remanded the case to the CGCCA because of the lower court's mistaken belief that it was “constrained” by Article 59(a), UCMJ. Applying principles of sentence appropriateness, CCAs can grant relief under Article 66(c) for unreasonable and unexplained post-trial delay that does not result in prejudice. On remand, the CGCCA agreed with appellant that “neither *United States v. Collazo*, [citation omitted], nor our higher court's decision in this case requires a showing of uniquely personal harm in order to justify a sentence reduction, rather that the delay is

to be considered along with the rest of the record in determining what sentence should be approved.” The CGCCA reduced appellant’s confinement for post-trial delay.

b) *United States v. Jones*, 61 M.J. 80 (C.A.A.F. 2005). Following his release from custody, appellant had applied for a position as a driver. He submitted to the court his own declaration and declarations from three officials of a potential employer that stated that he would have been considered for employment or actually hired if he had possessed a DD-214, even if his discharge was less than honorable. The employer was aware of appellant’s court martial for two specifications of unauthorized absence and two specifications of missing movement by design, in violation of Articles 86 and 87. The CAAF held that those un-rebutted declarations were sufficient to demonstrate ongoing prejudice beyond what would have been a reasonable time for post-trial proceedings. Whether appellant would have had a job for certain was not relevant. The court concluded that setting aside the bad-conduct discharge is a remedy more proportionate to the prejudice that the unreasonable post-trial delay had caused. Appellant was prejudiced by the facially unreasonable post-trial delay, which violated his right to due process. The appropriate remedy was disapproval of the bad-conduct discharge.

4. The current rule. On 11 May 2006, the CAAF released *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). The *Moreno* decision demonstrated that while the CAAF was not willing to return to an inflexible *Dunlap*-style 90-day rule, it was willing to apply heightened scrutiny and find due process violations in cases where post-trial processing crossed certain defined boundaries. In *Moreno*, the CAAF announced that it would apply a presumption of unreasonable delay to any case completed after 11 June 2006 that: (1) did not have initial action taken within 120 days of the completion of the trial; (2) was not docketed within 30 days of the convening authority’s action; or, (3) did not have appellate review completed by the Court of Criminal Appeals within 18 months of docketing.

a) Once the post-trial delay in a case is determined to be unreasonable, the court must balance: (1) the length of the delay against; (2) the reason for the delay; (3) the appellant’s assertion of the right to timely review and appeal; and, (4) prejudice. This test represented an adaptation of the *Barker v. Wingo*, 407 U.S. 514 (1972), test that had previously only been used to review speedy trial issues in a Sixth Amendment context. While failure to meet the *Moreno* timelines triggers the *Barker v. Wingo* analysis, the government can still rebut the presumption of prejudice by showing that the delay was not unreasonable.

b) When balancing the length of the delay against the other factors, no single factor is required to find that the post-trial delay constitutes a due process violation.

c) An appellate court must evaluate prejudice to the appellant in light of three interests: (1) preventing oppressive incarceration pending appeal; (2) minimizing anxiety and concern over those convicted awaiting the outcome of their appeals; (3) limiting the possibility that a convicted person’s ground for appeal, and his or her defenses in case of reversal or retrial, might be impaired.

d) In *United States v. Toohey*, 63 M.J. 353 (C.A.A.F. 2006), the CAAF further refined the prejudice factor by announcing that when an appellant had not shown actual prejudice under the fourth factor of the *Barker v. Wingo* analysis, the appellate courts could still find a due process violation when, in balancing the other three factors, the delay is “so egregious that tolerating it would adversely affect the public’s perception of the fairness and integrity of the military justice system.” *Id.* at 362.

e) In *Moreno*, the CAAF suggested a non-exclusive list of relief that could include, but was not limited to: (1) day-for-day reduction in confinement or confinement credit; (2) reduction of forfeitures; (3) set aside portions of the approved sentence including a punitive discharge; (4) set aside of the entire sentence, leaving a sentence of no punishment; (5) limitation upon the sentence that may be approved by the convening authority following a rehearing; and, (6) dismissal of the charges and specifications with or without prejudice.

f) In *United States v. Harrow*, 65 M.J. 190 (C.A.A.F. 2007), the CAAF determined that even when the post-trial delay is facially unreasonable, if an appellate court is convinced that any error was harmless beyond a reasonable doubt, there is no need to do a separate analysis of each of the *Barker v. Wingo* factors.

g) Cases.

(1) *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), *on remand*, No. 200100715, 2009 WL 1808459 (N-M. Ct. Crim. App. June 23, 2009) (unpublished), *aff'd*, 69 M.J. 36 (C.A.A.F. 2010) (summary disposition). Appellant was tried and convicted by members of rape in violation of Article 120, UCMJ. He was sentenced to reduction to E-1, TF, six years confinement, and DD. On appeal, appellant asserted that he was denied due process as a result of unreasonable post-trial delay. He was sentenced on 29 September 1999. The 746-page Record of Trial (ROT) was authenticated 288 days later. On 31 January 2001 (490 days after the court-martial), the CA took action. The case was docketed at NMCCA 76 days later. The NMCCA granted 18 defense motions for enlargement for time to file an appellate brief. From the end of his court-martial until the NMCCA rendered a decision, it took 1,688 days. In conducting an analysis of the case, the CAAF adopted the four factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), which are: (1) length of the delay; (2) reasons for the delay; (3) assertion by Appellant of the right to a timely review and appeal; and (4) prejudice suffered by Appellant. During the post-trial process, each of these factors will be analyzed based on the circumstances. More importantly for practitioners, the CAAF established new post-trial processing guidelines as follows: (1) from sentence to action, the government has 120 days; (2) from action to docketing at the Court of Criminal Appeals, the government has 30 days; and, (3) from docketing at the Court of Criminal Appeals to appellate decision, the Court has 18 months to render a decision. Failure to meet these processing timelines serves to trigger the four-part *Barker* analysis. However, the government can rebut the presumption by showing that the delay was not unreasonable.

(2) *United States v. Toohey*, 63 M.J. 353 (C.A.A.F. 2006). Appellant, contrary to his pleas, was convicted of rape and assault consummated by battery. On August 13, 1998, he was sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for twelve years and a dishonorable discharge. The transcript was 943 pages and the ROT was composed of eleven volumes. It took 2,240 days from the end of trial until the issuance of the NMCCA's decision, a period of over six years.

The NMCCA decision was set aside. The CAAF held that the appellant was denied his due process right to speedy post-trial and appellate review. They set forth the analytical framework using the four *Barker v. Wingo* factors of: (1) length of delay; (2) reasons for the delay; (3) assertion of the right to timely review and appeal; and (4) prejudice. The court determined that the first three factors weighed heavily in favor of the appellant. Moreover, CAAF ruled that where there is no finding of *Barker* prejudice, they will find a due process violation only when, in balancing the

other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of fairness and integrity of the military justice system. *See also United States v. Harvey*, 64 M.J. 13 (C.A.A.F. 2006).

(3) *United States v. Dearing*, 63 M.J. 478 (C.A.A.F. 2006). A 1,794 day delay from sentence to first-level appellate review violated the appellant's right to speedy post-trial relief because he suffered two forms of actual prejudice. First, he was denied timely review of a meritorious claim of legal error (an instructional error made at trial). Second, the lack of "institutional vigilance" by the government resulted in the loss of his right to free and timely professional assistance of detailed military appellate defense counsel. The CAAF granted relief in the form of cap on sentence at a rehearing ordered as a result of the instructional error.

(4) *United States v. Harvey*, 64 M.J. 13 (C.A.A.F. 2006). Despite not showing prejudice under the fourth prong of the *Barker* analysis, the court found that a 2,031-day delay from trial to first-level appellate review was "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." The CAAF granted relief in the form of a cap on sentence upon rehearing (the case had already been returned for rehearing on another basis).

(5) *United States v. Simon*, 64 M.J. 205 (C.A.A.F. 2006). The government's gross negligence in not mailing a 36-page ROT to the first-level appellate court for 572 days was a violation of the appellant's right to speedy post-trial review. The CAAF returned the case to the NMCCA with direction that it may grant relief under its broad sentence appropriateness authority under Article 66(c) or, as a matter of law, under the Due Process Clause.

(6) *United States v. Canchola*, 64 M.J. 245 (C.A.A.F. 2007). The CAAF specifically rejects the NMCCA's attempt to create a generalized "excludable delay" concept similar to that used under RCM 707(c) to examine pretrial speedy trial issues.

(7) *United States v. Young*, 64 M.J. 404 (C.A.A.F. 2007). The CAAF considered the circumstances and the entire record, and found that 1,637 days from trial through completion of ACCA review was harmless beyond a reasonable doubt.

(8) *United States v. Roberson*, 65 M.J. 43 (C.A.A.F. 2007). The CAAF found that under the facts of this case, 1,524 days from trial to NMCCA review was harmless beyond a reasonable doubt.

(9) *United States v. Pflueger*, 65 M.J. 127 (C.A.A.F. 2007). The NMCCA, in assessing the "unreasonable and unconscionable" post-trial delay in this case, did not approve the BCD. Sentence at trial was a BCD, confinement for four months, and reduction to E-1. CA's action suspended BCD and all confinement in excess of 90 days. The CAAF found that this was not meaningful sentence relief because the BCD had already been remitted at the end of the suspension period.

(10) *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006). The CAAF found that under the facts of this case, 1,867 days from trial to NMCCA review was harmless beyond a reasonable doubt.

(11) *United States v. Rodriguez-Rivera*, 63 M.J. 372 (C.A.A.F. 2006). The CAAF found that despite the six-year delay in appellate review in this case, any relief that would be actual and meaningful would be "disproportionate to the possible harm generated from the delay." No relief was warranted or granted.

(12) *United States v. Yammine*, 67 M.J. 717 (N-M. Ct. Crim. App. 2009). The NMCCA was able to assume, without deciding, that the appellant was denied speedy post-trial processing (214 days from sentencing to CA Action). The NMCCA then found that there was no prejudice and conclude that the error was harmless beyond a reasonable doubt.

(13) *United States v. Purdy*, 67 M.J. 780 (N-M. Ct. Crim. App. 2009). The NMCCA found held that a 1,007-day delay between sentencing and docketing with the court was unreasonable, but appellant conceded no material prejudice from the delay. As a result, no relief was granted. The NMCCA also placed emphasis on the fact that even with the most “energetic and proactive post-trial processing” the appellant’s 150 days of confinement would have been completed before any review was possible.

(14) *United States v. Bush*, 68 M.J. 96 (C.A.A.F. 2009). Appellant’s case file was “apparently lost in the mail for over six years.” It took over seven years to review a 143-page guilty plea. The CAAF finds this to be facially unreasonable. On the fourth *Barker v. Wingo* prong, the CAAF held that the appellant’s unsupported affidavit that he was denied employment at a store in Alabama was insufficient to establish prejudice. The CAAF holds that *Allende* does not shift the burden to him to establish that the due process violation was not harmless beyond a reasonable doubt. The burden remains upon the government. However, in an unsubstantiated affidavit case, the government’s burden of proving any due process violation was harmless beyond a reasonable doubt will be “more easily attained.”

(15) *United States v. Schweitzer*, 68 M.J. 133 (C.A.A.F. 2009). Appellant asserted that the eight-year delay from the announcement of sentence until the NMCCA rendered its original opinion violated his due process rights. He submitted an unsupported affidavit claiming that he averaged less than \$35,000 a year in annual income since he began his appellate leave, even though persons trained as he was normally earned between \$79,000 and \$95,000. Citing *Bush*, the CAAF held that there was no prejudice under the fourth *Barker v. Wingo* prong, and that the unsupported affidavit of the appellant allowed the government to more easily demonstrate that any violation of his due process right was harmless beyond a reasonable doubt.

(16) *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009). More than eight-year delay from the announcement of sentence until the NMCCA rendered its original opinion violated the appellant’s due process rights. However, unsupported (and belated) affidavit claiming that his inability to travel due to his appellate leave status do not establish actionable harm arising from any delay. The CAAF held that under the totality of the circumstances, the post-trial delay was harmless beyond a reasonable doubt. Due to the lack of convincing evidence of prejudice in the record, the court will not presume prejudice from the length of the delay alone.

(17) *United States v. Mullins*, 69 M.J. 113 (C.A.A.F. 2010). Convening authority did not take action for 363 days. After docketing, 448 days passed until the first contact between appellate defense counsel and the appellant. Over the course of the appeals, appellant had four separate appointed attorneys. Appellant also filed writs and motions pro se, including complaints about the delay in the appellate process. Appellant was eventually released from confinement. Two months later, he was allegedly denied unemployment insurance because he was on appellate leave and did not have a DD-214. The CAAF skipped over most of the analysis and went right to the lack of prejudice. The appellant had three assertions of prejudice: 1) no

unemployment benefits due to the lack of a DD-214; 2) anxiety because he had to register as a sex offender; and, 3) a timely appeal would have allowed him to seek legal custody of his children. The CAAF dismissed the latter two arguments since the appellant did not prevail on the merits of his appeal. Turning to the unemployment benefits, the CAAF held that while this may be prejudicial, it was not necessarily so in this case. The appellant provided no affidavits or direct proof that a person in appellant's situation would have been eligible for unemployment benefits. Unlike *United States v. Jones*, 61 M.J. 80 (C.A.A.F. 2004), where the appellant provided affidavits from potential employers, this case was lacking of such proof of prejudice. Absent prejudice, the post-trial delay was harmless beyond a reasonable doubt. The CAAF denied relief.

(18) *United States v. Luke*, 69 M.J. 309 (C.A.A.F. 2011). The court addressed the eleven-year delay between his conviction and the lower court decision (substantially due to a long USACIL investigation into a forensic chemist that worked on this case), and the appellant's claims that he was prejudiced because the government destroyed the physical evidence and that he was denied United States citizenship due to his conviction. The court assumed that there was error and proceeded directly to the conclusion that the delay was harmless beyond a reasonable doubt. The court had not found merit in the substantive appeal, so the claims of prejudice were harmless.

(19) *United States v. Arriaga*, 70 M.J. 51 (C.A.A.F. 2011). The government took 243 days from trial to convening authority action in this case. Much of this time was devoted to the record of trial. It took the court reporters 82 days to produce the record of trial, and it took the trial counsel 80 days to conduct errata on the record of trial. The remaining 81 days were spread out over the remaining steps in the post-trial process. In a 3-2 decision, the majority of the court found that the accused was denied his due process right to a speedy post-trial review and remanded the case to the AFCCA for appropriate relief. The court made note in dicta, however, that the government's argument that the delay was "only" 123 days because the *Moreno* standard of 120 days should not count against the government was dismissed outright. The court made special note that the clock begins to run on the day that the trial is concluded and stops on the date of action. (Note: This point was specifically agreed to by the dissent, making this "dicta holding" a 5-0 part of the decision.) The primary analysis revolved around prejudice, and more specifically, oppressive incarceration pending appeal. The appellant's original maximum release date (MRD) was March 25, 2012. After the AFCCA lowered his sentence to two years confinement, his MRD was March 25, 2010. The AFCCA decision was released on May 7, 2010, and the appellant was released on May 14, 2010. This amounted to 51 extra days in confinement that would not have been served had the government taken action within 120 days. The CAAF found that the government violated the appellant's due process rights to a speedy post-trial review. The dissent found no due process violation and would have affirmed the AFCCA decision. The dissent spent time discussing that a presumptively unreasonable delay is necessarily dependent on the type of case. Overall, the dissent would not find a 243 day period from trial to action to be prejudicial under the facts and circumstances of this case, and as a result, deny relief on that basis. Even assuming prejudicial delay, the dissent would still refuse to grant relief on the grounds that oppressive incarceration was speculative at best. There is no guarantee that the AFCCA decision would have been released in the same amount of time, even if the government would have taken less than 120 days to action. Even barring that, there is no guarantee that the AFCCA would have reduced

the appellant's sentence to confinement by such a large amount had there been no post-trial delay in this case.

