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Practicing Military Justice

Criminal Law Department
The Judge Advocate General's Legal Center and School
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PRACTICING MILITARY JUSTICE

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Chapter 1

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 and offense for resolution at court-martial); OR
5. Forwarding to a higher authority for preferral of charges (R.C.M. 306(c)).

D. Preferral of Charges. The first formal step in a court-martial, preferral 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.

Constitutional Safeguard: Presumption of Innocence	**General Courts-Martial**
"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." *Coffin v. United States*, 156 U.S. 432, 453 (1895)	If the accused fails to enter a proper plea, a plea of not guilty will be entered. R.C.M. 910(b). 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). The accused shall be properly attired in uniform with grade insignia and any decorations to which entitled. Physical restrain shall not be imposed unless prescribed by the military judge. R.C.M. 804

Constitutional Safeguard: Right to Remain Silent	**General Courts-Martial**
"No person ... shall be compelled in any criminal case to be a witness against himself..." Amendment V.	Coerced confessions or confessions made without statutory equivalent of Miranda warning are not admissible as evidence. Article 31, UCMJ, 10 U.S.C. § 831. 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.

Constitutional Safeguard: Freedom from Unreasonable Searches & Seizures	**General Courts-Martial**
"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..." Amendment IV.	"Evidence obtained as a result of an unlawful search or seizure ... is inadmissible against the accused ..." unless certain exceptions apply. M.R.E. 311. "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. Interception of wire and oral communications within the United States requires judicial application in accordance with 18 U.S.C. §§ 2516 *et seq*. M.R.E. 317. A search conducted by foreign officials is unlawful only if the accused is subject to "gross and brutal treatment." M.R.E. 311(c).

Constitutional Safeguard: Assistance of Effective Counsel	**General Courts-Martial**
"In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." Amendment VI.	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. 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. The military recognizes an attorney-client privilege. M.R.E. 502.

Constitutional Safeguard: Right to Indictment and Presentment	**General Courts-Martial**
"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 ...." Amendment V.	The right to indictment by grand jury is explicitly excluded in "cases arising in the land or naval forces." Amendment V. 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. 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).

Constitutional Safeguard: Right to Written Statement of Charges	**General Courts-Martial**
"In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; ..." Amendment VI.	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

Constitutional Safeguard: Right to be Present at Trial	**General Courts-Martial**
The Confrontation Clause of Amendment VI guarantees the accused's right to be present in the courtroom at every stage of his trial. *Illinois v. Allen*, 397 U.S. 337 (1970).	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.

Constitutional Safeguard: Prohibition against Ex Post Facto Crimes	**General Courts-Martial**
"No ... ex post facto law shall be passed." Art. I, § 9, cl. 3.	Courts-martial will not enforce an ex post facto law, including increasing amount of pay to be forfeited for specific crimes. *United States v. Gorki*, 47 M.J. 370 (C.A.A.F. 1997).

Constitutional Safeguard: Protection against Double Jeopardy	**General Courts-Martial**
"... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ..." Amendment V.	Double jeopardy clause applies. *See Wade v. Hunter*, 336 US 684, 688-89 (1949). Article 44, UCMJ prohibits double jeopardy, provides for jeopardy to attach after introduction of evidence. 10 U.S.C. § 844.

Subject to "dual sovereign" doctrine, that is, federal and state courts may prosecute an individual for the same conduct without violating the clause.	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. *United States v. Stokes*, 12 M.J. 229 (C.M.A. 1982). 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. *See* 54 AM. JUR. 2D, Military and Civil Defense §§ 227-28.

Constitutional Safeguard: Speedy & Public Trial	**General Courts-Martial**
"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, ..." Amendment VI.	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). The right to a public trial applies in courts-martial but is not absolute. R.C.M. 806. 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. *United States v. Grunden*, 2 M.J. 116 (CMA 1977).

Constitutional Safeguard: Burden & Standard of Proof	**General Courts-Martial**
Due Process requires the prosecution to prove the defendant guilty of each element of a crime beyond a reasonable doubt. *In re* Winship, 397 U.S. 358 (1970).	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).

Constitutional Safeguard: Privilege Against Self- Incrimination	**General Courts-Martial**
"No person ... shall be compelled in any criminal case to be a witness against himself..." Amendment V.	No person subject to the UCMJ may compel any person to answer incriminating questions. Article 31(a) UCMJ, 10 U.S.C. § 831(a). Accused may not be compelled to give testimony that is immaterial or potentially degrading. Article 31(c), UCMJ, 10 U.S.C. § 831(c). 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). 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.

Constitutional Safeguard: Right to Examine or Have Examined Adverse Witnesses	**General Courts-Martial**
"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; ...." Amendment VI.	Hearsay rules apply as in federal court. M.R.E. 801 *et seq*. 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.

Constitutional Safeguard: Right to Compulsory Process to Obtain Witnesses	**General Courts-Martial**
"In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor, ..." Amendment VI.	An accused has the right to compel appearance of witnesses necessary to their defense. R.C.M. 703. 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.

Constitutional Safeguard: Right to Trial by Impartial Judge	**General Courts-Martial**
"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." Article III § 1.	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. 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.

Constitutional Safeguard: Right to Trial By Impartial Jury	**General Courts-Martial**
"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; ...." Art III § 2 cl. 3. "In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury of the state ...." Amendment VI.	A military accused has no Sixth Amendment right to a trial by petit jury. *Ex Parte* Quirin, 317 U.S. 1, 39-40 (1942) (*dicta*). However, "Congress has provided for trial by members at a court-martial." *United States v. Witham*, 47 MJ 297, 301 (C.A.A.F. 1997); Article 25, UCMJ, 10 U.S.C. § 825. 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. *United States v. Lambert*, 55 M.J. 293 (C.A.A.F. 2001).

Constitutional Safeguard: Right to Appeal to Independent Reviewing Authority	**General Courts-Martial**
"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" Article I § 9 cl. 2.	The writ of *habeas corpus* 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. *Burns v. Wilson*, 346 U.S. 137 (1953). 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.

Constitutional Safeguard: Protection against Excessive Penalties	**General Courts-Martial**
"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Amendment VIII.	Death may only be adjudged for certain crimes 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. A conviction of spying during time of war under Article 106, UCMJ, carries a mandatory death penalty. 10 U.S.C. § 906.

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	Consult with counsel; lawyer at

	at hearing (at own expense)	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)

Chapter 2

I. Introduction.

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 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 amounted 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-lifes." 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, Fraternization, 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 a 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, Fraternization, 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.

Chapter 3

CASE CONSTRUCTION

Chapter Is Currently Under Construction

Chapter 4

Chapter 4
Trial Notebooks and Checklists

Few things are brought to a successful issue by impetuous desire, but most by calm and prudent forethought.

—Thucydides

I. Introduction

A. Welcome to criminal trial advocacy! As students of trial advocacy, you are studying one of the most exciting and rewarding areas in the legal profession. As a courtroom advocate, you will find yourself at the center of the intersection of statutory and case law, procedural and evidentiary rules, written and oral argument, emotion of various types and drama. Trial advocacy often can be a head-spinning experience for the new and experienced advocate alike. As has been aptly said, "trying a case can be a trying experience." Yet the pre-trial process and trial itself can be tamed into a logical, methodical and manageable process. Each trial advocacy student is provided a range of tools (checklists, outlines, sample questions), which, with sufficient organization and preparation, can maximize the chances of a successful outcome.

II. Organization

A. Whether as Trial Counsel or Defense Counsel, the goal of the trial advocate is hardly attainable without careful and thorough planning and organization. A well-organized trial demonstration will not guarantee the desired outcome, but it certainly enhances your credibility with your audience and the chances of prevailing. Indeed, the presiding judge, the jury, and client expect it. Moreover, judges abhor surprises and neither the presiding judge nor the jury have much tolerance for any delay caused by an unprepared trial attorney.

B. Instead, each trial advocate should strive to be the one person in the courtroom to whom the judge and the jury looks for a trusted and most accurate picture of the facts, the law, and the rules of evidence. To get there, each trial advocate will develop a unique pre-trial organization method. All trial advocates are strongly encouraged, however, to thread common, proven steps into the pre-trial organization procedure. The Criminal Trial Advocacy student is provided very helpful tools to guide the pre-trial organization, and the checklists (e.g., Trial Counsel Checklist, Defense Counsel Checklist, Expert Witness Checklist) are among the most useful. The final pretrial result will be an understandable and credible presentation of evidence elicited from witness testimony and from exhibits.

III. Witnesses

A. Witnesses generally come in three forms: professional (e.g., law enforcement), lay/civilian (e.g., victim, eye witness), and expert (e.g., chemist, fingerprint analyst). In addition, a witness can be favorable to your case or hostile. A trial advocate can follow steps and checklists to evaluate the credibility of a witness (e.g., knowledge, bias, education and training); determine whether the witness is essential or non-essential or, if essential, whether the witness testimony will be most effective in the case-in-chief or in rebuttal; and to prepare a witness to testify on the witness stand. There are a few key differences in each type of witness that will dictate how each will be prepared for testimony.

B. In most criminal cases, the witness list will include at least one professional law enforcement witness, such as the responding/reporting Military Police officer and/or the assigned Criminal Investigator. These witnesses very likely have at least minimal training and experience in the criminal justice system, having reported and testified in trial or in an Article 32. A Trial Counsel will want to interview this witness as early as possible. Doing so will help determine whether there are additional and necessary

investigatory steps that must be taken before proceeding with the matter further or to improve the existing case. (E.g., identify and interview other possible lay witnesses, gather documentation to corroborate victims and witnesses). Additionally, and particularly in the instances when there are multiple law enforcement officers who respond to a crime scene, interviewing all of them together will be tremendously helpful as they assist each other recall or clarify facts and observations.

C. Lay witnesses and victims particularly require a different preparation method, largely because they are unlikely to have any experience with the criminal justice system and may never have testified or been inside a courtroom. This especially applies to a child witness/victim. To be sure, the trial advocate will follow the checklists to evaluate this witness for testimony, gauging memory, refreshing recollection, preparing for direct- and cross-examination as well as the difference, and rehearsing. In addition, it will be necessary for the trial advocate to take steps with this witness to alleviate confusion and intimidation of the process, and to educate on, for example, the procedures to follow, the time-line of the case, and the roles of the personnel in the courtroom. In addition, a trial advocate might consider taking the witness to the courtroom where the witness can sit in the witness stand for a few minutes to become familiar with the setting. Of central importance in preparing a lay witness is to familiarize the witness with as much of the process and personnel, including the trial advocate.

D. A lay witness might be hostile to the trial advocate's case and will often require a different approach altogether. First, the trial advocate might decide to do no pretrial preparation with a hostile witness, thus avoid giving the witness a chance to prepare their answers. Sometimes simply asking the witness the first time in trial is the most effective. This approach can be unpredictable and risky. In most cases, a hostile witness may be useful to the case for a very limited purpose, to prove a fact or small set of facts that cannot be proved any other way, to lay a foundation of an exhibit or to corroborate another witness that is helpful. It is advisable to be mindful of the specific purpose, get it from the witness with a limited direct and, correspondingly thus limit the cross-examination. If the witness has made a helpful written statement, it will be very useful for the witness to admit writing it, that it was true when it was written, and that it was written when nearer to events in question.

E. An expert witness may be necessary for one party or the other to prove their case, usually by assisting the fact finder with facts and an opinion on how the facts relate to the subject at issue. Generally, this can be accomplished when the expert explains what may be sophisticated scientific and forensic principles as well as testing procedures so that they are understandable to the untrained fact finder. The expert must be qualified to render an opinion, and the checklist is a valuable tool to assist trial counsel for this purpose or, conversely, to challenge an opposing expert's qualifications. In either event, the trial counsel should endeavor to know the subject matter on which the expert will testify at least as well or better than the expert. This is important to prepare the expert for cross-examination and avoid errors and discrepancies, particularly with opposing expert testimony. It may also be necessary to hire a consulting expert to help build the requisite understanding and to help develop cross-examination questions for the opposing expert.

IV. Exhibits

A. In most cases, trial advocates will consider whether to utilize exhibits to prove a case at trial. The exhibits may be actual objects or documents that are factual and probative (murder weapon, forged check, written/recorded admission) or demonstrative (charts, diagrams, models) that may have little or no intrinsic probative value. The former are

essential for trial while the latter are helpful but not necessarily essential to prove the case.

B. It is always helpful and even necessary for the trial advocate, especially Trial Counsel, to identify and inspect all possible exhibits that may be used at trial when meeting with witnesses pre-trial. This is especially helpful when, for example, trial counsel is meeting with all possible law enforcement witnesses to determine which witnesses are necessary to identify the exhibit, foundation, chain of custody, and in that matter help determine which witnesses are essential for trial. In addition, it is always helpful to mark the evidence/exhibits at this stage particularly when determining the number or letter sequence of the exhibits for trial to demonstrate a logical presentation (e.g., chronological).

V. Pre-trial motions

A. Inevitably, a trial advocate will identify one or multiple legal issues while evaluating the merit of a case or while preparing for trial. One clear example is where Defense Counsel will challenge an arrest, seizure, or any statements/admissions on Constitutional grounds. In addition, trial counsel are advised to evaluate the anticipated evidence and determine whether to litigate the admissibility of the evidence in the pre-trial context with, for example, a motions *in limine*. Trial advocates will often weigh how the resolution of these issues tactically will impact the case. As a tactical matter, an aggressive, forward-leaning pre-trial motions practice can be very effective. Moreover, resolving legal issues before the court prior to the commencement of trial serves to streamline the trial into a more predictable and organized presentation of evidence and reduces the chance of mid-trial litigation and delay. The Motions Checklist will guide the trial advocate in this process.

B. In certain cases, these pre-trial litigative steps are essential. For example, trial advocates may find it necessary in sexual assault cases to litigate the admissibility of the accused's history under MRE 413 (evidence of similar crimes in sexual assault cases). In this instance, trial counsel will move the court in limine to admit such evidence while defense counsel may move to exclude. In the same way, trial counsel may move in limine to exclude evidence under MRE 412 (sex offense cases; relevance of alleged victim's sexual behavior or sexual predisposition), while defense counsel may move to admit. In addition, a motion *in limine* to admit or exclude evidence under MRE 404(b) (character evidence, other crimes, wrongs, or acts), is advisable in most cases

VI. Discovery

A. A critical element of pre-trial organization is the obligation of trial advocates to comply with the Discovery rules. Both Trial Counsel and Defense Counsel possess this reciprocal obligation in order to ensure a fair trial. For Trial Counsel, however, this obligation is especially significant because most if not all incriminating evidence is in the control of the prosecution and material to the preparation of the defense. When Trial Counsel possesses exculpatory or impeachment evidence that is material to guild or punishment, this evidence must be disclosed to the defense. These rules are established by RCM 701, the Jencks Act, found at RCM 914, *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). It is absolutely imperative that trial advocates know these rules and consider thoroughly how to meet these obligations in each case.

B. Trial Counsel should be mindful that while the rules provide that the disclosures be made in sufficient time to permit the defendant to make effective use for the information at trial, it is never a wise practice to withhold the evidence for tactical purposes, only to disclose it in advance of trial but allowing the defense minimal opportunity to prepare. This is not an area for gamesmanship. Generally, providing broad and early discovery promotes the truth-seeking aspect of the pre-trial and trial process and can help foster speedy resolution of cases. There are countervailing circumstances to consider, however, particularly the safety of victims and witnesses, protection of privacy, privileged information, integrity of on-going investigations, etc. Trial advocates should be familiar with the rules and seek guidance from supervisors. Additionally, trial advocates should keep a thorough record regarding such disclosures. And failure to disclose this evidence has severe ethical consequences.

VII. List of Appendices

A. Counsel Checklists

B. Case Preparation Tools

C. Witness Preparation

D. File Organization Tools

E. Defense Client Advice

Appendix A
Counsel Checklists

Trial Counsel Checklist

DATE OF SPEEDY TRIAL TRIGGER (PREFERRAL / PRETRIAL CONFINEMENT / RESTRICTION): _____

(Call the Company Commander to see if the Accused has been under any kind of restraint).

120TH DAY:_____

Date **Pretrial Actions**:

1. Preliminary Actions:

_____ a. Receive / review investigation (MP/CID, etc).

_____ b. Detail a 27D to the case.

_____ c. Check with Command on pretrial restraint/conditions on liberty/counsel.

_____ d. Request SMIF/ unit file / 2A and 2-1.

_____ e. Request OMPF.

_____ f. Notify MILPO to flag the soldier.

_____ g. Look for previous convictions.

_____ h. Interview witnesses / visit crime scene.

--Consider depositions, as necessary.

_____ i. Request admin hold on witnesses.

_____ j. Inspect evidence.

_____ k. Brainstorm for additional evidence

--Friends, teachers, neighbors, relatives, soldiers in command.

_____ l. Begin formulating:

--Theories of admissibility for evidence.

--Case theme (means, motive, opportunity)

--Closing argument.

--Sentencing argument.

_____ m. Anticipate defense arguments.

_____ n. Coordinate with Co, Bn and Bde on appropriate level of disposition.

_____ o. Obtain personal data for Charge Sheet on the accused.
--Cross-checked with 2A and 2-1 for accuracy.
--Double-checked for jurisdiction over the soldier.

_____ p. Draft charges and endorsements.
--Check charges and specs against sample specs in BB.
--Check for jurisdiction over the offense and the soldier.

_____ q. Requested / obtained Art 32 Officer from Adjutant.

_____ r. Draft witness list for Art 32

_____ s. Prepare disclosure of Accused statements learned about through interviews.

_____ t. Prepare pre-trial SJA memo

_____ u. Run charges / endorsements / 32 appointment memo through STC, CMJ.
--Compile preferral packet (inside cover-charge sheet; front 1st flap-transmittal docs; front 2d flap-pretrial SJA memo; back 2d flap-allied papers.)
Checked charges and specs against sample specs in MCM.

_____ v. Coordinate with Accuser for date/time for preferral of charges.

_____ w. Coordinate with SCMCA and SPCMCA for date /time of forwarding endorsements. (Same day as preferral).

_____ x. Coordinate with TDS for appointment of DC.

_____ y. Prepare preferral packet (everything we have to this point). Not mandated by disclosure.

Mandatory Disclosure Requirements

_____ 1. Evidence favorable to the defense

_____ 2. Before evidence is used up in testing, inform accused.

2. Preferral and Recommendations:

_____ a. Prefer charges. Have accused present to be provided a copy of charge sheet (then complete Block 12, DD Form 458).

_____ b. Meet with SCMCA for signature on forwarding endorsement. Complete Block 13, DD Form 458.

_____ c. Meet with SPCMCA for signature on endorsement / Art 32 appointment memo (as appropriate).

Mandatory Disclosure Requirements

_____ 1. Evidence favorable to the defense

3. Article 32:

_____ a. Contact Art 32 IO and provide written request for Government witnesses.

_____ b. Supervise coordination of:

1. Location.
2. All arrangements for witnesses.
3. All necessary paperwork for payment of witnesses.

_____ c. Meet with SPCMCA. Get signed endorsement.

_____ d. Capture all delays in writing.

Mandatory Disclosure Requirements

_____ 1. DC copy of Art 32 report (include all charge sheets, sworn statements, evidence custody documents, copies of pictures)/ serve copy on accused (with signed receipt).

_____ 2. DC and Court-Reporter each a copy of the Court-Martial packet (any papers that accompanied the charges when they were referred, any signed/sworn statements in TC's possession, convening order/amended orders) and preferred Charge Sheet.

_____ 3. Evidence favorable to the defense

4. Referral:

_____ a. Check CMCOs for possible grounds for disqualification. Notify Chief of Justice, as necessary.

_____ b. Provide preferred Charge Sheet, all signed endorsements and Art 32 report to Chief of Justice for referral.

_____ c. Capture all delays in writing.

_____ d. Prepare Docket Notification.

Mandatory Disclosure Requirements

_____ 1. DC and Court-Reporter each a copy of the Court-Martial packet (any papers that accompanied the charges when they were referred, any signed/sworn statements in TC's possession, convening order/amended orders) and referred Charge Sheet.

_____ 2. Evidence favorable to the defense

5. Post-Referral:

_____ a. Serve Docket Notification on Defense within 24 hours of referral.

_____ b. Serve SJA Pretrial Advice, referred Charge Sheet and CMCO on Accused and DC. Complete Block 15 on Charge Sheet. Serve as much of the pre-arraignment disclosure requirements as possible at this time.

_____ c. Collect Docket Notification from Defense 24 hours after receipt, send to Judge.

_____ d. Check Charge Sheet, CMCO and CA Action for proper referral to trial.

_____ e. Re-check CMCO for possible grounds for disqualification. Notify SJA, as necessary.

_____ f. Provide the MJ and Court Reporter with a copy of CMCO and referred Charge Sheet.

_____ g. Capture all delays in writing.

Mandatory Disclosure Requirements

_____ 1. Evidence favorable to the defense

6. Trial Preparation: Substantive

_____ a. Consult DC for:

--Plea / possible PTA

--Stipulations of Fact (MUST be signed and submitted prior to PTA going to the CA).

--Forum

--Motions

_____ b. Request Sanity Board (as required).

_____ c. If Defense discovery request, prepare and serve Government Reciprocal

Discovery Request.

_____ d. Request from defense names and addresses of any witnesses whom the defense intends to call at pre-sentencing procedures, and written material that will be presented.

_____ e. Submit written Notice of Motions (IAW local rules of court).

_____ f. Draft and submit motion briefs / respond to Defense motions.

_____ g. Prepare items for judicial notice. Provide to DC.

_____ h. Prepare proposed instructions (see instructions checklist in DA Pam 27-9).

_____ i. Provide witness notification to the DC (merits and sentencing).

_____ j. Draft Voir Dire questions.

_____ k. Examine evidence; motion in limine for documentary/real evidence.

_____ l. Assemble Trial Notebook.

Mandatory Disclosure Requirements

_____ 1. Evidence favorable/material to the defense

_____ 2. Witnesses (name and address of case-in-chief, or rebuttal to alibi, innocent ingestion, lack of mental responsibility)

_____ 3. Five days prior to arraignment:

--Notice of intent to introduce evidence of the victim's past sexual behavior

--Similar crimes in sex assault/child molestation cases.

_____ 4. Prior to arraignment:

--Any records of prior civilian/military convictions of the accused

that the TC is aware of and may offer on the merits for ANY purpose.

--All statements (oral or written) made by the accused that are: relevant to the case, known to the TC, within control of the armed forces.

--All evidence seized from the person/property of the accused that the TC intends to offer into evidence against the accused at trial.

--All evidence of prior identifications of the accused as a lineup or other identification process that the TC intends to offer into evidence at trial.

--SHOULD: any statements (signed, adopted, or approved by the witness) by the witness relating to the subject matter testified about.

_____ 5. In response to Defense request:

--Books, papers, documents, photographs, tangible objects, buildings, places, results/reports of physical/mental examinations, scientific tests/experiments IF intended for use by TC in case in chief, OR material to preparation of defense AND in TC's possession/control.

--Sentencing witnesses (names/addresses) and written material to be offered in pre-sentencing proceedings

--Pretrial notice of general nature of the evidence of other crimes, wrongs, or acts which the TC intends to introduce at trial.

_____ 6. Reasonable time prior to testimony:

--Grants of immunity/leniency in exchange for testimony.

--Notice of intent to use 803(6)

--Residual hearsay exception.

_____ 7. Reasonable time in advance of trial:

--Impeach with conviction greater than 10 years

7. Trial Preparation: Administrative

_____ a. Prepare a list of witnesses (Government and Defense) for MJ, Court Reporter and Bailiff.

_____ b. Draft Flyer.

_____ c. Draft Findings Worksheet.

_____ d. Draft Stip of Facts

_____ e. Prepare script.

_____ f. Draft Sentencing Worksheet.

_____ g. Draft seating chart.

_____ h. Supervise coordination of:

--Witnesses:

--Civilian (subpoena AND tender of fees required for a warrant of attachment).

--Military (on post). Coordinate with commander.

--Military (off-post). Coordinate with commander.

--Panel members. CALL THEM PERSONALLY.

--Bailiff.

--Transportation after trial to confinement.

_____ i. Assist DC, if required, in getting accused's uniform complete.

_____ j. Exhibits premarked (by the Court Reporter).

8. The Day of Trial:

_____ a. Provide the MJ with:

--Original Charge Sheet, marked as an Appellate Exhibit.

--All CMCOs.

--MJ Alone request (if applicable).

--Flyer.

--List of witnesses.

_____ b. Provide the DC with:

--Flyer.

--Findings Worksheet.

--Sentencing Worksheet.

--Charge Sheet.

--All CMCOs.

--Members' seating chart.

_____ c. Provide the Court Reporter with:

--List of witnesses.

--All CMCOs.

_____ d. Ensure the Court reporter has:

--Provided members with folders containing:

--All CMCOs

--Members Question Forms

--Flyer

--Note paper

--Pencil / pen.

--Placed a copy of the Members' seating chart in the deliberations room.

Mandatory Disclosure Requirements

_____ 1. After direct, on motion by opposing party, any statements (signed, adopted, or approved by the witness) by the witness relating to the subject matter testified about.

9. Post-Trial

_____ a. Have Court reporter prepare / TC sign Report of Result of Trial.

_____ b. Have Court reporter prepare / TC sign Confinement Order.

_____ c. Provide escorts with copies of Report of Result of Trial and Confinement Order (escort gets original Confinement Order, to be delivered to Confinement Facility).

Defense Counsel Checklist

Judge's Deadline: _____ 120 Days: _____

I. Pretrial Confinement:

_____ a. **Use pretrial confinement checklist**.

_____ b. Meet with client in confinement facility within 24-hours.

_____ c. Provide client with a Pretrial Confinement Information Sheet.

Ii. Preliminary Actions:

_____ a. Review Allied Papers / Client Questionnaire. If urinalysis case, check the code.

_____ b. Proof(ed) specs on Charge Sheet against the MCM with _____.

_____ c. Identify legal elements and defenses (check MCM, MCM discussions, Benchbook (all related instructions), TJAGLCS Deskbooks, New Developments materials, Crimes and Defenses Handbook, all available at JAGCNET).

_____ d. Inspect transmittals and verify command authority and relationships.

_____ e. Call client within 48-hours of detailing to set appointment.

_____ f. Have the paralegals provide the client with a copy of the allied papers. Have the client review statements and highlight discrepancies or things the client believes

is false, and ask if the client thinks any pieces of evidence are missing.

_____ g. Have paralegals give the client a copy of rights advisement, elements, discharge info paper.

Iii. Initial Meeting With Client

_____ a. Listen to the client.

_____ b. Talk to the client about the client's goals in life.

_____ c. Complete the initial rights advisement.

_____ d. Inform client of effects of discharge, status at conviction (felon / drug offender / sex offender). Determine the value that the client places on confinement versus discharge.

_____ e. Verify personal data on charge sheet with client.

_____ f. Verify ETS date and time in service. If near retirement, order retirement audit.

_____ g. Advise the client to remain silent, and to not do any investigation on his or her own without your direction. Give the client an office card.