4. The ACCA and the exercise of its Article 66, sentence appropriateness authority – prejudice not required for relief from post-trial delay.

a) *United States v. Collazo*, 53 M.J. 721 (A. Ct. Crim. App. 2000). The ACCA came up with a new method for dealing with post-trial processing delay. In *Collazo*, the court granted the appellant four months off of his confinement because the government did not exercise due diligence in processing the record of trial. The court expressly found no prejudice.

b) *United States v. Bauerbach*, 55 M.J. 501 (A. Ct. Crim. App. 2001). The only allegation of error was undue delay in the post-trial process. Defense sought relief in accordance with *Collazo*. Applying *Collazo*, the ACCA found that the government did not proceed with due diligence in the post-trial process when it took 288 days to process a 384-page record of trial. Although no prejudice was established, the court granted relief under its Article 66, sentence appropriateness authority reducing confinement by one month. The court did provide valuable guidance to SJAs and Chiefs of Justice regarding what might justify lengthy post-trial delay (remembering that the court will test whether the government has proceeded with due diligence in the post-trial process based on the totality of the circumstances). “Acceptable explanations may include excessive defense delays in the submission of RCM 1105 matters, post-trial absence or mental illness of the accused, exceptionally heavy military justice post-trial workload, or unavoidable delays as a result of operational deployments. Generally, routine court reporter problems are not an acceptable explanation.” *Bauerbach*, 55 M.J. at 507.

c) *United States v. Delvalle*, 55 M.J. 648 (A. Ct. Crim. App. 2001). Ten months to prepare 459-page ROT was too long; sentence reduced by two months.

d) *United States v. Maxwell*, 56 M.J. 928 (A. Ct. Crim. App. 2002). Appellant was convicted at a GCM of desertion terminated by apprehension and wrongful appropriation of a motor vehicle. The adjudged and approved sentence was confinement for five months and a BCD. On appeal, appellant alleged undue delay in the post-trial processing of her case. Held: fourteen months from trial to action in a case where the ROT is only 384 pages is an excessive delay that warrants relief under *Collazo* and *Bauerbach*. Note: appellant failed to cite any prejudice resulting from the delay, however, the ACCA, in exercise of its Article 66, UCMJ, sentence appropriateness authority affirmed the findings and reduced the period of confinement from five to four months. *See also United States v. Paz-Medina*, 56 M.J. 501 (A. Ct. Crim. App. 2001) (one year delay in post-trial processing of 718-page ROT unreasonable and indicates a lack of due diligence). *United States v. Hutchison*, 56 M.J. 756 (A. Ct. Crim. App. 2002) (419 day delay from trial to action in an 81-page ROT case is unreasonable – 3-month confinement reduction despite the lack of prejudice to the accused).

e) *United States v. Stachowski*, 58 M.J. 816 (A. Ct. Crim. App. 2003). Delay of 268 days between sentence and action was not excessive and did not warrant relief for dilatory post-trial processing. Applying a totality of circumstances approach, the court considered the following: that the CA reduced the appellant's confinement by thirty days because of the post-trial delay; while processing the appellant's case, the installation only had one court reporter; the lone reporter doubled as the military justice division NCOIC; the backlog of cases awaiting

transcription was significant; and the cases were transcribed on a “first in, first out” basis. *Id.* at 818.

f) *United States v. Bodkins*, 60 M.J. 322 (C.A.A.F. 2004). The CAAF rejected the ACCA’s conclusion that the accused is required to ask for timely post-trial processing, and that failure to do so waived any right to relief. The accused failed to object to dilatory post-trial processing in guilty plea case with a 74-page record of trial (ROT) (i.e., 252 days from sentence to action; 412 days from sentence to receipt of ROT by the ACCA). The CAAF noted that the responsibility to complete post-trial processing in a timely fashion lies with the CA and is not dependent on an accused’s request. The CAAF did, however, observe that the absence of a request from the defense is one factor a reviewing court may consider in assessing the impact of any delay in a particular case.

g) *United States v. Garman*, 59 M.J. 677 (A. Ct. Crim. App. 2003). Allegations of dilatory post-trial processing will be examined on a case-by-case basis applying a totality of the circumstances approach. Court refuses to adopt a bright line rule regarding post-trial delay. Held: appellant was not entitled to relief despite a post-trial delay of 248 days from sentence to action (i.e., 329 days less 81 days attributable to the defense; the military judge’s time to authenticate the record was government time). The factors the court considered were as follows: defense counsel’s objection to the post-trial delay was “dilatory,” occurring at day 324; after the defense objected, the government acted on the case expeditiously (i.e., in five days); although unexplained, the delay did not exceed 248 days; slow post-trial processing was the only post-trial error; and, the appellant failed to allege any prejudice or harm from the delay. Most significant in the court’s decision was the defense counsel’s lack of timely objection to the post-trial processing.

XIV. SUSPENSION OF SENTENCE; REMISSION. ARTICLE 71, UCMJ; RCM 1108.

A. The rule requires the conditions of any suspension to be specified in writing, served on the accused, and receipted for by the probationer. *United States v. Myrick*, 24 M.J. 792 (A.C.M.R. 1987) (there must be substantial compliance with RCM 1108). *See*:

1. AR 27-10, para. 5-35;
2. JAGMAN, section 0158; and,
3. AFI 51-201, para. 9.23.

B. Power of the CA to create conditions.

1. *United States v. Cowan*, 34 M.J. 258 (C.M.A. 1992). The accused asked the CA for a method by which she could serve her confinement and still support her 6-year-old child. CA approved the sentence, but suspended for one year confinement in excess of six months and forfeitures in excess of \$724.20, suspension of forfeitures conditioned upon:

- a) The initiation of an allotment payable to the daughter’s guardian of \$278.40, for the benefit of the girl; and
- b) The maintenance of the allotment during the time the accused is entitled to receive pay and allowances.

Held: Permissible. Note: court recognizes inherent problems; recommends careful use of such actions.

2. *United States v. Schneider*, 34 M.J. 639 (A.C.M.R. 1992), *aff'd*, 38 M.J. 387 (C.M.A. 1993). The accused asked for assistance in supporting his dependents. The ACMR upheld CA's suspension of forfeitures in excess of \$400.00 on conditions that the accused:

- a) Continue to claim on W-4, as long as he can legitimately do so, single with 2 dependents; and
- b) Initiate and maintain allotment to be paid directly to spouse in amount of \$2,500.

C. Period of suspension must be reasonable; conditions must not be "open-ended" or "unachievable."

1. Limited by AR 27-10, para. 5-35, on a sliding scale from three months in a SCM to two years or the period of unexecuted portion of confinement, whichever is longer, in a GCM.

2. *United States v. Spriggs*, 40 M.J. 158 (C.M.A. 1994). Uncertain and open-ended period of time required to fulfill one of the conditions (self-financed sex offender program) made the period of suspension of the discharge and reduction in grade "unreasonably long." The CMA, especially Judge Cox, signals approval for parties' "creative" and "compassionate" efforts.

3. *United States v. Ratliff*, 42 M.J. 797 (N-M. Ct. Crim. App. 1995). Eleven years probation not unreasonably long under the circumstances (though this extended suspension period may be barred in the Army by AR 27-10).

4. *United States v. Koppen*, 39 M.J. 897 (A.C.M.R. 1994). Suspension of period of confinement in conjunction with an approved discharge should coincide with serving the unsuspended portion of confinement.

5. *United States v. Wendlandt*, 39 M.J. 810 (A.C.M.R. 1994). Directing that suspension period begin on date later than action is not per se improper.

XV. VACATION OF SUSPENSION OF SENTENCE. ARTICLE 72, UCMJ; RCM 1109.

A. The rule sets forth the procedural and substantive requirements for vacating a suspended sentence. It authorizes immediate confinement pending the vacation proceedings, if under a suspended sentence to confinement. *See* Appendix 18, MCM.

B. *United States v. Connell*, 42 M.J. 462 (C.A.A.F. 1995). Appellant challenged the vacation of his suspended bad-conduct discharge because the hearing officer, his special court-martial convening authority (as required by RCM 1109(d)), had imposed nonjudicial punishment on him for the same offense that caused the vacation of his suspended bad-conduct discharge. The CAAF held that this did not make the special court-martial convening authority too personally interested to be a neutral and detached hearing officer as required by RCM 1109.

C. *United States v. Miley*, 59 M.J. 300 (C.A.A.F. 2004). Error for the hearing officer (i.e., SPCMCA) in a vacation of suspended punishment situation to refrain from making findings of fact on whether a basis for vacation existed. The hearing officer's decision, pursuant to RCM 1109, must include an evaluation of the contested facts and a determination of whether the facts warrant vacation. A decision based solely on equitable grounds is improper. Error for the GCMCA to vacate the suspended punishment when the hearing officer failed to comply with RCM 1109. Held: vacation action set aside and returned to the GCMCA for yet another (a third vacation hearing) or reinstatement of the terms of the original pretrial agreement. Note: 3-2 decision with J. Baker and C.J. Crawford dissenting.

XVI. WAIVER OR WITHDRAWAL OF APPELLATE REVIEW. ARTICLE 61, UCMJ; RCM 1110.

A. RCM 1110(a). After any GCM, except one in which the approved sentence includes death, and after a special court-martial in which the approved sentence includes a BCD the accused may elect to waive appellate review.

B. Waiver. The accused may sign a waiver of appellate review any time after the sentence is announced. The waiver may be filed only within 10 days after the accused or defense counsel is served with a copy of the action under RCM 1107(h). On written application of the accused, the CA may extend this period for good cause, for not more than 30 days. *See* RCM 1110(f)(1).

C. The accused has the right to consult with counsel before submitting a waiver or withdrawal. RCM 1110(b).

1. Waiver.

- a) Counsel who represented the accused at the court-martial.
- b) Associate counsel.
- c) Substitute counsel.

2. Withdrawal.

- a) Appellate defense counsel.
- b) Associate defense counsel.
- c) Detailed counsel if no appellate defense counsel has been assigned.
- d) Civilian counsel.

D. Procedure.

1. RCM 1110(d). Must be in writing, attached to ROT, and filed with the CA. Written statement must include: statement that accused and counsel have discussed accused's appellate rights and the effect of waiver or withdrawal on those rights; that accused understands these matters; that the waiver or withdrawal is submitted voluntarily; and signature of accused and counsel. *See* Appendix 19 and 20, MCM.

2. TDS SOP requires a seventy-two hour "cooling off" period; re-contact after initial request to waive/withdraw.

3. The accused may only file a waiver within ten days after he or DC is served with a copy of the action (or within period of extension not to exceed thirty days).

4. *United States v. Smith*, 44 M.J. 387 (C.A.A.F. 1996). May not validly waive appellate review, under Article 61, UCMJ, before CA takes initial action in a case, *citing, inter alia, United States v. Hernandez*, 33 M.J. 145 (C.M.A. 1991) (Article 61(a) permits such waiver "within 10 days after the action . . . is served on the accused or on defense counsel." RCM 1110(f) must be read in this context. Clearly the RCM cannot supersede a statute, but careful reading of the RCM reveals that it may be signed "at any time after the sentence is announced" but "must be *filed* within 10 days after" service of the action (emphasis added)). *Smith*, 44 M.J. at 391-392.

5. RCM 1110(f)(2). The accused may file a withdrawal at any time before appellate review is completed.

6. RCM 1110(g). Once filed in substantial compliance with the rules, the waiver or withdrawal may not be revoked.

- a) *United States v. Walker*, 34 M.J. 317 (C.M.A. 1992). Documents purporting to withdraw accused's appeal request were invalid attempt to waive appellate review prior to CA's action.
- b) *United States v. Smith*, 34 M.J. 247 (C.M.A. 1992). Waiver of appellate representation 58 days before action by CA was tantamount to waiver of appellate review; therefore, was premature and without effect.
- c) *Clay v. Woodmansee*, 29 M.J. 663 (A.C.M.R. 1989). Accused's waiver of appellate review was null and void as it was the result of the government's promise of clemency.

XVII. DISPOSITION OF RECORD OF TRIAL AFTER ACTION. RCM 1111.

- A. General Courts-Martial. ROT and CA's action will be sent to the Office of The Judge Advocate General (OTJAG).
- B. Special Courts-Martial with an approved BCD will be sent to OTJAG.
- C. Special Courts-Martial with an approved BCD and waiver of appeal. Record and action will be forwarded to a Judge Advocate for review (RCM 1112).
- D. Other special courts-martial and summary courts-martial will be reviewed by a Judge Advocate under RCM 1112.

XVIII. REVIEW BY A JUDGE ADVOCATE. ARTICLE 64, UCMJ; RCM 1112.

- A. A Judge Advocate (JA) shall review:
 - 1. Each general court-martial in which the accused has waived or withdrawn appellate review under RCM 1110.
 - 2. Each special court-martial in which the accused has waived or withdrawn appellate review under RCM 1110 or in which the approved sentence does not include a BCD or confinement for one year.
 - 3. Each summary court-martial.
- B. A JA shall review, under service regulations, each case not reviewed under Article 66. AR 27-10, para. 5-46b, says this review may be done either by a JA in the Office of the SJA of the convening command or by a JA otherwise under the technical supervision of the SJA.
- C. No review required for: total acquittal, a finding of not guilty only by reason of a lack of mental responsibility, or where the CA disapproved all findings of guilty.
- D. Disqualification of reviewer for prior participation in case.
- E. The review shall be in writing. It shall contain conclusions as to whether the court-martial has jurisdiction over the accused and the offenses, each specification states an offense, and the sentence is legal. The review must respond to each allegation of error made by the accused under RCM 1105, 1106(f), or filed with the reviewing officer directly. If action on the ROT is required by the CA, a recommendation as to the appropriate action and an opinion as to whether corrective action is required must be included.
- F. The ROT shall be sent to the GCMCA over the accused at the time the court-martial was held (or to that officer's successor) for supplementary action if: (1) the reviewer recommends corrective action; (2) the sentence approved by the CA includes dismissal, a DD or BCD or confinement in excess of six months; or, (3) service regulations require it.

G. If the reviewing JA recommends corrective action but the GCMCA acts to the contrary, the ROT is forwarded to the Judge Advocate General concerned for review under RCM 1201(b)(2). RCM 1112(g)(1).

H. If the approved sentence includes dismissal, the service Secretary concerned must review the case.

XIX. EXECUTION OF SENTENCE. UCMJ, ARTICLE 71, UCMJ; RCM 1113.

A. A sentence must be approved before it is executed (but confinement, forfeitures, and reduction may be carried out before ordered executed).

B. Confinement, unless deferred is immediate. Forfeitures, both automatic and adjudged, and reduction, unless deferred, take effect fourteen days after sentence is announced or upon action, whichever is earlier.

C. The CA's initial action may order executed all punishments except a DD, BCD, dismissal or death.

D. A Dishonorable Discharge (DD) or Bad-Conduct Discharge (BCD) may be ordered executed only after a final judgment within the meaning of RCM 1209 has been rendered in the case. If on the date of final judgment, a servicemember is not on appellate leave and more than six months have elapsed since approval of the sentence by the CA, before a DD or BCD may be executed, the officer exercising GCM jurisdiction over the servicemember shall consider the advice of that officer's SJA as to whether retention would be in the best interest of the service. Such advice shall include the findings and sentence as finally approved, the nature and character of duty since approval of the sentence by the CA, and a recommendation whether the discharge should be executed.

1. *United States v. Estrada*, 68 M.J. 548 (A. Ct. Crim. App. 2009), *aff'd*, 69 M.J. 45 (C.A.A.F. 2010). Purported honorable discharge given before bad-conduct discharge could be executed was void. AR 27-10, para. 5-16 automatically voided any purported discharge because the honorable discharge occurred prior to initial action.
2. *United States v. McPherson*, 68 M.J. 526 (A. Ct. Crim. App. 2009), *aff'd*, 68 M.J. 408 (C.A.A.F. 2009) (summary disposition). Purported honorable discharge given before bad-conduct discharge could be executed was not void and remits any approved bad-conduct discharge. The honorable discharge in this case occurred after initial action (after a prior honorable discharge issued before initial action was revoked as void).
3. *United States v. Watson*, 69 M.J. 623 (A. Ct. Crim. App. 2010). Prior to CA Action, the appellant, a reserve officer, was released from active duty (REFRAD). After CA Action that approved her dismissal, she received an honorable discharge. Because the proper authority (Commander, HRC, St. Louis) voided the erroneous honorable discharge, the dismissal was not remitted.
4. *United States v. Watson*, 69 M.J. 415 (C.A.A.F. 2011). On appeal from the above case, the CAAF (in a 3-2 decision) overturned the decision by the ACCA and held that the administrative honorable discharge was validly issued, and therefore remitted the adjudged dismissal.
5. *United States v. Brasington*, No. 20060033, 2010 WL 3582596 (A. Ct. Crim. App. Sept. 13, 2010) (unpublished). Purported honorable discharge given by reserve component of Human Resources Command (Soldier was an active duty Soldier, not reserve) was issued in error and withdrawn by the same command after a request from the Personnel Control Facility. The ACCA held that the reserve component of HRC did not have the authority to discharge the appellant, and his discharged was voidable.

6. *United States v. Tarniewicz*, 70 M.J. 543 (N-M. Ct. Crim. App. 2011). The convening authority action stated, in relevant part, “In accordance with the Uniform Code of Military Justice, the Manual for Courts-Martial, applicable regulations, and this action, the sentence is ordered executed. Pursuant to Article 71, UCMJ, the punitive discharge will be executed after final judgment.” The CA’s action, to the extent that it ordered the BCD executed, is a legal nullity. *See United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009). The court started by stating that the action did not follow the recommended forms for action in Appendix 16, MCM. However, Article 71, UCMJ, which states in relevant part, “if a sentence extends to . . . bad-conduct discharge . . . that part of the sentence extending to . . . bad-conduct discharge may not be executed until there is a final judgment as to the legality of the proceedings.” This means that in a case reviewed by a CCA, the BCD could not be executed until appellate review is final. The court held that the language in the CA’s action could be interpreted two ways: 1) the CA attempted to direct the execution of the BCD; or 2) mere commentary on a possible future event – that being affirmance of the case on appeal. In either case, the court held that the language has no effect. Article 71, UCMJ does not allow it.

E. Dismissal of a commissioned officer, cadet or midshipman may be approved and ordered executed only by the Secretary concerned or such Under Secretary or Assistant Secretary as the Secretary concerned may designate.

F. Death. A punishment of death may be ordered executed only by the President.

XX. PROMULGATING ORDERS. ARTICLE 76, UCMJ; RCM 1114.

A. A summary of the charges and specifications is authorized. *See* MCM, Appendix 17. *See also* United States Army Court of Criminal Appeals, Office of the Clerk of Court, Post Trial Handbook (2009).

B. The specifications and findings in the promulgating order need to sufficiently apprise a third party of the specific offenses that the accused was tried on. Stating “AWOL” without more is defective because it lacks sufficient specificity to prevent against subsequent prosecution for the same offense.

1. *United States v. Glover*, 57 M.J. 696 (N-M. Ct. Crim. App. 2002). RCM 1114(c) requires that the charges and specifications either be stated verbatim or summarized. The promulgating order in this case did neither, providing “no useful information about the offenses” the appellant was convicted of except for the number of the UCMJ Article that was violated. *Id.* at 697. Held: the promulgating order failed to comply with RCM 1114(c) and absent a verbatim summary of the specification, a “meaningful summary” must be provided. *Id.* at 698. The court provided relief in its decretal paragraph, affirming the findings and sentence and ordering that a supplemental promulgating order be issued in compliance with its decision.

2. *United States v. Suksdorf*, 59 M.J. 544 (C.G. Ct. Crim. App. 2003). Promulgating order that omits suspension of confinement in excess of 150 days and incorrectly reflects the pleas and findings at trial is erroneous. Similarly, an action which fails to reflect a required suspension of confinement is erroneous. Despite these errors, the appellant failed to allege any prejudice since he was released from confinement at the appropriate time and did not serve any confinement in excess of the required 150 days. Although Article 66, UCMJ, “does not provide general authority for a court of criminal appeals to suspend a sentence, [the CAAF has recognized a service court’s] authority to do so when a convening authority failed to comply with the terms of a pretrial agreement requiring suspension of some part of a sentence.” *Id.* at 547. As for the lack of attention to detail in the post-trial processing of the case, the CGCCA noted that post-trial processing is “not

rocket science, and careful proof-reading of materials presented to the convening authority, rather than inattention to detail, would save time and effort for all concerned.” In affirming the findings and sentence, the CGCCA suspended confinement in excess of 150 days and directed the CA to issue a new promulgating order.

XXI. ACTION BY THE JUDGE ADVOCATE GENERAL. ARTICLES 66 AND 69, UCMJ; RCM 1201.

- A. Cases automatically reviewed by a Court of Criminal Appeals (Article 66).
 - 1. Cases in which the approved sentence includes death.
 - 2. Cases in which the approved sentence includes a punitive discharge or confinement for a year or more.
- B. Scope of CCA review: both law and fact.
 - 1. *United States v. Clifton*, 35 M.J. 79 (C.M.A. 1992). Courts of Military Review need not address in writing all assignments of error, so long as the written opinion notes that judges considered any assignments of error and found them to be without merit.
 - 2. *United States v. Quigley*, 35 M.J. 345 (C.M.A. 1992). Choice of whether to call appellate court’s attention to issue rests with counsel, although choice is subject to scrutiny for effective assistance of counsel in each case.
 - 3. *United States v. Gunter*, 34 M.J. 181 (C.M.A. 1992). Error for CMR to deny accused’s motion to submit handwritten matter for consideration by that court (detailed summary by appellate defense counsel not sufficient).
- C. Power of Courts of Criminal Appeals (CCAs). UCMJ, Article 66(c):
 - 1. “It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.”
 - 2. *United States v. Cole*, 31 M.J. 270 (C.M.A. 1990). “Article 66(c)[‘s] . . . awesome, plenary, *de novo* power of review” grants CCAs the authority to substitute their judgment for that of the MJ. It also allows a “substitution of judgment” for that of the court members.
 - 3. *United States v. Claxton*, 32 M.J. 159 (C.M.A. 1991). A “*carte blanche*” to do justice. J. Sullivan in dissent notes CCAs are still bound by the law.
 - 4. *United States v. Keith*, 36 M.J. 518 (A.C.M.R. 1992). In appropriate case, the ACMR may fashion equitable and meaningful remedy regarding sentence.
 - 5. *United States v. Smith*, 39 M.J. 448 (C.M.A. 1994). Plenary, *de novo* power of CCA does not include finding facts regarding allegations of which fact finder has found accused not guilty.
 - 6. *United States v. Lewis*, 38 M.J. 501 (A.C.M.R. 1993), *aff’d*, 42 M.J. 1 (C.A.A.F. 2005). Appellate court has authority to investigate allegations of IAC, including authority to order submission of affidavits and a hearing before a MJ.
 - 7. *United States v. Joyner*, 39 M.J. 965 (A.F.C.M.R. 1994). In reviewing severity of sentence, appellate court’s duty is to determine whether accused’s approved sentence is correct in law and fact based on individualized consideration of nature and seriousness of offense and character of accused. *United States v. Smith*, 56 M.J. 653 (A. Ct. Crim. App. 2001) (holding that nine-year sentence for escape from Disciplinary Barracks and related

offenses not inappropriately severe even though co-accused and individual who initiated the scheme to escape only received three years). *See also United States v. Hundley*, 56 M.J. 858 (N-M. Ct. Crim. App. 2002); *United States v. Ransom*, 56 M.J. 861 (A. Ct. Crim. App. 2002).

8. *United States v. Ragard*, 56 M.J. 852 (A. Ct. Crim. App. 2002). Clemency power is not within the powers granted to appellate courts by Article 66, UCMJ. Appellant argued that his medical condition (having AIDS) made his dismissal an inappropriately severe sentence because his dismissal would limit his access to medical care. The Army court disagreed, noting that sentence appropriateness involves a judicial function of ensuring that the accused gets the punishment deserved while clemency involves “bestowing mercy.”

9. *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). Appellate court may reassess a sentence if it is convinced that the sentence would have been of at least a certain magnitude, even if there is no error. If there is an error, such a reassessment must purge the prejudicial impact of the error. If the error was of constitutional magnitude, the court must be persuaded beyond a reasonable doubt that its reassessment has rendered any error harmless. If the appellate court cannot be certain that the prejudicial impact can be eliminated by reassessment and that the sentence would have been of a certain magnitude, it must order a rehearing on sentence. *See also United States v. Harris*, 53 M.J. 86 (C.A.A.F. 2000) (noting that appellate courts must also make the same determination if a sentence has been reassessed by a convening authority).

a) *United States v. Doss*, 57 M.J. 182 (C.A.A.F. 2002). Appellant convicted of assault consummated by a battery, assault with a dangerous weapon, and soliciting another to murder his wife. At trial, the DC presented no evidence on appellant’s mental condition other than his unsworn statement. On appeal, the NMCCA found appellant’s defense counsel ineffective during the sentencing portion of the trial by failing to present evidence of appellant’s mental condition. The court reassessed the appellant’s sentence and reduced the period of confinement from eight to seven years. On appeal, the CAAF found that the DC’s omissions could not be cured (i.e., rendered harmless beyond a reasonable doubt) by reassessing the sentence because it was impossible to determine what evidence a competent defense counsel would have presented. The court, therefore, held that the lower court abused its discretion in reassessing the sentence instead of ordering a rehearing.

b) *United States v. Mitchell*, 58 M.J. 446 (C.A.A.F. 2003). Appellant convicted of, among other offenses, five drug distribution specifications and sentenced to a BCD, ten years confinement, total forfeitures, and reduction to E-1. On appeal, the ACCA set aside two distribution specifications and ordered a rehearing on sentence. On rehearing, the appellant was sentenced to a DD, six years confinement, and reduction to E-1. The ACCA affirmed the sentence finding that under an objective standard, a reasonable person would not view the rehearing sentence as “in excess of or more severe than” the original sentence; therefore, Article 63, UCMJ, and RCM 810(d)(1) were not violated. The CAAF reversed as to sentence, finding that a DD is more severe than a BCD and no objective equivalence is available when comparing a punitive discharge with confinement. The CAAF affirmed only so much of the sentence as provided for a BCD, six years confinement, and reduction to E-1.

10. *United States v. Commander*, 39 M.J. 972 (A.F.C.M.R. 1994). Appellate courts may examine disparate sentences when there is direct correlation between each accused and

their respective offenses, sentences are highly disparate, and there are no good and cogent reasons for differences in punishment. *See also United States v. Kelly*, 40 M.J. 558 (N.M.C.M.R. 1994).

11. *United States v. Pingree*, 39 M.J. 884 (A.C.M.R. 1994) (inappropriately severe sentence reassessed, dismissal disapproved). *See also United States v. Hudson*, 39 M.J. 958 (N.M.C.M.R. 1994) (court disapproved BCD); *United States v. Triplett*, 56 M.J. 875 (A. Ct. Crim. App. 2002) (court reduced accused period of confinement from fifteen years to ten years based on the five- and six-year sentences two co-accused received).

12. *United States v. Dykes*, 38 M.J. 270 (C.M.A. 1993). Standard for ordering post-trial hearing on issue presented to appellate court:

- a) Not required where no reasonable person could view opposing affidavits, in light of record of trial, and find the facts alleged by accused to support claim.
- b) Required where substantial unresolved questions concerning accused's claim.

13. *United States v. Fagan*, 58 M.J. 534 (A. Ct. Crim. App. 2003), *rev'd*, 59 M.J. 238 (C.A.A.F. 2004). The lower court was correct in holding that *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997)¹ provides the proper analytical framework for dealing with a post-trial affidavit raising a claim of cruel and unusual punishment. The lower court, however, erred in holding that it could grant relief at its level "in lieu of ordering a *DuBay* hearing (*United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967)), to resolve the disputed factual issues raised by the appellant's affidavit. "The linchpin of the *Ginn* framework is the recognition that a Court of Criminal Appeals' fact-finding authority under Article 66(c) does not extend to deciding disputed questions of fact pertaining to a post-trial claim, solely or in part on the basis of conflicting affidavits submitted by the parties." 59 M.J. 238, 242 (C.A.A.F. 2004). Finally, the lower court erred in finding a conflict, "where none exists" between *Ginn* and *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F.

¹ In *United States v. Ginn*, the CAAF established six principles for dealing with allegations of error raised for the first time on appeal in a post-trial affidavit:

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

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

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

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

Fifth, when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal.

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

Fagan, 58 M.J. at 537 (emphasis in original).

1998). 59 M.J. at 243. “The exercise of the ‘broad power’ referred to in *Wheelus* flowed from the existence of an acknowledged legal error or deficiency in the post-trial review process. It is not a ‘broad power to moot claims of prejudice’ in the absence of acknowledged legal error or deficiency, nor is it a mechanism to ‘moot claims’ as an alternative to ascertaining whether a legal error or deficiency exists in the first place.” 59 M.J. at 244.

14. *United States v. Campbell*, 57 M.J. 134 (C.A.A.F. 2002). Standard for handling post-trial discovery issues:

- a) Has appellant met his threshold burden of demonstrating that some measure of appellate inquiry is warranted? If no – stop. If yes, then –
- b) What method of review should be used (e.g., affidavits, interrogatories, fact-finding hearing, etc.)?

15. *United States v. Hutchison*, 57 M.J. 231 (C.A.A.F. 2002). Sentence review limited to determining appropriateness of sentence. Consideration of whether civilian criminal prosecution was “appropriate” is an improper consideration for the CCA.

16. *United States v. Perron*, 58 M.J. 78 (C.A.A.F. 2003). Appellate courts (i.e., CCAs) cannot impose alternative relief on an unwilling appellant to rectify a mutual misunderstanding of a material term of a PTA. Appellant must consent to the proposed relief or be afforded the opportunity to withdraw from the prior plea. *But see United States v. Lundy*, 63 M.J. 299 (C.A.A.F. 2006).

17. *United States v. Holt*, 58 M.J. 227 (C.A.A.F. 2003). The lower court (AFCCA) erred, depriving the appellant of a proper Article 66(c) review limited to the record of trial, when it considered numerous exhibits for the truth of the matters asserted, “alter[ing] the evidentiary quality of the [exhibits]” when the military judge ruled otherwise and instructed the members that they were not to consider the cited evidence for the truth of the matters asserted. *Id.* at 233. “Article 66(c) limits the Courts of Criminal Appeals to a review of the facts, testimony, and evidence presented at trial, and precludes a Court of Criminal Appeals from considering ‘extra-record’ matters when making determinations of guilt, innocence, and sentence appropriateness (citation omitted). Similarly, the Courts of Criminal Appeals are precluded from considering evidence excluded at trial in performing their appellate review function under Article 66(c).” *Id.* at 232.

18. *United States v. Osuna*, 58 M.J. 879 (C.G. Ct. Crim. App. 2003). Appellate courts are limited, absent clearly erroneous findings or legal error, to the factual determinations made by prior panels of that court. In appellant’s first appeal, the court affirmed the findings but remanded for a new review and action because there was no evidence that the CA considered the appellant’s clemency submissions or that he was ever advised to consider the defense’s written submissions. C.J. Baum, in the first appeal, dissented re: findings on several offenses citing to a lack of factual sufficiency. On appeal the second time, the appellant renewed his challenge to the findings. The court, in an opinion authored by C.J. Baum, held “it would be inappropriate for us to readdress our previous factual determination, absent a legal error necessitating such action.” *Id.* at 880.

19. *United States v. Castillo*, 59 M.J. 600 (N-M. Ct. Crim. App. 2003). The appellant was convicted of unauthorized absence terminated by apprehension and sentenced to reduction to E-1, fifty-one days confinement, and a BCD. On appeal [*Castillo I*], the appellant alleged that her sentence was inappropriately severe, an allegation that the court agreed with, setting aside the CA’s action and remanding with the following direction:

The record will be returned to The Judge Advocate General for remand to the [CA], who may upon further consideration approve an adjudged sentence no greater than one including a discharge *suspended* under proper conditions.

Id. at 601 (*quoting United States v. Castillo*, No. 200101326, 2002 WL 1791911 (N-M. Ct. Crim. App. Jul. 31, 2002) (unpublished)). Upon remand, the SJAR erroneously advised the CA that the appellate court “recommended” that the punitive discharge be set aside. The defense counsel disagreed with the SJAR noting that the guidance from the NMCCA was not a recommendation. The CA, following the SJA’s advice, again approved a punitive discharge. Held: the CA’s decision to disregard the court’s guidance was “a clear and obvious error,” a decision based on advice that was similarly “clearly erroneous” and “misguided.” *Id.* Finally, the court advised that “[p]arties practicing before trial and appellate courts have only three options when faced with [their] rulings [: comply with the decision, request reconsideration, or appeal to the next higher authority to include certification of an issue by the Judge Advocate General].” *Id.* In exercising its sentence appropriateness authority under Article 66(c), UCMJ, the court approved only so much of the sentence as provided for reduction to E-1 and 51 days confinement, and disapproved the BCD.

20. Extraordinary Writs and Government Appeals.

D. Cases reviewed by TJAG (Article 69(a)).

1. Those GCMs when the approved sentence does not include a dismissal, DD, or BCD, or confinement for a year or more (Article 69(a)).
2. Those cases where a JA finds, under RCM 1112, that as a matter of law corrective action should be taken and the GCMCA does not take action that is at least as favorable to the accused as that recommended by the JA (RCM 1112(g)(l)).
3. Cases which have been finally reviewed, but not reviewed by a CCA or TJAG (per RCM 1201(b)(1)), may *sua sponte* or upon application of the accused under Article 69(b) be reviewed on the grounds of:
 - a) Newly discovered evidence.
 - b) Fraud on the court.
 - c) Lack of jurisdiction.
 - d) Error prejudicial to the substantial rights of the accused.
 - e) Appropriateness of the sentence.
4. TJAG may consider if the sentence is appropriate and modify or set aside the findings or sentence.
5. TJAG has the power to authorize a rehearing.