_____ h. Give client card to 27D.

Iv. Sentence Credit and Speedy Trial Analysis

_____ a. *Allen* (pretrial confinement): YES / NO

_____ b. *Mason* (restriction tantamount to confinement): YES / NO

_____ c. *Chaney* (other past civilian confinement not yet credited): YES / NO

_____ d. *Pierce* (Article 15 punishment for same offenses): YES / NO

_____ e. 305(k) (noncompliance with pretrial confinement reviews): YES / NO

_____ f. 305(k) + *Rendon* (*Mason* + physical restraint and no 305 reviews): YES / NO

_____ g. 305(k) (unusually harsh pretrial confinement conditions): YES / NO

_____ h. Art. 13 (pretrial punishment): YES / NO

_____ i. Art. 33 (GCM, client in pretrial, and unit did not do Art. 32 or forward memo to CA within 8 days; use 305(k) (abuse of discretion) YES / NO

_____ j. 305(k) (any abuse of discretion while the client was in pretrial confinement) YES / NO

_____ k. Art. 10 (slow processing of case that does not rise to dismissing charges) YES / NO

TYPE OF SPEEDY TRIAL TRIGGER	
DATE OF SPEEDY TRIAL TRIGGER	
ALL TYPES OF RESTRAINT / WHEN IMPOSED	
120TH DAY:	

V. Sanity Board Analysis

_____ a. Talk to client about the client's mental health. Look for indicators of depression, mania, or schizo-spectrum disorders. Ask client about any mental health treatment during lifetime, and any mental health records.

_____ b. Ask client about family history of mental health.

_____ c. Refer client to mental health, if necessary.

_____ d. Decide whether to submit a sanity board request or find some other way to document any potential mitigating evidence.

_____ e. Gather evidence to support a sanity board request.

_____ f. Submit a sanity board request.

Vi. Evidence Preparation:

_____ a. Marshal the evidence

_____ 1. Inspect evidence at CID / MPI.

_____ 2. Interview witnesses / take statements (third party observer?).

_____ 3. Visit crime scene.

_____ b. Create chronology.

_____ c. Convert legal elements into claims (merits and sentencing).

_____ d. Identify the crucial claims.

_____ e. Brainstorm for additional evidence.

_____ f. Conduct evidence analysis.

_____ g. Check discovery requirements

Burden	When	What	Source	Done?
Government	As soon as practicable after preferral	Identification of accuser	M.R.E. 308	
Government	As soon as practicable	Evidence that reasonably tends to be favorable to the accused	RCM 701(a)(6)	
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)	Trombetta, Youngblood, and Garries	
Government	As soon as practicable after service of charges (referral)	Papers accompanying the charges; convening orders; & statements	RCM 701(a)(1)	
Government	**Defense Request** (after service of charges (referral))	Documents, tangible objects and reports etc.	RCM 701(a)(2)	
Government	**Defense Request**	Information to be used at sentencing	RCM 701(a)(5)	
Government	**Defense Request**	Notice of Uncharged misconduct	M.R.E. 404(b)	
Government	**Defense request** (prior to referral of charges) or government claim of privilege	Classified Information	M.R.E. 505	
Government	**Defense Request** (prior to referral of charges)	Privileged information other than classified information	M.R.E. 506	
Government	Government (claim of privilege); **Defense** (motion to disclose)	Identity of informant	M.R.E. 507	

_____ h. Requests.

_____ 1. Draft and submit to the TC your witness production lists (request for expert witness and expert assistance; witness production at trial under RCM 703; discovery of witnesses prior to trial under RCM 701; and depositions under RCM 702).

_____ 2. Draft and submit to the government your case-in-chief and sentencing witness notification.

_____ 3. Draft and submit to the TC your discovery requests (based on what you need to tell your story at trial, and RCM 701(e) and 703).

Vii. Construct Arguments

_____ a. Construct arguments for each crucial factual proposition.

_____ b. Identify government's story and evidentiary requirements.

Viii. Motions Analysis

_____ a. Evaluate motions (**use motions checklist**).

_____ b. Draft motions. Remember to request anything that the CA has disapproved (experts, witnesses, sanity board). Prepare proposed instructions, items for judicial notice, requested voir dire questions, etc.

_____ c. Draft notice of motions for the judge.

IX. Evaluate The Case

_____ a. Create courses of action for the client.

_____ b. Give the client your professional opinion about the most likely outcome if the case goes to trial, and give your professional opinion of the lowest and highest reasonably likely outcomes.

_____ c. Discuss good time credit / parole proceedings and how they will affect the time spent in jail.

_____ d. Discuss courses of action with client and get decisions on:

Pleas (Contest / Mixed Plea / PTA / Chapter 10).

Forum (JA / Officer Panel / Enlisted Panel).

Client's testimony.

X. Article 32 Investigation

_____ a. Identify goals for Art. 32.

_____ b. Prepare and submit request for continuance, if necessary.

_____ c. Interview government and defense witnesses.

_____ d. Submit request for defense witnesses and evidence.

_____ e. Scrub the government's physical evidence against R.C.M. 405(g)(5) and testimonial evidence against R.C.M. 405(g)(4) and prepare objections.

_____ f. Prepare voir dire for IO, if necessary.

_____ g. Request verbatim transcript, if necessary.

_____ h. If client is in confinement, seek the report within 8 days.

_____ i. Prepare / file objections to 32 with CA within 5 days of service of report on client.

_____ j. Check discovery requirements.

Burden	When	What	Source	Done?
Government	Promptly after report is completed	Article 32 Investigating Officer's Report	M.R.E. 405(j)(3)	

XI. Post-Referral Actions

_____ a. Check Charge Sheet, CMCO and CA Action for proper referral to trial.

_____ b. Submit case-in-chief and sentencing witness notification to judge.

_____ c. Submit motions, plea and forum notice, and notice of certain defenses to judge.

_____ d. Review panel member questionnaires

_____ e. Prepare voir dire, opening, closing, direct, cross.

_____ f. Verify discovery requirements.

Burden	When	What	Source	Done?
Proponent	Sufficient advance notice	Notice of intent to impeach w/ > 10 year old conviction	M.R.E. 609	
Government	Completion of sanity board	Mental examination of accused – distribution of the report	RCM 706(c)(3)(B)	
Defense	Government request	Pre-sentencing witnesses and evidence	RCM 701(b)(1)(B)	
Defense	Government request after earlier defense discovery request	Documents and tangible objects; Reports of results of mental examinations, tests, and scientific experiments	RCM 701(b)(3) RCM 701(b)(4)	
Defense	Before trial on merits	Names of witnesses and statements	RCM 701(b)(1)(A)	
Defense	Before trial on merits	Notice of certain defenses (alibi; lack of mental responsibility; innocent ingestion, intent to introduce expert testimony on mental condition)	RCM 701(b)(2)	
Government	Defense notice under RCM 701(b)((1) or (2); Before start of trial	Witnesses to rebut certain defenses	RCM 701(a)(3)(B)	

XII. Arraignment

_____ a. Check referral-to-trial timeline (Article 35). Advise client if fewer than 3 days elapsed (special), 5 days elapsed (general) between service of charges and arraignment. Prepare for judge's waiver inquiry.

_____ b. Check discovery requirements

Burden	When	What	Source	Done?
Proponent	Minimum of 5 days before entry of pleas	Rape shield	M.R.E. 412(c)	
Government	Before arraignment	Prior convictions of accused to be offered on the merits for any reason, including impeachment	RCM 701(a)(4)	
Government	Before arraignment or within reasonable time before witness testifies	Immunity	M.R.E. 301	
Government	Before arraignment	Statements of accused relevant to case, regardless of whether government intends to use them	M.R.E. 304(d)	
Government	Before arraignment	Property seized from accused	M.R.E. 311(d)	
Government	Before arraignment	Identifications of accused	M.R.E. 321(c)	
Government	Capital cases, before arraignment	Notice of aggravating factors	RCM 1004(b)(1),	

XIII. Trial Preparation

_____ a. Check discovery requirements.

Burden	When	What	Source	Done?
Government	Before start of trial	Witnesses in case-in-chief	RCM 701(a)(3)(A)	
Government	Minimum of 5 days before scheduled date of trial	Evidence of similar crimes (child molestation and sexual assault cases)	M.R.E. 413/414	
Government	Before start of trial	Witnesses in case-in-chief	RCM 701(a)(3)(A)	
Defense	Accused to testify in motion to suppress evidence seized from accused; suppress confession; suppress out of court identification	Notice that accused will testify for limited purposes of the motion	M.R.E. 311(f) M.R.E. 304(f) M.R.E. 321(e)	
Proponent	After witness testifies on direct, on motion of opposing party	Production of statements concerning which witness testified	RCM 914 (Jencks Act)	

_____ b. Update list of witnesses for MJ, Court Reporter and Bailiff.

_____ c. Re-verify personal data on the top of the Charge Sheet with the client.

_____ d. Make additional copies of Defense Exhibits, as required.

_____ e. Premark exhibits with the Court Reporter.

_____ f. Review Government Findings Worksheet (as required).

_____ g. Review Government Sentencing Worksheet.

_____ h. Prepare / discuss with client the Post-trial and Appellate Rights Form.

1. Deferment of confinement request?
2. Deferment of forfeitures / reduction request?
3. Waiver of forfeitures request?
4. VEL Request?
5. Exception to Policy for Shipment of Household Goods?
6. Your request for a copy of the authenticated ROT, IAW R.C.M. 1106(f)?

_____ i. Assemble Trial Notebook (and client's folder). For guilty pleas, ensure at a minimum:

____ Judge Alone Request (original and three copies)

____ Charge Sheet (two copies)

____ Stipulation of Fact Signed by All Parties (two copies)

____ Offer to Plead Guilty (two copies)

____ Quantum (two copies)

____ Post-Trial and Appellate Rights (original and two copies)

____ Letters (original and three copies)

____ Stipulations of Expected Testimony (original and three copies)

____ Awards/Certificates (ask for substituted in the record to get originals back)

____ Corrected ERB/2-1(original and three copies)

____ Unsworn Statement (if applicable)

_____ j. Obtain a list of clemency witnesses from client. Provide client an address and fax number to return his clemency statement

_____ k. Have TDS NCO check the client's uniform.

_____ l. Provide client with paper / pencil for trial.

Motions Checklist

APPROPRIATE RELIEF	RULE	APPLIES?
Defective preferral	905(b)(1), 307	YES NO
Defective forwarding	905(b)(1), 401	YES NO
Defective investigation or pretrial advice	905(b)(1), 405, 406	YES NO
Defective referral	905(b)(1), 407, 601	YES NO
Defective charge or specification (other than failure to state offense or jurisdiction)	905(b)(2)	YES NO
Compel discovery	905(b)(4), 906(b)(7), 914, 701, 703, 1001(e)	YES NO
Production of statements	914(a)	YES NO
Severance of accused	905(b)(5), 906(b)	YES NO
Severance of charges	905(b)(5), 906(b)(10)	YES NO
Severance of duplicitous charges	906(b)(5), 907(b)(3)(B), 307	YES NO
Objection to denial of counsel	905(b)(6), 906(b)(2)	YES NO
Withdraw from pretrial agreement	705(d)(4)	YES NO
Withdraw from stipulation agreement	811(d)	YES NO
Withdraw plea	910(h)(1)	YES NO
Improper selection of members	912(b)(1)	YES NO
Recusal of military judge	902(d)(1)	YES NO
Continuance	906(b)(1)	YES NO
Amendment of charges or specifications	906(b)(4), 603(a)	YES NO
Bill of particulars	906(b)(6)	YES NO
Relief from improper pretrial confinement	906(b)(8), 305(j)	YES NO

Change of venue	906(b)(11)	YES NO
Determination of capacity to stand trial	906(b)(14), 706, 909(c)(2)	YES NO
Determination of mental capacity – affirmative defense	906(b)(14), 706, 916(k)(3)(A)	YES NO
Request for immunity of defense witness	704(c)	YES NO
Mistrial	915(a)	YES NO
Preliminary ruling on admissibility of evidence	906(b)(13)	YES NO
Request for investigative or expert assistance	701, 703(c), (d)	YES NO

SUPPRESS	**RULE**	**APPLIES?**
Statements	905(b)(3), M.R.E. 304	YES NO
Evidence	905(b)(3), M.R.E. 311	YES NO
Identifications	905(b)(3), M.R.E. 321	YES NO
Consent searches	905(b)(3), M.R.E. 314	YES NO

DISMISS	**RULE**	**APPLIES?**
Lack of jurisdiction	907(b)(1)(A)	YES NO
Failure to state an offense	907(b)(1)(B)	YES NO
Speedy trial	707(c)(2), 907(b)(2)(A)	YES NO
Statute of limitations	907(b)(2)(B)	YES NO
Former jeopardy	907(b)(2)(C)	YES NO
Prosecution barred (immunity, condonation of desertion, double jeopardy)	907(b)(2)(D)	YES NO
Defective specification	907(b)(3)(A)	YES NO

Multiplicity	907(b)(3)(A)	YES NO
Inadequate Art. 32 investigation	905(b)(1)	YES NO
Unlawful command influence	Case law (22 M.J. 388)	YES NO
Lack of due process	Case law (25 M.J. 650)	YES NO
Vindictive prosecution	Case law (20 M.J. 148)	YES NO

FINDING OF NOT GUILTY	RULE	APPLIES?
	917	YES NO

POST-TRIAL MOTIONS	RULE	APPLIES?
Improper instructions	920(f)	YES NO
Impeachment of findings or sentence	923, 1009, M.R.E. 606(b)	YES NO
Reconsideration	905(f), 924, 1009, 1102(b)(1)	YES NO
Defer confinement or forfeitures	1101(c), Art. 57	YES NO
Correction of record of trial	1103(i)(1)(B)	YES NO

Defense Counsel
Pretrial Confinement Checklist

_____ 1. Explain to the client the review procedures and his or her rights under R.C.M. 305(e). Provide the client with the Pretrial Confinement Handout.

_____ 2. Get a complete packet from the Trial Counsel.

Waiver

_____ 1. Consider the reasons why the client may want to waive personal appearance.

_____ a. The client may flee.

_____ b. The client will get into more trouble if he is released.

_____ c. The client has a drug or alcohol problem.

_____ d. The client is treated poorly or abused by his unit, and wants to get away from them.

_____ e. (If post-trial confinement is likely) The client gets day-for-day credit, and gets paid. After trial, the client probably won't get paid.

_____ f. The command may view pretrial confinement as punishment (even though it is not) and be willing to approve a discharge in lieu of court-martial.

_____ g. The client will likely get strict restrictions anyway, but not strict enough to warrant credit.

_____ h. Pretrial confinement triggers the speedy trial clock and Article 10 protection. If the government is overworked, they may not have the energy to put together a good case.

_____ i. The client may have mental health issues or be suicidal, and pretrial confinement may be the only way the client can get treatment or be properly observed.

Contesting the Confinement Decision

_____ 1. Probable cause that the accused committed an offense.

_____ a. Did the commander rely on accurate information?

_____ b. Has the government met their burden of production (more than just the 72 hour memo)?

_____ 2. Flight risk.

_____ a. If the offense is not very serious, the client is less likely to flee.

_____ b. If the evidence is weak, the client is less likely to flee.

_____ c. Does the client have lots of ties with the local community (bank accounts, family, off-duty employment, home ownership)? Does the client have unusual family needs?

_____ d. Does the client have a record of appearing at other disciplinary events (Art. 15s, summary courts)?

_____ e. If the client is returning from AWOL, did he return voluntarily? If apprehension, did the client follow the conditions of the travel pass?

_____ f. If the client is returning from AWOL, what caused the client to leave in the first place? Do those reasons still exist?

_____ g. If the client is returning from AWOL, is this the client's first AWOL?

_____ h. Is the client otherwise a "good soldier?"

____ i. Has the client been upfront with the government up to this point? Not tried to cover up the crime?

_____ 3. Future serious misconduct.

_____ a. Is the client suspected of a one-time type crime, or a crime that is easily repeated?

_____ b. Did the client crack under some particular kind of pressure that no longer exists?

_____ c. Did the client commit an opportunistic crime, where the opportunity will not present itself again?

_____ d. Has the client only committed low-end crimes (pain-in-the-neck behavior) that does not rise to the level of serious?

_____ 4. Less severe forms of restraint.

_____ a. Has the command tried other forms in the past, and have they worked (Art. 15s, summary court punishments)?

_____ b. Has the client responded to past counseling forms, showing that he responds to moral pressure?

_____ c. Look at the future serious misconduct that the government is concerned about. Could other forms of restraint prevent it (restraining order, etc.)? What is the real risk to society if the client fails to follow the restraint?

_____ 5. Appeal directly to the commander, if necessary. Stress the cost to the unit from escorting the soldier back and forth to confinement

_____ 6. Seek evidence that will support your client: sworn statements from friends that the accused is not a flight risk, a threat to morale, or that lesser forms of restriction would work.

Building the Case for Credit

_____ 1. Are there any potential R.C.M. 305(k) issues?

_____ a. 48-hour, 72-hour, 7-day reviews satisfied? Did the client get counsel within 72-hours?

_____ b. Did the command put the client in restriction tantamount to confinement *before* putting the client in jail? If so, the client will get additional day -for-day credit, *and*, that date would trigger the 305 review procedures. The government probably will have missed those, so the client will get more credit.

_____ c. Has the confinement (either actual or tantamount) been unduly harsh?

_____ 2. Are there any Article 13 issues?

Prepping for Trial

_____ 1. Complete as much of the Defense Counsel Checklist as practicable during this initial counseling session.

_____ 2. Counsel client to stay quiet in jail.

_____ 3. Counsel client to stay out of trouble. Good behavior in jail can show rehab potential.

Defense Counsel
Guilty Plea Checklist

Appellate Exhibits

____ Judge Alone Request (original)

____ Stipulation of Fact Signed by All Parties (original)

____ Offer to Plead Guilty (original)

____ Quantum (original)

____ Post-Trial and Appellate Rights (original)

____ Letters (original)

____ Stipulations of Expected Testimony (original)

____ Awards/Certificates (ask for substituted in the record to let A get originals back)

____ Corrected ERB/2-1

Packet for Accused and Copy for Government

____ Judge Alone Request (copy)

____ Charge Sheet (copy)

____ Stipulation (copy)

____ Offer (copy)

____ Quantum (copy)

____ Stipulations (copy)

____ Unsworn Statement (if applicable)

____ Post-Trial and Appellate Rights (copy)

Defense Counsel
Post-Trial Checklist

Confinement Facility: _____

Expected Release Date: _____

_____ a. Review the Report of Result of Trial for accuracy (PTC credit, pleas, findings, etc).

_____ b. Call client once he reaches confinement. Verify the facility and expected release date.

_____ c. Send client "initial" letter.

_____ d. Review ROT for errata.

_____ e. Send client the "errata" letter.

_____ f. Receive the authenticated copy of the ROT and SJAR. Scrub the SJAR:

FINDINGS ADJUDGED (must accurately reflect trial findings)	YES	NO
SENTENCE ADJUDGED	YES	NO
MJ/PANEL CLEMENCY RECOMMENDATION	YES	NO
LENGTH/CHARACTER OF SERVICE	YES	NO
AWARDS & DECORATIONS	YES	NO
NONJUDICIAL PUNISHMENT	YES	NO
CONVICTIONS	YES	NO
NATURE/DURATION OF ANY PRETRIAL RESTRAINT	YES	NO
TERMS OF ANY PRETRIAL AGREEMENT	YES	NO
RECOMMENDATION AS TO ACTION	YES	NO

_____ g. Contact client in jail. Get the list of clemency witnesses and prepare clemency matters.

_____ h. Contact the client to confirm that the client has received a copy of the authenticated ROT and SJA PTR.

_____ i. Request addition 20-days for 1105 matters, if necessary.

_____ j. Complete your post-trial submissions (with attachments) and mail a copy of your letter and all attachments to the client.

_____ k. Call the client to discuss your post-trial submissions.

_____ l. Explore post-trial motions possibilities (**use motions checklist**).

_____ m. If you alleged legal error, review SJA addendum:

		COMMENT ON LEGAL ERRORS RAISED	YES	NO
		CORRECTIVE ACTION NECESSARY	YES	NO
		NEW MATTER	YES	NO
		SERVICE OF NEW MATTER ON DC	YES	NO

_____ n. Check if the CA is disqualified from taking action.

_____ o. Check Action for accuracy and completeness.

CA DECISION AS TO SENTENCE	YES	NO
ANY GUILTY FINDINGS DISAPPROVED	YES	NO
ORDERS AS TO OTHER DISPOSITION	YES	NO
CA PERSONALLY SIGNED	YES	NO
DEFERMENT OF CONFINEMENT	YES	NO
PRETRIAL CONFINEMENT CREDIT	YES	NO
REPRIMAND	YES	NO
TOTAL FORFEITURES w/o CONFINEMENT	YES	NO
DEFERRMENT/WAIVER OF FORFEITURES	YES	NO

_____ p. Check Promulgating Order for accuracy and completeness.

ISSUED BY CONVENING AUTHORITY	YES	NO
DATE OF ACTION	YES	NO
TYPE OF COURT-MARTIAL	YES	NO
COMMAND BY WHICH COURT-MARTIAL WAS CONVENED	YES	NO
SUMMARY OF CHARGES AND SPECIFICATIONS ARRAIGNED	YES	NO
ACCUSED'S PLEAS	YES	NO
FINDINGS OR OTHER DISPOSITION	YES	NO
SENTENCE	YES	NO
ACTION BY CONVENING AUTHORITY	YES	NO

_____ q. Alert DAD to issues that are not clear from either the ROT or your post-trial submissions.

_____ r. Send letter to client explaining that your actions are done, and that your attorney client relationship continues ends when appellate counsel is appointed.

Counsel Requested Instructions Checklist

Submitted By: ☐ Prosecution ☐ Defense

I. Findings Instructions

A. Lesser Included Offenses

Ch / Sp

(_____) _____

(_____) _____

(_____) _____

(_____) _____

(_____) _____

(_____) _____

(_____) _____

(_____) _____

B. Terms Having Special Legal Significance

☐ _____

☐ _____

C. Self-Defense/Defenses to Assaults

Self-Defense (5-2)

- ☐ Homicide/Aggravated Assault (5-2-1)
- ☐ Non-Aggravated Assault (5-2-2)
- ☐ Assault as LIO (5-2-3)
- ☐ Homicide/Unintended Death (5-2-4)
- ☐ Use of Force to Deter (5-2-5)
- ☐ Other Instructions – Self-Defense (5-2-6)
  - ☐ Opportunity to Withdraw (Note 2)
  - ☐ State of Mind (Note 3)
  - ☐ Voluntary Intoxication (Note 4)
  - ☐ Provocateur – Mutual Combat (Note 5)
    - ☐ Burden of Proof (Note 6)
    - ☐ Withdrawal Reviving Right (Note 7)

Defense of Another (5-3)

- ☐ Homicide/Aggravated Assault (5-3-1)
- ☐ Assault/Battery (5-3-2)
- ☐ Homicide/Agg Assault Plus LIO (5-3-3)

☐ Accident (5-4)

☐ Duress (Compulsion or Coercion) (5-5)

☐ Defense of Property (5-7)

☐ Parental Discipline (5-16)

☐ Causation – Lack of (5-19)

D. Other Defenses

☐ Accident (5-4)

☐ Duress (Compulsion or Coercion) (5-5)

☐ Entrapment (5-6)

Obedience to Orders (5-8)

- ☐ Unlawful Order (5-8-1)
- ☐ Lawful Orders (5-8-2)

☐ Physical Impossibility (5-9-1)

☐ Physical Inability (5-9-2)

☐ Financial and Other Inability (5-10)

Ignorance or Mistake of Fact (5-11)

- ☐ Specific Intent / Knowledge (5-11-1)
- ☐ General Intent (5-11-2)
- ☐ Article 134 Check Offenses (5-11-3)
- ☐ Drug Offenses (5-11-4)

☐ Voluntary Intoxication (5-12)

☐ Alibi (5-13)

☐ Voluntary Abandonment (5-15)

☐ Parental Discipline (5-16)

☐ Evidence Negating Mens Rea (5-17)

☐ Self-Help Under a Claim of Right (5-18)

☐ Causation – Lack of (5-19)

E. Pretrial Statements

☐ Pretrial Statements (Chapter 4)

F. Law of Principals (7-1)

☐ Aider and Abettor (7-1-1)

☐ Counseling, Commanding, Procuring (7-1-2)

☐ Causing an Act to be Done (7-1-3)

☐ Liability of Coconspirators (7-1-4)

G. Joint Offenders

☐ Joint Offenders (7-2)

J. Defense of Lack of Mental Responsibility

☐ Mental Responsibility at Time of Offense (6-4)

☐ Partial Mental Responsibility (6-5)

☐ Expert Testimony (7-9-1)

☐ Evaluation of Testimony (6-6)

K. Evidentiary and other instructions

☐ Circumstantial Evidence (7-3)

- ☐ Justifiable Inferences (Note 1)
- ☐ Proof of Intent (Note 2)
- ☐ Proof of Knowledge (Note 3)

☐ Stipulation of Fact (7-4-1)

☐ Stipulation of Testimony (7-4-2)

☐ Depositions (7-5)

☐ Judicial Notice (7-6)

☐ Credibility of Witness (7-7-1)

☐ Interracial Identification (7-7-2)

☐ Character Evidence– Accused (7-8-1)

☐ Character Evidence– Victim (7-8-2)

☐ Character for Untruthfulness (7-8-3)

☐ Expert Testimony (7-9-1)

☐ Polygraph Expert (7-9-2)

☐ Accomplice Testimony (7-10)

☐ Prior Inconsistent Statement (7-11-1)

☐ Prior Consistent Statement (7-11-2)

☐ Accused's Failure to Testify (7-12)

☐ Uncharged Misconduct– Accused (7-13-1)

☐ Prior Conviction to Impeach (7-13-2)

☐ Past Sex Behav Nonconsent Sex Victim (7-14)

☐ Variance– Find by Except & Subst (7-15)

☐ Value, Damage or Amount (7-16)

☐ Spill-Over (7-17)

☐ "Have you Heard" Impeach Question (7-18)

☐ Witness Under Grant of Immunity (7-19)

☐ Chain of Custody (7-20)

☐ Privilege (7-21)

☐ False Exculpatory Statements (7-22)

☐ Closed Trial Sessions (7-23)

L. Other Findings Instructions (Tailored or Special)

Attach Proposed Requested Language & Authority

☐ Topic:_____

☐ Topic:_____

☐ Topic:_____

☐ Topic:_____

☐ Topic:_____

☐ Topic:_____

☐ Topic:_____

☐ Topic:_____

II. Sentencing Instructions

☐ Pretrial Confinement Credit:_____ Days

☐ Fine

☐ Article 58b CA Clemency Powers (Family)

☐ Mental Responsibility Sentencing Factors (6-9)

☐ Accused's Failure to Testify

☐ Accused's Not Testifying Under Oath

☐ Effect of Guilty Plea

☐ Mendacity

☐ Clemency (Recommend Suspension) (2-7-16)

☐ Clemency (Additional Instructions) (2-7-17)

***Wheeler* Factors (E&M or Aggravation)**

E&M	A	
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____

Other Sentencing Instructions (Tailored or Special)

Attach Proposed Requested Language & Authority

☐ Topic: _____

☐ Topic: _____

☐ Topic: _____

☐ Topic: _____

☐ Topic:_____

☐ Topic:_____

☐ Topic:_____

☐ Topic:_____

Exhibits Check List: US v _____ Tried on: _____ at: _____

APPELLATE		PROSECUTION				DEFENSE			
			O	R			O	R	
I		**1**				**A**			
II		**2**				**B**			
III		**3**				**C**			
IV		**4**				**D**			
V		**5**				**E**			
VI		**6**				**F**			
VII		**7**				**G**			
VIII		**8**				**H**			
IX		**9**				**I**			
X		**10**				**J**			
XI		**11**				**K**			
XII		**12**				**L**			
XIII		**13**				**M**			
XIV		**14**				**N**			
XV		**15**				**O**			
XVI		**16**				**P**			
XVII		**17**				**Q**			
XVIII		**18**				**R**			
XIX		**19**				**S**			
XX		**20**				**T**			
XXI		**21**				**U**			

XXII		**22**				**V**			
XXIII		**23**				**W**			
XXIV		**24**				**X**			
XXV		**25**				**Y**			
XXVI		**26**				**Z**			
XXVII		**27**				**AA**			
XXVIII		**28**				**BB**			
XXIX		**29**				**CC**			
XXX		**30**				**DD**			
XXXI		**31**				**EE**			
XXXII		**32**				**FF**			
XXXIII		**33**				**GG**			
XXXIV		**34**				**HH**			
XXXV		**35**				**II**			
XXXVI		**36**				**JJ**			
XXXVII		**37**				**KK**			

APPELLATE		PROSECUTION				DEFENSE			
			O	R			O	R	

INSTRUCTIONS CHECKLIST
MENTAL RESPONSIBILITY
IS IN ISSUE

I. Preliminary - At Assembly

(__) Preliminary instructions (P. 36).