E. United States Army Legal Services Agency (USALSA).

1. Army Court of Criminal Appeals (Article 66, UCMJ).
2. Defense Appellate Division (Article 70, UCMJ).
3. Government Appellate Division (Article 70, UCMJ).
4. Examination and New Trials Division (Article 69, UCMJ).

XXII. REVIEW BY THE COURT OF APPEALS FOR THE ARMED FORCES. ARTICLES 67 & 142, UCMJ; RCM 1204.

- A. Authorized five judges since 1 October 1990.
- B. Expanded role of Senior Judges.
- C. Service of Article III Judges.
- D. Cases reviewed.
 1. All cases in which the sentence as approved by a Court of Criminal Appeals extends to death.
 2. All cases reviewed by a Court of Criminal Appeals which TJAG orders sent to the CAAF for review.
 3. All cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the CAAF has granted a review.
 4. Extraordinary writ authority.
- E. *United States v. Schoof*, 37 M.J. 96 (C.M.A. 1993). Equal protection and due process challenge to TJAG's authority to certify issues under Article 67.

F. *United States v. Jones*, 39 M.J. 315 (C.M.A. 1994). Power of the CAAF usually does not include making sentence-appropriateness determinations; that is the province of the Courts of Criminal Appeals.

G. *United States v. Rodriguez*, 67 M.J. 110 (C.A.A.F. 2009). Article 67(b), UCMJ, provides that the appellant has sixty days from the date of notification of a Court of Criminal Appeals decision to petition the Court of Appeals for the Armed Forces for review. The appellant in this case filed his petition for review approximately 73 days after notification of the NMCCA decision. The United States Supreme Court decided *Bowles v. Russell*, 551 U.S. 205 (2007), shortly before the NMCCA decision in this case. *Bowles* concluded that statutory periods within which an accused may file a petition for review are jurisdictional. The CAAF holds that Article 67(b) is jurisdictional. Appeal was outside the authority of the CAAF to grant.

H. Abatement *Ab Initio*. *United States v. Rorie*, 58 M.J. 399 (C.A.A.F. 2003). Appeal to the CAAF under Article 67(a)(3), UCMJ, is a matter of discretion and NOT a matter of right. As such, the CAAF will no longer grant abatement *ab initio* upon death of an appellant pending Article 67(a)(3) appellate review, reversing a policy followed by the court since 1953. Abatement *ab initio* is a "matter of policy in Federal courts," not mandated by the Constitution or statute, and is not part of the Rules of Practice and Procedures for the CAAF. By reversing its prior 50-year policy, the court is now in line with the rule established by the Supreme Court in *Dove v. United States*, 423 U.S. 325 (1976). To the extent that *United States v. Kuskie*, 11 M.J. 253 (C.M.A. 1981) and *Berry v. The Judges of the United States Army Court of Military Review*, 37 M.J. 158 (C.M.A. 1983) are inconsistent with this decision, they were overruled. See also *United States v. Ribaldo*, 62 M.J. 286 (C.A.A.F. 2006).

XXIII. REVIEW BY THE SUPREME COURT. ARTICLE 67a, UCMJ; RCM 1205.

- A. Decisions of the Court of Appeals for Armed Forces may be reviewed by the Supreme Court by writ of certiorari.
- B. The Supreme Court may not review by writ of certiorari any action of CAAF in refusing to grant a petition for review.

XXIV. POWERS AND RESPONSIBILITIES OF THE SECRETARY. RCM 1206.

Sentences that extend to dismissal of a commissioned officer, cadet, or midshipman may not be executed until approved by the Secretary concerned or his designee.

XXV. SENTENCES REQUIRING APPROVAL BY THE PRESIDENT. RCM 1207.

That part of a court-martial sentence extending to death may not be executed until approved by the President.

XXVI. FINALITY OF COURTS-MARTIAL. RCM 1209.

A. When is a conviction final?

1. When review is completed by a Court of Criminal Appeals and —

- a) The accused does not file a timely petition for review by CAAF and the case is not otherwise under review by that court; or
- b) A petition for review is denied or otherwise rejected by CAAF; or
- c) Review is completed in accordance with the judgment of CAAF and:
 - (1) A petition for a writ of certiorari is not filed within applicable time limits;
 - (2) A petition for a writ of certiorari is denied or otherwise rejected by the Supreme Court; or,
 - (3) Review is otherwise completed in accordance with the judgment of the Supreme Court.

2. In cases not reviewed by a Court of Criminal Appeals.

- a) When the findings and sentence have been found legally sufficient by a JA, and when action by such officer is required, have been approved by the GCMCA, or
- b) The findings and sentence have been affirmed by TJAG when review by TJAG is required under RCM 1112(g)(1) or 1201(b)(1).

B. *United States v. Jackson*, 38 M.J. 744 (A.C.M.R. 1993). Abatement after death of appellant, before appeal to Court of Military Appeals. *See also United States v. Huey*, 57 M.J. 504 (N-M. Ct. Crim. App. 2002) (findings and sentence set aside based on accused's death prior to final action – motions to vacate and attach granted). *But see United States v. Rorie*, 58 M.J. 399 (C.A.A.F. 2003) (the CAAF will no longer grant abatement *ab initio* upon death of an appellant pending Article 67(a)(3) appellate review, reversing a policy followed by the court since 1953).

C. Finality and execution of sentences.

- 1. A DD or BCD may be ordered executed only after a final judgment within the meaning of RCM 1209.
- 2. Dismissal may be approved and ordered executed only by the Secretary concerned.
- 3. Only President may order execution of death penalty.

XXVII. PETITION FOR A NEW TRIAL. ARTICLE 73, UCMJ; RCM 1210

A. Within 2 years of initial action by the CA.

B. Requirements:

- 1. Evidence discovered after trial or fraud on the court.
- 2. Evidence not such that it would have been discovered by petitioner at time of trial in exercise of due diligence.

3. Newly discovered evidence, if considered by a court-martial in light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

C. Approval authority: OTJAG, CCA, or CAAF.

D. Concern for avoiding *manifest injustice* is adequately addressed in three requirements in RCM 1210(f)(2). *United States v. Williams*, 37 M.J. 352 (C.M.A. 1993).

E. *United States v. Hanson*, 39 M.J. 610 (A.C.M.R. 1994). Petition for new trial based on newly discovered evidence.

F. *United States v. Luke*, 69 M.J. 309 (C.A.A.F. 2011). Petition for a new trial based upon misconduct by USACIL serology analyst. The CAAF cited to the three requirements above and held that this evidence would not have resulted in a substantially more favorable result for the appellant. Several of the judges would also have found this request for a new trial time barred under Article 73, UCMJ, which requires a petition to be filed within two years of CA action. In this case, the request came in four years after the two year window (due to the late discovery of the serology analyst misconduct).

G. *United States v. Hull*, 70 M.J. 145 (C.A.A.F. 2011). SJA advised the convening authority of the three requirements above in the addendum to the SJAR after the defense post-trial submissions contained an unsworn statement from a witness that could potentially provide evidence that the victim lied. However, the SJA also advised the convening authority that a petition for a new trial should not be granted since the witness was uncooperative and refused to participate, thus impacting her credibility. The CAAF held that this advice was not erroneous and that “requests for a new trial, and thus rehearings and reopenings of trial proceedings, are generally disfavored.”

XXVIII. ASSERTIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

A. *United States v. Lewis*, 42 M.J. 1 (C.A.A.F. 1995). Counsel’s refusal to submit handwritten letter as part of post-trial matters was error. Counsel may advise client on contents of post-trial matters but final decision is the client’s. The CAAF rejects the ACCA’s procedures for handling IAC allegations, originally set out in *United States v. Burdine*, 29 M.J. 834 (A.C.M.R. 1989). Trial defense counsel should not be ordered to explain their actions until a court reviews the record and finds sufficient evidence to overcome the presumption of competence.

B. *United States v. Burdine*, 29 M.J. 834 (A.C.M.R. 1989). Two key points:

1. When the accused specifies error in his request for appellate representation or in some other form, appellate defense counsel will, at a minimum, invite the attention of the CCA to those issues and it will, at a minimum, acknowledge that it has considered those issues and its disposition of them.
2. Guidelines for resolving IAC allegations:
 - a) Appellate counsel must ascertain with as much specificity as possible grounds for IAC claim.
 - b) Appellate defense counsel then will allow the appellant the opportunity to make his assertions in the form of an affidavit (explaining the affidavit is not a requirement, but also pointing out that it will “add credence” to his allegations).
 - c) Appellate defense counsel advises the accused that the allegations relieve the DC of the duty of confidentiality with respect to the allegations.
 - d) Appellate government counsel will contact the DC and secure affidavit in response to the IAC allegations.

C. *United States v. Dresen*, 40 M.J. 462 (C.M.A. 1994). Counsel's request, in clemency petition, for punitive discharge was contrary to wishes of accused and constituted inadequate post-trial representation. Returned for new PTR and action.

D. *United States v. Pierce*, 40 M.J. 149 (C.M.A. 1994). Factual dispute as to whether DC waived accused's right to submit matters to the CA. Held: where DC continues to represent accused post-trial, there must be some showing of prejudice before granting relief based on premature CA action. Any error by failing to secure accused's approval of waiver was not prejudicial in this case.

E. *United States v. Aflague*, 40 M.J. 501 (A.C.M.R. 1994). Where there is no logical reason for counsel's failure to submit matters on behalf of an accused and where the record glaringly calls for the submission of such matters, the presumption of counsel effectiveness has been overcome and appellate court should do something to cleanse the record of this apparent error.

F. *United States v. Robertson*, 39 M.J. 211 (C.M.A. 1994). Defense counsel submitted no post-trial clemency/response documents. Accused did not meet burden of showing that counsel did not exercise due diligence.

G. *United States v. Carmack*, 37 M.J. 765 (A.C.M.R. 1993). Defense counsel neglected to contact accused (confined at USDB) regarding post-trial submissions. Court admonished all defense counsel to live up to post-trial responsibilities; also, admonished SJAs and CAs to "clean up the battlefield" as much as possible.

H. *United States v. Sanders*, 37 M.J. 628 (A.C.M.R. 1993). Court unwilling to adopt *per se* rule that DCs must submit post-trial matters in all cases.

I. *United States v. Jackson*, 37 M.J. 1045 (N.M.C.M.R. 1993). Since clemency is sole prerogative of CA, where defense counsel is seriously deficient in post-trial representation, court reluctant to substitute its judgment for that of CA.

J. *United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001). IAC in submitting three post-trial documents which were not approved or reviewed by appellant and which seriously undermined any hope of getting clemency; the CAAF also found IAC in counsel's trial performance.

K. *United States v. Key*, 57 M.J. 246 (C.A.A.F. 2002). Without holding, the CAAF hints that counsel may be ineffective if they fail to advise the client on his post-trial right to request waiver of forfeitures for the benefit of his dependents.

L. *United States v. Starling*, 58 M.J. 620 (N-M. Ct. Crim. App. 2003). The appellant was not denied post-trial effective assistance of counsel by his counsel's failure to submit clemency matters. The court went on to establish a prospective standard for handling IAC allegations resulting from a failure to submit evidence on sentencing or during post-trial:

[A]bsent a clear indication of inaction by the defense counsel when action was compelled by the situation, future claims of inadequate representation for failure to exercise sentencing rights or post-trial rights will not be seriously entertained without the submission of an affidavit by the appellant stating how counsel's inaction contrasted with his wishes. If the claim involves the failure to submit matters for consideration, the content of the matters that would have been submitted must be detailed.

Id. at 623.

M. *Diaz v. The Judge Advocate General of the Navy*, 59 M.J. 34 (C.A.A.F. 2003). Article 66, UCMJ, and Due Process entitle appellants to timely post-trial and appellate review. In so holding, the court noted the following: "the standards for representation of servicemembers by military or civilian counsel in military appellate proceedings are identical" and the "duty of diligent

representation owed by detailed military counsel to servicemembers is no less than the duty of public defenders to indigent civilians.” *Id.* at 38-39. Finally, the differences between the military justice system as compared to the civilian system, to include the [military] appellate courts’ unique fact finding authority, compel even “greater diligence and timeliness than is found in the civilian system.” *Id.* at 39. *See also United States v. Brunson*, 59 M.J. 41 (C.A.A.F. 2003) (counsel have a duty to aggressively represent their clients before military trial and appellate courts, late filings and flagrant or repeated disregard for court rules subject the violator to sanctions). *Id.* at 43.

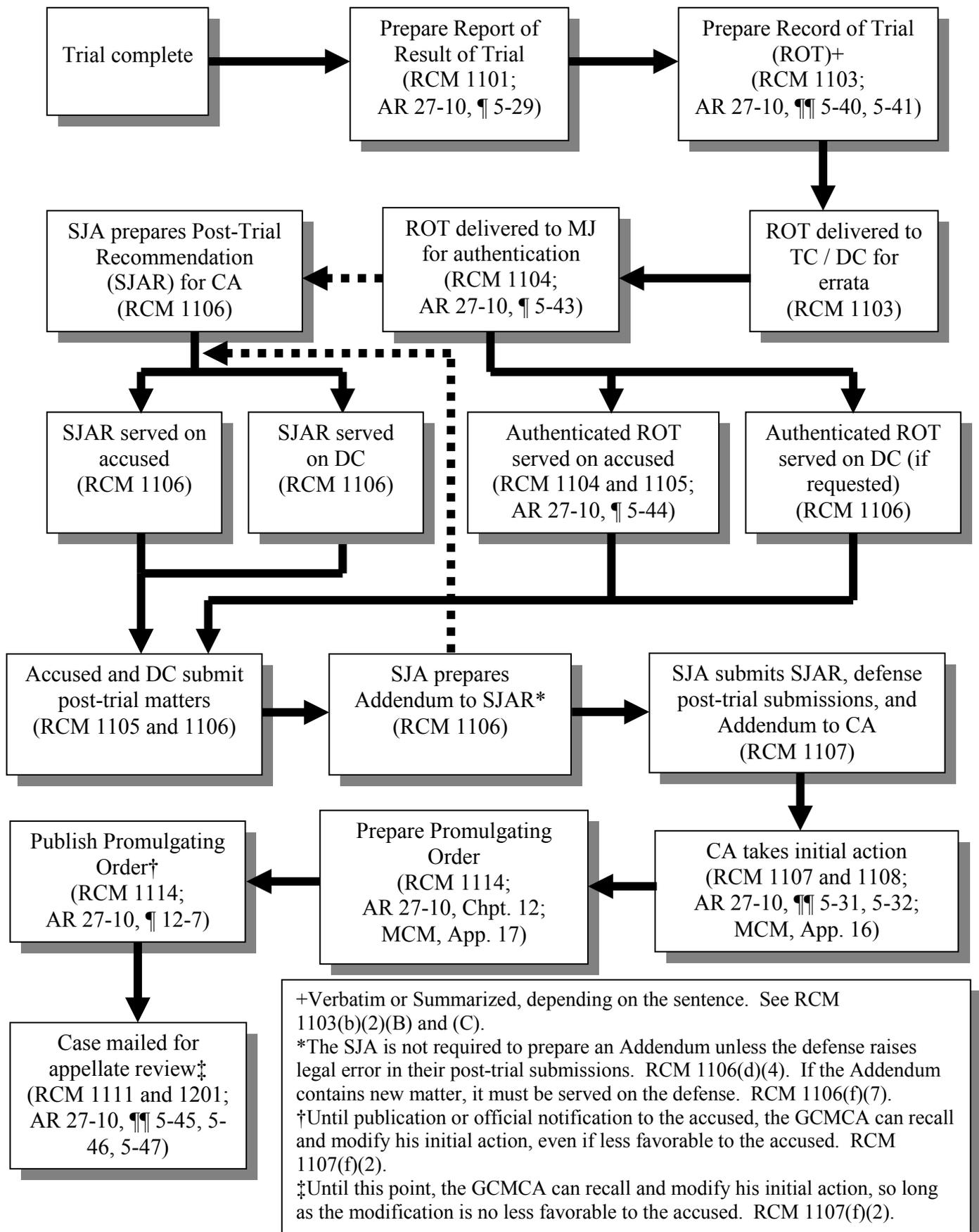
XXIX. RELEASE FOR CONFINEMENT *PENDENTE LITE*.

A. *Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990). Moore successfully appealed his rape convictions before NMCMR and sought release from confinement pending the government’s appeal to the C.M.A. Held:

1. Under the All Writs Act, 28 U.S.C. 1651, C.M.R. and C.M.A. have authority to order deferment of confinement pending completion of appellate review.
2. If the accused has won a “favorable decision from the Court of Military Review,” and “the situation is one in which the Government could establish a basis for pretrial confinement (*see* RCM 305), then it should have the opportunity to show why the accused should be kept in confinement pending the completion of appellate review. This can best be handled by ordering a hearing before a military judge or special master [for a determination similar to that for pretrial confinement].”

XXX. CONCLUSION.

Typical General/Special Court-Martial Post-Trial Processing



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GOVERNMENT APPEALS AND EXTRAORDINARY WRITS

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**MAJ PHILIP STATEN
SPRING 2012**

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GOVERNMENT APPEALS AND EXTRAORDINARY WRITS

Outline of Instruction

I. GOVERNMENT APPEALS.

A. Introduction.

Article 62, UCMJ; R.C.M. 908(a). In a trial by a court-martial over which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal an order or ruling that terminates the proceedings with respect to a charge or specification, excludes evidence that is substantial proof of a fact material in the proceedings, or affects the disclosure or nondisclosure of classified information. However, the United States may not appeal an order or ruling that is, or amounts to, a finding of not guilty, with respect to the charge or specification.

B. Qualifying Proceeding.

1. Military judge presides; and
2. A punitive discharge may be adjudged. This includes a rehearing on sentence which did not result in a punitive discharge. *See United States v. Davis*, 63 M.J. 171 (2006) (“We conclude that the Government properly appealed the military judge’s decision under Article 62, UCMJ, as the sentence rehearing was empowered to adjudge any sentence authorized for the underlying offenses regardless of the sentence approved after the original trial.”)

C. Qualifying Ruling.

1. “. . . ***order or ruling that terminates the proceedings with respect to a charge or specification.***” R.C.M. 908(a).
 - a. *United States v. Dossey*, 66 M.J. 619 (N-M. Ct. Crim. App. 2008). Accused charged with various offenses related to using government computers to access child pornography. Military judge granted defense motion, in part, to exclude evidence obtained from a search of the government’s computer. The government later introduced evidence to the panel that violated the military judge’s ruling. The military judge declared a mistrial to the affected charge and specification. The government appealed the decision pursuant to Article 62. The Navy-Marine Court of Criminal Appeals initially denied the government’s appeal stating that it did not have jurisdiction. The Navy-Marine Court of Criminal Appeals reconsidered its ruling and determined that “terminates the proceedings” means to “terminate the proceedings *before the particular court-martial* to which a charge has been referred” and that it had jurisdiction. The court then vacated the military judge’s order declaring a mistrial and reinstated the original charge and specification.

- b. *United States v. Weymouth*, 40 M.J. 798 (A.F.C.M.R. 1994), *aff'd* 43 M.J. 329 (1995). Accused charged with various offenses arising out of stabbing fellow airman (attempted murder, assault with intent to commit murder, assault by stabbing with a dangerous weapon, assault by IIGBH). MJ granted defense motion to dismiss all but attempted murder on multiplicity grounds, but advised parties he would instruct on any lesser-included offenses raised by the evidence during trial. Parties further agreed accused could only stand convicted of one offense. AFCMR held that MJ “terminate[d] the proceedings with respect to a charge or specification” when dismissed on multiplicity grounds; although he would instruct on lesser-included raised by the evidence, no recourse was likely for the government if the MJ concluded that the LIO was not raised by the evidence. Thus, jurisdiction was proper under Article 62, UCMJ.
 - c. *United States v. Woods*, 28 M.J. 318 (C.M.A. 1989). The court reversed the trial court's ruling to dismiss a charge alleging a violation of Article 134 (sexually transmitting a deadly virus).
2. “... order or ruling . . . which excludes evidence that is substantial proof of a fact material...” R.C.M. 908(a).
- a. *United States v. Baldwin*, 54 M.J. 551 (A.F. Ct. Crim. App. 2000). Appellate court found, on reconsideration request by government, that military judge erroneously suppressed the accused's confession.
 - b. *United States v. Stevenson*, 53 M.J. 257 (2000), *cert. denied*, No. 00-919, 2001 U.S. LEXIS 2192 (U.S. Mar. 19, 2001). Government appealed the NMCCA decision affirming the military judge's ruling to suppress DNA evidence obtained from the accused's blood. CAAF reversed the NMCCA and returned the case to the Navy for remand to the court-martial for trial on the merits.
 - c. *United States v. Moore*, 41 M.J. 812 (N-M. Ct. Crim. App. 1995). The appellate court reversed the MJ's grant of defense's motion to suppress the results of two urine tests. In case of urinalysis testing, MJ's findings regarding the “primary purpose” may be a “matter of fact,” but “whether the examination is an inspection, is a matter of law.”
 - d. *United States v. Phillips*, 30 M.J. 1 (C.M.A. 1990) (hearing a government appeal concerning the MJ's ruling that the accused was improperly “seized” within the meaning of the fourth amendment; trial court upheld).
 - e. *United States v. Konieczka*, 30 M.J. 752 (A.C.M.R. 1990) (considering whether a urinalysis test was properly suppressed; trial court reversed).
 - f. *United States v. Austin*, 21 M.J. 592 (A.C.M.R. 1985) (considering whether a urinalysis test was properly suppressed; trial court upheld).
 - g. *United States v. Bradford*, 68 M.J. 371 (C.A.A.F. 2010) (finding that a military judge's decision to not “preadmit” evidence **did not** constitute “[a]n order or ruling which excludes evidence that is substantial proof of fact material in the proceeding).
 - h. “It is sufficient that the petitioner believes that the evidence is significant.” *United States v. Scholz*, 19 M.J. 530 (A.F.C.M.R. 1984). *See also United States v. Pacheco*, 36 M.J. 530 (A.F.C.M.R. 1992) (“it is not necessary that the evidence suppressed be the only evidence in the case”); *United States v. Hamilton*, 36 M.J. 927 (A.F.C.M.R. 1993).

3. Or, the **functional equivalent** of an R.C.M. 908 appealable order.
 - a. *United States v. Sepulveda*, 40 M.J. 856 (A.F.C.M.R. 1994). The MJ granted defense's motion to dismiss three specifications of indecent acts as lesser-included offenses of three indecent assault specifications also charged, and further granted defense's motion to consolidate three specs of indecent assault into one specification. AFCMR found jurisdiction for appeal appropriate to determine whether dismissal should be with or without prejudice, because the MJ terminated proceedings with regard to indecent acts specifications. Jurisdiction was also proper with regard to the consolidated specs. since consolidation is a functional equivalent of dismissal.
 - b. *United States v. True*, 28 M.J. 1 (C.M.A. 1989). The MJ's abatement order was the "functional equivalent" of a ruling that terminates the proceedings. The MJ ordered the Government to provide a defense expert and the CA would not pay. Use the "practical effects" test. *See also United States v. Metcalf*, 34 M.J. 1056 (A.F.C.M.R. 1992).
 - c. *United States v. Harding*, 63 M.J. 65 (CAAF 2006). MJ's abatement order in this case was not a "termination of proceedings" and the Government appeal was not valid under Article 62, UCMJ. MJ simply abated proceedings pending enforcement of a warrant of attachment; in this case the Government acknowledged that the Marshal's Service had not enforced the writ of attachment the MJ issued to obtain certain records.
4. **BUT NOT** "an order or ruling that is, or amounts to, a finding of not guilty of a charge or specification".

United States v. Adams, 52 M.J. 836 (A.F. Ct. Crim. App. 2000). Appellate court lacked jurisdiction to hear government appeal of military judge's granting of defense motion for a finding of not guilty pursuant to R.C.M. 917. *But see United States v. Brooks*, 41 M.J. 792 (Army Ct. Crim. App. 1995). A court-martial panel president announced guilty to specification "by absolute majority." Voir dire of the panel indicated several straw votes were taken on the specification - which resulted in insufficient votes to convict - MJ entered finding of not guilty to specification. Government filed appeal under R.C.M. 908. The appellate court had jurisdiction, notwithstanding a *finding of not guilty*, since MJ's characterization of the action was not controlling, and since the case was a members trial, only the panel could evaluate the evidence and render findings as to guilt or innocence (except for R.C.M. 917 finding). Therefore, the act of the MJ amounted to a dismissal with prejudice, and was a proper subject for government appeal.
5. **Classified Information.** The 1996 expansion of Art. 62, and 1998 changes to R.C.M. 908(a), permits appeal of a judge's order or ruling directing disclosure of classified information or imposing sanctions for nondisclosure of classified information. The government may also appeal a refusal of the judge to issue a protective order to prevent disclosure of classified information, or refusal to enforce such an order previously issued by competent authority.

D. **Further appellate review.** In *United States v. Lopez de Victoria*, 66 M.J. 67 (2008), the CAAF decided 3-2 that it had statutory authority to exercise jurisdiction over the courts of criminal appeals' decisions in Article 62 cases despite the absence of an express grant of authority in Article 67 (a). Relying on the express language in Article 67 (a) that the CAAF has jurisdiction over "all cases reviewed by a Court of Criminal Appeals . . .," the majority reasoned that Congress intended uniformity in the application of the Code between the services. If "all cases" did not include government appeals, which are by their very nature interlocutory appeals, then the purpose of the statute would be defeated. The dissent reasoned that nothing in the plain language of Article 62, Article 67, or any other statute grants the CAAF the statutory authority to entertain an Article 62 appeal.

E. **Government Appeal Procedure.**

1. Trial counsel may request a delay of not more than 72 hours. R.C.M. 908(b)(1).
2. A court-martial may not proceed, except as to matters unaffected by the ruling or order.
3. However, if the order is nonappealable within the meaning of R.C.M. 908, the trial judge may properly proceed with the trial. *United States v. Browers*, 20 M.J. 356 (C.M.A. 1985).
4. The decision to file a notice of appeal with the judge must be authorized by the SJA or the GCMCA. For example, *see* DEP'T. OF ARMY, REG. 27-10, MILITARY JUSTICE, para. 13-3(a) (16 Nov 2005) (effective 16 Dec 2005).
5. Written notice of the appeal must be filed with the military judge not later than 72 hours after the ruling or order. R.C.M. 908(b)(3).
 - a. *United States v. Daly*, 69 M.J. 485 (C.A.A.F. 2011). The CAAF held the Government's action was untimely because it failed to file either a motion for reconsideration of the order to dismiss or a notice of appeal within the seventy-two-hour period of government appeals authorized in Article 62(a)(2), UCMJ. Instead, the Government took twelve days to finalize and submit a brief to the military judge asking for reconsideration of the order to dismiss.
 - b. *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010). The government has an *unqualified* seventy-two hour period to file a notice of appeal. The government need not request a delay in the proceedings in order to preserve the seventy-two hour period for filing a notice of appeal.
 - c. *United States v. Flores-Galarza*, 40 M.J. 900 (N.M.C.M.R. 1994). The appellate court found R.C.M. 908 provision to file appeal within 72 hours mandatory, and a MJ has no authority to extend the time for filing appeal notice. To avoid procedural issues in the future, the court recommended the following: 1) MJ should enter essential findings contemporaneously with ruling on motion; 2) MJ should state on record that his action is ruling of the court; 3) if MJ rules adverse to the government on a significant matter, the MJ should then ascertain on the record whether the government is contemplating an appeal; and, 4) if the government is contemplating an appeal, the MJ should state on record the time of the ruling, i.e., the time the 72-hour period will run, and how and where the government may provide the MJ with written notice of appeal.
6. Written notice to the military judge shall (R.C.M. 908(b)(3)):
7. Specify the order appealed and the charges and specifications affected.

8. Certify that the appeal is not for the purpose of delay.
9. Certify that the evidence excluded is substantial proof of a material fact.
10. **Automatic Stay.** Notice of appeal “automatically stays” trial proceedings except as to unaffected charges or specifications. R.C.M. 908(b)(4).
 - a. Motions may be litigated in the judge’s discretion.
 - b. If trial on merits has not begun:
 - 1) Severance at the request of all parties.
 - 2) Severance requested by the accused to prevent manifest injustice.
11. If trial on merits has begun: a party may put on additional evidence within the judge’s discretion.
12. Requesting reconsideration.
 - a. Should be undertaken upon request. *United States v. Tucker*, 20 M.J. 602 (N.M.C.M.R. 1985). *But see United States v. Vangelisti*, 30 M.J. 234 (C.M.A. 1990) (military judge did not abuse his discretion in denying the prosecution’s request to reopen after granting the defense motion to suppress the accused’s confession).
 - b. Scope of reconsideration. *Harrison v. United States*, 20 M.J. 55 (C.M.A. 1985). A trial judge has inherent authority, not only to reconsider a previous ruling on matters properly before him, but also to take additional evidence in connection therewith.
 - c. Effect of reconsideration and time limits. *United States v. Santiago*, 56 M.J. 610 (N-M. Ct. Crim. App. 2001). The denial of a reconsideration ruling can be appealed, and the time limit within which to appeal does not start until the trial court rules on the petition for reconsideration. While the MCM does not address timeliness of request for reconsideration, the time limits from Article 62 and R.C.M. 908 are appropriately applied to such requests in assessing the timeliness for purpose of appeal.
13. Speedy trial rules are generally not a problem as long as the appeal is not frivolous. *See* R.C.M. 707 (b)(3)(c) and R.C.M. 707(c). *See also United States v. Ramsey*, 28 M.J. 370 (C.M.A. 1989) (“[a] frivolous appeal is one where the law is so clear and well-established that continued litigation is evidence of bad faith.”) The government gets a NEW 120 DAY CLOCK. R.C.M. 707(b)(3)(C).
14. Pretrial confinement of accused pending government appeal. R.C.M. 908(b)(9):
 If an accused is in pretrial confinement at the time the United States files notice of its intent to appeal, the commander, in determining whether the accused should be confined pending the outcome of an appeal by the United States, should consider the same factors which would authorize the imposition of pretrial confinement under R.C.M. 305(h)(2)(B).
15. Record of trial. R.C.M. 908(b)(5).
16. Prepared and authenticated to the extent necessary to resolve the issue appealed.
17. Essential findings.
 - a. When ruling on motions to suppress evidence, military judges are required to state their essential findings of fact on the record (R.C.M. 905(d)).

- b. Findings should be logical and complete enough so that there is no need to resort to other parts of the record for meaning.
 - c. Military judge should state the legal basis for the decision—the legal standards applied and the analysis of the application of these standards to the facts previously stated.
 - d. Military judge should state any conclusions made and the decision.
 - e. Help frame issues at the trial level; seek clarity and precision in judge’s ruling.
- 18. Military judge or Court of Criminal Appeals may require additional portions of the record.
 - 19. “Forwarding” of the appeal to government representative. R.C.M. 908(b)(6).
 - 20. Statement of the issues appealed.
 - 21. The original record or summary of the evidence.
 - 22. Within 20 days from the date written notice of appeal is filed with the trial court.
 - a. *United States v. Combs*, 38 M.J. 741 (A.F.C.M.R. 1993). Government appeal properly dismissed for failure to promptly forward.
 - b. *United States v. Snyder*, 30 M.J. 662 (A.F.C.M.R. 1990). The government failed to forward the authenticated ROT within 20 days; the accused had remained in pretrial confinement pending resolution of appeal. HELD: “The right to liberty is too fundamental to apply an ‘almost good enough’ standard to the government’s actions.”
 - 23. Mailing within 20 days meets the requirements of “forwarding.” *United States v. Bolado*, 34 M.J. 732 (N.M.C.M.R. 1991) *aff’d* 36 M.J. 2 (C.M.A. 1992).
 - 24. The Chief, Government Appellate Division, makes the decision whether to file the appeal; therefore coordinate with Government Appellate from the beginning.

F. Appellate Review

- 1. Initially, *must be* filed at Court of Criminal Appeals.
- 2. Appellate counsel represent the parties. But trial counsel and trial defense counsel must maintain close contact with appellate counsel.
- 3. Priority review.
- 4. Courts of Criminal Appeals “may take action only with respect to matters of law.” *See United States v. Solorio*, 21 M.J. 251 (C.M.A. 1986).
- 5. Standard of review.
 - a. Did the military judge “err as a matter of law”?
 - 1) Questions of law are reviewed de novo. *United States v. Kosek*, 41 M.J. 60 (1994).
 - 2) *See United States v. Rittenhouse*, 62 M.J. 509 (A. Ct. Crim. App. 2005) (holding military judge erred in applying the law to computer evidence and admissions).
 - b. Findings of fact?