(__) Beyond reasonable doubt (P. 37)

(__) Credibility of witnesses (P. 37).

(__) Joint offenders (7-2)

(__) Elements of offenses (Chp 3)

(__) Vicarious liability. (Chp 7)

(__) Preliminary instruction on mental responsibility (6-3)

(__) _____

(__) _____

II. Findings

A. (__) Prefatory Instructions (P. 49)

B. (__) Elements of offenses (Chp 3)

(__) CH/SP _____ LIO _____

(__) CH/SP _____ LIO _____

(__) CH/SP _____ LIO _____

(__) CH/SP _____ LIO _____

C. (__) Terms having special legal significance

(__) _____ (__) _____ (__) _____

D. (__) Law of Principals. (7-1)

E. Self-Defense/Defenses to Assaults

Self-Defense (5-2)

(__) Homicide/Aggravated Assault (5-2-1)

(__) Non-Aggravated Assault (5-2-2)

(__) Assault as LIO. (5-2-3)

(__) Homicide/unintended death (5-2-4)

(__) Use of Force to Deter (5-2-5)

(__) Other Instructions - self-defense (5-2-6)

(__) _____
(__) _____
(__) _____
(__) _____

(__) Defense of Another (5-3)

(__) Homicide/Aggravated Assault (5-3-1)

(__) Assault/Battery (5-3-2)

(__) Homicide/Agg assault plus LIO (5-3-3)

(__) Accident (5-4)

(__) Duress (Compulsion or Coercion) (5-5)

(__) Defense of Property (5-7)

(__) Parental Discipline (5-16)

(__) Causation - Lack of (5-19)

F. Other Defenses

(__) Accident (5-4)

(__) Duress (Compulsion or Coercion) (5-5)

(__) Entrapment (5-6)

(__) Obedience to Orders (5-8)

(__) Unlawful Order (5-8-1)

(__) Lawful Orders (5-8-2)

(__) Physical Impossibility (5-9-1)

(__) Physical Inability (5-9-2)

(__) Financial and Other Inability (5-10)

(__) Ignorance or Mistake of Fact (5-11)

(__) Specific intent/knowledge (5-11-1)

(__) General intent (5-11-2)

(__) Article 134 Check Offenses (5-11-3)

(__) Drug Offenses (5-11-4)

(__) Voluntary Intoxication (5-12)

(__) Alibi (5-13)

(__) Voluntary Abandonment (5-15)

(__) Parental Discipline (5-16)

NO Evidence Negating Mens Rea (5-17)

(__) Self-Help Under a Claim of Right (5-18)

(__) Causation - Lack of (5-19)

(__) Other _____.

(__) Other _____.

(__) Other _____.

G. Pretrial Statements

(__) Pretrial Statements (Chapter 4)

H. Law of Principals (7-1) (if not given in Part II D)

(__) Aider and Abettor (7-1-1)

(__) Counseling, Commanding, Procuring (7-1-2)

(__) Causing an Act to be Done (7-1-3)

(__) Liability of Coconspirators (7-1-4)

I. Joint Offenders

(__) Joint Offenders (7-2)

J. Defense of Lack of Mental Responsibility

(__) Mental Responsibility at Time of Offense (6-4)

(__) Partial Mental Responsibility (6-5)

(__) Expert Testimony (7-9-1)

(__) Evaluation of Testimony (6-6)

K. Evidentiary and other instructions

(__) Circumstantial Evidence (7-3)

(__) Proof of intent

(__) Proof of knowledge

(__) Stipulation of Fact (7-4-1)

(__) Stipulation of Testimony (7-4-2)

(__) Depositions (7-5)

(__) Judicial Notice (7-6)

(__) Credibility of Witness (7-7-1)

(__) Interracial Identification (7-7-2)

(__) Character Evidence - Accused (7-8-1)

(__) Character Evidence - Victim (7-8-2)

(__) Character for Untruthfulness (7-8-3)

(__) (Expert Testimony (7-9-1))

(__) Polygraph Expert (7-9-2*)*

(__) Accomplice Testimony (7-10)

(__) Prior Inconsistent Statement (7-11-1)

(__) Prior Consistent Statement (7-11-2)

(__) Accused's Failure to Testify (7-12)

(__) Uncharged Misconduct - Accused (7-13-1)

(__) Prior Conviction to Impeach (7-13-2)

(__) Past Sexual Behavior of Nonconsensual Sex Victim (7-14)

(__) Variance --Findings by Exceptions and Substitutions (7-15)

(__) Value, Damage or Amount (7-16)

(__) Spill-Over (7-17)

(__) Have you Heard Impeachment Questions (7-18)

(__) Witness Under Grant of Immunity (7-19)

(__) Chain of Custody (7-20)

(__) Privilege (7-21)

(__) False Exculpatory Statements (7-22)

(__) Closed Trial Sessions (7-23)

(__) Brain Death (7-24)

(__) Divers or Specified Conditions (7-25)

L. (__) Closing Substantive Instructions on findings

M. Argument by Counsel

N. (__) Procedural Instructions on Findings in cases where mental responsibility is in issue. (6-7)

O. (__) No Sentencing Proceedings

If no sentencing proceedings are required, give Excusal Instruction at P. 106

III. Sentencing Instructions

(__) Instructions on Sentence

(__) Article 58a

(__) Pretrial Confinement Credit

(__) Article 58b

(__) 58b Clemency Powers by CA

(__) Fine

(__) Punitive discharge

(__) Vested benefits.

(__) No punishment.

(__) Summary of Evidence in Extenuation/Mitigation

(__) Mental Responsibility Sentencing Factors (6-9)

(__) Accused's Failure to Testify

(__) Accused's not Testifying Under Oath

(__) Effect of Guilty Plea

(__) Mendacity

(__) Argument for Specific Sentence

((__) Clemency (P. 129))

(__) Other _____.

(__) Other _____.

(__) Other _____.

(__) Concluding Instructions

IV. Excusing Members - Give Excusal Instruction at p. 106

INSTRUCTIONS CHECKLIST
MENTAL RESPONSIBILITY
NOT IN ISSUE

I. Preliminary - At Assembly

(__) Preliminary instructions (P. 36).

(__) Beyond reasonable doubt (P. 37)

(__) Credibility of witnesses (P. 37).

(__) Joint offenders (7-2)

(__) Elements of offenses (Chp 3)

(__) Vicarious liability. (Chp 7)

(__) _____

(__) _____

II. Findings

A. (__) Prefatory Instructions (P. 49)

B. (__) Elements of offenses (Chp 3)

(__) CH/SP _____ LIO _____

(__) CH/SP _____ LIO _____

(__) CH/SP _____ LIO _____

(__) CH/SP _____ LIO _____

C. (__) Terms having special legal significance

(__) _____ (__) _____ (__) _____

D. (__) Law of Principals (7-1)

E. Self-Defense/Defenses to Assaults

Self-Defense (5-2)

(__) Homicide/Aggravated Assault (5-2-1)

(__) Non-Aggravated Assault (5-2-2)

(__) Assault as LIO. (5-2-3)

(__) Homicide/unintended death (5-2-4)

(__) Use of Force to Deter (5-2-5)

(__) Other Instructions - self-defense (5-2-6)

(__) _____

(__) _____

(__) _____

(__) _____

Defense of Another (5-3)

(__) Homicide/Aggravated Assault (5-3-1)

(__) Assault/Battery (5-3-2)

(__) Homicide/Agg assault plus LIO (5-3-3)

(__) Accident (5-4)

(__) Duress (Compulsion or Coercion) (5-5)

(__) Defense of Property (5-7)

(__) Parental Discipline (5-16)

(__) Causation - Lack of (5-19)

F. Other Defenses

(__) Accident (5-4)

(__) Duress (Compulsion or Coercion) (5-5)

(__) Entrapment (5-6)

Obedience to Orders (5-8)

(__) Unlawful Order (5-8-1)

(__) Lawful Orders (5-8-2)

(__) Physical Impossibility (5-9-1)

(__) Physical Inability (5-9-2)

(__) Financial and Other Inability (5-10)

(__)Ignorance or Mistake of Fact (5-11)

(__) Specific intent/knowledge (5-11-1)

(__) General intent (5-11-2)

(__) Article 134 Check Offenses (5-11-3)

(__) Drug Offenses (5-11-4)

(__) Voluntary Intoxication (5-12)

(__) Alibi (5-13)

(__) Voluntary Abandonment (5-15)

(__) Parental Discipline (5-16)

(__) Evidence Negating Mens Rea (5-17)

(__) Self-Help Under a Claim of Right (5-18)

(__) Causation - Lack of (5-19)

(__) Other _____.

(__) Other _____.

(__) Other _____.

G. Pretrial Statements

(__) Pretrial Statements (Chapter 4)

H. Law of Principals (7-1) (if not given in Part II D)

(__) Aider and Abettor (7-1-1)

(__) Counseling, Commanding, Procuring (7-1-2)

(__) Causing an Act to be Done (7-1-3)

(__) Liability of Coconspirators (7-1-4)

I. Joint Offenders

(__) Joint Offenders (7-2)

J. Evidentiary and other instructions

(__) Circumstantial Evidence (7-3)

(__) Proof of intent .

(__) Proof of knowledge.

(__) Stipulation of Fact (7-4-1)

(__) Stipulation of Testimony (7-4-2)

(__) Depositions (7-5)

(__) Judicial Notice (7-6)

(__) Credibility of Witness (7-7-1)

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(__) Prior Conviction to Impeach (7-13-2)

(__) Past Sexual Behavior of Nonconsensual Sex Victim (7-14)

(__) Variance --Findings by Exceptions and Substitutions (7-15)

(__) Value, Damage or Amount (7-16)

(__) Spill-Over (7-17)

(__) Have you Heard Impeachment Questions (7-18)

(__) Witness Under Grant of Immunity (7-19)

(__) Chain of Custody (7-20)

(__) Privilege (7-21)

(__) False Exculpatory Statements (7-22)

(__) Closed Trial Sessions (7-23)

(__) Brain Death (7-24)

(__) Divers or Specified Conditions (7-25)

(__) _____

(__) _____

(__) _____

K. (__) Closing Substantive Instructions on findings (p. 52)

L. Argument by Counsel

M. (__) Procedural Instructions on Findings (p. 54)

N. (__) No Sentencing Proceedings

If no sentencing proceedings are required, give Excusal Instruction at p. 106

III. SENTENCING INSTRUCTIONS

(__) Instructions on Sentence

(__) Article 58a

(__) Pretrial Confinement Credit

(__) Article 58b

(__) 58b Clemency Powers by CA

(__) Fine

(__) Punitive discharge

(__) Vested benefits.

(__) No punishment.

(__) Summary of Evidence in Extenuation/Mitigation

(__) Accused's Failure to Testify

(__) Accused's not Testifying Under Oath

(__) Effect of Guilty Plea

(__) Mendacity

(__) Argument for Specific Sentence

((__) Clemency (P. 129))

(__) Other
_____.

(__) Other
_____.

(__) Other
_____.

(__) Concluding Instructions

IV._Excusing Members - Give Excusal Instruction at p. 106

Trial Counsel
Pretrial Confinement Checklist

1. Determine whether SM meets burden for PTC versus other less restrictive means of restraint. *RCM 305(d)*

   a. Probable cause that an offense triable by CM has been committed;

   b. PC that the person to be restrained committed the offense; and

   c. Circumstances require PTC.

2. Review Military Justice policy memoranda to determine if any CA withheld authority to approve PTC (GCMCA will often require approval).

3. If GCMCA requires approval, contact the CoJ to request SJA drive-by. Provide CoJ facts of the case and why you think the circumstances require PTC. If GCMCA does not require approval, notify CoJ of the command's intent to place SM in PTC.

4. Contact whatever confinement facility will be holding SM.

5. Direct 27D to brief command on prisoner escort procedures, to include signing for handcuffs from the MPs.

6. Direct 27D to contact medical facility to coordinate confinee medical exam.

7. Contact TDS to notify them that the command is putting SM in PTC. Request name of detailed DC and make contact.

8. Draft confinee advice memorandum. *RCM 305(e)*

   a. Nature of the offenses

   b. Right to remain silent

   c. Right to retain civilian counsel and right to request military counsel

   d. Nature of the confinement review procedure

9. Direct 27D to complete confinement order (DD Form 2707) and commander's portion of any local forms. Review the confinement order for accuracy.

10. Have the command assemble the SM and escorts (senior to SM). Commander reads SM his rights and signs the confinement order. Escorts take SM to medical facility then confinement facility.

11. If someone other than the commander ordered the confinement, notify the commander of the name of the prisoner, the offenses charged/suspected, and the name of the person who order or authorized confinement. *RCM 305(h)(1)*

12. Identify a neutral and detached commander to conduct the combined 48-hour PC determination and 72-hour review. This can be another company commander in the same battalion. *RCM 305(h)(2)*

13. Draft the 48-hour PC determination/72 hour-hour review memorandum and have the neutral and detached commander review it and sign it. The neutral and detached commander can sign this memorandum any time after the confining commander signs the confinement order but must be within 48 hours.

14. Coordinate with PTMM for 7-day review. This review can be any time after confinement and after 48-hour determination/72-hour review and should generally be as soon as possible. Include detailed TDS attorney on all correspondence with PTMM. Notify TDS of time for review hearing. *RCM 305(i)*

15. Attend the 7-day review. If PTMM orders continued confinement, monitor SM's confinement and ensure SM has access to his/her DC. If PTMM directs release, notify command and help the command come up with less restrictive restraint IAW RCM 304.

16. If continued confinement, charge SM as soon as possible IAW Article 10, UCMJ and RCM 707. If immediate charging is not an option due to ongoing investigation, document all forward progress on the case on a daily log for use during Article 10 hearing.

120 days from day confined (from order, not after 7-day review): _____

Deposition Checklist

1. Determine if you need to conduct a deposition. YES, if:

a. Witness may be unavailable for Article 32 (see RCM 405(g)); OR

b. Witness may be unavailable for trial (see RCM 703(b)). Pay particular attention to civilian witnesses travelling to foreign country to testify at trial; OR

c. Counsel wants to preserve sworn testimony for trial for some other reason (impeachment).

2. Identify who has the authority to order the deposition (RCM 702(b)):

a. Pre-referral: The commander who has the charges for disposition. This is usually the brigade commander.

b. Post-referral: The convening authority or the military judge.

3. TC: If you cannot attend the deposition, request support from local MJ office through your COJ. This is common when the case will occur OCONUS and your witness is CONUS (deployed trial or OCONUS trial with civilian CONUS witnesses).

4. COJ: Identify COJ in local jurisdiction and request logistical and TC support (deposition officer, courtroom, reporter, government counsel, witness transport, etc.). Deposition officer is usually a JAG attorney.

5. TC: Make your formal request to the appropriate authority using format in RCM 702(c). If the charges are pre-referral, prepare deposition order IAW RCM 703(d) and provide notice to opposing party IAW RCM 703(f).

6. TC: If requesting local support, BPT brief the local TC on the basic facts of the case, your goal with the deposition, and provide a list of questions for him/her to ask.

7. Depo Officer:

a. Notify parties and witnesses of time/date of deposition.

b. If pre-referral and stationed OCONUS, coordinate with IA attorney to subpoena foreign civilian witnesses IAW local law.

c. If post-referral and CONUS, subpoena witnesses.

d. Be present on day of deposition and follow all procedures outlined in RCM 703(f).

8. Reporter: Record and transcribe the deposition. Send to testifying witnesses, deposition officer, TC present and deposition, and DC for authentication.

9. TC: Continue preparing for trial as if witness will attend. Obtain ITO, passport, visa, and plane tickets. Have 27D in charge of witness travel document or save all communications with witness. You need to prove to the court that you've done everything possible to bring the witness to trial.

10. Disclose to the DC your intent to use deposition testimony IAW RCM 701. Check the PTO to see if MJ requires notice of intent to use deposition testimony.

Guide To Articulating Probable Cause To Search

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. The 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 the 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. The witness is a good, honest Soldier; you know him from personal knowledge or by reputation or opinion of chain of command.

2. The witness has given reliable information before; he has a good track record (CID may have records).

3. The witness has no reason to lie.

4. The witness has a truthful demeanor.

5. The witness made a 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. The witness made an admission against his or her 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.

Encl 8 (Military Magistrates SOP)

Notes On Request For Search Authorization

Date/Time Called: _____

Called By: _____ of the _____office.

The requester **did/did** not present an affidavit.

The requester **was/was not** sworn. (The requester was not sworn because _____).

The requester **had/had not** previously requested another magistrate, judge or commander, to grant the same request. (If such a previous request was made, what new information - if any - has been obtained?
_____

The offense being investigated was:
_____

The requester requested to search for the following items:
_____

The requester wanted to search for the items at/in following place(s) or upon the following person:
_____

Why does the requester believe that what he/she wants to search for is located at the place(s) he/she wishes to search? (Indicate here a narrative of the information the requester presents. If an affidavit is attached, indicate only information that is not contained in the affidavit. Use "Fact Notes" sheets to detail information.)

_____
_____
_____
_____
_____
_____

Documents or reports **were/were not** reviewed in making my decision. The names of the items I reviewed **are/are not** listed on reverse. I **did/did not** initial all pages of documents I reviewed.

Probable cause to search exists when there is a reasonable belief that the property, or evidence sought is located in the place or on the person to be searched.

The request was **approved/disapproved/approved with the following modifications:**_____.

A written search authorization **was/was not** executed.

Encl 9 (Military Magistrates SOP)

Checklist for Review of Pretrial Confinement

1. Is the confinee subject to the UCMJ?

2. Was the confinee confined by order of a commissioned officer of the Armed Forces?

3. Was the confinee previously confined for the same offense(s) and released by any person authorized under R.C.M. 305(g)?

4. Did the confinee's commander decide within 72 hours of ordering the confinee into pretrial confinement, or receipt of a report that a member of his unit was confined, whether pretrial confinement would continue?

5. Did the commander prepare a memorandum of his reasons for approving continued pretrial confinement?

6. Has a charge sheet been prepared?

7. Is the confinee charged only with an offense normally tried by summary court-martial?

8. Did the confinee have or request military counsel prior to this review or meeting with the prisoner?

9. Was the confinee's counsel informed of the date, time and place of any meeting with the prisoner?

10. Has the confinee been informed of:

a. The nature of the offenses for which held;

b. The right to remain silent and that any statement made by the confinee may be used against the confinee;

c. The right to retain civilian counsel at no expense to the United States, and the right to request assignment of free military counsel; and

d. The procedures by which continued pretrial confinement will be reviewed?

11. Is there a reasonable belief that:

a. An offense triable by court-martial has been committed;

b. The confinee committed it; and

c. Pretrial confinement Is required?

12. Has a written memorandum of the decision to approve continued pretrial confinement or order immediate release, including the factual findings upon which they were based, been prepared?

13. Have the confinee and the commander been informed of the decision?

14. Has a copy of the memorandum of the decision with all documents considered been kept on file?

Encl 11 (SOP for Military Magistrates)

List of nonexclusive factors to consider in determining whether continued PTC is warranted		
Factor	**Discussion**	**Magistrate's Notes**
The nature and circumstances of the offenses charged or suspected, including extenuating circumstances.	The more serious the offense(s), the more likely it may be the confinee might want to avoid prosecution	
The weight of the evidence against the confinee	The more likely there will be a conviction, the more likely it may be the confinee might avoid trial	
The confinee's ties to the community, including house, family, off-duty employment, financial resources, and length of residence	Where is home? What does the confinee have to gain or lose by leaving the area?	
The confinee's character and mental condition.	Law abiding? Follows orders? Violent? Peaceful? Stable?	
The confinee's service record, including any record of previous misconduct. Consider counseling statements if part of the commander's packet.	If the unit is to use conditions on liberty, those conditions are often enforceable only by moral suasion on the confinee. Is the confinee the kind of Soldier that follows orders?	
Has the confinee been disciplined before? How did (s)he respond to corrective action?	Soldiers who respond favorable to corrective action are less likely to engage in future misconduct.	
The confinee's record of appearance at or flight from other pretrial investigations, trials and similar proceedings.	Is there evidence the confinee has missed appointments or hearings?	
The likelihood the confinee can and will commit further criminal misconduct if allowed to remain at liberty pending trial?	This is a combination of a lot of other factors.	

What other forms of restraint have been tried, if any, and found to be ineffective?	The commander is not required to actually try lesser forms of restraint but the magistrate should not continue confinement unless lesser forms of restraint won't work. If the unit has tried lesser forms of restraint, how did the confinee respond to them?	
If AWOL before being confined, how did the confinee come under military control and how long was the absence?	Was the AWOL terminated by apprehension or did the confinee turn himself in. Is there evidence the AWOL was a desertion or just cold feet.	
Does the confinee have a history of AWOL, desertion, FTRs?		

List of nonexclusive factors that might indicate whether the confinee may or may not interfere with trial preparation or obstruct justice		
Factor	**Discussion**	**Magistrate's Notes**
Does the case depend mainly on witness testimony rather than documentary or physical evidence?	Documents don't change. Witnesses can.	
Are the witnesses members of the confinee's unit, live in the confinee's barracks or have a common place of duty with the confine?	Does the confinee have access to the witnesses?	
What is the confinee's reputation, if any, for violence, bribery or false statements.		
Is there reliable information demonstrating threats or acts of violence against witnesses by or at the behest of the confinee?		
Has the confine violated conditions of any previously established no contact or protective orders.		

DAPM-ACC 13 Dec 11

MEMORANDUM FOR RECORD

SUBJECT: Department of Army Confinement Procedures Checklist

1. IAW AR 190-47, based on operational requirements and programs, Army Corrections Command (ACC) will determine place of incarceration for all Army prisoners who are sentenced to confinement beyond 30 days. Notification of summary C/M's remaining in local contract jails is required, including the required confinement documents and confinement checklist. Local contract jails may not be used to confine adjudged prisoners beyond 30 days without prior approval from ACC.

2. The enclosed checklist is required for any Courts-Martial resulting in a sentence to confinement and will be completely filled out by the primary SJA POC/representative. All required documents will be scanned and emailed to Mike Chvojka/ michael.t.chvojka.civ@mail.mil, Laura Mitchell/laura.l.mitchell.civ@mail.mil or Larry Kester/ larry.j.kester.civ@mail.mil or faxed to DSN 328-7722/COM 703-428-7722 (do not e-mail or fax the MPR and ROI. They will be hand carried by escorts).

3. Reassignment orders: Soldiers who receive a sentence of 121 days or more confinement without a punitive discharge/dismissal, or adjudged a punitive discharge/dismissal will be administratively assigned to the appropriate PCF with confinement at the designated correctional facility IAW AR 600-62, Para 3-12. For those prisoners that do not meet the criteria for reassignment the commander/1SG contact information is required (e-mail, phone, and address).

4. The transfer date is coordinated with ACC and the SJA representative/losing unit. The transfer date is not an on or about date. It is the expected arrival date. If the unit is unable to complete the mission on the designated date, ACC or the gaining facility needs to be notified immediately. Before conducting the actual transfer of the prisoner(s), the losing unit or SJA representative will contact the gaining ACC facility and provide the escorts information as well as their travel itinerary. SJA will provide the escorts with the checklist and all required documents to be hand carried to the gaining facility. It is highly encouraged that unit commanders contact the installation PMO for escorting instructions/assistance for high risk/special management prisoners.

5. ACC Points of contact be Mike Chvojka, 703-428-7701, DSN: 328-7701, Laura Mitchell, 703-428-7705, DSN: 328-7705 or Larry Kester 703-428-7713, DSN 328-7713.

Encl
Confinement Procedures Checklist

GREGORY J. STROEBEL Operations Chief
Army Corrections Command

Confinement Procedures Checklist

DD Form 2704 (MAR 1999) V/W _____
Initials

DA Form 4430 (MAY 2010) Result of Trial _____
Initials

DD Form 2707 (SEP 2005) Confinement Order _____
Initials

DD Form 458 (MAY 2000) Charge Sheet _____
Initials

Report of Investigation (CID Report) (EMAIL ONLY/DO NOT FAX) _____
Initials

ERB/ORB _____
Initials

Pre-Trial Agreement (if any) _____
Initials

Age of prisoner _____

Is the prisoner currently in pretrial confinement, if so where? _____

Gender: M__F__

Any previous disciplinary actions? Y__ N__

Were alcohol or drugs a contributing factor in this case? Y__ N__

Is the prisoner currently under a Doctors' care? Y__ N__

(If so, list name and phone number of Health Care Provider)

Does the prisoner have any current or ongoing medical problems or require special medical equipment? Y__ N__

Are there any mental health problems, i.e.: suicidal/homicidal/homosexual/ assaultive thoughts or tendencies or a history of mental health problems? Y__ N__

Does the prisoner have any PTSD related issues? Y__ N__

Has the prisoner assaulted or threatened any staff or other prisoners? Y__ N__

List names of non-psychotropic medications prescribed for prisoner and daily dosages if applicable _____

List names of psychotropic medications prescribed for prisoner and daily dosages if applicable _____

How many days medication supply will prisoner have on hand upon arrival? _____
Is the prisoner an escape risk? Y__ N__ (If yes, explain why)

_____
_____

Was DNA sample collected? ___Y ___N (If yes, include test kit#) _____

Is there any additional information that should be known about this prisoner?