- 1) “[I]f a military judge’s finding of fact is supported by the evidence of record (or lack thereof), then it shall not be disturbed on appeal taken under Article 62.” *United States v. Vangelisti*, 30 M.J. 234 (C.M.A. 1990).
 - 2) *United States v. Lincoln*, 42 M.J. 315 (1995). NMCMR reversed MJ on a government appeal of the suppression of a confession, and ordered the confession admitted into evidence. CAAF noted, “on questions of fact the appellate court is limited to determining whether the military judge’s findings are clearly erroneous or unsupported by the record. If the findings are incomplete or ambiguous, the ‘appropriate remedy . . . is a remand for clarification’ or additional findings.”
 - 3) *United States v. Reinecke*, 30 M.J. 1010 (A.F.C.M.R. 1990). When ruling on motions to suppress, the MJ is required to state essential findings on the record; findings stated separately and succinctly; findings logical and complete enough so the appellate court does not have to resort to other parts of record for meaning; after stating findings, MJ should state legal basis for decision, *i.e.*, legal standards applied and analysis of the application of the standards to the facts previously stated; and, MJ should state any conclusions made and why.
 - 4) **BUT** “clearly erroneous” factual findings do not bind Courts of Criminal Appeals.
 - 5) *United States v. Burris*, 21 M.J. 140 (C.M.A. 1985); *United States v. Clarke*, 23 M.J. 519 (A.F.C.M.R. 1986), *aff’d* 23 M.J. 352 (C.M.A. 1987) (. . . “We will reverse for an abuse of discretion if the military judge’s findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law. . . . ” *United States v. Dooley*, 61 M.J. 258 (2005), citing *United States v. Gore*, 60 M.J. 178 (2004).
 - 6) *United States v. Hatfield*, 43 M.J. 662 (N.M. Ct. Crim. App. 1995). MJ dismissed charges on speedy trial grounds. NMCCA reversed on government appeal, applying standard of review that “findings by the trial court are ‘clearly erroneous’ when, although there is some evidence to support them, the appellate court is left with the definite and firm conviction that a mistake has been made.” Appellate court cannot simply substitute its own judgment of what constitutes “reasonable diligence.”
6. The CAAF or U.S. Supreme Court may stay trial pending additional review.

II. EXTRAORDINARY WRITS.

A. Introduction.

In 1948, Congress enacted the All Writs Act, 28 U.S.C. §1651(a), which gave federal appellate courts the ability to grant relief in aid of their jurisdiction. The All Writs Act does not confer an independent jurisdictional basis; rather, it provides ancillary or supervisory jurisdiction to augment the actual jurisdiction of the court. In 1969, the Supreme Court held that the All Writs Act applied to our military appellate courts. *Noyd v. Bond*, 395 U.S. 683 (1969). Consistent with federal courts, our military appellate courts view writ relief as a drastic remedy that should only be invoked in those situations that are truly extraordinary. Further, our courts will exercise extraordinary writ jurisdiction sparingly.

At trial, if a party (usually defense) seeks extraordinary relief, there is no requirement to continue the trial to allow the party to petition the appellate court. If the appellate court grants a stay, however, the military judge must stop the proceedings pending resolution of the issue.

B. The All Writs Act.

1. “All Writs Act.” 28 U.S.C. § 1651(a). “The Supreme Court and *all courts established by act of Congress* may issue all writs *necessary or appropriate in aid of their respective jurisdictions* and *agreeable to the usages and principles of law.*”
2. “[A]ll courts established by act of Congress.” Includes both Court of Appeals for the Armed Forces and service Courts of Criminal Appeals. *United States v. Dowty*, 48 M.J. 102 (1998); *McKineey v. Jarvis*, 46 M.J. 870 (Army Ct. Crim. App. 1997). *See also Noyd v. Bond*, 395 U.S. 683 (1969); *United States v. Curtin*, 44 M.J. 439 (1996); *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979); *McPhail v. United States*, 1 M.J. 457 (C.M.A. 1976); *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).

C. Theories of Jurisdiction.

1. **Actual Jurisdiction:** The authority of the appellate courts to review a court-martial on direct review.
 - a. Article 66, UCMJ—Court of Criminal Appeals jurisdiction. Every court-martial in which the approved sentence extends to death, dismissal, punitive discharge or confinement for one year or more.
 - b. Article 67, UCMJ—Court of Appeals for the Armed Forces jurisdiction. Every court-martial in which the sentence as affirmed by a Court of Criminal Appeals extends to death . . . cases certified by the Judge Advocate General . . . and cases reviewed by Courts of Criminal Appeals where accused shows good cause for grant of review.
 - c. Article 69, UCMJ—The Court of Criminal Appeals may review any court-martial where action was taken by the Judge Advocate General pursuant to his authority under Article 69, or has been sent to the Court by the Judge Advocate General for review.
2. **Potential Jurisdiction.** The authority to determine a matter that may reach the actual jurisdiction of the court.

- a. *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996). Petition for writ of mandamus to open Article 32 hearing to public where USAF major charged with murder of child. Court found jurisdiction to consider petition for extraordinary relief in exercising supervisory authority over court-martial process, and over cases that may potentially reach court on appeal. Since Article 32 hearing is integral part of court-martial process, then court has jurisdiction to supervise each tier of military justice process. *And see, The Denver Post Corp. v. the U.S. and CPT Robert Ayers*, Army No. 20041215 (February 23, 2005).
 - b. *U.S.N.M.C.M.R. v. Carlucci, et al*, 26 M.J. 328 (C.M.A. 1988); *Waller v. Swift*, 30 M.J. 139 (C.M.A. 1990). (“The sentence adjudged by the court-martial included a punitive discharge and so was of a severity that would have authorized direct appellate review by this court. Indeed, even in its commuted form, the sentence is of such severity.” *Id.* at 142). *See also Addis v. Thorsen*, 32 M.J. 777 (C.G.C.M.R. 1991).
3. **Ancillary jurisdiction.** The authority to determine matters incidental to the court's exercise of its primary jurisdiction, such as ensuring adherence to a court order. *Boudreaux v. U.S.N.M.C.M.R.*, 28 M.J. 181 (C.M.A. 1989); *United States v. Montesinos*, 28 M.J. 38, n.3 (C.M.A. 1989) (Because the integrity of the judicial process is at stake, appellate courts can issue extraordinary writs on their own motion).
 4. **Supervisory Jurisdiction.** The broad authority to determine matters that fall within the supervisory function of administering the military justice system.
 - a. *Unger v. Zemniak*, 27 M.J. 349 (C.M.A. 1989). Military appellate courts have jurisdiction to grant extraordinary relief under the All Writs Act over courts-martial that do not qualify for review in the ordinary course of appeal.
 - b. *Jones v. Commander*, 18 M.J. 198 (C.M.A. 1984) (Everett, C.J., dissenting). The court refused to exercise writ jurisdiction over a nonjudicial punishment proceeding.
- D. Actual v. Supervisory Jurisdiction; the All Writs Act and *Goldsmith*
1. **Pre-Goldsmith Case Law.**
 - a. *ABC Inc. v. Powell*, 47 M.J. 363 (1997). Absent “good cause,” petitions for extraordinary relief should be submitted initially to the Court of Criminal Appeals. The CAAF exercised supervisory jurisdiction under the All Writs Act to grant relief during an Article 32(b) Investigation.
 - b. *Loving v. Hart*, 47 M.J. 438 (1998). The CAAF has jurisdiction to issue a writ under the All Writs Act even after the case has been affirmed by the Supreme Court. The accused sought extraordinary relief because his death sentence was based in part on a conviction of felony murder that was unsupported by a unanimous finding of intent to kill or reckless indifference to human life. This was an issue raised by Justice Scalia during oral argument before the Supreme Court. The CAAF heard the petition but denied relief.
 - c. *United States v. Dowty*, 48 M.J. 102 (1998). The CAAF has authority under the All Writs Act to exercise jurisdiction over issues arising from proceedings where the Court would not have had direct review.

- d. *Dew v. United States*, 48 M.J. 639 (A. Ct. Crim. App. 1998). Under the All Writs Act, the Army Court has supervisory jurisdiction to consider, on the merits, a writ challenging the action taken by The Judge Advocate General pursuant to Article 69(a), UCMJ. The accused was convicted of making and uttering worthless checks by dishonorably failing to maintain funds. The Office of the Army Judge Advocate General reviewed the case and denied relief. The accused petitioned the Army Court, challenging the decision made by the Office of the Judge Advocate General. The Army Court exercised its supervisory authority under the All Writs Act, heard the petition, but denied relief.
 - e. *Morgan v. Mahoney*, 50 M.J. 633 (A.F. Ct. Crim. App. 1999). The government involuntarily recalled the accused (a member of the retired reserves) to active duty to face a court-martial. At trial, the accused challenged the jurisdiction of the court-martial. The military judge denied the accused's motion, and the accused petitioned the Air Force Court seeking an extraordinary writ ordering the military judge to dismiss all charges and specifications. The service court held that it had jurisdiction under the All Writs Act to hear the issue and denied the accused's relief. In denying the writ, the court found that the accused was a member of retired reserves, which made him part of the reserve component and subject to lawful orders to return to active duty. Since the accused was in an active duty status at the time of trial, the court-martial did not lack *in personam* jurisdiction.
2. ***Clinton v. Goldsmith*, 119 S.Ct. 1538 (1999).** The CAAF exercised supervisory jurisdiction under the All Writs Act to stop the government from dropping the accused from the rolls of the Air Force. The Supreme Court held that the CAAF lacked jurisdiction, under the All Writs Act, to issue the injunction in question because, (1) the injunction was not "in aid of" the CAAF's strictly circumscribed jurisdiction to review court-martial findings and sentences; and (2) even if the CAAF might have had some arguable basis for jurisdiction, the injunction was neither "necessary" nor "appropriate," in light of the alternative federal administrative and judicial remedies available, under other federal statutes, to a service member demanding to be kept on the rolls. In a unanimous decision, the Supreme Court held that CAAF exceeded its supervisory jurisdiction under the All Writs Act.
 3. **Case Law (Post-Goldsmith).**
 - a. *United States v. Byrd*, 53 M.J. 35 (2000). In October 1996, the Navy-Marine Corps Court affirmed the accused's conviction and sentence, which included a punitive discharge. The accused did not petition CAAF for review until 22 January 1997. On 2 January 1997 the convening authority executed his sentence under Article 71. The service court held that since the accused did not petition CAAF for review within 60 days, the intervening discharge terminated jurisdiction. CAAF vacated the lower court's decision on the grounds that the Govt. failed to establish the petition for review as being untimely and, therefore, the sentence had been improperly executed. CAAF also stated it has jurisdiction to review such a case under the All Writs Act, notwithstanding execution of the punitive discharge, but declined to decide which standard of review was more appropriate, direct or collateral.

- b. *United States v. King*, No. 00-8007/NA, 2000 CAAF LEXIS 321 (Mar. 16, 2000). Accused filed a motion to stay Article 32 proceedings but was denied relief by the NMCCA under *Clinton v. Goldsmith*. CAAF disagreed and granted the motion to stay under the All Writs Act. In a concurring opinion, Judge Sullivan stated, "this Court clearly has the power to supervise criminal proceedings under Article 32, UCMJ." See also *King v. Ramos*, No. NMCM 200001991 (Jan. 26, 2001).
- c. *Ponder v. Stone*, 54 M.J. 613 (N-M. Ct. Crim. App. 2000). Accused refused order to receive anthrax vaccination and submitted a request for a stay of proceedings by way of a writ of mandamus. Government argued that the Navy court lacked jurisdiction to entertain the petition under *Goldsmith*, because the court could only grant extraordinary relief on matters affecting the findings and sentence of a court-martial. NMCCA disagreed, stating that review of the petition under the All Writs Act was properly a matter in aid of its jurisdiction.
- d. *Fisher v. United States*, 56 M.J. 691 (N-M. Ct. Crim. App. 2001). Accused filed petition for extraordinary relief. The government argued that the appellate court had no jurisdiction to consider the petition because the accused's court-martial was final under Article 76. The NMCCA disagreed and considered the petition but denied it.
- e. *United States v. Denedo*, 129 S. Ct. 2213 (2009). The accused filed an extraordinary writ in the Navy-Marine Court, alleging ineffective assistance of counsel almost ten years after his case had become final under Article 71. The Navy-Marine Court denied relief. The CAAF granted review of the accused's extraordinary writ. The government appealed the CAAF's decision to the Supreme Court, asserting that neither the Navy-Marine Court nor the CAAF had jurisdiction in this case. Without overturning *Goldsmith*, the Supreme Court ruled that the CAAF and the Navy-Marine Court did, in fact, have jurisdiction. The Supreme Court reasoned that jurisdiction was proper since the accused's petition directly challenged the validity of his conviction.

E. Extraordinary Circumstances.

- 1. Much like the military appellate courts, federal courts struggle with the scope of their jurisdiction under the All Writs Act. The Supreme Court held that federal courts can exercise writ jurisdiction to protect the legal rights of parties, and are not limited to orders protecting just the courts' own duties and jurisdiction. See *United States v. New York Telephone Co.*, 434 U.S. 159 (1977).
- 2. Ordinary course of appellate review of trial cannot give adequate relief. *Andrews v. Heupel*, 29 M.J. 743 (A.F.C.M.R. 1989). "An extraordinary writ is not to be a substitute for an appeal even though hardship may ensue from delay and perhaps an unnecessary trial."
- 3. Circumstances warrant extraordinary relief.

- a. *McCray v. Grande*, 38 M.J. 657 (A.C.M.R. 1993). Petitioner seeks extraordinary writ for release from confinement. CA commuted BCD to four months, but did so five months after sentencing. Accused was immediately taken to the brig at Camp Lejeune. The brig determined that the accused's sentence ran from date of sentence and not confinement and released the accused. A week later, the accused was taken to an Army facility. The Army facility took the position that the accused's sentence began on the date that the CA commuted the BCD to six months and incarcerated petitioner. Proper subject for review by Court, and ordered release.
 - b. *Keaton v. Marsh*, 43 M.J. 757 (Army Ct. Crim. App. 1996). Petition for writ of habeas corpus by accused who was ordered released from pretrial confinement by military magistrate, and subsequently ordered back into pretrial confinement by military judge. Court found propriety of accused's pretrial confinement proper subject for extraordinary writ, and ordered release.
 - c. Petition for writ of prohibition by accused who was a retiree challenging the right of the military justice system to exercise jurisdiction over him was an extraordinary situation warranting consideration. *Pearson v. Bloss*, 28 M.J. 764 (A.F.C.M.R. 1989). *See also Sands v. Colby*, 35 M.J. 620 (A.C.M.R.). 1992).
 - d. *Toohey v. United States*, No. 04-8019, 2004 CAAF LEXIS 656 (Jul. 2, 2004). Petitioner seeks extraordinary writ for release from confinement because of lengthy appellate delay. The chronology of the case indicates that the Petitioner has not received his first level of appeal as of right more than five years and ten months after his sentence was adjudged. Court agrees that delay is unreasonable but does not order release. Court gives Navy-Marine Corps Court 90 days to issue decision.
 - e. *United States v. Kreutzer*, 60 M.J. 453 (2005). (Crawford, J., dissenting). As Petitioner not currently under sentence of death, writ of mandamus granted to the extent that Petitioner must be moved from death row.
 - f. *United States v. Buber*, 61 M.J. 70 (2005). (Crawford, J., dissenting). Army Court dismissed specification supporting remaining confinement and Government filed for reconsideration. Writ of habeas corpus granted with direction to release Petitioner from post-trial confinement immediately.
4. Available remedies are exhausted.
 5. Relief will advance judicial economy.
 - a. Maximize utility of judicial resources.
 - b. Resolve recurrent issues that will inevitably lead to more cases in the future.
 - c. To prevent a waste of time and energy of military tribunals.
- F. Writ classifications.
1. **Mandamus.** Directs a party to take action; rights are not established or created; pre-existing duty enforced.

2. **Prohibition.** Directs a party to cease doing an act or prohibits execution of a planned act that violates a law or an individual’s rights.
3. **Error Coram Nobis.** “Error in our court”; a review of a court’s own prior judgment predicated on a material error of fact, or to correct constitutional or fundamental errors, including those sounding in due process.
4. **Habeas Corpus.** “That you have the body”; directs the release of a person from some form of custody.

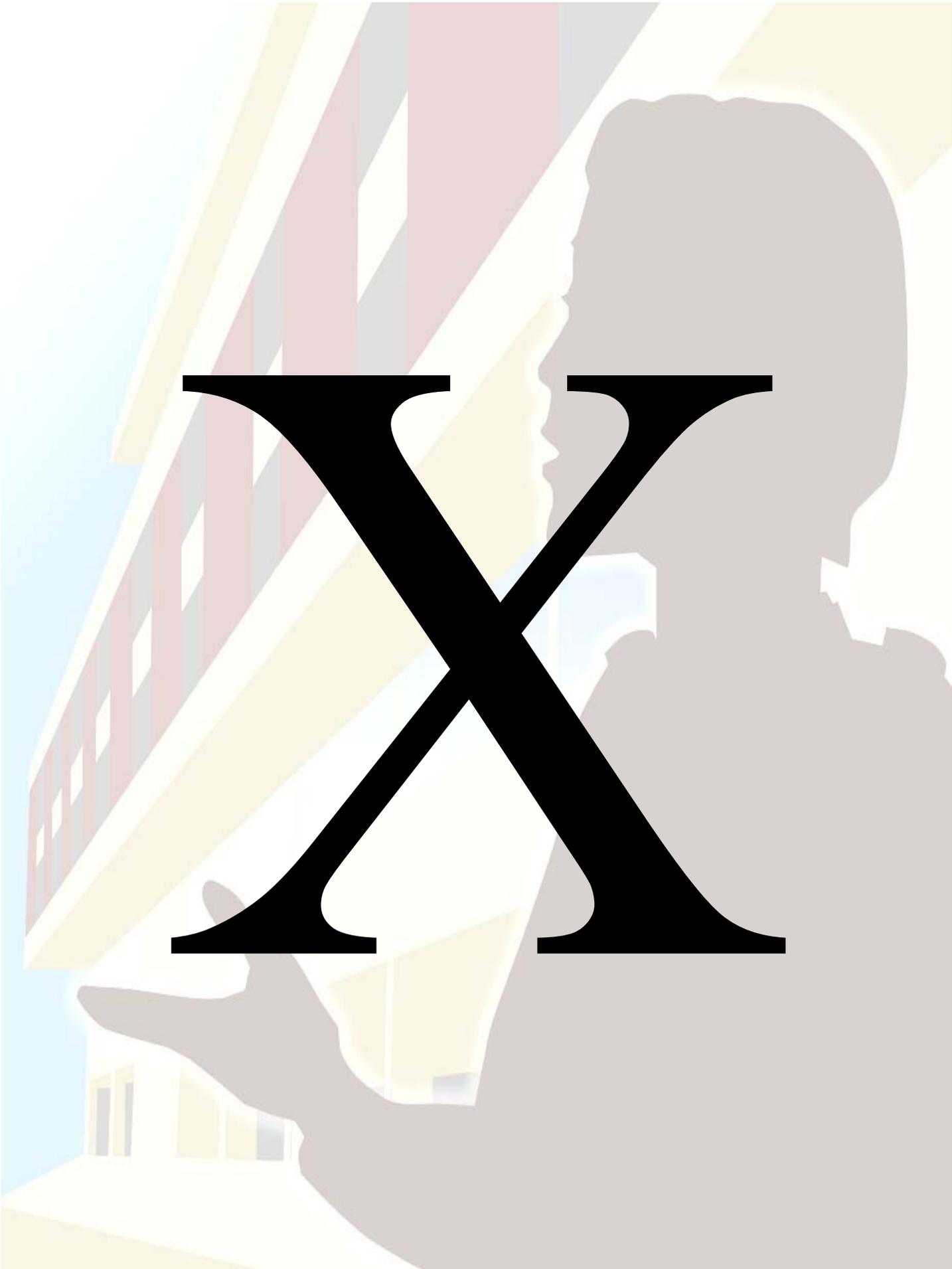
G. Filing a writ.

1. Preliminary Considerations.
 - a. Does the case qualify?
 - 1) Jurisdiction.
 - 2) Relief sought.
 - 3) Extraordinary Circumstance.
 - b. Must the military judge grant a continuance?
 - 1) Discretion of the military judge (R.C.M. 906(b)(1)).
 - 2) No automatic stay; but once a stay is issued by CCA or CAAF, proceedings **must** stop.
 - c. Which forum?
 - 1) There is a preference for initial consideration by a CCA. *See ABC, Inc. v. Powell*, 47 M.J. 363 (1997); *United States v. Redding*, 11 M.J. 100 (C.M.A. 1981) (opinion of Cook, J.); *See also* R.C.M. 1204(a), Discussion (C.M.R. filing favored for judicial economy).
 - 2) CAAF, Rules of Practice and procedure, Rule 4(b)(1): The Court may, in its discretion, entertain original petitions for extraordinary relief . . . Absent good cause, no such petition shall be filed unless relief has first been sought in the appropriate Court of Criminal Appeals. Original writs are rarely granted.
 - d. Considerations of time and subject matter.
2. Special rule for trial counsel. Before filing an application for extraordinary relief on behalf of the government, government representatives should (will) coordinate with Appellate Government.

H. Procedure.

1. Petitioner has initial burden of persuasion to show jurisdiction and extraordinary circumstances. The party seeking relief has an “extremely heavy burden.” *McKinney v. Jarvis*, 46 M.J. 870, 873 (Army Ct. Crim. App. 1997; *United States v. Mahoney*, 36 M.J. 679, 685 (A.F.C.M.R. 1992). The petitioner must show that the complained of actions were more than “gross error” and constitute a “judicial usurpation of power.” *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996).
2. The “show cause” order shifts burden.

III. CONCLUSION.



CORRECTIONS, CLEMENCY, & PAROLE

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MAJ Benjamin Grimes
Summer 2012

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CORRECTIONS, CLEMENCY, & PAROLE

I. INTRODUCTION

A. The military, as well as society recognizes five principal reasons when determining an appropriate sentence once an individual has been convicted. Those reasons are rehabilitation, punishment, protection of society, preservation of good order and discipline, and deterrence. The types of sentences that a court-martial panel member or military judge may impose include no action, reduction in rank, forfeitures, fine, hard labor without confinement, confinement, punitive discharge or in the case of an officer a dismissal.

II. REFERENCES

- A. Chapter 47 -- *Uniform Code of Military Justice*, 10 U.S.C. §§ 801 -- 946.
- B. Chapter 48 -- *Military Correctional Facilities*, 10 U.S.C. §§ 951 -- 956.
- C. Chapter 59 -- Commissioned officers: limitations on dismissal, 10 U.S.C. §1161.
- D. Chapter 59 -- Members under confinement by sentence of court-martial: separation after six months confinement, 10 U.S.C. §1167.
- E. Chapter 79 -- Correction of Military Records, 10 U.S.C. §1552 -- Correction of military records: claims incident thereto.
- F. Chapter 79 -- Correction of Military Records, 10 U.S.C. §1553 -- Review of discharge or dismissal.
- G. 28 CFR 2.1 -2.67, Parole, Release, Supervision and Recommitment of Prisoners
.Judicial Administration, Department of Justice (U.S. Parole Commission Rules).
- H. DoD Directive 1325.4, Confinement of Military Prisoners and Administration of Military Correctional Programs and Facilities, April 23, 2007.
- I. DoD Instruction 1332.30, Separation of Regular and Reserve Commissioned Officers, December 11, 2008.
- J. DoD Directive 1332.41, Boards for Correction of Military Records (BCMRs) and Discharge Review Boards (DRBs), March 8, 2004.
- K. DoD Instruction 1325.7, Administration of Military Correctional Facilities and Clemency and Parole, July 17, 2001; C1, June 10, 2003.
- L. DoD Instruction 1332.28, Discharge Review Boards (DRB) Procedures and Standards, April 4, 2004.
- M. DoD 1325.7-M, DoD Sentence Computation Manual, July 27, 2004.
- N. AR 15-80, Army Grade Determination Review Board and Grade Determinations, 12 July 2002.
- O. AR 15-130, *Army Clemency and Parole Board*, 23 October 1998 (under revision).
- P. AR 15-180, *Army Discharge Review Board*, 20 March 1998.
- Q. AR 15-185, Army Board for Correction of Military Records, 31 March 2006.
- R. AR 27-10, *Military Justice*, 3 October 2011.
- S. AR 190-47, The Army Corrections System, 15 June 2006.

- T. AR 600-8-24, Officer Transfers and Discharges, 12 April 2006.
- U. AR 633-30, AFR 125-30, *Military Sentences to Confinement*, 28 February 1989.
- V. AR 600-8-10, Leaves and Passes: Personal Absences, 15 February 2006.
- W. SECNAVINST 1640.9C, Department of the Navy Corrections Manual, 3 January 2006.
- X. SECNAVINST 1920.6C, *Administrative Separation of Officers*, 15 December 2005, with Chg 1, 19 September 2007.
- Y. SECNAVINST 5420.193, *Board for Correction to Naval Records*, 19 November 1997.
- Z. SECNAVINST 5815.3J, Department of the Navy Clemency and Parole Systems, 12 June 2003.
- AA. AFI 31-205, The Air Force Corrections System, 7 April 2004.
- BB. AFI 36-2603, Air Force Board for Correction of Military Records, 1 March 1996.
- CC. AFI 36-3203, *Personnel – Service Retirements*, 8 September 2006, with Chg 2, 14 September 2009.
- DD. Coast Guard Personnel Manual, COMTINST M1000.6A, thru Change 41, 18 June 2007.

III. CORRECTIONS

- A. DoD policy states that the Military Services' correction programs should strive to achieve uniformity, effectiveness, and efficiency in the administration of corrections functions. Additionally, the Military Departments shall administer the clemency and parole programs to foster safe and appropriate release of military offenders under such terms and conditions that are consistent with the needs of society, the rights of victims, and the rehabilitation of the prisoner. DoD Instruction 1325.7, *Administration of Military Correctional Facilities and Clemency and Parole*, July 17, 2001; C1, June 10, 2003.
- B. Military corrections have three objectives:
 - 1. Provide a safe and secure environment for the incarceration of military offenders;
 - 2. Protect the community from offenders;
 - 3. Prepare military prisoners for their release whether return to duty or civilian status with the prospect of becoming productive Soldier/citizens for conforming to military or civilian environments.
- C. DoD Correctional Facilities include confinement facilities, Regional Corrections Facilities (RCFs), and a centralized, long-term corrections facility, the United States Disciplinary Barracks (USDB).
 - 1. Confinement facilities (Level 1) provide pretrial and short-term post-trial confinement support. Each service will determine the time limit for confinement at each of its level one facilities. The current norm for the Army is up to 90 days; when necessary the Level 1 facility may confine prisoners more than 90 days, but may not exceed 1 year. A Level 1 facility provides custody and control, administrative support, and limited counseling support for military prisoners. There are currently four Level 1 military facilities:
 - a) Mannheim, GE Correctional Facility,
 - b) Camp Humphries, Korea Correctional Facility,
 - c) Norfolk, VA, Naval Brig, and

d) Quantico, VA Marine Corps Brig .

2. Regional Corrections Facilities (RCF) (Level 2) house prisoners sentenced to confinement of five (5) years or less. For sentences over five years, each Service must evaluate its prisoners to determine whether they can be appropriately confined at a RCF (Level 2 facility). A Level 2 facility provides multifaceted correctional treatment programs, vocational and military training, administrative support, basic educational opportunity, employment, selected mental health programs, custodial control, and training to prepare military prisoners for return to duty, if deemed suitable, or to civilian society as a productive citizen. There are six Level 2 RCFs:

- a) Fort Lewis, WA Regional Correctional Facility,
- b) Fort Sill, OK Regional Correctional Facility,
- c) Charleston, SC Naval Brig,
- d) Miramar, CA Naval Brig (also used as Level 2 & 3 for all women),
- e) Camp Lejeune, NC Marine Corps Brig, and
- f) Camp Pendleton, CA Marine Corps Brig.

D. Federal Bureau of Prisons (FBOP) Facilities.

1. Prisoners with approved sentences to confinement may be transferred to a FBOP facility with the concurrence or by direction of the appropriate Secretary of Military Department or designee.

2. Authority to transfer the prisoners to the FBOP confers no right on prisoners to request transfer.

3. Factors considered when determining whether to transfer a prisoner to a FBOP include:

- a) The prisoner's demonstrated potential for return to military service or rehabilitation.
- b) The nature and circumstances of the prisoner's offenses.
- c) The prisoner's incarceration record, including participation in rehabilitation programs.
- d) The status of the prisoner's court-martial appeal and involvement in other legal proceedings.
- e) The nature and circumstances of the prisoner's sentence, including length of sentence to confinement.
- f) The prisoner's age.
- g) Any other special circumstances relating to the prisoner, the needs of the Service, or the interests of national security.

4. Commitments based on lack of mental capacity to stand trial or acquittal because of lack of mental capacity at time of offense are transferred to the FBOP. See AR 190-47, para 3-4, R.C.M 706, R.C.M. 909, and 18 U.S.C. §§ 4241(d) & 4246.

E. The Department of the Army, Provost Marshal General determines the place of incarceration for prisoners who are sentenced to more than 30 days based on operational requirements and programs.

F. Prisoner Status.

1. Pretrial prisoner: a person subject to the UCMJ who is properly ordered to confinement pending preferral of charges, disposition of charges, or trial by court-martial, or a person properly ordered to confinement while awaiting trial by a foreign court is a pretrial prisoner.
2. Adjudged prisoner: a person whose sentence to confinement has been announced in open court by not yet approved by the convening authority.
3. Sentenced prisoner: occurs when the convening authority takes action to approve the confinement portion of the sentence.
4. Discharged prisoner: occurs upon completion of appellate review and execution of the punitive discharge.

G. Abatement of Confinement.

1. Good conduct time (GCT) is a deduction from a prisoner's release date for good conduct and faithful observance of all facility rules and regulations.

2. FOR SENTENCES ADJUDGED PRIOR TO 1 JANUARY 2005

	Sentence	Rate
a)	< 12 months	5 days per month
b)	1 < 3 years	6 days per month
c)	3 < 5 years	7 days per month
d)	5 < 10 years	8 days per month
e)	10 years or more	10 days per month
f)	Life or death	None

3. FOR SENTENCES ADJUDGED ON OR AFTER 1 JANUARY 2005

4. Five days for each month of confinement, and 1 day for each 6-day portion of a month, regardless of sentence or multiple sentence length.

5. Extra good conduct time (EGCT) or earned time (ET) is a deduction from a prisoner's release date earned for participation and graded effort in the areas of work, offense-related or other rehabilitation programs, education, self-improvement and personal growth, and support activities. This credit is awarded only when overall evaluations are average or higher.

6. **New rule: Maximum of 8 days earned time may be awarded per month.** Old rule: During first year of confinement, not to exceed 3 days per month; thereafter, not to exceed 5 days per month.

7. Special acts abatement (SAA) is a deduction from a prisoner's release date earned for a specific act of heroism, humanitarianism, or extraordinary institutional or community support deemed appropriate by the correctional facility commander. Prisoner without a release date (e.g. life without parole, death) may earn SAA, but it shall be held in abeyance and only awarded if the sentence is reduced to a determinate sentence length.

- a) Maximum award of 2 days of SAA per month for a period not to exceed 12 months for a single act. Additional special acts may only extend period of abatement, not the monthly rate of earning.