(If so, list it here) _____

Any additional remarks, comments, or concerns:

_____
_____
_____
_____

Requested move date: _____

Prisoner's UIC: _____

Primary SJA POC: _____

SJA POC legible name

_____

Phone number/Commercial or DSN

_____

Phone number/Cell

_____

Email address

_____

SJA POC legible signature

Appendix B
Case Preparation Tools

Elements and Evidence Matrix

CHARGE ___, Specification ___: ARTICLE ___				
	ELEMENT	EVIDENCE	PROOF PROBLEMS / DEFENSES	ISSUES / ADMISSIBILITY
1				
2				
3				
4				
5				
6				
7				

CHARGE ___, Specification ___: ARTICLE ___				
	ELEMENT	EVIDENCE	PROOF PROBLEMS / DEFENSES	ISSUES / ADMISSIBILITY
1				
2				
3				
4				
5				
6				
7				

Objection Planning Worksheet

Anticipated Objections to Adversary's Evidence

Witness / Exhibit	Evidence	Objection	Grounds (Rule / Statute / Case Law)	Limited Admission	Curative Instruction

Anticipated Objections to be Made by Adversary

Witness / Exhibit	Evidence	Objection	Grounds (Rule / Statute / Case law)	Response to Objection	Other Sources of Evidence	Offer of Proof	Limited Admission

Pretrial Evidentiary Motions

Motions in Limine	Anticipated Ruling	Alternative Way to Introduce / Oppose Evidence

Argument Worksheet

Legal element:
Factual claim:
Most Probative Evidence:
Generalization:
Especially when: •

•   •   •   •   •
Except when: •   •

Sample Argument Worksheet

Legal element: (2007 Art. 120) Mistake of fact cannot be based on the negligent failure to discover the true facts
Claim: SGT Archie should have at least said, “”Huh?” after he heard, “I don’t want to do this.”
Most Probative Evidence: SGT Archie did not stop when he heard that.
Generalization: If a man is trying to have sex with a woman and she says, “I don’t want to do this,” the man will almost always say, “Huh” or try to talk her into it.
Especially when: • This is the first time they are having sex. • They don’t really know each other very well. • She just said, “This is a bad idea.” • She did not invite him up. • She has a boyfriend and doesn’t want to cheat on him. • She did not initiate the kissing. • She did not do any other foreplay.
Except when:

- Her other behaviors indicate she meant the opposite (grinding).
- The tone in her voice indicated she meant the opposite.
- What she meant was, “Because my boyfriend will find out.”
- She doesn’t care about cheating on her boyfriend.

Sentencing Argument Worksheet

Opening (why any sentence more than X would be unjust):
Extenuation (what facts explain why the client did this, and why those facts support your proposition that X sentence is just): • • • •
Rehabilitation (what facts indicate which sentence will best rehabilitate the client, and why those facts support your proposition that X sentence is just) • • • •
Specific deterrence (what facts indicate whether or not society needs to be protected from your client, and why the facts support your proposition that X sentence is just) •

•   •   •
General deterrence (what facts indicate that this punishment (if any) will prevent others from doing this, and why the facts support your proposition that X sentence is just):   •   •   •   •
Social retribution (what facts indicate the moral weight of this crime, and why those facts support your proposition that X sentence is just):   •   •   •   •
Mitigation (what facts about the client call for mercy, and why those facts support your proposition that X sentence is just):   •   •   •

•
Closing (why any sentence more than X would be unjust):

Appendix C
Witness Preparation

Witness Worksheet

Name: Date:

Rank/MOS: Witness:

Unit: Dates Unavailable:

Service History:

Interview:

Credibility Checklist

KNOWLEDGE	
Intelligence	
Ability to observe	
Ability to accurately record	
Authority to engage in the observing conduct	
Reason to engage in the observing conduct	
BIAS (can be proved by extrinsic evidence)	
Friendships	
Prejudices	
Relationship to other side of case	
Manner in which witness might be affected by the verdict	
Motive to misrepresent	
RELATIONSHIP TO OTHER EVIDENCE	
Consistent with what evidence?	
Inconsistent with what evidence?	

Important inconsistency?	
OTHER	
Sincerity	
Character for truthfulness (Can anyone attack it with specific instances on cross? If adverse, who can I call to attack it?)	
Conduct in court	

Witness Checklist

Final Interview

1. Explain the theory of the case and where the witness fits in.

2. Have witness read previous statements.

    a. Is anything misleading? Errors? Do you remember differently now?

    b. Explain impeachment, rehabilitation, refreshing recollection, past recollection recorded.

3. Revisit scene, if necessary.

4. Have the physical evidence in the interview.

    a. If sealed containers, have DC send a representative if necessary.

5. Rehearse.

6. It is okay to talk to the other lawyer. Tell the truth.

Checklist

1. General:

    a. Wear all badges and decorations.

    b. When outside the courtroom, be serious and polite. Don't discuss the case. Don't speak to other court members.

    c. How to take the stand.

    d. Taking the oath

e. Be serious but pleasant.

f. Look at the person asking the question.

g. Be silent and wait if anyone objects or interrupts.

2. Direct:

a. Opening questions will be basic stuff. Relax, panel can size you up.

b. Listen carefully to all questions.

c. If you don't understand, say so and ask for clarification.

d. Talk in paragraphs.

e. Don't memorize – testify from memory.

f. Explain what you saw, rather than drawing conclusions (he was red, slammed fist into wall rather than he was angry)

g. Don't volunteer information.

h. If an estimate, say so. Time and distance is often off.

i. Don't exaggerate or make overly broad generalizations.

j. If an answer is incorrect or incomplete, correct immediately.

3. Cross-Examination:

a. You are not on trial – won't expose every bad thing you have done.

b. Tell the truth.

c. Be firm but polite. Be confident. Just explain what you know.

d. No sarcasm.

e. Don't try to outwit the other attorney.

f. Don't be bullied into a yes or no answer if the question can't be answered by yes or no.

g. If you need to explain, explain, but don't volunteer information.

h. Don't be afraid of silence. Wait for the next question.

i. Correct any mistakes immediately.

j. If you don't know, say so. There is nothing wrong with not knowing.

k. I can conduct redirect. This isn't your only chance.

l. Don't look at me if you get in trouble. Look at the judge.

4. Last:

a. Is there anything else I should know?

b. I'm only interested in the truth.

Expert Witness Checklist

Name: **Date:**

Business/Occupation	
What	
How long	
Capacity	
Description of field	
Company/Organization	
Where located	
Prior positions	
Descriptions of positions	
Total time practicing in field	
Education	
Undergraduate (Degree, when)	
Field of study	
Graduate (Degree, when)	

Field of study	
Postgraduate	
Field of study	
Training	
Formal courses (what, when)	
Training under recognized expert (who, when, how long)	
Licenses	
What	
When reviewed	
Speciality certifications	
Exams required	
When	
Requirements	

Professional Associations	
What	
Positions held	
Other background	
Teaching positions	
Publications	
Lectures	
Consulting work	
Experience at trial	
How many	
Which sides	
Experience in speciality required for this case	
Has this theory/technique been tested?	
Has it been subject to peer review?	
Error rate?	
Has the scientific community accepted the theory/technique?	

Appendix D
File Organization Tools

Trial Notebook Index

CHARGE SHEET AND ALLIED PAPERS

1. Charge Sheet
2. Convening Order
3. Art. 32
4. SJA Pretrial Advice and Transmittals

ELEMENTS OF PROOF CHECKLIST

5. Trial Counsel Memo

MOTIONS

6. Defense Notice of Motion and Motion
7. Government Response
8. Witnesses
9. Research

DISCOVERY AND DISCLOSURE

10. Section III Disclosure
11. Government Requests/Defense Response
12. Defense Requests/Government Response

WITNESSES

13. Government List
14. Defense List
15. Defense Production Requests/Government Response

SENTENCING

16. Pretrial Agreement/Quantum
17. Notice of Plea and Forum Selection
18. Stipulation of Fact and Expected Testimony
19. Government Sentencing Witnesses
20. Defense Sentencing Witnesses
21. MILITARY PAY CHART
22. PRETRIAL ORDER/DOCKET NOTIFICATION

Case Action Log

US v. _____

VIII. DATE	TIME	SUMMARY OF ACTION/ACTIVITY

Page: ____

Trial Defense Service
Courts-Martial Packet Standard Organization

1st Flap (Inside Front Cover)

- DC Checklist
- Elements and Evidence Worksheet
- Case Info Sheet
- Case Suspense Log
- Action Log
- Motions Checklist
- Acknowledgement of Rights Advisement
- Client Questionnaire
- Personal Financial Statement
- Post-Trial and Appellate Rights (GCM or BCD)
- Detailing Order & Release of Military Defense Client
- Attorney Work Product

2rd Flap

- Charge Sheet
- Transmittal
- Vice Order(s)
- Convening Order
- Pre-Trial Confinement
- Discharge/Resignation in Lieu of Court-Martial
- Pre-trial Agreement & Stipulation of Fact
- Immunity
- Sanity Board & Mental Health

3rd Flap

- Discovery
- Motions
- Delays
- Communication between Counsel

4th Flap

- Article 32

5th Flap

- Client's Records
- OMPF
- ERB/2-1 & 2A
- SMIF

6th Flap (Inside Back Cover)

- Witness Statements
- Law Enforcement Reports
- Other Documentary Evidence

Case File Setup

Flap	Items
1:	**ALL WORK PRODUCT (on top: TC checklists & work log)**
2:	**Charge sheet (always on top); transmittals; CMCOs**
3:	**Closed legal documents**
4:	**Open legal documents**
5:	**Documentary evidence, including statements**
6:	**Post-trial documents**

Appendix E
Defense Client Advice

DCAP FORM 1 (SEX OFFENDER REGISTRATION ADVICE)

Instructions for Using the Sex Offender Registration Advice Form

(This page is for Defense Counsel use and need not be given to the accused.)

Using this form is required by *U.S. v. Miller*, 63 M.J. 452 (C.A.A.F. 2006) and DODI 1325.7.

Prior to trial, if the accused is charged with any offense that is listed in the enclosure to the form, have the accused read the form, answer any questions, and have the accused sign it. Counsel will also sign and provide the accused a copy for his records.

If the accused intends to plead guilty to any offense that may require sexual offender registration, it is essential this form be executed *before* the offer to plead guilty is submitted so the accused knows the consequences of his plea. Because of the impact of sex offender registration, it could have a great impact on the decision whether to plead guilty to a qualifying offense. If there is no pretrial agreement, the advice must be executed before the plea is entered.

Have a signed copy of the form available at trial to mark as an Appellate Exhibit. The Military Judge's Benchbook includes an inquiry whether the accused has been so advised.

Because state and territorial laws are so diverse, and where the accused may reside, carry on a vocation, or go to school is uncertain, trial defense counsel should be very cautious on giving advice that an offense is not covered or the exact procedures to register other than "check with local authorities for registration requirements." In other words, even if the offense is not listed on the enclosure, a State or territory may still require sex offender registration. Counsel should not guarantee what a state law may require because some requirements are unpublished and the potential registrant must check with state authorities first. The Coast Guard Court of Criminal Appeals wrote about the dangers of telling a client he would not have to register as a sex offender only to later discover a State had registration requirements that were not generally known despite counsel's researching the issue. *See United States v. Molina*, 68 MJ 532 (C.G.C.C.A. 2009).

Trial Defense Counsel may wish to have the following article available as a list of state points of contact: *Sex Offender Laws and the Uniform Code of Military Justice: A Primer*, The Army Lawyer, August 2009, (hosted on the DCAP Portal in the Army Lawyer articles section).

Also, remember to ensure the accused is advised in writing of his post-trial and appellate rights.

Disposition of original and copies. (This includes both the signed form and the enclosure.)

- Original: For inclusion into record of trial.
- Copy to accused.
- Copy for defense counsel case file.

This form, and the post-trial and appellate rights advisement form, are on the DCAP Portal in the DC101 – Quick Links References (Post-Trial).

References: DODI 1325.7; 42 USC § 16912, 14071, 16991; 18 USC § 2250; U.S. v. Miller, 63 M.J. 452 (C.A.A.F., 2006); Chapter 24, AR 27-10; and DoD Memorandum "Sexual Offense Reporting Requirements," dated Nov 16, 2009.

Advice Concerning Requirements to Register as a Sex Offender

General Information: Under Federal law, DoD Instruction 1325.7, and Army Regulation 27-10, those who have been convicted of any offense listed on the attached page must register with the appropriate authorities in the jurisdiction (State, District of Columbia, Commonwealth of Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, the United States Virgin Islands, and Indian Tribal lands) in which they reside, carry on a vocation, or attend school. Generally, this registration must take place within three days of release from confinement or within three days of conviction if not confined. This requirement exists regardless of whether the service member remains in the Army or is separated. If the service member remains in the military, registration with the installation Provost Marshal is also required.

Advice to Client: Registration as a sex offender is accessible by the public, and I understand that I may encounter substantial prejudice from being classified as a sex offender.

Because each State's laws or territorial laws are different and can be changed or interpreted differently, it will be my responsibility to determine the registration requirements where I reside, carry on a vocation, or am a student to determine the requirements. It is a violation of law to fail to register as a sex offender if the law requires me to do so.

The offenses which commonly require registration as a sex offender are very broad and include, as a minimum, those listed on the enclosure. State or territorial law may be even broader.

I have discussed the above matters with my defense counsel.

I have read and understand the contents of this form and the enclosure and have been provided a copy of them.

_____	_____
Name of Defense Counsel providing advice	Defense Counsel's signature
_____	_____
Accused's Rank and Name	Accused's signature
	Date signed: _____

One enclosure

1. List of reportable offenses

List of Reportable Offenses

Offenses committed before 1 October 2007
Rape or carnal knowledge, Article 120
Forcible sodomy or sodomy of a minor, Article 125
Conduct unbecoming an officer that involves any sexually violent offense or a criminal offense of a sexual nature against a minor or kidnapping of a minor, Article 133.
Prostitution or pandering involving a minor, Article 134
Indecent assault, Article 134
Assault with intent to commit rape or sodomy, Article 134
Indecent act with a minor, Article 134
Kidnapping of a minor by a person not a parent, Article 134
Pornography involving a minor, Article 134
Conduct prejudicial to good order and discipline involving any sexually violent offense or a criminal offense of a sexual nature against a minor, Article 134
Assimilated Crimes Act conviction under federal or state law of a sexually violent offense or a criminal offense of a sexual nature against a minor or kidnapping of a minor, Article 134
Any attempt (Article 80), solicitation (Article 82), or conspiracy (Article 81) to commit any of the above offenses, and violations of Article 133, UCMJ, that involve any of the above offenses.

(One must check with local authorities where they reside, carry on a vocation, or attend school to determine whether state registration requirements include other offenses not listed below.)

Offenses committed on or after 1 October 2007
Any violation of Article 120
Forcible sodomy or sodomy of a minor, Article 125
Assault with intent to commit rape or sodomy, Article 134
Pornography or prostitution involving a minor, Article 134
Kidnapping of a minor by a person not a parent, Article 134
Conduct unbecoming an officer that describes conduct set out in any provision of this table, Article 133
Article 134 convictions under clauses one or two (prejudicial to good order and discipline or service discrediting) or clause three (Assimilative Crimes Act for violations of state or federal law) that (1) has an element involving the sexual contact with another; (2) involves kidnapping of a minor (except by a parent of the minor); (3) involves false imprisonment of a minor (except by a parent of the minor); (4) involves solicitation of a minor to engage in sexual conduct; (5) involves the use of a minor in a sexual performance; (6) involves video voyeurism of a minor as described in 18 U.S.C. § 1801; (7) involves possession, production, or distribution of child pornography; (8) involves criminal sexual conduct involving a minor, or use of the internet to facilitate or attempt such conduct; or (9) or any conduct that by its nature is a sex offense against a minor.
Article 134 convictions under clause three (Assimilative Crimes Act) under the following provisions of 18 U.S.C.: sections 1152 & 1153 (assimilating federal and state law as to Indian lands); section 1591 (sex trafficking of children); Chapter 109A (sexual abuse) ; Chapter 110 (sexual exploitation and other abuse of children) except §§ 2257 and 2257A (record keeping requirements) and 2258 (failure to report child abuse); and Chapter 117 (transportation for illegal sexual activity and related crimes.)
Any attempt (Article 80), solicitation (Article 82), or conspiracy (Article 81) to commit any of the above offenses, and violations of Article 133, UCMJ, that involve any of the above offenses.
NOTE: Notwithstanding the above listed offenses, an offense involving consensual conduct between adults is not reportable by federal authorities unless the adult victim was under the custodial authority of the offender at the time of the offense, *but the purported offender should check state registration requirement which may include similar offenses not in this table.*
NOTE: Notwithstanding the above listed offenses, an offense involving consensual conduct is not reportable by federal authorities if the victim was at least 13 years old and the offender was not more than four years older than the victim (as determined by dates of birth), *but the purported offender should check state registration requirement which may include similar offenses not in this table.*

DCAP FORM 2 (ADVICE TO NON-US CITIZENS OR NATIONALS)

Advice to Clients who are not U.S. Citizens or Nationals

Members of the Trial Defense Service do not have training on the very specialized area of immigration law. However, based on our discussions, it appears that you are neither a U.S. citizen nor national and that you have been charged with an offense, or offenses, that may have an effect on your immigration status if you plead guilty or are found guilty.

Those consequences are that you could be:

1. Deported or removed from the United States.
2. Denied citizenship or naturalization should you apply.
3. Denied reentry into the United States.

Depending on the immigration status and citizenship or nationality of your spouse or children, if any, their immigration status could be affected if it is dependent on yours. The same is true if you have any relatives or other persons whose immigration status is dependent on yours.

We are unable to predict if the United States will or will not take action adverse to your immigration status as described above, but you are advised that is a very real possibility.

If you have more detailed or specific questions, you are encouraged to consult with an attorney who practices in the area of immigration law. Your defense counsel has already determined if there are other Judge Advocates who are immigration attorneys or if the Staff Judge Advocate's legal assistance office has a list of civilian attorneys who practice in this specialty. If so, that information has been provided to you.

_____	_____
Printed name of Defense Counsel	Signature of Defense Counsel
_____	_____
Printed name of Accused	Signature of Accused
_____	
Date	

Appellate Exhibit _____

DCAP FORM 3 (POST TRIAL AND APPELLATE RIGHTS ADVISEMENT)

Instructions *to counsel* for using this form.

DCAP Form 3, (13 May 2010)

(Post Trial and Appellate Rights Advisement)

Do not use other Post Trial and Appellate Rights Advisement Forms

Prior to trial in any Special Courts-Martial or any *non-capital* General Courts-Martial, provide the accused this form, have the accused read it, answer any questions, have the accused make his elections, and have the accused sign the form.

A signed copy of this form should be retained in counsel's records and a signed copy provided to the accused. The original signed copy will be available at trial to be made into an Appellate Exhibit.

If the accused has been charged with any sex offense or offense involving a minor, also have the accused execute DCAP Form 1, "Advice Concerning Requirements to Register as a Sex Offender." (See DCAP Sends 3-31). Instructions for use of that form are included with the form itself.)

With regard to the options in paragraph 12b, it is recommended that in most cases, the accused not elect to have substitute service. See DCAP Sends 4-8; "Substitute Service, Just Say 'No.'" (15 April 2010). In most cases, option 12b(3) is the best.

If the accused is neither a U.S. citizen nor a national of the United States, it will be necessary for the defense counsel to give advice to alien accused, DCAP Form 2. See also the "Advice to Alien Client" section on the DCAP Portal.

In those rare instances where an accused may wish to waive appellate rights, have the accused also execute DD Form 2331.

This form is far more detailed than its superseded predecessor, and there are more choices for the accused to make. Take your time in executing this form.

These instructions are NOT part of the form, need not be given to the accused, and should not be offered as an Appellate Exhibit

U N I T E D S T A T E S	)	
	)	Post Trial and Appellate Rights Advisement
v.	)	
	)	Special Courts-Martial
	)	*and*
SOLDIER'S NAME	)	General Courts-Martial (non-capital)
RANK	)	
UNIT	)	
U.S. Army	)	

The accused is to initial where there is a ____ and where indicated, either provide information or strike out inapplicable language.

I am the accused whose name appears above. I certify that my trial defense counsel has advised me of the following post-trial and appellate rights in the event that I am convicted of a violation of the Uniform Code of Military Justice.

1. In exercising my post-trial rights, or in making any decision to waive them, I am entitled to the advice and assistance of military counsel provided free of charge or civilian counsel provided at no expense to the government.

2. After the record of trial is prepared, the convening authority will act on my case. The convening authority can approve the sentence adjudged (as limited by any pretrial agreement), or he can approve a lesser sentence, or disapprove the sentence entirely. The convening authority cannot increase the sentence. He can also disapprove some or all of the findings of guilty. The convening authority is not required to review the case for legal errors, but may take action to correct them.

3. Under Rules for Court-Martial 1105 and 1106, I have the right to submit any matters to the convening authority that I wish him to consider in deciding what action to take in my case. These matters include, but are not limited to, a personal statement, personal letters and documents, letters and documents from any other person, requests for deferment and waiver of forfeitures, and any other matter I desire the convening authority to consider before taking action in my case.

a. Before the convening authority takes action, the staff judge advocate will submit a recommendation to the convening authority. This recommendation will be sent to me and/or my defense counsel before the convening authority takes action.

b. If I have matters that I wish the convening authority to consider, or matters in response to the staff judge advocate's recommendation, such matters must be submitted within 10 days after I receive a copy of the record of trial or the recommendation of the staff judge advocate, whichever occurs later. If I authorize substitute service in accordance with paragraph 12 of this form, the 10 day period begins to run after my counsel receives the record of trial or the staff judge advocate's recommendation, whichever occurs later.

c. Upon my request, the convening authority may extend this period, for good cause, for not more than 20 days.

d. I understand that I must work with my defense counsel to assist him/her in collecting and preparing those matters I want to be submitted to the convening authority, and in that regard I must remain in contact with my defense counsel even after my case has been tried.

___ e. **(Strike through inapplicable portions)**. I *(authorize) (do not authorize)* my defense counsel to submit matters pursuant to RCM 1105 and 1106 on my behalf in the event that he is unable to contact me after making reasonable efforts to find me, or if I fail or am unable to provide matters to my defense counsel within the time frames set out above.

4. If the convening authority approves an adjudged punitive discharge (dismissal for officers; bad-conduct or dishonorable discharge for enlisted soldiers) or confinement for one year or longer, my case will be automatically reviewed by the Army Court of Criminal Appeals (ACCA). I am entitled to be represented by counsel before such court. If I so request, military counsel will be appointed to represent me at no cost to me. If I so choose, I may also be represented by civilian counsel at no expense to the United States.

5. After the ACCA completes its review, I may petition the United States Court of Appeals for the Armed Forces (CAAF) to review my case. If that Court grants my petition, I may request review by the Supreme Court of the United States. I have the same rights to counsel before those courts as I have before the ACCA. If I am pending an approved dishonorable or bad-conduct discharge it may only be ordered executed after completion of the appellate process in accordance with Rule for Court-Martial 1209, unless I waive appellate review.

6. ***THIS PARAGRAPH IS APPLICABLE TO ONLY GENERAL COURTS-MARTIAL***. If the convening authority approves no punitive discharge and approves confinement for less than a year, my case will be examined in the Office of The Judge Advocate General for any legal errors and to determine if the sentence is appropriate. The Judge Advocate General (TJAG) may take corrective action as appropriate. This mandatory review under Article 69(a), UCMJ, will constitute the final review of my case unless TJAG directs review by the ACCA.

7. ***THIS PARAGRAPH IS APPLICABLE TO ONLY SPECIAL COURTS-MARTIAL***. If the convening authority approves no punitive discharge and approves confinement for less than a year, my case will be examined by a legal officer for any legal errors and to determine if the sentence is appropriate. The convening authority may take corrective action as appropriate. This mandatory review will constitute the

final review of my case, however pursuant to Article 69(b), UCMJ, I may seek review by The Judge Advocate General within two years of action being taken in my case.

8. I may waive or withdraw review by the appellate courts. I understand that if I waive or withdraw review:

a. My decision is final and I cannot change my mind.

b. My case will then be reviewed by a military lawyer for legal error. It will also be sent to the general court-martial convening authority for final action.

c. Within two (2) years after the sentence is approved, I may request The Judge Advocate General (TJAG) to take corrective action on the basis of newly discovered evidence, fraud on the court-martial, lack of jurisdiction over me or the offense, error prejudicial to my substantial rights, or the appropriateness of the sentence.

9. I understand that any period of confinement included in my sentence begins to run from the date the court-martial adjudges my sentence. I may request that the convening authority defer commencement of confinement. The decision to defer confinement is within the sole discretion of the convening authority.

10. Adjudged forfeitures and reduction in rank.

a. Any forfeitures adjudged in my case are effective 14 days after the sentence is adjudged or when the convening authority takes action, whichever occurs first, unless adjudged forfeitures are deferred. If forfeitures are adjudged at the court-martial, I understand that I may petition the convening authority to defer them until action and to disapprove, mitigate, or suspend them at action.

b. Adjudged reduction (enlisted personnel only). Any reduction in rank adjudged in my case is effective 14 days after the sentence is adjudged or when the convening authority takes action, whichever occurs first, unless the reduction is deferred. If a reduction is adjudged at the court-martial, I understand that I may petition the convening authority to defer a reduction in rank until action and to disapprove or suspend it at action.

11. Automatic forfeitures. I understand that by operation of Article 58b of the Uniform Code of Military Justice, any sentence which includes confinement for more than 6 months, or confinement for 6 months or less and a punitive discharge, will result in automatic forfeitures even if no forfeitures are adjudged. In the case of a General Court-Martial, automatic forfeitures are for all pay and allowances. In a Special Court-Martial, the automatic forfeitures are for two-thirds of pay. Automatic forfeitures go into effect 14 days after my sentence is adjudged or when the convening authority takes action, whichever occurs first.

____ a. I understand I may petition the convening authority to defer adjudged or automatic forfeitures, if any, until the time of final action, but such relief is solely within the discretion of the convening authority, who may rescind deferment at any time.

____ b. I understand that if I reach my ETS date while I am in confinement all my pay and allowances will stop on my ETS date, even if a request for deferment or waiver of automatic forfeitures is granted.

____ c. I further understand that if I reach my ETS date while I am in confinement all my pay and allowances will stop on my ETS date, even if a request for deferment or disapproval of adjudged forfeitures is granted.

____ d. *(Applicable if accused has a pretrial agreement).* I further understand that if I reach my ETS date while I am in confinement all my pay and allowances will stop on my ETS date, regardless of what is in my pretrial agreement.

12. I have read and had my post-trial rights explained to me by counsel and I acknowledge these rights and make the elections set forth below.

____ a. I understand my post-trial and appellate review rights.

____ b. I understand that a copy of the authenticated record of trial will be served on me, or if I so request, will be forwarded to my defense counsel pursuant to RCM 1104(b).

Select only one of the following three numbered options. Option (3) is the recommended best option in most cases.

____ (1) I want the record of trial sent to only me; ***or***

____ (2) **(Indicate counsel.)** I want the record of trial forwarded to my defense counsel, _____; ***or***

____ (3) **(Indicate counsel.)** I want the record of trial sent to me AND I request that my defense counsel _____ be provided a copy at the same time I receive my copy in order to expedite preparation of post-trial matters.

_____ c. I further understand that individual copies of the staff judge advocate's post trial recommendation will be served on me and my defense counsel pursuant to RCM 1106(f).

_____ d. **(Indicate counsel.)** My defense counsel, _____, will submit R.C.M. 1105 and 1106 matters in my case if I desire. I further understand that I must stay in contact with this counsel to assist him in collecting and preparing the matters for submission.

_____ e. **(Strike through inapplicable portions.)** I *(do) (do not)* want to request deferment of automatic and adjudged forfeitures.

_____ f. **(Strike through inapplicable portions – Enlisted personnel only.)** I *(do) (do not)* want to request deferment of an adjudged reduction in rank.