8. Total of GCT, ET, and SAA awarded for any one month shall not exceed 15 days.

9. Minimum release date is calculated upon arrival at facility based on good conduct time that could be earned for entire period of sentence. Inmate is released at minimum release date absent parole or forfeiture of good conduct time or extra good conduct time, if any.
 10. A reduction in confinement by clemency will adjust the minimum release date.
 11. Inmates accepting parole waive all time abatements and remain on parole until maximum release date.
 12. Prisoners who have an approved finding of guilty for an offense that occurred after 1 October 2004, the award of good conduct time, earned time, and special act abatement shall be conditioned on the prisoner submitting an acceptable release plan and fully cooperating in all other respects with the mandatory supervised release policy, if directed to do so.
 13. Forfeiture and restoration of abatements. As a consequence of violations of institutional rules or the UCMJ, a facility commander may direct forfeiture of GCT, ET, and SAA. Discipline and Adjustment Boards are used to ensure due process. Forfeited time can be reinstated at the discretion of the facility commander.
- H. Mandatory Supervised Release. Prisoners who are not granted parole prior to their MRD (minimum release date) can be ordered on a supervised release.
1. Policy of the DoD to use supervised release in all cases except where it is determined by the Service Clemency and Parole Boards to be inappropriate.
 2. Terms and conditions are identified in the release plan. The prisoner acknowledges the receipt of the terms and conditions.
 3. The Service Clemency and Parole Boards may modify or release any terms or conditions of supervision or may terminate supervision entirely.
 4. A violation of the supervised release will be considered equivalent to a violation of the terms and conditions of parole and processed in the same manner.
 5. *United States v. Pena*, 64 MJ 259 (2007) – The Air Force Clemency and Parole Board ordered Pena to participate in the Mandatory Supervised Release Program for seventy-two days –terminating on his maximum release date. The Board set forth twenty-five conditions to include participating in a community based sex offender treatment program and consent to periodic examinations of his computer. Prior to his release he submitted a declaration that noted a number of hardships his participation in the program created. The declaration did not describe his living circumstances, sources of support or overall financial condition. CAAF looked to see if his participation in the program constituted cruel or unusual punishment or otherwise violated an express prohibition in the UCMJ; unlawfully increased his punishment; or rendered his guilty plea improvident. CAAF held that the program did not constitute cruel or unusual punishment, that Pena did not demonstrate that the collateral consequences actually imposed increased his punishment; and that the plea agreement was provident. CAAF did leave open the possibility that in some cases the Mandatory Supervised Release program could be imposed in a manner that increases the punishment of the prisoner. The burden is on party challenging the conditions to demonstrate the increased punishment.

IV. CLEMENCY & PAROLE

- A. Service Clemency & Parole Boards
 1. Senior civilian employees and field grade officers.

2. Act for Service Secretaries, **except for** parole considerations for prisoners in FBOP facilities which are decided by U.S. Parole Commission.

B. Clemency Eligibility.

1. Inmate may not waive clemency review. Death sentence cases are not eligible for review by boards.

Initial Review	
Sentence is 12 months – 10 yrs	NLT 9 months after confined
Sentence is 10-20 years	NLT 24 months after confined
Sentence is 20-30 years	NLT 3 years after confined
Sentence greater than 30 years	NLT 10 years after confined (for offenses after 16 Jan 2000)
Life w/o parole	NET 20 years after confined (requires Service Secretary Approval)
After Initial Review	
12 months to 20 years	Annually
20-30 years	After 3 years
30 years to Life w/o parole	After 10 years
Life w/o parole	Every 3 years after 20 years of confinement (requires Service Secretary Approval)

C. Parole Eligibility.

1. Must have sentence of at least twelve (12) months confinement and a punitive discharge. Once considered, inmate will be considered annually by service board unless transferred to FBOP. Inmate may waive parole consideration.

- | | |
|-----------------------------|---|
| 2. Sentence | Eligibility |
| 3. 12 months - 30 years | 1/3 of sentence, but NET < 6 mos. |
| 4. 30 years to life | 10 years |
| 5. Life | 20 years (if offense occurred at least 30 days after 16 Jan 2000) |
| 6. Death or Life w/o parole | Not eligible |

D. Considerations.

- Nature and circumstances of offenses.
- Civilian and military history.
- Confinement record.
- Personal characteristics, such as age, education, marital and family status, and psychological profile.
- Victim impact.
- Protection and welfare of society.
- Need for good order and discipline.
- Other matters as appropriate.

E. Conditions for parole release.

- Prisoner must submit a parole plan and agree to abide by the plan.

2. The plan must include:
 - a) A statement of where the prisoner plans to reside and with whom.
 - b) Guaranteed employment, an offer of effective assistance to obtain employment, or acceptance in a valid educational or vocational program.
 - c) A requirement that the prisoner shall comply with State and local registration requirements in the location the prisoner plans to reside.
 - d) Other requirements such as a restitution plan, completion of a substance abuse treatment, participation in counseling or therapy programs, etc.
 3. The Board may establish and subsequently modify conditions or release as it considers reasonable or appropriate.
 4. Prisoners who accept parole waive all GCT and EGCT and serve parole till the expiration of their full sentence.
- F. Parole supervision: Individuals released on parole are under the direct supervision of Federal probation officers.
- G. Parole revocation.
1. Standard—violation of condition that warrants revocation.
 2. Suspension of parole.
 3. Preliminary interview.
 4. Parole revocation hearing.
 5. Forfeiture of credit for service of sentence on parole.
- H. Additional Opportunities for Clemency.
1. Discharge Review Boards can review discharges not given by general courts-martial.
 2. Boards for Correction of Military Records may grant clemency after Clemency & Parole Boards lose review authority; however, may not overturn conviction.
 3. Presidential Pardons.

V. OFFICER RESIGNATIONS FOR THE GOOD OF THE SERVICE (RFGOS)

- A. AR 600-8-24, para. 3-13
- B. Eligibility Criteria—Officer under suspended sentence of dismissal or who has charges preferred with a view to trial by general court-martial.
- C. General Court-Martial Convening Authority (GCMCA) can proceed to trial or hold proceedings in abeyance pending decision on resignation.
- D. GCMCA cannot take action on the findings and sentence until resignation has been approved or disapproved. However, note by definition an officer under a suspended sentence of dismissal can only submit a RFGOS after action is taken.
- E. Approval of resignation before action requires GCMCA to disapprove both the findings and sentence based on approval authority's expressed intent. *U.S. v. Woods*, 26 MJ 372 (CMA 1988) and AR 27-10, paragraph 5-18.
- F. Practice points: Send complete information about offenses – law enforcement investigations, victim/witness impact, Article 32 investigations, chain of command

recommendations and rationale. Provide points of contact information for government and defense, preferably names, phone numbers, and email addresses.

VI. DISMISSAL/DROP FROM THE ROLLS/SEPARATION AFTER SIX MONTHS CONFINEMENT

- A. Commissioned Officers: limitations on dismissal. 10 U.S.C. §1161(a). No commissioned officer may be dismissed from any armed force except—
1. By sentence of a general court-martial;
 2. In commutation of a sentence of a general court-martial; or
 3. In time of war, by order of the President.
- B. Drop From the Rolls (DFR) of the service. 10 U.S.C. §1161(b). The President may drop from the rolls of any armed force any commissioned officer—
1. Who has been absent without authority for at least three months;
 2. Who may be separated under 10 U.S.C. §1167 by reason of a sentence to confinement adjudged by a court-martial – must be sentenced to more than 6 months confinement, served at least six months, and sentence to confinement is final; or
 3. Who is sentenced to confinement in a Federal or State penitentiary or correctional institution after having been found guilty of an offense by a court other than a court-martial or other military court, and whose sentence has become final.
- C. Practice points: This is not a drop from the rolls of the unit. This is a drop from the rolls of the service – the administrative equivalent of the death penalty. It severs benefits except for non-regular retirement at age 60 for reservists. Process is relatively easy compared to a full blown elimination action.

VII. RESOURCES

- A. Army Review Boards Agency (ARBA) Web page: <http://arba.army.pentagon.mil>. Includes application form (DD Form 149), procedures, frequently asked questions, DoD Directive, Army Regulation, links to other web sites, and case status checker.
- B. ARBA Client Information & Quality Assurance Office, DSN 327- 1600, Commercial (703) 607-1600.
- C. ARBA Legal Office.
1. Mr. Jan W. Serene, DSN 327-2031, Commercial (703) 607-2031, serenjw@hqda.army.mil.
 2. Mr. John P. Taitt, DSN 327-1878, Commercial (703) 607-1878, John.Taitt@hqda.army.mil.
 3. (Currently vacant), DSN 327-1625, Commercial (703) 607-1625,
 4. Mr. W. Sherwin Fulton III, paralegal, DSN 327-1838, Commercial (703) 607-1838, fultows@hqda.army.mil.
 5. FAX: Commercial (703) 607-0542.
- D. Army, Air Force, Navy, Coast Guard Boards Reading Rooms: <http://boards.law.af.mil>. Contains some past decisional documents for correction and Discharge Review Boards. Microfiche copies of all past decisional documents for which records are available are maintained at the Armed Forces Reading Room located at ARBA in Crystal City, Arlington, VA.

E. Air Force Review Boards Office Web Page: <http://ask.afpc.randolph.af.mil/default.asp>. Click on Personnel Services tab, then Legal & Appeals, then Air Force Review Boards. Includes application form, procedures, frequently asked questions, and AF Instruction and Pamphlet for Discharge Review Board.

F. Navy Clemency and Parole Board Web Page:
http://www.hq.navy.mil/ncpb/NCPB/Clemency_Parole.htm

G. Naval Council of Review Boards Web Page: <http://www.hq.navy.mil/ncpb/>. Includes information on Naval Clemency and Parole Board, Naval Discharge Review Board, and Physical Evaluation Board.

H. Web Page for DoD Directives & Instructions, Army regulations, SECNAV Instructions, and Air Force regulations: <http://www.dtic.mil/whs/directives/>. Service regulations are available under “Other Agency Links.”

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DOUBLE JEOPARDY

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SUMMER 2012

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DOUBLE JEOPARDY

I. DOUBLE JEOPARDY, GENERALLY

- A. In a nutshell, the Double Jeopardy Clause of the Fifth Amendment protects against being tried twice for the same offense.
- B. Article 44, UCMJ
 - 1. Prohibits (like the Double Jeopardy Clause) trying a person twice for the **same offense**. (definition of what constitutes the same offense can be found later in this outline)
 - 2. When an accused is found guilty, the “trial” (for purposes of this article) is not complete until the case has been reviewed.
 - 3. When, after evidence has been introduced, but before findings have been announced, the convening authority dismisses the charges or terminates the proceeding or the prosecution does so due to failure of available evidence or witnesses (through no fault of the accused), a “trial” has occurred.
- C. Purpose of double jeopardy clause and Article 44: Prohibition of a second, third, or fourth bite at the apple
 - 1. The state, with all of its power and resources, should not be allowed to make repeated attempts to convict an individual for an alleged offense. *United States v. Green*, 355 US 184 (1957).

II. SAME OFFENSE

- A. In order to trigger the protections of Article 44, UCMJ and the Double Jeopardy Clause, the accused must be in jeopardy of being tried a second time for the same offense.
- B. Definition of “Same Offense”
 - 1. Offenses are different if each statutory provision requires proof of an additional fact that the other does not. *See Blockburger v. United States*, 284 U.S. 299 (1932).
 - 2. Lesser Included Offenses and Greater Offenses

- a) A finding of guilt on a lesser included offense constitutes an acquittal on the greater offense and prohibits retrial on the greater offense. *Green v. United States*, 355 U.S. 184 (195); *See also Blueford v. Arkansas* (2012) for a thorough discussion of *Green*
 - (1) So, practically speaking, if an accused is charged with Murder and is found guilty of Manslaughter, the government is barred from trying the accused for murder at a later court-martial.
- b) Similarly, a finding of not guilty of a lesser included offense will bar a subsequent prosecution of the greater offense. *See Brown v. Ohio*, 432 U.S. 161, 169 and n. 7 (1977).
 - (1) BUT, there might be an exception where the government is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence. For a thorough discussion of this, *see* Major Daniel J. Everett, *Double, Double Toil and Trouble: An Invitation for Regaining Double Jeopardy Symmetry in Courts-Martial*, Army Lawyer, Apr. 2011 at 20-30.

III. SAME SOVEREIGN

- A. Double Jeopardy only applies to successive trials by the same sovereign.
 - 1. A single act that violates the laws of two separate sovereigns constitutes two separate crimes, and prosecution by each of the sovereigns does not violate the Double Jeopardy Clause. *Heath v. Alabama*, 474 U.S. 82, 88 (1985); *United States v. Lanza*, 260 U.S. 377 (1922).
 - 2. Trial by a court-martial is barred by the UCMJ only if the accused has already been tried in federal court. *United States v. Stokes*, 12 M.J. 229, 231 (C.M.A. 1982).
 - a) Note, however: each of the military services has established restrictions concerning trial by court-martial following a trial in a civilian state or foreign court for the same offense. *See* Major Charles L. Pritchard, Jr., *The Pit and the Pendulum: Why the Military Must Change its Policy Regarding Successive State-Military Prosecutions*, Army Lawyer, Nov. 2007, 18-19 (describing the policies of each military service).

(1) Army Policy

(a) A person who has been tried in a civilian court may, but ordinarily will not, be tried by court-martial for the same act over which the civilian court has exercised jurisdiction. AR 27-10, Chapter 4-2

(b) Procedure

(i) GCMCA may authorize disposition of a case under the UCMJ despite a previous trial if he personally determines that authorized administrative action alone is inadequate and punitive action is essential to maintain discipline in the command. AR 27-10, Chapter 4-3.

(ii) Practice Tip: If this is the case, then the CG's action should use the exact language found in AR 27-10.

IV. ATTACHMENT OF JEOPARDY

A. Trial by Military Judge Alone

1. Jeopardy attaches after an accused has been arraigned, has pleaded, and the court has begun to hear evidence.

B. Trial by Members

1. Jeopardy attaches after the introduction of evidence, per Article 44, UCMJ.

a) Note: in civilian courts, when a case is tried before a jury, jeopardy attaches when the jury is impaneled and sworn. *See Crist v. Bretz*, 437 U.S. 28, 35 (1978)

b) For a discussion of the differences between the military and civilian standards and the rationale for those differences, see *United States v. Easton*, 71 MJ ___ (CAAF 2012) (case No. 12-0053/AR).

V. DISMISSAL OR WITHDRAWAL OF CHARGES AND MISTRIAL

- A. Once jeopardy attaches (after introduction of evidence, in a court-martial), termination of a trial prior to findings will bar a successive prosecution (of the same offense), unless:
1. There is a “manifest necessity” to terminate proceedings; or
 2. The accused consents to the termination.
- B. Manifest Necessity
1. “A trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice. “ *Wade v. Hunter*, 336 U.S. 684 (1949).
 - a) *Wade* originated as a court-martial and the opinion provides great insight into manifest necessity. Wade was accused of raping a woman in Krov, Germany in March, 1945. Wade, at that time, was a Soldier in the 76th Infantry Division. Between the date of the offense and the court-martial (22 days), the Division had advanced 22 miles further into Germany. Many of the witnesses were unavailable and the panel, after closing for deliberations, reopened and announced that the court would be continued due to the unavailability of witnesses. A week later, the Commanding General of the 76th Infantry Division withdrew the charges and transmitted them to the Commanding General of the Third Army. The Commanding General of the Third Army concluded that the tactical situation of his command and its considerable distance from Krov made it impracticable for Third Army to conduct the court-martial. Jurisdiction was transferred to Fifteenth Army, and Wade was tried and convicted.
 - b) The Court held that there was manifest necessity in this case and therefore, the second trial was not barred by the Double Jeopardy Clause.
 - c) Contrarily, CAAF, in *Easton*, 71 MJ ___ (CAAF 2012), found that manifest necessity did not exist in a case where the convening authority withdrew charges after the panel had been sworn, but before the introduction of evidence due to taped depositions being unusable.
 - (1) Though there were other considerations the court took into account in coming to their decision, the court noted that the

convening authority did not articulate his reasons for withdrawing the charges, nor was there any rationale put on the record.

(a) Practice Tip: If the convening authority decides to withdraw charges at any point during the court-martial, the reasons for so doing should be clearly articulated (if he is thinking of referring those charges to a subsequent court-martial).

2. Note, there is no rigid test or formula to determine whether manifest necessity existed at the time of withdrawal. There does, however, under *Wade*, appear to be a balancing test (of sorts) that you can use in determining whether manifest necessity exists:

a) Defendant's valued right to have his trial completed by a particular tribunal vs. the public's interest in fair trials designed to end in just judgments.

C. Request or Consent of the Accused

1. If the accused requests or consents to a mistrial, the double jeopardy clause prohibits retrial only if the government's conduct prior to the judge granting the mistrial was intended to provoke the accused into moving for a mistrial. *See Oregon v. Kennedy*, 456 U.S. 667, 679 (1982).

VI. COLLATERAL ESTOPPEL

A. When an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot be litigated in the future (between the same parties). *See Ashe v. Swenson*, 397 U.S. 436, 443 (1970).

1. BUT "collateral estoppel does not preclude use of otherwise admissible evidence even though it was previously introduced on charges of which an accused has been acquitted. The questions to be decided are whether the evidence is relevant (Mil. R. Evid. 401) and whether the probative value of the proffered evidence is outweighed by its prejudicial effect (Mil. R. Evid. 403)." *United States v. Hicks*, 24 M.J. 3 (C.M.A. 1987).

B. The doctrine of collateral estoppels cannot be invoked by an accused where the successive prosecution is by a separate sovereign. *United States v. Schneider*, 38 M.J. 387, 392 (C.M.A. 1993).

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