____ g. **(Strike through inapplicable portions.**) If I have financial dependents, I may request the convening authority waive any or all automatic forfeitures of pay and allowances, to be paid to my dependents during any period of confinement or parole not to exceed six (6) months. I (*do*) (*do not*) have DEERs **(**Defense Enrollment Eligibility Reporting System**)** enrolled dependents. If applicable, I (*request*) (*do not request*) my defense counsel to petition the convening authority to waive automatic forfeitures for the benefits of my dependent(s). If the waiver is granted, I understand that the amounts that would be automatically forfeited will be paid to my dependents.

____ h. **(Strike through inapplicable portions).** If sentenced to confinement, I *(want my defense counsel to request deferment of confinement) (do not want my defense counsel to request deferment of confinement) (will decide later, and inform my defense counsel, if I desire deferment of confinement).*

13. **(Strike through inapplicable portion.**) If applicable, I *(do) (do not)* want to be represented before the Army Court of Criminal Appeals by Appellate Defense Counsel appointed by The Judge Advocate General (TJAG) of the Army. I understand that I may contact my Appellate Defense Counsel by writing to Defense Appellate Division, U.S. Army Legal Services Agency (JALS-DA), 901 North Stuart Street, Arlington, Virginia 22203-1837.

____ I have been informed that I have the right to retain civilian counsel at my own expense to represent me in my appellate decisions. If I have already retained civilian counsel, his/her name and address is written below:
_____

_____

____ If I later retain civilian counsel, I must provide the attorney's name and address to: Clerk of Court ATTN: Chief Paralegal, The U.S. Army Court of Criminal Appeals, 901 North Stuart Street, Suite 1200 Arlington, Virginia 22203-1837.

Phone: (703) 588-7922 DSN: 425-7922

FAX: (703) 696-8777 DSN: 426-8777

E-Mail: linda.erickson@hqda.army.mil

14. Pending action on my case, I can be contacted or a message may be left for me at the following address:

NAME: _____

STREET: _____

CITY/ STATE / ZIP CODE: _____

AREA CODE / TELEPHONE NUMBER: _____

EMAIL ADDRESS: _____

CIVILIAN / PERMANENT EMAIL ADDRESS: _____

PERSONAL CONTACT: _____

Date: _____

SOLDIER'S NAME
RANK, US Army
Accused

I certify that I have advised the accused whose name appears above regarding his/her post trial and appellate rights as set forth above, that he/she has received a copy of this document, and that he/she has personally made all the elections herein.

Date: _____

DEFENSE COUNSEL NAME
____, JA
Defense Counsel

Summary Courts Rights Advisement

DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
ADDRESS

REPLY TO
ATTENTION OF:

OFFICE SYMBOL DATE

MEMORANDUM FOR RECORD

SUBJECT: Summary Court-Martial Rights Advisement

1. ____ I, CLIENT NAME, the accused in a case which has been or will be referred to trial by court-martial, hereby acknowledge that I was advised by ATTY of the following:

a. ___ I was told that there exists an attorney-client relationship between myself and my counsel which gives me a privilege and incentive to discuss everything I know about the charges with my counsel. Failure to disclose all information I know about the case will make it difficult for my attorney to represent me to the fullest. Telling my attorney any information which is false will severely inhibit my attorney in defending me. All information I discuss with my attorney is confidential and may not be revealed to others without my consent.

b. ___ That I have the following rights to counsel:

1) ___ I have the right to consult with a lawyer qualified to practice before military courts.

2) ___ ATTY has been, or will be detailed to counsel me prior to my court-martial. He has advised me that I basically operate as my own attorney during the proceeding. I have the right present my case I have the right to call and question witnesses on my behalf, as well as to cross-examine witnesses against me. The summary court officer should assist me in these matters.

3) ___ I also have the right to be represented at trial by a civilian lawyer provided at my own expense, if it will not unreasonably delay the proceedings.

c. ___ I should not discuss any aspect of my case with anyone without the approval of my defense counsel and without my attorney present. This includes, friends, roommates, chain of command, investigators, family members, etc.

d. ____ My case will be heard by an officer appointed by my battalion commander. I may ask that officer questions to see if they are impartial and may challenge them from hearing the case if I have a good reason.

e. ___ I should consider the following rights and other considerations regarding the appropriate plea in my case:

1) I may turn down the summary court-martial and demand a full court-martial.

2) I am legally entitled to plead guilty or not guilty to any or all of the specifications and charges.

2) I may plead not guilty to any offense even though I am guilty, and believe that I am guilty of the offense.

3) I should not plead guilty to an offense unless I am, in fact and in my personal belief, guilty of every element of that offense.

4) A plea of not guilty by me to any offense places the burden upon the prosecution to prove me guilty of that offense beyond a reasonable doubt. I have the right to assert any defense or objection.

5) ____ A plea of guilty to an offense admits every act or omission charged and every element of the offense.

6) ____ A plea of guilty to an offense would permit the court to find me guilty without further proof of that offense.

7) ____ If I plead guilty to an offense, I waive my right against self-incrimination, my right to trial on the facts and my right to confront and cross-examine the witnesses against me as to the offense.

8) ____ I may submit to the convening authority an offer to plead guilty providing that he will approve no sentence greater then a stated amount when he takes action on the finding and sentence in my case. If the convening authority accepts such an offer, he is bound to reduce my sentence in his action to the agreed limits if the sentence adjudged by the court exceeds those agreed limits.

9) ____ The elements of each offense charged have been explained to me as well as the elements of lesser included offenses.

f. ____ Prior to the findings of the court, I may be sworn and take the stand as witness in my own behalf. I have the rights and privileges of any other witness and may be cross-examined if I do testify.

g. ____ I may remain silent and am not required to testify at the trial. If I do remain silent, this will not count against me or be considered as an admission of my guilt nor may the prosecutor comment to the court upon upon my silence.

h. ____ If I am found guilty, I may present evidence in extenuation and mitigation of the offense of which I was convicted. I may testify under oath or I may remain silent. In addition if I wish, I may make an unsworn statement in extenuation and mitigation. I cannot be cross-examined upon this unsworn statement, but the prosecution may offer evidence in rebuttal of the statement. I may make this unsworn statement orally or in writing, or both, and either my counsel or myself, or both of us, may make the statement. I may also present evidence of good duty performance and my potential for rehabilitation. This evidence may be in the form of documents and testimony of witnesses, either in person or by phone.

i. ____ The maximum sentence that can be adjudged against me by the court if I am found guilty of all of the offenses, either pursuant to a plea of guilty or plea of not guilty is

- Confinement: 30 days (or 45 days hard labor w/o confinement or 60 days restriction)
- Discharge: None
- Forfeiture: 2/3 pay for 1 month.
- Reduction the grade of E1:
- Fine: In combination with Forfeitures, cannot exceed 2/3 pay for 1 month.
- Reprimand.

j. ____ Though I can't be given a punitive discharge at this level of court, if I demand a higher level court and I am discharged with either a dishonorable discharge or bad-conduct discharge, the discharge will be a permanent restriction on my employment and government benefits. Conviction at a Special or General Court-Martial is a federal conviction, but I understand that a conviction at this summary court-martial is not a federal conviction.

k. ____ In the event a finding of guilty on any or all charges and specifications has been entered against me, and a sentence is adjudged, I may appeal the findings and the sentence to the convening authority (battalion commander) within 7 days of my hearing.

l. ____ If a sentence adjudged by the court includes confinement, I will begin serving that portion of sentence immediately. I may request the convening authority to defer confinement until he takes action on the case if I can establish a good reason for doing so. I may petition the convening authority for clemency from any sentence by the court before action is taken.

m. ____ I have checked the information in the top portion of my charge sheet for accuracy. The information is accurate, except for the following: _____.

n. ____ I have received the following advice from my detailed defense counsel:

1) ____ I must comply at all times with every term of any restriction placed upon me. Violation of restriction will most likely result in additional charges and pretrial confinement.

2) ____ I must stay out of trouble while pending court-martial. I must perform my duties as expected, respect superior NCO's and officers and strive to maintain a good attitude.

3) ____ I must not discuss my case with anyone. This means roommates, friends, and anyone in my chain of command. If I am asked about my case by anyone, I should simply reply that my lawyer has instructed me not to discuss the case. The only exception to this rule is if my attorney specifically instructs me to do something or talk to a specific person.

4) ____ On the day for trial I must be neatly groomed and be wearing proper Class A uniform.

CLIENT
RANK, USA

On _____ I advised the accused of his rights in accordance with the foregoing. All decisions indicated above were personally made by the accused after receiving legal counseling.

ATTY SIGNATURE BLOCK

Chapter 5

I. Principals. UCMJ ART. 77.

A. Principal Liability Defined.

1. Text. "Any person punishable under this chapter who: (1) commits an offense punishable by this chapter or aids, abets, counsels, commands, or procures its commission; or (2) causes an act to be done which if directly performed by him would be punishable by this chapter; is a principal." Article 77.

2. Purpose. Article 77 directs that a person need not personally perform the acts necessary to constitute an offense to be guilty of that offense. It eliminates the common law distinctions between principals in the first degree, principals in the second degree, and accessories before the fact. All of these parties to an offense are deemed principals, are equally guilty of the offense, and may be punished to the same extent.

B. Who are "Principals?" The MCM creates two categories of individuals that can be guilty of an offense as a principal: 1) Perpetrators & 2) Other Parties.

1. Perpetrators. "A perpetrator is one who actually commits the offense, either by the perpetrator's own hand, or by knowingly or intentionally inducing or setting in motion" acts by an agent or instrument which results in the commission of the offense. MCM, pt. IV, ¶ 1b(2)(a).

a) *United States v. Perry*, 27 M.J. 796 (A.F.C.M.R. 1988) (holding accused liable as a perpetrator where, although accused never touched the stolen property, he directed another airman to grab a paper bag that had been left temporarily unguarded at a local bar).

b) Suppose Person A intentionally causes an innocent Person B to commit an offense's act against Person B's will. The offense's *mens rea* requirement may be satisfied by Person A's criminal intent. In such a case, only Person A is guilty of a crime. *United States v. Minor*, 11 M.J. 608 (A.C.M.R. 1981) (holding accused liable as a principal to sodomy, where accused makes himself a party to the co-accused's threat compelling a victim's boyfriend to commit sodomy on victim).

c) Authority of government "agent" or "decoy," however, may prevent liability as a perpetrator. *United States v. Sneed*, 38 C.M.R. 249 (C.M.A. 1968). Accused proposed theft of military property to two other soldiers. Soldiers informed military authorities and were told to go along with the proposal. Accused subsequently directed one Soldier to load military property on a truck and directed the other Soldier to drive away with the military property. Because the Soldiers were government "agents or decoys," the government never lost control or possession of the military property and their acts did not constitute a wrongful taking. Under the circumstances, the accused never acquired possession, dominion, or control; conviction for larceny reversed, and lesser included offense of attempted larceny affirmed. *See also United States v. Klink*, 14 M.J. 743 (A.F.C.M.R. 1982) (larceny upheld where accused, along with assistance of two government operatives, actually took goods from a government warehouse, carried them to a dock, loaded them into getaway vehicle, and helped drive them away).

2. Other Parties. "If one is not a perpetrator, to be guilty of an offense committed by the perpetrator, the person must" meet the two requirements listed at MCM, pt. IV, ¶ 1b(2)(b).

a) Aider and Abettor. Case law still predominantly describes the MCM's "Other Party" liability as "aider and abettor liability." Aiding and abetting requires the following proof: "(1) the specific intent to facilitate the commission of a crime by another; (2) guilty knowledge on the part of the accused; (3) that an offense was being committed by someone; and (4) that the accused assisted or participated in the commission of an offense." *United States v. Pritchett*, 31 M.J. 213 (C.M.A. 1990). See discussion below regarding the basis for principal liability.

b) Co-conspirators.

(1) Article 77 is broad enough to encompass vicarious liability of co-conspirators. *United States v. Browning*, 54 M.J. 1, 7 (C.A.A.F. 2000) (holding that prosecution could prove larceny and fraudulent claim charges on theory that accused was perpetrator, aider and abettor, *or* co-conspirator, even though conspiracy was not on the charge sheet).

(2) A conspirator may be convicted of substantive offenses committed by a co-conspirator, provided such offenses were committed in furtherance of the agreement while the agreement continued to exist and the conspirator remains a party to it. MCM, pt. IV, ¶ 5c(5); *Pinkerton v. United States*, 328 U.S. 640 (1946); *United States v. Browning*, 54 M.J. 1 (C.A.A.F. 2000); *United States v. Gaeta*, 14 M.J. 383 (C.M.A. 1983) (members were properly instructed on liability for co-conspirator's drug distribution; *citing Nye and Nissen v. United States*, 336 U.S. 613 (1949)); *United States v. Figueroa*, 28 M.J. 570 (N.M.C.M.R. 1989) (guilty plea to drug distribution by one co-conspirator to another co-conspirator was provident even though accused did not physically participate in the distribution).

c) Basis for Liability: Actus Reus (Assist, encourage, advise, instigate, counsel, command, procure)

(1) Article 77 requires an affirmative step on the part of the accused to be liable as an aider and abettor. *United States v. Thompson*, 50 M.J. 257 (1999). The evidence was legally sufficient for a conviction of rape as a principal where the accused participated in getting the victim helplessly intoxicated, knew a friend was going to have intercourse with the victim, did nothing to dissuade the friend when he looked to the accused for approval, and provided the friend with a condom.

(2) *United States v. Speer*, 40 M.J. 230 (C.M.A. 1994). An accused aids and abets the offense of drug distribution when he verifies purchase price and accepts the cash payment from the buyer, even though the delivery of the drugs has been completed, because he facilitates the "financial climax of the deal." The court adopts the "criminal venture" approach to aiding and abetting.

(3) *United States v. Bolden*, 28 M.J. 127 (C.M.A. 1989). Accused was guilty of larceny as an aider and abettor where he suggested and assisted a "sham" marriage to obtain quarters allowance and a false rental agreement that overstated the monthly rent.

(4) *United States v. Patterson*, 21 C.M.R. 135 (C.M.A. 1956). An accused who blocked a door with the intent of preventing the escape of the victim from his assailant aided and abetted the assailant.

(5) *United States v. Jacobs*, 2 C.M.R. 115 (C.M.A. 1952). Accused and three others broke into a private home and assaulted the occupant. Although the accused did not personally take property from victim, he aided and abetted the others in committing a robbery and was liable as a principal. The "assault provides the necessary act of assistance, and accordingly we have before us much more than mere presence at the scene of the crime."

d) Basis for Liability: Mens Rea (Shared Criminal Intent with Perpetrator)

(1) In the case of an accomplice, the intent element may be satisfied with "proof that the accomplice shared in the perpetrator's criminal purpose and intended to facilitate the intent of the perpetrator with respect to the commission of the offense." *United States v. Mitchell*, 66 M.J. 176 (C.A.A.F. 2008) (in a guilty plea for aiding and abetting an indecent assault, the accused admitted to acting with the specific intent to gratify the principal's lust and sexual desires and the court concluded that there was no need to demonstrate that the aider and abettor intended to gratify his own lust and sexual desires).

(2) The requisite *mens rea* for aiding and abetting is sharing the criminal intent or purpose of the active perpetrator of the crime. *United States v. Jacobs*, 2 C.M.R. 115, 117 (C.M.A. 1952) ("[t]he proof must show that the aider or abettor . . . participated in it as in something he wished to bring about, that he sought by his action to make it successful") (prosecution under Articles of War, because offense pre-dated effective date of the UCMJ); *United States v. Bolden*, 28 M.J. 127 (C.M.A. 1989); *United States v. Gosselin*, 62 M.J. 349 (2006) (record did not reflect a shared "criminal purpose" of introducing drugs onto the base).

(3) *United States v. Fullen*, 1 M.J. 853 (A.F.C.M.R. 1976). Accused agreed with two others to lure the victim to a dark area where they would grab and rob the victim. According to the accused, he was unaware that one of his companions was going to strike the victim with a pipe. After the victim fell to the ground, the accused took the victim's wallet, which contained $9. Accused was guilty of robbery, because the intended grabbing would have been an assault sufficient for the compound offense of robbery.

(4) *United States v. Patterson*, 21 C.M.R. 135 (C.M.A. 1956). Accused pulled victim to the floor, and co-accused hit victim with chair. Later the same day, the co-accused struck victim several times in the face with a large belt buckle. Victim tried to flee, but accused blocked access to the door and co-accused bit victim's ear. Notwithstanding accused's claim that he did not intend that an *aggravated* assault be committed, the facts belie his claim and support conviction of aggravated assault. Principals are chargeable with results that flow as natural and probable consequences of the offense subjectively intended.

(5) An aider or abettor may be guilty of an offense of greater or lesser seriousness than the perpetrator, depending on his level of intent. MCM, pt. IV, ¶ 1b(4). *United States v. Jackson*, 19 C.M.R. 319 (C.M.A. 1955). Accused and co-accused assaulted the victim. Co-accused stabbed the victim, who subsequently died. Both accused were convicted of premeditated murder at a joint trial. Court affirmed co-accused's conviction but reversed accused's conviction, because of failure to instruct on lesser included offense of involuntary manslaughter. The aider and abettor may be guilty in a different degree from the principal, and the law holds each accountable according to the turpitude of his own motive. *Compare United States v. Richards*, 56 M.J. 282 (2002) (intent to kill or inflict great bodily harm by kicking the victim sufficient to establish guilt as an aider and abettor of voluntary manslaughter even though death caused by co-accused stabbing the victim).

e) Presence at the Scene of the Crime. Appellate courts have considered the extent to which presence at the scene of the crime constitutes a sufficient act or evinces sufficient intent to establish Article 77 liability.

(1) Presence is not necessary. Presence at the scene of a crime is not necessary to make one a party to the crime and liable as a principal. *See United States v. Carter*, 23 C.M.R. 872 (A.F.B.R. 1957) Accused who loaned his car to a friend with the knowledge that it was going to be used in the commission of a larceny was guilty of larceny on aiding and abetting theory, even though he did not know all the details of how the crime was to be committed and was not present at the commission of the crime.

(2) Presence is not sufficient. Mere presence at the scene of crime does not make one a principal. MCM, pt. IV, ¶ 1b(3)(b). *See United States v. Shelly*, 19 M.J. 325 (C.M.A. 1985) (holding that mere presence in a misappropriated vehicle did not make the accused liable as a principal); *United States v. Waluski*, 21 C.M.R. 46 (C.M.A. 1956) (holding that mere presence was insufficient to support finding that accused aided and abetted the driver in the culpably negligent operation of a vehicle); *United States v. Johnson*, 19 C.M.R. 146 (C.M.A. 1955) (holding that mere presence with group of pedestrians who robbed a passerby was insufficient to support conviction as aider and abettor); *United States v. Guest*, 11 C.M.R. 147 (C.M.A. 1953) (holding that evidence was insufficient to support conviction as aider and abettor of murder and larceny, even though the accused was present at the scene of the murder, robbery, and subsequent discussion of the sale of the stolen property, because he did nothing to encourage or aid the murder or the larceny); *United States v. Gosselin*, 62 M.J. 349 (2006) (mere presence in the car with drugs not enough to establish guilt, citing *United States v. Burroughs*, 12 M.J. 380 (C.M.A. 1982)).

(3) Presence may be a factor in establishing liability. United States v. Pritchett, 31 M.J. 213 (C.M.A. 1990).

(4) *United States v. Cobb*, 45 M.J. 82 (C.A.A.F. 1996). Evidence was legally sufficient to support accused's conviction as an aider and abettor to robbery when he was present at crime, fully aware of his companion's

impending crime, expected and in fact was offered a share of the proceeds, and may have held perpetrator's feet as he leaned out of vehicle to effect robbery.

(5) *United States v. Pritchett*, 31 M.J. 213 (C.M.A. 1990). The fact that the wife shared an apartment with the accused, the fact that 166 grams of marijuana were stored in a coffee can in a dresser in the only bathroom in the apartment, the fact that the accused knowingly permitted his residence to be used as a respository for the drugs, the fact that the accused was found caught after the sale in possession of a purse that contained marked bills from the drug sale, and the fact that the appellant's fingerprints were found on several foil wrapped pieces in the can were sufficient to show that the accused aided and abetted his wife's possession with intent to distribute marijuana. Additionally, his immediate presence during the drug sale, "his preliminary drug talk, and his maintenance of a drug-sale safe house" were sufficient to constitute active encouragement and assistance to support a conviction for aiding and abetting his wife's drug distribution. Finally, the accused's facilitation of his wife's drug distribution, the fact that the sale took place in a common area of the home while the accused was at home, and the fact that the money from the controlled buy was found in the accused's possession were sufficient to show that the accused aided and abetted his wife's distribution of marijuana.

(6) *United States v. Dunn*, 27 M.J. 624 (A.F.C.M.R. 1988). Accused's presence at the scene of a shoplifting, perpetrated as part of the accused's criminal training, was sufficient to establish his guilt for larceny as an aider and abettor.

(7) *United States v. Hatchett*, 46 C.M.R. 1239 (N.M.C.M.R. 1973). Hitchhiker sat in back seat of vehicle between accused and active perpetrator. As car moved along, active perpetrator robbed victim. Accused was guilty of robbery. He was aware the victim was given ride in order to be robbed and his presence in the rear seat of the vehicle "ensured the victim could not escape."

f) Failure to Stop Crime. Failure to stop a crime does not constitute aiding and abetting unless there is an affirmative duty to interfere (*e.g.*, a security guard). If a person has a duty to interfere, but fails to do so, that person is a party to the crime *if* such noninterference is intended to and does operate as an aid or encouragement to the perpetrator. MCM, pt. IV, ¶ 1b(2)(b). *See United States v. Thompson*, 22 M.J. 40 (C.M.A. 1986) (holding no general duty of NCOs to prevent crime absent "identifiable regulation, directive, or custom of the service."); *United States v. Simmons*, 63 M.J. 89 (2006) (duty of NCO to prevent crime within unit may arise, but failure to act must be accompanied by shared criminal purpose).

(1) Liability found. *See United States v. Shearer*, 44 M.J. 330 (1996) (affirming conviction after of guilty plea to aiding and abetting flight from the scene of an accident where accused admitted that he had a duty to report the identity of the driver to Japanese authorities at the scene of the accident); *United States v. Crouch*, 11 M.J. 128 (C.M.A. 1981) (motor pool guard allowed friends to steal tools); *United States v. Ford*,

30 C.M.R. 31 (C.M.A. 1960) (evidence showed that security guard told perpetrators about unsecured building and his failure to interfere was intended to encourage fellow guards to steal unsecured property).

(2) No liability found. *See United States v. Epps*, 25 M.J. 319 (C.M.A. 1987) (under the facts, failure to stop barracks larceny did not make accused an aider and abettor); *United States v. Shelly*, 19 M.J. 325 (C.M.A. 1985) (government failed to prove the existence of duty of senior vehicle occupant to ensure the safe operation of the vehicle); *United States v. McCarthy*, 29 C.M.R. 574 (C.M.A. 1960) (after advising subordinates not to steal hubcaps, lieutenant's failure to take active measures to prevent crime committed in his presence did not establish his guilt as a principal); *United States v. Lyons*, 28 C.M.R. 292 (C.M.A. 1959) (holding that a truck guard who accepted money to "see nothing" not liable as an aider or abettor where he was not told why he was offered the money and there was no evidence that he participated in the venture as something he desired to bring about); *United States v. Fuller*, 25 M.J. 514 (A.C.M.R. 1987) (soldier, whose job was fuel handler, had no duty to prevent burning of barracks room).

g) Duty to Report Crime. As a general rule, mere failure to report a crime does not by itself make one an aider and abettor. However, statutory exceptions to this rule may exist in certain circumstances. *See, e.g.*, 18 U.S.C. §793(f) (defining criminal offense to fail to report illegal disposition of national defense information). Also, the services can require that personnel report offenses that they observe. Thus, failure to report a crime may be a dereliction under some circumstances. *See United States v. Heyward*, 22 M.J. 35 (C.M.A. 1985) (Air Force regulation imposing special duty to report drug abuse did not violate the Fifth Amendment, because it did not compel members to report their own illegal acts but only those of other members) *cert. denied*, 479 U.S. 1011 (1986); *United States v. Bland*, 39 M.J. 921 (N.M.C.M.R. 1994) (upholding Navy regulation imposing a general duty to report crime which has been observed).

C. Principals Are Independently Liable.

1. One may be convicted as a principal, even if the perpetrator is not identified or prosecuted, or is acquitted. MCM, pt. IV, ¶ 1b(6).

2. *Standefer v. United States*, 447 U.S. 10 (1980). A defendant can be convicted of aiding and abetting the commission of a federal offense, despite the prior acquittal of the alleged actual perpetrator of the offense.

3. *United States v. Minor*, 11 M.J. 608 (A.C.M.R. 1981). Co-accused forced victim's boyfriend to commit sodomy on victim by threatening him and accused aided and abetted threat by encouraging victim's boyfriend to comply. The accused was properly convicted of sodomy as a principal, because the amenability of the actual perpetrator to prosecution is not a requirement for criminal liability as an aider and abettor. The actor need not be subject to the UCMJ.

4. *United States v. Crocker*, 35 C.M.R. 725, 739-40 (A.F.B.R. 1964). Accused and Holloway engaged in assault with a knife upon the victim. The evidence established that Holloway fatally stabbed the victim. Holloway was acquitted of murder, and but found guilty of aggravated assault. The accused was convicted of unpremeditated murder, and

the court affirmed the conviction. The acquittal of the active perpetrator has no effect on the accused's case.

5. *United States v. Duffy*, 47 C.M.R. 658 (A.C.M.R. 1973) (officer who ordered NCO to kill prisoner guilty as principal despite acquittal of NCO based on lack of mental capacity).

D. Liability for Other Offenses. The statutory principal is criminally liable for all offenses embraced by the common venture and for offenses likely to result as a natural and probable consequence of the offense directly intended. MCM, pt. IV, ¶ 1b(5).

1. *United States v. Knudson*, 14 M.J. 13 (C.M.A. 1982). Accused loaned money to Shaw to buy LSD to be resold at a profit, drove Shaw to off-post residence to buy LSD, and informed prospective buyer that Shaw still had LSD. Evidence was sufficient for conviction of wrongful introduction and wrongful distribution of LSD. If there is a concert of purpose to do a criminal act, all probable results that could be expected are chargeable to all parties concerned. "The fact that the accused did not know in advance of the particular transfers or the parties to whom the transfers would be made does not relieve him of criminal responsibility."

2. *United States v. Waluski*, 21 C.M.R. 46 (C.M.A. 1956). Accused and Hart stole a jeep. Hart drove away from scene at high rate of speed and ran over a pedestrian, killing him. Because there was no evidence that accused actively aided and abetted the operation of the vehicle, accused could not be convicted of involuntary manslaughter.

3. *United States v. Wooten*, 3 C.M.R. 92, 97 (C.M.A. 1952). Aider and abettor of larceny of 250 pairs of Army issue trousers also liable for wrongful disposition of military property, because it was a natural and probable consequence of the theft.

4. *United States v. Self*, 13 C.M.R. 227 (A.B.R. 1953). Accused and two co-accused wrongfully appropriated jeep and drove away. When stopped at a checkpoint, co-accused shot and killed a sentinel. Accused was in the back seat and did nothing during the events at the checkpoint. Where an accused has combined with others in the perpetration of an unlawful act under such circumstances as will, when tested by experience, probably result in the taking of human life, he is equally responsible for a homicide flowing as a natural consequence of such unlawful combination. The court reversed the conviction for murder, because the larceny of the vehicle, however, was not "so desperate a design that its execution might naturally or probably result in the taking of human life."

E. Withdrawal as a Principal. A person may withdraw from a common venture or design and avoid liability for any offenses committed after the withdrawal. To be effective the withdrawal must:

1. Occur before the offense is committed;

2. Effectively countermand or negate the assistance, encouragement, advice, instigation, counsel, command, or procurement; *and*

3. Be clearly communicated to the would-be perpetrators or to appropriate law enforcement authorities in time for the perpetrators to abandon the plan or for law enforcement authorities to prevent the offense. MCM, pt. IV, ¶ 1.b.(7).

F. Pleading.

1. All principals are charged as if each was the perpetrator. R.C.M. 307(c)(3) discussion, ¶ H(i).

2. *United States v. Vidal*, 23 M.J. 319 (C.M.A. 1987). Accused and PFC Hunt kidnapped German woman. Accused drove car to secluded area. PFC Hunt and then the accused had sexual intercourse with her in the back seat. Accused charged with a single specification of rape, but the specification did not indicate whether he was the perpetrator or an aider and abettor. The court affirmed the conviction, because the standard rape specification is sufficient to charge accused as perpetrator or aider and abettor, and the prosecution is not required to elect between those two theories. *See also United States v. Westmoreland*, 31 M.J. 160 (C.M.A. 1990) (judge can instruct, and accused can be convicted, under an aiding and abetting theory, even though case has not been presented on that theory); *United States v. Dayton*, 29 M.J. 6 (C.M.A. 1989) (government is entitled to prosecute the accused for distribution of LSD on the alternate theories that he is guilty as a perpetrator or as an aider and abettor).

G. Relationship to Inchoate Crimes.

1. Attempts. For an accused to be guilty as an aider and abettor to an attempt, the actual perpetrator must have actually attempted the commission of the underlying offense. *United States v. Jones*, 37 M.J. 459 (C.M.A. 1993). Accused aided and abetted perpetrator who took "substantial step" with intent to distribute cocaine to an undercover officer. Perpetrator's failure to go through with the transaction did nothing to alter her or accused's liability.

2. Solicitation.

a) The crime of solicitation is complete when the solicitation or advice is communicated. Conviction as a principal for aiding and abetting, however, requires that the completion or attempt of a crime.

b) Solicitation pertains to inducing an action in the future; aiding and abetting pertains to involvement in ongoing activity. *United States v. Dean*, 44 M.J. 683 (A. Ct. Crim. App. 1996) (holding that accused's call to her co-conspirator "don't let him get into the door" made during ongoing beating was aiding and abetting rather than solicitation).

Solicitation may exist even when the object is predisposed to the crime. *United States v. Hays*, 62 M.J. 158 (2005) (holding that appellant's request for photographs of a sexual encounter between "JD" and a nine-year old girl immediately after the appellant's inquiry into whether JD had engaged in sexual intercourse with the nine-year-old girl was a serious request to commit carnal knowledge). The court further stated that neither the MCM nor the UCMJ precludes a conviction for solicitation because the object is predisposed towards the crime (rejecting the requirement set forth in *Dean*, 44 M.J. 683 (A. Ct. Crim. App. 1996)).

II. Accessory After the Fact. UCMJ ART. 78.

A. Introduction.

1. Text. "Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment shall be punished as a court-martial may direct." Article 78.

2. Not a Lesser included Offense of the Underlying Offense--Must Be Independently Charged. *United States v. Price*, 34 C.M.R. 516 (A.B.R. 1963) (holding that neither accessory after the fact nor receiving stolen property were lesser included offenses of

larceny); *United States v. Greener*, 1 M.J. 1111 (N-M.C.M.R. 1977). *But see United States v. Michaels*, 3 M.J. 846 (A.C.M.R. 1977) (permitting accused to enter a substitute plea of accessory after the fact to larceny, even though not a lesser included offense of the referred larceny charge).

3. Acquittal of the Principal Actor Is No Defense. *United States v. Marsh*, 32 C.M.R. 252 (C.M.A. 1962) (holding that an accused can be convicted of a violation of Article 78 without regard to the separate conviction or acquittal of the principal actor).

4. Principal Offender Need Not Be Subject to the UCMJ. *United States v. Michaels*, 3 M.J. 846 (A.C.M.R. 1977); *United States v. Blevins*, 34 C.M.R. 967 (A.F.B.R. 1964) (holding that military accused can be convicted of a violation of Article 78 without regard for the amenability of the principal offender to military jurisdiction).

5. Failure to Report Offense. The mere failure to report an offense will not make one an accessory after the fact. However, such failure may violate a lawful order or regulation and thus constitute an offense under Article 92. *See supra* ¶ I.C.5., this chapter. Also, a positive act of concealment *and* failure to report a serious offense can constitute the offense of misprision of a serious offense under Article 134. *See infra* ¶ II.D., this chapter.

B. Acts Sufficient for Accessory After the Fact.

1. *United States v. Davis*, 42 M.J. 453 (C.A.A.F. 1996). Accused who falsely informed investigators that he did not know who committed larceny but hinted that someone other than the actual thief was responsible gave "assistance" to the actual offender, thereby making accused an accessory after the fact to larceny.

2. *United States v. Foushee*, 13 M.J. 833 (A.C.M.R. 1982). Providing Q-tips and alcohol to clean blood off the knife used in an assault and to treat offender's injured ankle constituted receipt, comfort, and assistance for the purposes of hindering or preventing the apprehension or trial of the offender. However, where evidence showed only that the accused knew the principal perpetrator had stabbed the victim with the knife but did not know the perpetrator intended to kill or inflict grievous bodily harm, accused could be convicted of being accessory after the fact to assault with a dangerous weapon but not assault with intent to murder. *See also United States v. Marsh*, 32 C.M.R. 252 (C.M.A. 1962) (advising perpetrator of theft to get rid of stolen goods and thereafter consuming liquor bought with proceeds); *United States v. Tamas*, 20 C.M.R. 218 (C.M.A. 1955) (concealing proceeds of a theft for purpose of assisting thief); *United States v. Blevins*, 34 C.M.R. 967 (A.F.B.R. 1964) (concealing and transporting proceeds of theft).

3. *United States v. Michaels*, 3 M.J. 846 (A.C.M.R. 1977). Where accused has responsibility to protect particular property, accused is an accessory after the fact when he accepts money not to disclose completed larcenies.

C. Liability as a Principal Distinguished.

1. The co-perpetrator of the offense of possession of heroin cannot be an accessory after the fact to the same offense. *United States v. McCrea*, 50 C.M.R. 194 (A.C.M.R. 1975).

2. Act of principal must occur before or during the crime. If the act is after the crime, then it must have been part of an agreement or plan before commission of the offense, for the accused to be guilty as a principal rather than an accessory after the fact. *See United States v. Greener*, 1 M.J. 1111 (N.C.M.R. 1977) (one who is not a party to the original larceny scheme but who after the theft removes purloined goods from a cache is an accessory after the fact).

One is not an accessory after the fact if the offense is still in progress when the assistance is rendered. Even though the perpetrator of a larceny has consummated the larceny as soon as any taking occurs, others may become aiders and abettors by participating in the continuing asportation of the stolen property. *United States v. Bryant*, 9 M.J. 918 (C.M.R. 1980). *But see United States v. Manuel*, 8 M.J. 822 (A.F.C.M.R. 1979). Notwithstanding that larceny is a continuing offense, accused may be convicted of accessory after the fact when, with the intent to assist the active perpetrator avoid detention and prosecution, he advises the active perpetrator to destroy the stolen property. The purpose of the assistance is critical. If it is to secure the fruits of the crime, he is a principal, but if it is to assist the perpetrator in avoiding detection and punishment, he is an accessory after the fact.

D. Liability for Misprision of a Serious Offense Distinguished. *See* ¶ VI.G, ch. 4.

1. One can be an accessory to *any* offense; however, misprision requires an offense punishable by confinement for more than one year. MCM, pt. IV. ¶ 95c(2).

2. An accessory must "receive," "comfort" or "assist" a principal "in order to hinder or prevent his apprehension, trial or punishment." MCM, pt. IV, ¶ 2. Misprision requires a positive act to conceal a felony, but it does not require intent to benefit the principal. MCM, pt. IV, ¶ 95.c.(1).

3. Act Sufficient for Misprision. *United States v. Sanchez*, 51 M.J. 165 (C.A.A.F. 1999). Disposal of knife used in aggravated assault and formulation of plan to avoid detection amounted to affirmative assistance supportive of a misprision conviction.

4. Acts Insufficient for Misprision. *United States v. Maclin*, 27 C.M.R. 590 (A.B.R. 1958) (reversing conviction for misprision, because accused who was burying stolen property did not know the prior theft was a felony); *United States v. Assey*, 9 C.M.R. 732 (A.F.B.R. 1953) (lending money to larceny perpetrator to replace stolen goods was not a "positive act of concealment").

III. Lesser Included Offenses. UCMJ ART. 79.

A. Introduction.

1. Text. "An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein." Article 79.

2. In order to determine if one offense is "necessarily included" in another, apply the elements test. "Under the elements test, one compares the elements of each offense. If all of the elements of offense X are also elements of offense Y, then X is an LIO of Y. Offense Y is called the greater offense because it contains all of the elements of offense X along with one or more additional elements." *United States v. Jones*¸ 68 M.J. 465, 470 (C.A.A.F. 2010).

3. Background: Evolution of LIO Doctrine.

a) The Court of Military Appeals formerly construed Article 79 and its "necessarily included" language to mean offenses that are "fairly embraced" in the pleadings and proof of the greater offense. *United States v. Baker*, 14 M.J. 361 (C.M.A. 1983).

b) In 1989, the Supreme Court held that Fed.R.Crim.P. 31(c) should be construed to include only lesser included offenses as established by the statutory elements. *Schmuck v. United States*, 489 U.S. 705 (1989).

c) In *United States v. Teters*, 37 M.J. 370, 376 (C.M.A. 1993), the Court of Military Appeals stated, "In view of the identity of language of Article 79 and Fed.R.Crim.P. 31(c), we will apply the Supreme Court's more recent holding and abandon the 'fairly embraced' test for determining lesser included offenses as a matter of law."

d) *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994). Citing *Schmuck*, the court held: "One offense is not necessarily included in another unless the elements of the lesser offense are a subset of the elements of the charged offense" (emphasis omitted). This formulation of the test for multiplicity and lesser included offenses created a significant issue for offenses charged under Art. 134, which requires proof of an element not required for proof of offenses under Arts. 80–132: that the conduct was prejudicial to good order and discipline or service-discrediting. The court held that the phrase "necessarily included" in Art. 79 "encompasses derivative offenses under Article 134." An offense under Art. 134 may, "depending on the facts of the case, stand either as a greater or lesser offense of an offense arising under an enumerated article." This is because "the enumerated articles are rooted in the principle that such conduct *per se* is either prejudicial to good order and discipline or brings discredit to the armed forces; these elements are implicit in the enumerated articles."

e) *United States v. Weymouth*, 43 M.J. 329 (C.A.A.F. 1995). The CAAF refined its holdings in *Teters* and *Foster*, adopting the "pleadings-elements" approach: "In the military, the specification, in combination with the statute, provides notice of the essential elements of the offense" (emphasis omitted). The court cautions that it did not retreat to the "fairly embraced" test rejected in *Teters*: "Either the elements alleging the greater offense (by the statute and pleadings) fairly include all of the elements of the lesser offense or they do not. As alleged, proof of the greater offense must invariably prove the lesser offense; otherwise the lesser offense is not included."

f) *United States v. Jones*¸ 68 M.J. 465 (C.A.A.F. 2010). The CAAF definitely abandoned principles announced in *Foster* and *Weymouth* and returned to the "elements test" announced in *Teters.*

B. Fair Notice: A Fundamental Principle.

1. The Constitution requires that an accused be on notice as to the offense that must be defended against. *Jackson v. Virginia*, 443 U.S. 307 (1979); *Schmuck v. United States*, 489 U.S. 705 (1989).

2. When one offense is an LIO of another, the accused is on notice that he may be convicted of either offense; thus satisfying the Due Process notice requirement. Courts apply a strict elements test for determining whether one offense is an LIO of another. Specifically, the test is derived from Article 79, UCMJ, as well as *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010) and *Schmuck v. United States*, 489 U.S. 705 (1989). Article 79 states that "[a]n accused may be found guilty of an offense necessarily included in the offense charged."

3. In order to determine if one offense is "necessarily included" in another, the court compares the elements of the two offenses and determines if the elements of the lesser offense are a subset of the greater offense. "Under the elements test, one compares the elements of each offense. If all of the elements of offense X are also elements of offense Y, then X is an LIO of Y. Offense Y is called the greater offense because it contains all

of the elements of offense X along with one or more additional elements." *United States v. Jones*¸ 68 M.J. 465, 470 (C.A.A.F. 2010). The offenses do not have to use "identical statutory language;" rather, the court uses "normal principles of statutory construction" to determine the meaning of each element. *See also United States v. Teters*, 37 M.J. 270 (C.M.A. 1993) (adopting the elements test for military LIOs); *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994); *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008); *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009).

4. Language describing the elements need not match verbatim. For example, Aggraved Sexual Assault by bodily harm is a proper LIO of Rape by force. *United States v. Alson*, 69 M.J. 214 (C.A.A.F. 2010). CAAF will normally apply the common and ordinary understanding of the words in the statute. Similarly, Assault Consumated by Battery is a proper LIO of Wrongful Sexual Contact. *United States v. Bonner*, 70 M.J. 1 (C.A.A.F. 2011). An offense is included in another only if the greater offense "could not possibly be committed without committing the lesser offense." *United States v. Oatney*, 45 M.J. 185, 188 (C.A.A.F. 1996) (holding that communicating a threat was not a lesser included offense of obstruction of justice for purposes of multiplicity).

5. Listings of LIOs in the MCM are not binding on the courts. Until Congress says otherwise, LIOs are determined based on the elements defined by Congress for the greater offense. The President does not have the power to make one offense an LIO of another by simply listing it as such in the MCM. *United States v. Jones*¸ 68 M.J. 465, 471–72 (C.A.A.F. 2010). Practitioners should not rely on the LIOs listed under each punitive article in Part IV of the MCM, but should use the list as a guide and then apply the elements test to be sure that the lesser offense is necessarily included.

6. The previously-employed "closely related offense" doctrine fails to provide the requisite fair notice, and is "no longer viable." *United States v. Morton*, 69 M.J. 12 (C.A.A.F. 2010) (invalidating CCA's affirmance of two specifications of false official statements as a remedy for an improvident guilty plea to two specifications of forgery.)

7. Application to Article 134.

a) In comparing elements of offenses to determine whether an Article 134 offense stands as a lesser included offense to an offense under Articles 82 through 132, the CAAF has held that the terminal element of Article 134—contained in clauses 1 and 2—causes it to fail the elements test. *United States v. Jones*¸ 68 M.J. 465, 470 (C.A.A.F. 2010). *See also United States v. McMurrin*, 69 M.J. 591 (N.M.Ct.Crim.App. 2010) (applying *Jones* to hold that Negligent Homicide is not a lesser-included offense of Involuntary Manslaughter).

b) Articles 82 through 132 are not *per se* prejudicial to good order and discipline or service discreding. Accordingly, clauses 1 and 2 of Article 134 are not *per se* included in every enumerated offense. *United States v. Miller*, 67 M.J. 325 (C.A.A.F. 2009), overruling in part, *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994).

c) Offenses charged under clauses 1 and 2 of Article 134 are not *per se* lesser included offenses of offenses charged under Clause 3 of Article 134. *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008).

C. Pleading Issues.

1. Lesser included offenses to the charged offense need not be separately pled. *See* R.C.M. 307(c)(4) discussion. However, where it is unclear whether an offense is a lesser included offense, it is prudent to allege both the greater and the purported lesser offenses.

2. If the MCM suggests that an enumerated article (Articles 82 through 132) has a lesser included offense in Art. 134, counsel should consider pleading both the enumerated offense and the Article 134 offense. *See United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010); *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009); *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008); *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994).

3. If a lesser included offense is separately pled in addition to the greater offense, an accused may not be convicted of both the lesser and greater offense. *See United States v. Hudson*, 59 M.J. 357 (C.A.A.F. 2004).

4. The Three Clauses of Article 134. Clauses 1 and 2 are not considered LIOs of Clause 3 of Article 134. In order to provide the requisite notice that the Government intends to pursue Clauses 1 and 2 in addition to Clause 3, the charge sheet should allege a violation of all three clauses. This is usually done by adding Clause 1 and/or Clause 2 language (i.e., the terminal element) to a Clause 3 specificication. *See United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008).

5. *Jones* has necessitated a wholesale reexamination of what offenses are LIOs. Recent cases have provided some insight.

a) What are LIOs:

(1) Aggravated sexual assault is an LIO of rape by force. *United States v. Alston*, 69 M.J. 214 (C.A.A.F. 2010).

(2) Assault consummated by a battery is an LIO of wrongful sexual contact. *United States v. Bonner*, 70 M.J. 1 (C.A.A.F. 2011).

(3) Housebreaking is an LIO of burglary. *United States v. Arriaga*, 70 M.J. 51 (C.A.A.F. 2011).

(4) Aggravated assault is an LIO of maiming. *United States v. McLean*, ___ M.J. ___ (A.F. Ct. Crim. App. 2011).

b) What are not LIOs:

(1) Negligent homicide is not an LIO of premeditated murder. *United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011).

(2) Negligent homicide is not an LIO of involuntary manslaughter. *United States v. McMurrin*, 70 M.J. 15 (C.A.A.F. 2011).

(3) Incapacitation for duty is not an LIO of drunk on station. *United States v. Martinez*, 69 M.J. 683 (A. Ct. Crim. App. 2010).

(4) Indecent act is not an LIO of aggravated sexual assault. *United States v. Clifton*, ___ M.J. ___ (C.G. Ct. Crim. App. 2011).

D. Instructions.

1. If there is some evidence admitted at trial that reasonably raises a lesser included offense, then the military judge has a *sua sponte* duty to give an instruction on the lesser included offense. *United States v. Miergrimado*, 66 M.J. 34 (C.A.A.F. 2008); *United States v. Rodwell*, 20 M.J. 264, 265 (C.M.A.1985); *United States v. Davis*, 53 M.J. 202 (C.A.A.F. 2000) (reversing involuntary manslaughter conviction for failing to instruct on

lesser included offense of negligent homicide); *United States v. Wells*, 52 M.J. 126 (C.A.A.F. 1999) (reversing premeditated murder conviction for failing to instruct on lesser included offense of voluntary manslaughter).

2. If the military judge fails to give an instruction, defense failure to object constitutes waiver, absent plain error. R.C.M. 920(f); *United States v. Pasha*, 24 M.J. 87 , 91 (C.M.A. 1987); *United States v. Mundy*, 9 C.M.R. 130 (C.M.A. 1953). The defense may waive an LIO instruction in order to pursue an "all or nothing" trial strategy and there is no rule that prevents the Government from acquiescing in such a strategy. *See United States v. Upham*, 66 M.J. 83, 87 (C.A.A.F. 2008). The military judge need not oblige, however. As one court observed, "Such a litigation tactic remains viable in military jurisprudence, but it is far from being an absolute right or the unilateral prerogative of the defense." *United States v. Swemley*, No. 200900359 (N.M. Ct. Crim. App. Apr. 29, 2010) (unpub.).

3. An instruction on a lesser included offense is proper when an element of the charged greater offense, which is not required for the lesser included offense, is in dispute. *United States v. Miergrimado*, 66 M.J. 34 (C.A.A.F. 2008); *United States v. Griffin*, 50 M.J. 480 (C.A.A.F.1999) (holding that factual issue as to whether accused *intended* to stab victim with a knife, which he knowingly held in his hand, did not require an instruction on the lesser included offense of simple battery, because proof of intent to use the dangerous weapon is not required for the greater offense).

IV. ATTEMPTS. UCMJ ART. 80.

A. Introduction.

1. Text. "An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense." Article 80(a).

2. Elements. MCM, pt. IV, ¶ 4b.

a) The accused did a certain overt act;

b) The act was done with the specific intent to commit a certain offense under the code;

c) The act amounted to more than mere preparation; and

d) The act apparently tended to effect the commission of the intended offense.

3. Advisement of Elements During Guilty Plea. Military judge must adequately advise and explain each of the four elements of attempt to an accused. *United States v. Redlinski*, 58 M.J. 117 (C.A.A.F. 2003).

B. Overt Act.

1. Generally.

a) The overt act need not be alleged in the specification. *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990); *United States v. Marshall*, 40 C.M.R. 138 (C.M.A. 1969).

b) The overt act need not be illegal. *United States v. Johnson*, 22 C.M.R. 278 (C.M.A. 1957) (accused guilty of attempted desertion where all acts occurred within limits of legitimate pass).

2. Specific Intent.

a) The overt act must be done with the specific intent to commit an offense under the UCMJ.

b) Applications.

(1) Attempted murder requires specific intent to kill, even though murder may require a lesser intent. *See United States v. Roa*, 12 M.J. 210 (C.M.A. 1982) (explaining that, because an attempt requires a specific intent, there can be no "attempt" to commit involuntary manslaughter "by culpable negligence"); *United States v. Allen*, 21 M.J. 72 (C.M.A. 1985) (finding circumstantial evidence sufficient to prove intent to kill required for attempted murder).

(2) Attempted rape requires specific intent to have sexual intercourse by force and without consent, even though rape is general intent crime. *United States v. Sampson*, 7 M.J. 513 (A.C.M.R. 1979); *cf. United States v. Adams*, 13 M.J. 818 (A.C.M.R. 1982) (assault with intent to commit rape).

(3) In a prosecution for attempted violation of a lawful general regulation, under Article 92(1), the accused must have had the specific intent to commit the proscribed act, and it is immaterial whether the accused knew the act violated any particular provision of any particular regulation. *United States v. Foster*, 14 M.J. 246 (C.M.A. 1982).

(4) No attempted sale of heroin where accused intentionally sold brown sugar. *United States v. Collier*, 3 M.J. 932 (A.C.M.R. 1977).

(5) Transferred or concurrent intent doctrine may be applied to attempted murder. *United States v. Willis*, 43 M.J. 889 (A.F.C.C.A. 1996), *aff'd*, 46 M.J. 258 (C.A.A.F. 1997).

3. More Than Mere Preparation.

a) Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The required overt act must go beyond preparatory steps and be a direct movement towards the commission of the offense. MCM, pt. IV, ¶ 4c(2); *United States v. Jackson*, 5 M.J. 765 (A.C.M.R. 1978) (holding that approaching and asking other soldiers if they want to buy a "bag" or "reefer" was not an attempt, but affirming it as a solicitation).

b) For the accused to be guilty of an attempt, the overt acts tending toward commission of the consummated offense must amount to more than mere preparation and constitute at least the beginning of its effectuation. However, "[t]here is no requirement under the law of attempts that the trip to the doorstep of the intended crime be completed in order for the attempt to have been committed." *United States v. Anzalone*, 41 M.J. 142 (C.M.A. 1994) (affirming assault by attempt, where accused retrieved his rifle, locked and loaded a round in the chamber, and started toward the victim's tent, even though he was stopped before he reached a point where he could have actually inflicted harm); *United States v. Owen*, 47 M.J. 501 (A.C.C.A. 1997) (holding that giving middle-man a map, automobile license number, and guidance on method for "hit man," where

accused believed "hit man" had already arrived in town for the job, was sufficient overt act for attempted murder).

c) The line of demarcation between preparation and a direct movement towards the offense is not always clear. Primarily the difference is one of fact, not law. *United States v. Choat*, 21 C.M.R. 313 (C.M.A. 1956) (attempted unlawful entry).

d) After a guilty plea where the accused admits that her acts went beyond mere preparation and points to a particular action that satisfies herself on this point, appellate courts will not find actions that fall within the "twilight zone" between mere preparation and attempt to be substantially inconsistent with the guilty plea. *United States v. Smith*, 50 M.J. 380 (C.A.A.F. 1999).

e) Words alone may be sufficient to constitute an overt act. *United States v. Brantner*, 28 M.J. 941 (N.M.C.M.R. 1989) (a recruiter's request to conduct a "hernia examination" was an act deemed more than mere preparation for a charge of attempted indecent assault).

4. "Substantial Step."

a) The overt act must be a "substantial step" toward the commission of the crime. Whether the act is only preparatory or a substantial step toward commission of the crime must be determined on a case-by-case basis. *United States v. Jones*, 32 M.J. 430 (C.M.A. 1991) (holding that soliciting another to destroy car, making plans to destroy it, and finally delivering the car and its keys to that person on the agreed day of the auto's destruction constituted substantial step toward larceny from insurance company); *United States v. Williamson*, 42 M.J. 613 (N.M.C.C.A. 1995) (accused's acts of putting knife in his pocket and "going after" intended victim, without some indication of how close he came to completing the crime or why he failed to complete it, were not factually sufficient to constitute a substantial step toward the commission of the intended crime); *United States v. Church*, 29 M.J. 679 (A.F.C.M.R. 1989), *aff'd*, 32 M.J. 70 (C.M.A. 1991) (planning wife's murder, hiring undercover agent to kill wife, making payments for killing, and telling agent how to shoot wife constituted substantial step toward murder).

b) The "Test." *United States v. Byrd*, 24 M.J. 286 (C.M.A. 1987).

(1) The overt act must be a substantial step and direct movement toward commission of the crime.

(2) A substantial step is one strongly corroborative of the accused's criminal intent and is indicative of resolve to commit the offense.

c) The accused must have engaged in conduct that is strongly corroborative of the firmness of the accused's criminal intent. *United States v. Byrd*, 24 M.J. 286 (C.M.A. 1987) (accepting money from undercover agent and riding to an off-post location to purchase marijuana was not strongly corroborative of the firmness of the accused's intent to distribute marijuana); *United States v. Presto*, 24 M.J. 350 (C.M.A. 1987) (after agreeing to try to get marijuana for undercover agent, placing phone calls to drug supplier was not a substantial step toward distribution of marijuana); *United States v. LeProwse*, 26 M.J. 652 (A.C.M.R. 1988) (offering to pay two boys to remove their trousers was strongly corroborative of the firmness of the accused's intent to commit indecent liberties); *see also United*

States v. Jones, 32 M.J. 430, 432 (C.M.A. 1991) ("It is not the acts alone which determine the intent of the person committing them. The circumstances in which those acts were done are also indicative of a person's intent.").

5. Tending to Effect the Commission of the Offense.

a) *United States v. McGinty*, 38 M.J. 131 (C.M.A. 1993) (the accused's running his fingers through the victim's hair and hugging him was an affirmative step toward committing indecent acts).

b) The overt act need not be the ultimate step in the consummation of the crime. It is sufficient if it is one that in the ordinary and likely course of events, would, if not interrupted by extraneous causes, result in the commission of the offense itself. *United States v. Johnson*, 22 C.M.R. 278 (C.M.A. 1957) (although within the 50 mile limit of his pass, the accused's walking to within the prohibited distance from the East German border, after unsuccessful attempts to get taxi drivers to cross the border, was sufficient overt act for attempted desertion); *United States v. Gugliotta*, 23 M.J. 905 (N.M.C.M.R. 1987) (overt act sufficient to constitute direct movement to commission of robbery where accused and accomplices made plans, procured implements, and went to the site of the crime with the tools for purpose of robbing exchange).

C. Defenses.

1. Factual Impossibility. Factual impossibility is not a defense to attempt. If the accused's act would constitute a crime if the facts and circumstances were as the accused believed them to be, then he may be found guilty of an attempt to commit the intended crime, even though it was impossible to commit the intended crime under the actual circumstances. MCM, pt. IV, ¶ 4c(3).

a) The defense of factual impossibility does not preclude conviction of attempted conspiracy where the other purported conspirator is an undercover government agent. *United States v. Anzalone*, 43 M.J. 322 (C.A.A.F. 1995) (attempted conspiracy to commit espionage); *see also United States v. Valigura*, 54 M.J. 187 (C.A.A.F. 2000); *United States v. Baker*, 43 M.J. 736 (A.F.C.C.A. 1995) (conspiracy would have been completed, but for the fact that informant did not share accused's criminal intent); *United States v. Roeseler*, 55 M.J. 286 (C.A.A.F. 2001) (factual impossibility not a defense to attempted conspiracy where accused agreed to murder the fictitious in-laws of a fellow member of his platoon; because the impossibility of the fictitious victims being murdered was not a defense to either attempt or conspiracy, it was not a defense to the offense of attempted conspiracy).

b) *United States v. Thomas*, 32 C.M.R. 278 (C.M.A. 1962). The accused and two companions committed sexual intercourse with a female, whom they believed to be unconscious, under circumstances amounting to rape. The female, however, was dead at the time of the sexual intercourse. Conviction for attempted rape affirmed.

c) *United States v. Dominguez*, 22 C.M.R. 275 (C.M.A. 1957). The accused injected himself with a substance he believed to be a narcotic drug. Regardless of the true nature of the white powdery substance, accused was guilty of attempted use of a narcotic drug.

d) *United States v. Riddle*, 44 M.J. 282 (C.A.A.F. 1996). The accused could be convicted of attempted conspiracy to steal military pay entitlements to which he was entitled by law or regulation, where he did not believe he was married at the time, even if he was married at the time.

e) *United States v. Church*, 29 M.J. 679 (A.F.C.M.R. 1989) *aff'd* 32 M.J. 70 (C.M.A. 1991). Evidence supported the accused's conviction for attempted premeditated murder of his wife, although the person he hired to kill his wife was an undercover agent.

f) *United States v. Wilson*, 7 M.J. 997 (A.C.M.R. 1979). The accused came upon another person who was unconscious. Beside the person was a hypodermic needle and syringe used by him to inject heroin. The accused destroyed the needle and syringe to hinder or prevent the person's apprehension for use and possession of narcotics. Because this person was probably dead at the time the items were destroyed, the accused cannot be found guilty of accessory after the fact in violation of Article 78. Because the accused believed the person was alive at the time he destroyed the needle and syringe, however, he may be found guilty of attempted accessory after the fact.

g) *United States v. Longtin*, 7 M.J. 784 (A.C.M.R. 1979). The accused sold a substance, which he believed to be opium, as opium. The laboratory test was inconclusive, and the Government could not prove it was opium. The court affirmed the conviction for attempted sale of opium. Had the facts and circumstances been as he believed them to be, he could have been convicted of sale of opium.

h) *United States v. Powell*, 24 M.J. 603 (A.F.C.M.R. 1987) (attempted larceny even though bank denied loan application).

2. Voluntary Abandonment.

a) A person who, with the specific intent to commit a crime, has performed an act that is beyond mere preparation and a substantial step toward commission of the offense may nevertheless avoid liability for the attempt by voluntarily abandoning the criminal effort. *United States v. Byrd*, 24 M.J. 286 (C.M.A. 1987) (recognizing voluntary abandonment as an affirmative defense in military justice).

b) It is a defense to a completed attempt that the person voluntarily and completely abandoned the intended crime, solely because of the person's own sense that it was wrong, prior to the completion of the crime. MCM, pt. IV, ¶ 4c(4) (added to the MCM in 1995).

c) When the actions of the accused have progressed into their last stages and the victim has already suffered substantial harm, voluntary abandonment is not a defense to attempt. *United States v. Smauley*, 42 M.J. 449 (C.A.A.F. 1995) (upholding guilty plea to attempted carnal knowledge).

d) The defense of voluntary abandonment is "unavailable if the criminal venture is frustrated by any circumstance that was not present or apparent when the actor began his criminal course of conduct that makes the accomplishment of the criminal purpose more difficult." *United States v. Haney*, 39 M.J. 917 (N.M.C.M.R. 1994) (citing *United States v. Rios*, 33 M.J. 436 (C.M.A 1991)).

e) Applications.

(1) *United States v. Schoof*, 37 M.J. 96 (C.M.A. 1993) (fact that accused, later the same day, solicited someone to assist him in continuing to pursue the same crime of delivering classified microfiche to the Soviet Embassy undermined his claim that he had completely renounced his criminal purpose).

(2) *United States v. Rios*, 33 M.J. 436 (C.M.A 1991) (accused did not voluntarily abandon attempted robbery where he merely postponed the criminal conduct to a more advantageous time and transferred the criminal effort to a different but similar victim); *see also United States v. Haney*, 39 M.J. 917 (N.M.C.M.R. 1994) (defense of voluntary abandonment not available to an accused where he and another sailor tried to rob a vending machine by drilling a hole in the glass and the glass shattered, "prompt[ing] their conclusion that continuing in the endeavor would be a 'bad idea'").

(3) *United States v. Collier*, 36 M.J. 501 (A.F.C.M.R. 1992) (holding that when an attempted murder has proceeded so far that injury results, abandonment is not available as a defense).

(4) *United States v. Wilmouth* 34 M.J. 739 (N.M.C.M.R. 1991) (accused's failure to deliver classified information because of inability to locate agent could not be attributed to a change of heart).

(5) *United States v. Miller*, 30 M.J. 999 (N.M.C.M.R. 1990) (abandoning a course of action is not voluntary when it is motivated by circumstances that increase the probability of detection and apprehension).

(6) *United States v. Walthers*, 30 M.J. 829 (N.M.C.M.R. 1990) (where the record indicated that the accused abandoned attempt to steal a car stereo, after breaking into the car, because of his own sense that it was wrong, the guilty plea to attempted larceny was improvident).

D. Pleading.

1. Only the elements of the inchoate offense (attempt) need to be alleged – the elements of the attempted offense (also called the "predicate" or "target" offense) need not be plead. "However, sufficient specificity is required so that an accused is aware of the nature of the underlying target or predicate offense." *United States v. Norwood*, ___M.J. ___ (C.A.A.F. 2012).

2. Overt act need not be alleged. *United States v. Marshall*, 40 C.M.R. 138 (C.M.A. 1969).

3. Attempted drug offenses.

a) *United States v. Showers*, 45 C.M.R. 647 (A.C.M.R. 1972). Specification alleging that the accused "did . . . on or about 31 August 1971 attempt to sell some quantity of a habit forming drug, to wit: Heroin" was fatally defective, because it fails to allege that the attempt was wrongful. *Accord United States v. Brice*, 38 C.M.R. 134 (C.M.A. 1967); *but see United States v. Simpson*, 25 M.J. 865 (A.C.M.R. 1988) (omission of the word "wrongful" from one of four drug distribution specifications not a fatal defect where defendant pled guilty), *aff'd*, 27 M.J. 483 (C.M.A. 1988).

b) *United States v. Guevara*, 26 M.J. 779 (A.F.C.M.R. 1988). Conviction for attempted use of a controlled substance, alleged in the generic, affirmed. Accused intended to use some type of controlled substance.

4. Attempted Robbery.

a) All the *essential* elements of robbery must be alleged in an attempted robbery specification. *United States v. Rios*, 15 C.M.R. 203 (C.M.A. 1954) (specification failing to allege the attempted taking was from the person or the presence of the victim was fatally defective).

b) *United States v. Hunt*, 7 M.J. 985 (A.C.M.R. 1979) (specification failing to allege the attempted taking was from the person or the presence of the victims was fatally defective; conviction of attempted larceny affirmed), *aff'd* 10 M.J. 222 (C.M.A. 1981).

c) *United States v. Ferguson*, 2 M.J. 1225 (N.C.M.R. 1976) (specification alleging, in part, that the accused did "attempt to rob a wallet, the property of PFC Hoge," was fatally defective).

d) *United States v. Wright*, 35 C.M.R. 546 (A.B.R. 1964) (specification alleging that accused "attempted to commit the offense of robbery by entering the Wolfgang Roth Insurance and Loan Agency, wearing a mask and armed with a pistol," was fatally defective).

E. Attempt as a Lesser Included Offense.

1. Text. "An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein." Article 79.

2. *United States v. Banks*, 7 M.J. 501 (A.F.C.M.R. 1979). Attempted destruction of military property was a lesser included offense of sabotage, prosecuted under Article 134(3) and 18 U.S.C. § 2155.

3. The specification alleging the greater offense and the facts of the case put the defense on notice of the existence of the lesser offense of attempt. *See United States v. LaFontant*, 16 M.J. 236 (C.M.A. 1983) (affirming lesser included offense of attempted possession of LSD, even though members had not been instructed thereon, because the accused was convicted of actual possession and there was evidence that accused consciously and intentionally possessed a substance he believed to be LSD); *United States v. Guillory*, 36 M.J. 952 (A.C.M.R. 1993) (plea of guilty to attempted possession provident where inquiry establishes guilt to greater offense of possession with intent to distribute, even though military judge did not advise accused of elements of attempt).

4. Specific intent requirement. *United States v. Roa*, 12 M.J. 210 (C.M.A. 1982) (attempt requires specific intent even where greater offense does not).

F. Attempts Expressly Enumerated in Substantive Offenses.

1. While most attempts should be charged under Article 80, the attempts listed below are specifically addressed under the article defining the primary offense and should be charged accordingly. MCM, pt. IV, ¶ 4c(6).

a) Article 85 (desertion).

b) Article 94 (mutiny).

c) Article 100 (subordinate compelling surrender).

d) Article 104 (aiding the enemy).

e) Article 106a (espionage).

f) Article128 (assault).

2. Attempted Conspiracy. Attempted conspiracy is a viable offense under the UCMJ. *United States v. Riddle*, 44 M.J. 282 (C.A.A.F. 1996) (affirming conviction for attempted conspiracy to steal military pay entitlements). Attempted conspiracy is applicable where an accused agrees with an undercover *United States v. Anzalone*, 43 M.J. 322 (C.A.A.F. 1995) (holding that attempt and conspiracy statutes did not prohibit charge of attempted conspiracy to commit espionage, when other alleged conspirator is an undercover government agent); *United States v. Roeseler*, 55 M.J. 286 (C.A.A.F. 2001) (affirming conviction for attempted conspiracy to murder fictitious in-laws of fellow soldier).

3. Solicitation. "Soliciting another to commit an offense does not constitute an attempt." MCM, pt. IV, ¶ 4c(5).

4. Attempted drug offenses.

a) If the accused believed the substance was an illegal drug, but the prosecution cannot prove it or the substance was actually not an illegal drug, then the accused can be convicted of attempting to commit the drug offense. *United States v. Dominguez*, 22 C.M.R. 275 (C.M.A. 1957) (attempted use of narcotic drug); *United States v. Longtin*, 7 M.J. 784 (A.C.M.R. 1979) (attempted sale of opium, where laboratory test inconclusive); *United States v. Gray*, 41 C.M.R. 756 (N.C.M.R. 1969) (attempted possession of marijuana and mescaline, where substances were not seized).

b) If the accused did not believe the substance was an illegal drug, however, the accused did not attempt to commit a drug offense. *United States v. Collier*, 3 M.J. 932 (A.C.M.R. 1977) (where accused was putting one over on the heroin buyer by selling him brown sugar, guilty plea to attempted transfer of heroin was improvident); *United States v. Giles*, 42 C.M.R. 960 (A.F.C.M.R. 1970) (accused who knows he has been deceived by seller, but nevertheless smokes substance hoping to achieve a "high," was not guilty of attempted use).

c) If the accused sold fake drugs, he can be charged and convicted of larceny by false pretenses, under Article 121. *See United States v. Williams*, 3 M.J. 555 (A.C.M.R. 1977) (sale of fake LSD) *rev'd on other grounds* 4 M.J. 336 (C.M.A. 1978).

5. Attempted Adultery. *United States v. St. Fort*, 26 M.J. 764 (A.C.M.R. 1988) (man returned home unexpectedly and found his wife clad only in bathrobe and the accused naked in a closet).

V. CONSPIRACY. UCMJ ART. 81.

A. Introduction.

1. "Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct." Article 81.

2. Public Policy Rationale. The concerted activity of a conspiracy is much more dangerous to society than the acts of individuals. The criminal enterprise is more difficult to detect because of its secrecy, is more likely to succeed because of the combination of strengths and resources of its members, and may continue to exist even

after the initial object of the conspiracy has been achieved. *See United States v. Feola*, 420 U.S. 671, 693-94 (1975); *United States v. Rabinowich*, 238 U.S. 78, 88 (1915).

3. Elements. MCM, pt. IV, ¶ 5b.

a) The accused entered into an agreement with one or more persons to commit an offense under the code; and

b) While the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

4. Pleading. Only the elements of the inchoate offense (conspiracy) need to be alleged – the elements of the conspired offense (also called the "predicate" or "target" offense) need not be plead. "However, sufficient specificity is required so that an accused is aware of the nature of the underlying target or predicate offense." *United States v. Norwood*, ___M.J. ___ (C.A.A.F. 2012).

B. Parties to a Conspiracy.

1. Two or more persons are required in order to have a conspiracy. MCM, pt. IV, ¶ 5c(1).

a) Co-conspirators need not be subject to the UCMJ. *United States v. Rhodes*, 29 C.M.R. 551 (C.M.A. 1960) (co-conspirator was a foreign national).

b) At least two parties must be culpably involved. There must be a "meeting of minds" regarding the criminal object of the conspiracy. *United States v. Valigura*, 54 M.J. 187 (C.A.A.F. 2000) (adhering to the traditional "bilateral theory" and rejecting the modern "unilateral theory"; no conspiracy where only co-conspirator was an undercover agent; affirming conviction for attempted conspiracy); *United States v. LaBossiere*, 32 C.M.R. 337 (C.M.A. 1962). ("it is well settled that there can be no conspiracy when a supposed participant merely feigns acquiescence with another's criminal proposal in order to secure his detection and apprehension by proper authorities.").

2. Acquittal of accused's co-conspirators in a separate trial does not preclude conspiracy conviction of the accused. *United States v. Garcia*, 16 M.J. 52 (C.M.A. 1983) (overruling the former "rule of consistency").

C. "Bilateral Theory" of liability.

1. Conspiracy, under Article 81, requires a "meeting of the minds" to achieve the purported criminal goal. *United States v. Valigura*, 54 M.J. 187 (C.A.A.F. 2000); *United States v. LaBossiere*, 32 C.M.R. 337 (C.M.A. 1962) (if only two persons involved, one cannot be a government agent); *United States v. Duffy*, 47 C.M.R. 658 (A.C.M.R. 1973) (mentally incapacitated co-accused not culpably involved).

2. The law does not require 'consistency of verdicts.' If one of two co-conspirators is acquitted of conspiracy in a previous trial, the other co-conspirator may still be tried and convicted of conspiracy. *United States v. Garcia*, 16 M.J. 52, 57 (C.M.A. 1983).

3. An accused may be convicted of attempted conspiracy with an undercover law enforcement agent. *United States v. Anzalone*, 43 M.J. 322 (C.A.A.F. 1995); *United States v. Valigura*, 54 M.J. 187 (C.A.A.F. 2000).

4. Attempted conspiracy does not require an agreement or shared intent among the expected conspirators with respect to the object of the conspiracy. *United States v. Roeseler*, 55 M.J. 286 (C.A.A.F. 2001) (accused agreed to murder fictitious parents-in-law of fellow member of platoon).

D. The Agreement.

1. No particular words or form of agreement are required, only a common understanding to accomplish the object of the conspiracy. This may be shown by the conduct of the parties. The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play. *United States v. Whitten*, 56 M.J. 234 (C.A.A.F. 2002) (agreement formed by circling back to take a duffel bag after spotting it outside a vehicle while driving through housing area); MCM, pt. IV, ¶ 5c(2).

a) "Object of the conspiracy."

(1) *United States v. Shelton*, 62 M.J. 1 (C.A.A.F. 2005). The MJ instructed on lesser included offenses of unpremeditated murder and conspiracy to commit unpremeditated murder. MJ told the members that they would have to find "that at the time of the killing, the accused had the intent to kill or inflict great bodily harm on PFC Chafin." MJ erred. If the intent of the parties to the agreement was limited to the infliction of great bodily harm, their agreement was to commit aggravated assault, not unpremeditated murder.

(2) *United States v. Denaro*, 62 M.J. 663 (C.G. Ct. Crim. App. 2006). Object must be a UCMJ offense. Interfering with a urinalysis constitutes the Article 134 offense of wrongfully interfering with an adverse administrative proceeding, thereby establishing the unlawful object of the conspiracy.

b) *United States v. Billings*, 58 M.J. 861 (A. Ct. Crim. App. 2003) (evidence established an agreement by the accused to commit robbery where accused was leader of the gang and she silently concurred when a subordinate outlined the robbery plan as a way to make money for the gang and evidence suggested that the accused shared in the proceeds) *aff'd*, 61 M.J. 163 (C.A.A.F. 2005).

c) *United States v. Cobb*, 45 M.J. 82 (C.A.A.F. 1996) (evidence established agreement to commit robbery, where accused brought co-conspirators together, knew of their criminal venture, and expected to share in the proceeds).

d) *United States v. Garner*, 43 M.J. 435 (C.A.A.F. 1996) (affirming conviction for conspiracy to steal insurance funds where accused hired a fellow soldier to kill accused's wife with promise to share her life insurance proceeds).

e) *United States v. Barnes*, 38 M.J. 72 (C.M.A. 1993) ("existence of a conspiracy is generally established by circumstantial evidence and is usually manifested by the conduct of the parties themselves").

f) *United States v. Matias*, 25 M.J. 356 (C.M.A. 1987) (conduct of accused and roommate was sufficient evidence of an agreement between them to sell marijuana), *cert. denied*, 485 U.S. 968 (1988).

g) *United States v. Jackson*, 20 M.J. 68 (C.M.A. 1985) (without saying a word, the co-conspirator joined the accused in a conspiracy to commit larceny).

h) *United States v. Brown*, 41 M.J. 504 (A. Ct. Crim. App. 1994) (conspiracy to organize a strike manifested by circumstantial evidence) *aff'd*, 45 M.J. 389 (C.A.A.F. 1996).

i) *United States v. Dickey*, 41 M.J. 637 (N-M. Ct. Crim. App. 1994), *vacated and remanded*, 43 M.J. 170 (C.A.A.F. 1995), *aff'd*, 46 M.J. 123 (C.A.A.F. 1996) (agreement to commit rape need not be expressed but only need be implied).

j) *United States v. Pete*, 39 M.J. 521 (A.C.M.R. 1994) (mere involvement in "gripe sessions" at which soldiers discussed leaving post without authority to protest conditions did not amount to a conspiracy).

k) *United States v. Walker*, 39 M.J. 731 (N-M.C.M.R. 1994) (affirming conviction for conspiracy to distribute marijuana where accused acted as a lookout and knew his associates were selling marijuana), *aff'd*, 41 M.J. 79 (C.M.A. 1994).

l) *United States v. Graalum*, 19 C.M.R. 667, 697-98 (A.F.B.R. 1955) ("conduct of the alleged co-conspirators, their declarations to or in the presence of each other, and other circumstantial evidence" clearly manifested agreement to commit bribery).

m) *United States v. Triplett*, 56 M.J. 875 (A. Ct. Crim. App. 2002) (accused's acts of straddling victim's chest and placing hands on her throat to facilitate rape by co-conspirator established that accused and co-conspirator formed an agreement to rape victim).

n) *United States v. Brown*, 9 M.J. 599 (A.F.C.M.R. 1980) (accused's involvement in first two of four thefts was insufficient to establish that the scope and object of the conspiracy, of which the accused was a member, included the last two thefts).

2. Mere presence is insufficient basis for inference of agreement. *United States v. Wright*, 42 M.J. 163 (C.A.A.F. 1995) (evidence that accused agreed to be present to assist if necessary and to assist in disposal of the victim's body was sufficient proof of agreement to commit premeditated murder); *United States v. Mukes*, 18 M.J. 358 (C.M.A. 1984) (conspiracy requires "deliberate, knowing, and specific intent to join the conspiracy, not . . . that [the accused] was merely present when the crime was committed").

3. A conditional agreement is sufficient for conspiracy if the accused believes that the condition is likely to be fulfilled. *United States v. Wright*, 42 M.J. 163, 166-67 (C.A.A.F. 1995) (citing federal case law).

4. Single Agreement to Commit Multiple Crimes. A single agreement to commit multiple offenses is a single conspiracy.

a) *United States v. Mack*, 58 M.J. 413 (C.A.A.F. 2003). Accused was convicted separately of conspiracy to commit check forgery and conspiracy to commit larceny of the check proceeds. On appeal, the government acknowledged there was only one agreement and thus, only one conspiracy. The court consolidated the two conspiracy specifications. "[O]ne agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one."

b) *United States v. Pereira*, 53 M.J. 183 (C.A.A.F. 2000). Accused pled guilty to and was convicted of separate specifications of conspiracy to commit murder,

conspiracy to commit robbery, and conspiracy to commit kidnapping. The record established that the accused and his co-conspirators formed only one agreement to commit all the underlying offenses. As a matter of law, there was only one conspiracy, and the court consolidated the three specifications into one specification.

5. Complex Conspiracies. The scope and structure of conspiracies will vary considerably. The simplest form is a single bilateral agreement to commit a single crime. From that simple model, conspiracies may evolve into highly complex networks involving agreements between multiple parties to commit multiple crimes. In some cases, separate conspiracies are linked together by one or more common members. The scope and structure of the conspiracy has critical implications for determining liability of co-conspirators for crimes committed in furtherance of the conspiracy, resolving of evidentiary issues, and presenting a coherent theory to the panel. Two common metaphors used to describe complex conspiracies are the "wheel with spokes" conspiracy and the "chain" conspiracy.

a) A "totality of the circumstances" analysis is the correct approach when determining the number of conspiracies in a given case. Federal court decisions have identified a variety of factors that may be relevant to determining whether a single or multiple conspiracies exist. Among such factors are the following: (1) the objectives of each alleged conspiracy; (2) the nature of the scheme in each alleged conspiracy; (3) the nature of the charge; (4) the overt acts alleged in each; (5) the time each of the alleged conspiracies took place; (6) the location of each of the alleged conspiracies; (7) the conspiratorial participants in each; and (8) the degree of interdependence between the alleged conspiracies. *United States v. Finlayson*, 58 M.J. 824 (A. Ct. Crim. App. 2003) (applying the eight factors to find one conspiracy where the accused used two suppliers, one of whom also supplied the other, and later had his wife join him in his drug distributing venture).

b) Under the "wheel" metaphor, establishing a single conspiracy requires that the prosecution prove that the spokes are bound by a "rim," which is the concerted action of all the parties working together with a single design for the accomplishment of a common purpose. The circumstances must lead to an inference that some form of overall agreement existed. This agreement may be inferred from the parties' acts or other circumstantial evidence. *United States v. Kenny*, 645 F.2d 1323, 1334-35 (9th Cir. 1981) (finding a single conspiracy in the form of a "wheel" with the defendant as a central "hub" dealing in individual transactions with the other defendants as "spokes"), *cert. denied,* 452 U.S. 920 (1981).

c) The government need not show direct contact or explicit agreement between the defendants. It is sufficient to show that each defendant knew or had reason to know of the scope of the conspiracy and that each defendant had reason to believe that their own benefits were dependent upon the success of the entire venture. *United States v. Kostoff*, 585 F.2d 378, 380 (9th Cir. 1978).

d) Once the existence of a conspiracy has been established, evidence of only a slight connection is necessary to convict a defendant of knowing participation in it. *United States v. Dunn*, 564 F.2d 348, 357 (9th Cir. 1977).

E. Overt Act.

1. The overt act must be independent of the agreement, and it must take place during or after the agreement. MCM, pt. IV, ¶ 5c(4)(a). *United States v. Kauffman*, 34 C.M.R. 63 (C.M.A. 1963) (the act of receiving the name and address of his contact, which was not separate from the agreement, was not a sufficient overt act for conspiracy to wrongfully communicate with agents of East Germany); *United States v. Schwab*, 27 M.J. 559 (A.C.M.R. 1988) (accused's conversations with his alleged co-conspirator, his statement that he put money aside, and co-conspirator's notes and sketches did not satisfy the overt act requirement for conspiracy to commit larceny and wrongful sale of firearms); *United States v. Farkas*, 21 M.J. 458 (C.M.A. 1986), *cert. denied*, 479 U.S. 857 (1986) (act done prior to agreement is not a sufficient overt act).

2. The overt act must be done by one or more of the co-conspirators, but not necessarily the accused. MCM, pt. IV, ¶ 5c(4)(a); *see United States v. Yarborough*, 5 C.M.R. 106 (C.M.A. 1962) (in conspiracy to intentionally inflict self-injury, the government could have alleged overt acts proven to be committed by the co-conspirator, but the government alleged overt acts by the accused that it did not prove).

3. An overt act by one conspirator is the act of all; the overt act may be performed by any member of the conspiracy. Each conspirator is equally guilty even though each does not participate in, or have knowledge of, all of the details. MCM, pt. IV, ¶ 5c(4)(c); *see United States v. Figueroa*, 28 M.J. 570 (N.M.C.M.R. 1989).

4. The overt act need not be criminal. Although committing the intended offense may constitute the overt act, it is not essential. Mere preparation may be enough, as long as it manifests that the agreement is being executed. MCM, pt. IV, ¶ 5c(4)(b); *United States v. Choat*, 21 C.M.R. 313 (C.M.A. 1956) (obtaining crowbar with which to break and enter a store was sufficient overt act for conspiracy to commit larceny); see *United States v. Brown*, 41 M.J. 504 (A.C.C.A. 1994) (agreement may be contemporaneous with the offense itself in a conspiracy to organize a strike), *aff'd*, 45 M.J. 389 (C.A.A.F. 1996).

5. At least one overt act must be alleged and proved; *United States v. McGlothlin*, 44 C.M.R. 533 (A.C.M.R. 1971) (holding that specification alleging conspiracy to commit pandering but not alleging any overt act in furtherance of the conspiracy was fatally defective). Government may allege several overt acts, but need prove only one; *United States v. Reid*, 31 C.M.R. 83 (C.M.A. 1961).

6. Substitution of proof of an unalleged overt act does not necessarily constitute a fatal variance, as long as there is "substantial similarity" between the alleged overt act and the overt act proven at trial. *United States v. Collier*, 14 M.J. 377 (C.M.A. 1983); see *United States v. Moreno*, 46 M.J. 216 (C.A.A.F. 1997) (where basic facts remain unchanged, amendment of alleged overt act the day before trial was permissible minor change).

F. Wharton's Rule.

1. Some offenses require two or more culpable actors acting in concert. There can be no conspiracy where the agreement exists only between the persons necessary to commit such an offense. Examples include dueling, bigamy, incest, adultery, and bribery. MCM, pt. IV, ¶ 5c(3).

2. *Iannelli v. United States*, 420 U.S. 770, 782-86 (1975). Defendant and seven others were convicted of conspiracy to violate and violating 18 U.S.C. § 1955, a federal statute making it a crime for five or more persons to operate a prohibited gambling business. Convictions for both offenses were affirmed. Wharton's Rule "has current vitality only

as a judicial presumption, to be applied in the absence of legislative intent to the contrary. The classic Wharton's Rule offenses—adultery, incest, bigamy, dueling—are crimes that are characterized by the general congruence of the agreement and the completed substantive offense. The parties to the agreement are the only persons who participate in commission of the substantive offense, and the immediate consequences of the crime rest on the parties themselves rather than society at large."

3. Rule does not apply where the substantive offense does not demand concerted criminal activity, such as drug use or distribution. *United States v. Crocker*, 18 M.J. 33, 38-39 (C.M.A. 1984) (drug distribution); *United States v. Johnson*, 58 M.J. 509 (N-M. Ct. Crim. App. 2003) (drug use); *United States v. Osthoff*, 8 M.J. 629 (A.C.M.R. 1979).

4. Rule does not apply when the conspiracy involves the cooperation of a greater number of persons than is required for commission of the substantive offense. *See United States v. Crocker*, 18 M.J. 33, 38 (C.M.A. 1984) (affirming conspiracy conviction where accused accepted money and agreed to buy drugs for another airman on a trip to Amsterdam; Wharton's Rule did not apply because only one party to a drug distribution need have a criminal intent); *United States v. Jiles*, 51 M.J. 583 (N.M. Ct. Crim. App. 1999) (holding Wharton's Rule did not apply to conspiracy to distribute marijuana).

5. *But see United States v. Parada*, 54 M.J. 730 (C.G. Ct. Crim. App. 2001) (Application of Wharton's Rule to drug offenses is a highly fact-dependent determination in which the extent of the enterprise in time and reach are prime considerations. Conspiracy to distribute marijuana where the only parties involved were the accused, who mailed the drugs, and his friend, who received them, was unnecessary "piling-on" of charges); *United States v. Viser*, 27 M.J. 562 (A.C.M.R. 1988) (holding Wharton's Rule does not apply to drug offenses).

6. Wharton's Rule does not apply to conspiracy to violate an anti-black marketing regulation. *United States v. Wood*, 7 M.J. 885 (A.F.C.M.R. 1979) (reasoning that the regulation could be violated by one person).

G. Duration.

1. Termination. A conspiracy terminates when the object of the conspiracy is accomplished, the members withdraw, or the members abandon the conspiracy. *United States v. Beverly*, 14 U.S.C.M.A. 468, 471 (C.M.A. 1964).

a) *United States v. Jimenez Recio*, 537 U.S. 270 (2003) Conspiracy does not automatically terminate simply because the Government has defeated its object. Thus, defendants may be convicted of conspiracy, even absent proof they joined the conspiracy before its defeat.

b) *United States v. Ratliff*, 42 M.J. 797 (N-M.C.C.A. 1995). Accused and four other Marines conspired to rob enough other Marines to finance a trip to Raleigh, North Carolina. After successfully getting money from one robbery victim but then failing to get money from two other victims that ran away, it was obvious that the co-conspirators did not think that they had attained the object of their conspiracy. Therefore, a statement made by a co-conspirator, at that time, was not hearsay, under MRE 801(d)(2)(E).

c) *United States v. Hooper*, 4 M.J. 830 (A.F.C.M.R. 1978). Accused charged with conspiring to violate and violating an Air Force regulation proscribing demonstrations in foreign countries by burning a cross. Later, an alleged co-

conspirator stated that the accused lit the fire. The statement was admissible only if it was made during and in furtherance of the conspiracy. "It is well settled that a conspiracy ends when the objectives thereof are accomplished, if not earlier by abandonment of the aims or when any of the members of the joint enterprise withdraw therefrom." The object of the conspiracy was the erection and burning of the cross. When that was accomplished, the conspiracy terminated.

2. Withdrawal.

a) An individual is not guilty of conspiracy if he effectively withdraws before the alleged overt act is committed. An effective withdrawal must consist of affirmative conduct that is wholly inconsistent with adherence to the unlawful agreement and that shows that the party has severed all connection with the conspiracy. A conspirator who effectively withdraws from the conspiracy after the performance of the alleged overt act remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the withdrawal, but he is not liable for offenses committed by the remaining conspirators after his withdrawal. MCM, pt. IV, ¶ 5c(6).

b) *United States v. Miasel*, 24 C.M.R. 184 (C.M.A. 1957). Accused and six others agreed to commit sodomy upon a fellow soldier in the stockade. The group forced the victim to lie down while the accused climbed on top of the victim. The accused declined to try to commit sodomy. The group took the victim out of the room and committed forcible sodomy upon him, but the accused did not leave the room with the group and had no further participation in the venture. "The failure of the accused to accompany the group when they left the barracks is indicative of an affirmative act on his part to effect a withdrawal and constitutes conduct wholly inconsistent with the theory of continuing adherence."

c) Mere inactivity does not constitute withdrawal. *United States v. Rhodes*, 28 C.M.R. 427 (A.B.R. 1959), aff'd 29 C.M.R. 551 (C.M.A. 1960). From 1951 to 1953, the accused, while stationed at the United States embassy in Moscow, agreed to supply information to Soviet agents. In 1953, he returned to the United States and did not again actively participate in the conspiracy. In 1957, a co-conspirator committed an overt act. Accused was guilty of conspiracy. "[I]t is no defense to the charge of conspiracy that appellant was inactive [in the conspiracy] subsequent to June 1953.

3. A conspiracy is presumed to continue, until the contrary is shown. *United States v. Graalum*, 19 C.M.R. 667 (A.F.B.R. 1955) (affirming conviction for conspiracy to commit bribery, where accused did not effectively withdraw prior to the performance of the overt act by the co-conspirator).

H. Vicarious Liability.

1. A co-conspirator may be convicted for substantive offenses committed by another co-conspirator, provided such offenses were committed while the agreement continued to exist and were in furtherance of the agreement. MCM, pt. IV, ¶ 5c(5); *Pinkerton v. United States*, 328 U.S. 640 (1946); *United States v. Browning*, 54 M.J. 1 (C.A.A.F. 2000); *United States v. Gaeta*, 14 M.J. 383 (C.M.A. 1983) (members were properly instructed on liability for co-conspirator's drug distribution); *United States v. Figueroa*, 28 M.J. 570 (N.M.C.M.R. 1989) (guilty plea to drug distribution by co-conspirator was provident).

2. *United States v. Billings*, 58 M.J. 861 (A.C.C.A. 2003) (accused's silent consent as approval authority for all gang activity supported conviction for robbery even though other gang members carried out the crime) *aff'd*, 61 M.J. 163 (2005).

3. *United States v. Finlayson*, 58 M.J. 824 (A.C.C.A. 2003) (dicta) (accused could be criminally liable for the actions of other conspirators before he joined the conspiracy).

4. Article 77 is broad enough to encompass vicarious liability of co-conspirators. *United States v. Browning*, 54 M.J. 1, 7 (C.A.A.F. 2000) (holding that prosecution could prove larceny and fraudulent claim charges on theory that accused was perpetrator, aider and abettor, or co-conspirator, even though conspiracy was not on the charge sheet).

5. A co-conspirator's statement may be admissible under MRE 801(d)(2)(E) even though conspiracy is not a charged offense. *United States v. Knudson*, 14 M.J. 13 (C.M.A. 1982).

I. Punishment.

1. Conspiracy to commit an offense is distinct and separate from the offense that is the object of the conspiracy. The accused can be convicted and punished separately for both the conspiracy and the underlying offense. Also, commission of the intended offense may constitute the overt act required for conspiracy. MCM, pt. IV, ¶ 5c(8); *Pinkerton v. United States*, 328 U.S. 640 (1946); *United States v. Dunbar*, 12 M.J. 218 (C.M.A. 1982); *United States v. Washington*, 1 M.J. 473 (C.M.A. 1976); *United States v. Nagle*, 30 M.J. 1229 (A.C.M.R. 1990).

2. Conspiracy to commit a crime and solicitation to commit the same crime are separate offenses. *See United States v. Ramsey*, 52 M.J. 322 (C.A.A.F. 2000); *United States v. Carroll*, 43 M.J. 487 (C.A.A.F. 1996).

3. Conspiracy to commit a crime and attempted commission of the same crime are separate offenses, because each offense requires proof of a separate element. *United States v. Stottlemire*, 28 M.J. 477 (C.M.A. 1989).

4. Where the theft of two separate items was contemplated by the conspiracy, the value of the items can be aggregated to calculate the maximum punishment available for the conspiracy. *United States v. Crawford*, 31 M.J. 736 (A.F.C.M.R. 1990).

VI. SOLICITATION. UCMJ ART. 82 and ART. 134.

A. Introduction. Solicitation may be charged under either Article 82 or Article 134, depending on the crime solicited.

1. Article 82 covers solicitation to commit the offenses of desertion (Article 85), mutiny (Article 94), misbehavior before the enemy (Article 99), or sedition (Article 94).

2. Article 134 covers solicitation to commit offenses other than these four named offenses.

B. Discussion.

1. Instantaneous offense. The offense is complete when a solicitation is made or advice given with the specific wrongful intent to influence another or others to commit an offense. It is not necessary that the person or persons solicited or advised agree to or act upon the solicitation or advice. MCM, pt. IV, ¶ 6c(1).

2. Form of solicitation. Solicitation may be by means other than word of mouth or writing. Any act or conduct that reasonably may be construed as a serious request or advice to commit an offense can be considered solicitation. It is not necessary that the accused act

alone; the accused may act through other persons in committing this offense. MCM, pt. IV, ¶ 6c(2).

3. The prosecution must prove the accused had the specific intent that the offense actually be committed. *United States v. Taylor*, 23 M.J. 314 (C.M.A. 1987); *United States v. Benton*, 7 M.J. 606 (N.C.M.R. 1979).

4. An express or implicit invitation to join in a criminal plan is a solicitation. The context in which an alleged statement was made can be considered to determine its criminal nature as a solicitation. *United States v. Williams*, 52 M.J. 218 (C.A.A.F. 2000) (where accused and other person had used drugs together and the other person was informed of the accused's international drug smuggling operation, including the employment of a third party for drug buying trips to Turkey, the accused's statement, "Are you ready to go; you got your passport?" to which the other person promptly answered, "I'm not going to go," could reasonably be construed as an invitation to join the criminal enterprise).

5. The person solicited must know that an offense is contemplated. *United States v. Higgins*, 40 M.J. 67 (C.M.A. 1994) (guilty plea to solicitation improvident where accused asked soldier to withdraw money from ATM machine but did not tell him that the ATM card did not belong to accused); *United States v. Davis*, 39 M.J. 1110 (A.F.C.M.R. 1994) (plea to solicitation improvident where accused asked person to cash "girlfriend's check," and solicitee believed the act was properly authorized and thus legal).

6. The person solicited cannot be the victim of the offense. *United States v. Sutton*, 68 M.J. 455 (C.A.A.F. 2010). OVERRULED *United States v. Conway*, 40 M.J. 859 (A.F.C.M.R. 1994) (accused who requested to see his 15-year-old stepdaughter naked, when child was aware of improper purpose, was guilty of solicitation) and *United States v. Harris*, 2003 C.C.A. Lexis 269 (N-M.C.C.A. 2003).

7. The person solicited may be predisposed toward the crime. *United States v. Hays*, 62 M.J. 158 (2005) (holding neither the MCM nor the UCMJ precludes a conviction for solicitation because the object is predisposed towards the crime (rejecting the requirement set forth in *Dean*, 44 M.J. 683 (Army Ct. Crim. App. 1996)).

C. Miscellaneous Issues.

1. Accomplice liability distinguished. If the solicitee commits the intended offense, the solicitor may be liable for the commission of the crime as a principal under Article 77. MCM, pt. IV, ¶ 1.b.(2)(b).

2. Pleading. Incorrectly charging an Article 134 solicitation under Article 82 may be amended as a minor change. *United States v. Brewster*, 32 M.J. 591 (A.C.M.R. 1991).

3. "Solicitation" of a minor to engage in indecent conduct is not solicitation within the inchoate-offense meaning of the term. One cannot solicit another individual to be commit an offense and simultaneously be the victim of that offense. Such "solicitation" is merely indecent conduct, and if charged as Article solicitation, fails to state an offense. *United States v. Sutton*, 68 M.J. 455 (C.A.A.F. 2010).

Military Offenses

PART I: ABSENCE, DISOBEDIENCE, AND RELATED OFFENSES

VII. Unauthorized Absence - Generally.

A. Introduction.

1. Scope. As used in this chapter, Absence without authority refers to offenses under three articles of the Uniform Code of Military Justice:

a) Article 85: Desertion and attempted desertion.

b) Article 86: Failure to go to appointed place of duty, leaving appointed place of duty, and absence without leave.

c) Article 87: Missing movement.

B. Charges. Unauthorized absences are punishable under Articles 85, 86 and 87 and not under Article 134. *United States v. Deller*, 12 C.M.R. 165 (C.M.A. 1953) (allegation that accused absented himself without leave "with the wrongful intention of permanently preventing completion of basic training and useful service as a soldier" was not an offense in violation of Article 134; however, the court affirmed a conviction under Article 85).

VIII. ABSENCE WITHOUT LEAVE. UCMJ ART. 86.

A. Failure to Go to Appointed Place of Duty (Failure to Repair). UCMJ art. 86(1).

1. Elements. MCM, pt. IV, ¶ 10.b.(1).

a) A certain authority appointed a certain time and place of duty for the accused;

b) The accused knew of that time and place; and

c) The accused, without authority, failed to go to the appointed place of duty at the time prescribed.

2. Pleadings. The "appointed place of duty" addressed in Article 86(1) refers to a specifically appointed place of duty rather than a general place of duty. A specification listing only the accused's unit does not list a specific place of duty and is fatally defective. *United States v. Sturkey*, 50 C.M.R. 110 (A.C.M.R. 1975). *See also United States v. Coleman*, 34 M.J. 1020 (ACMR 1992). The appointed place need not be alleged with as much specificity in nonjudicial proceedings. *United States v. Atchison*, 13 M.J. 798 (A.C.M.R. 1982).

a) The offense requires that the accused actually knew the appointed time and place. MCM, pt. IV, ¶ 10.c.(2). *But see United States v. Adams*, 63 M.J. 223 (2006) (holding the Art. 112a theory of "deliberate avoidance" satisfies the knowledge requirement for ALL Art. 86 offenses).

b) The accused need not know the identity of the person appointing the place of duty. *United States v. Fanning*, 69 M.J. 546, (A.F.Ct.Crim.App. 2010).

c) "Appointed place of duty" includes the place(s) where a restricted soldier is required to sign-in. *United States v. High*, 39 M.J. 82 (C.M.A. 1994).

d) Ordinarily, violation of an order to report to a particular place, though charged under Article 92, constitutes no more than a failure to repair. The

maximum punishment is therefore limited to that for failure to repair. *United States v. Hargrove*, 51 M.J. 408 (C.A.A.F. 1999) (accused guilty of failure to go to appointed place of duty, rather than disobeying a lawful order, when order was to sign-in hourly when not working); *United States v. Henderson*, 44 M.J. 232 (C.A.A.F. 1996) (accused's failure to comply with staff sergeant's order to get dressed and be at morning formation 45 minutes later constituted offense of failure to repair rather than willfully disobeying an NCO); *United States v. Baldwin*, 49 C.M.R. 814 (A.C.M.R. 1975); MCM, pt. IV, paragraphs 14.c.(2)(b) and 16.e.(2).

e) On the other hand, if the order to return to duty was issued in performance of a proper military function and not for the purpose of increasing the punishment, the accused may be convicted and punished for both offenses. *United States v. Pettersen*, 17 M.J. 69 (C.M.A. 1983); *see generally* MCM, pt. IV, paragraph 14c(2)(a)(iii) (stating that an order must have a proper military purpose and not be designed to increase punishment).

3. "Without Proper Authority." *United States v. Duncan*, 60 M.J. 973 (Army Ct. Crim. App. 2005). Appellant told his squad leader that he had to take his son to the hospital, and based on that false information his squad leader gave him permission to miss the formation. Appellant claimed that this evidence was a matter inconsistent with his plea. An absence from a unit, organization, or place of duty is without authority if it is preceded by false statements, false documents, or false information provided by an accused.

B. Leaving Place of Duty. Article 86(2).

1. Elements. MCM, pt. IV, ¶ 10b(2).

a) A certain authority appointed a certain time and place of duty for the accused;

b) The accused knew of that time and place; and

c) The accused, without authority, went from the appointed place of duty after having reported to that place.

2. Pleadings. See supra ¶ A.2., this chapter.

C. Absence Without Leave. Article 86(3).

1. Elements. MCM, pt. IV, ¶ 10.a.(3).

a) The accused absented himself from his unit, organization or place of duty at which he was required to be;

b) The absence was without proper authority from anyone competent to give him leave; and

c) The absence was for a certain period of time.

2. Several aggravated forms of AWOL permit increased punishment. MCM, pt. IV, ¶ 10.e.(3)-(5). Note that two of these aggravated offenses contain an intent element. For the elements and a discussion of these aggravated forms of AWOL, see MCM, pt. IV, paragraphs 10.b.(3), (4) and 10.c.(4). Unless otherwise indicated, the discussion of AWOL in this section refers to the standard, non-aggravated form of AWOL.

3. Definition of Terms.

a) "Unit" refers to a military element such as a company or battery.

b) "Organization" refers to a larger command consisting of two or more units. One can be AWOL from an armed force as a whole. *United States v. Vidal*, 45 C.M.R. 540 (A.C.M.R. 1972); *see United States v. Brown*, 24 C.M.R. 585 (A.F.B.R. 1957) (holding the United States Air Force was both an organization and a place of duty).

c) "Place of duty at which the accused was required to be" is a generic term designed to broadly cover places such as a command, quarters, station, base, camp or post. *United States v. Brown*, 24 C.M.R. 585 (A.F.B.R. 1957). Note that this definition is different from "a place of duty" under Article 86(1) and 86(2), which refers to a specific "appointed place of duty."

d) An individual may be absent from more than one unit. *United States v. Mitchell*, 22 C.M.R. 28 (C.M.A. 1956); *United States v. Green*, 14 M.J. 766 (A.C.M.R. 1982).

4. A specification alleging the wrong unit requires dismissal. *United States v. Walls*, 1 M.J. 734 (A.F.C.M.R. 1975); *United States v. Riley*, 1 M.J. 639 (C.G.C.M.R. 1975); *United States v. Holmes*, 43 C.M.R. 446 (A.C.M.R. 1970) (holding that dismissal for fatal variance does not preclude retrial for unauthorized absence from correct unit).

5. An Article 86(3) specification must allege the accused was absent from his unit, organization, or other place of duty at which he was required to be. Failure to allege that the accused was required to be there is fatal. *United States v. Kohlman*, 21 C.M.R. 793 (A.F.C.M.R. 1956). Absence from a unit cannot be supported when the member is in fact present in the unit, albeit casually. *United States v. Wargo*, 11 M.J. 501 (N.C.M.R. 1981). *But see United States v. Phillips*, 28 M.J. 599 (N.M.C.M.R 1989) (affirming conviction of accused who remained on the installation but in another unit's barracks). *See also United States v. Cary*, 57 M.J. 655 (N-M. Ct. Crim. App. 2002) (accused was allowed to leave local area and live with cousin, conditioned upon the requirement he call his unit daily to report status; accused's failure was not an unauthorized absence, but rather a failure to perform a particular task).

6. The specification must allege that the absence was "without authority." Failure to do so may be a fatal defect. *United States v. Fout*, 13 C.M.R. 121 (C.M.A. 1953), *overruled in part by United States v. Watkins*, 21 M.J. 208 (C.M.A. 1986) (omission not fatal when first challenged on appeal, accused pled guilty, another AWOL specification to which the accused pled guilty contained the phrase "without authority," and no prejudice evident).

7. Mere failure to follow unit checkout procedure by accused who was granted leave does not constitute AWOL. *United States v. Dukes*, 30 M.J. 793 (N.M.C.M.R. 1990).

8. A definitive inception date is indispensable to a successful prosecution for unauthorized absence. *United States v. Hardeman*, 59 M.J. 389 (C.A.A.F. 2004).

9. Computing the Duration of the Absence. MCM, pt. IV, ¶ 10.c.(9).

a) An unauthorized absence is complete the moment the accused leaves the unit without authority. It is not a continuing offense. *See United States v. Jackson*, 20 M.J. 83 (C.M.A. 1985); *United States v. Lynch*, 47 C.M.R. 498 (C.M.A. 1973); *United States v. Newton*, 11 M.J. 580 (N.C.M.R. 1980) (accused's plea improvident when he admitted his absence actually began before the date alleged in the specification which constituted an admission to an uncharged offense). *But see United States v. Brock*, 13 M.J. 766 (A.F.C.M.R. 1982) (plea to "13

October" absence not improvident as it was embraced by "on or about" 14 October specification). Leave is considered an absence from duty, and one in an AWOL status cannot take leave. *United States v. Kimbrell*, 28 M.J. 542 (A.F.C.M.R. 1989); *United States v. Ringer*, 14 M.J. 979 (N.M.C.M.R. 1982).

b) The duration of an absence must be proved in order to determine the legal punishment for the offense. *United States v. Lynch*, 47 C.M.R. 498 (C.M.A. 1973); *see also United States v. Simmons*, 3 M.J. 398 (C.M.A. 1977).

c) The duration of an absence alleged in a specification may be decreased but not enlarged by the court. *United States v. Turner*, 23 C.M.R. 674 (C.G.B.R. 1957), *rev'd on other grounds*, 25 C.M.R. 386 (C.M.A. 1958); *United States v. Scott*, 59 M.J. 718 (Army Ct. Crim. App. 2004) (holding plea improvident for charged period when accused signed in with CQ and departed the next day; citing MCM pt. IV, ¶ 10c(11), the court divided the period of absence into two shorter absences under the same specification and affirmed the findings and sentence); An accused may be found guilty of two or more separate unauthorized absences under one specification, but the maximum punishment may not increase. MCM, pt. IV, ¶ 10c(11).

d) If a member is released by the civilian authorities without trial, and was on authorized leave at the time of arrest or detention, the member may be found guilty of unauthorized absence only if it is proved that the member actually committed the offense for which detained, thus establishing that the absence was the result of the member's own misconduct. MCM, pt. IV, ¶ 10.c.(5). *But see United States v. Sprague*, 25 M.J. 743 (A.C.M.R. 1987) (holding guilty plea provident where accused admitted his arrest on a warrant for contempt of court was his own fault, despite the fact that he was released without trial).

e) If a service member is given authorization to attend civilian court proceedings, pursuant to UCMJ Article 14, and is put in civilian jail as a result, the ensuing absence is not unauthorized. *United States v. Urban*, 45 M.J. 528 (N-M. Ct. Crim. App. 1996).

10. Termination of the Absence: Return to Military Control.

a) Surrender to military authority. If an accused presents himself to military authorities and notifies them of his AWOL status, the surrender terminates the absence. MCM, pt. IV, ¶ 10.c.(10)(a).

(1) *United States v. Coglin*, 10 M.J. 670, 672 (A.C.M.R. 1981) lists three factors which must be found to constitute an effective voluntary termination:

(a) "[T]he absentee must present himself to competent military authority with the intention of returning to military duty;"

(b) "[T]he absentee must identify himself properly and must disclose his status as an absentee;" and

(c) "[T]he military authority, with full knowledge of the individual's status as an absentee, exercises control over him."

(2) Casual presence. *United States v. Rogers*, 59 M.J. 584 (Army Ct. Crim. App. 2003) (affirming conviction when accused pled guilty and

said she was "sometimes" on post during the charged periods, but admitted she had no intent to return and did not turn herself in to her unit; casual presence on post for personal reasons did not voluntarily terminate her absence). The opinion contains a pattern instruction for voluntary termination issues.

(3) Intent to return to duty. The soldier must voluntarily submit or offer to submit to military authorities with a bona fide intention to return to duty. *United States v. Self*, 35 C.M.R. 557 (A.B.R. 1965).

b) Military Control.

(1) Where an accused thwarted an attempt to exercise control by refusing to submit to lawful orders, military control was not established. *United States v. Pettersen*, 14 M.J. 608 (A.F.C.M.R. 1982), *aff'd* 17 M.J. 69 (C.M.A. 1983).

(2) Telephone contact alone will not effect a return to military control. *United States v. Anderson*, 1 M.J. 688 (N.C.M.R. 1975); *see also United States v. Sandell*, 9 M.J. 798 (N.C.M.R. 1980) (rejecting claim of constructive termination where accused informed recruiter by telephone he wished to surrender, but before surrendering to a captain at the reserve center, accused became frightened and departed the center).

(3) Civilian bail/bond. *United States v. Dubry*, 12 M.J. 36 (C.M.A. 1981) (accused's surrender to military authority was not complete because the terms of his civilian bail made him unavailable to return to unrestricted military control).

(4) Where the record reflects the accused 1) may have submitted himself to military authorities, and 2) military authorities failed to exercise control over the accused, a substantial basis in law and fact exists to question the providence of the accused's plea of guilty to unauthorized absence (relative to the calculation of the termination date of the accused's absence). *United States v. Phillipe*, 63 M.J. 307 (C.A.A.F. 2006); *see also United States v. Pinero*, 60 M.J. 31 (C.A.A.F. 2004) (AWOL soldier who returned to his unit to submit to a urinalysis that lasted five hours, and then went AWOL again, terminated his initial AWOL when he returned to submit to the urinalysis).

c) Knowledge of absentee's status.

(1) "[K]nown presence at a military installation will not constitute termination where the absentee, by design and misrepresentation, conceals his identity or duty status." *United States v. Self*, 35 C.M.R. 557 (A.B.R. 1965).

(2) Casual presence at a military installation, unknown to proper authority and primarily for the absentee's own purposes, does not end the unauthorized absence. *United States v. Williams*, 29 M.J. 504 (A.C.M.R. 1989) (if an absentee temporarily submits himself to military control but does not disclose his status as an absentee, the AWOL is not terminated); *United States v. Self*, 35 C.M.R. 557 (A.B.R. 1965); *United States v. Murat Acemoglu*, 45 C.M.R. 335 (C.M.A. 1972) (going to American embassy to find out information on how to surrender was not enough to

terminate AWOL); *United States v. Baughman*, 8 M.J. 545 (C.G.C.M.R. 1979).

(3) Constructive knowledge of absentee's status. An unauthorized absence may be terminated by the exercise of control over the absentee by military authorities having a duty to inquire into the absentee's status, if they could have determined such status by reasonable diligence. *United States v. Gudatis*, 18 M.J. 816 (A.F.C.M.R. 1984). *But see United States v. Jackson*, 2 C.M.R. 96 (C.M.A. 1952) (After the accused went AWOL, he was tried by summary court-martial for other offenses in a different area of Korea. During World War II and the Korean Conflict, summary courts-martial were convened in areas where large troop concentrations existed, and courts often did not know the accused soldiers' status. Thus, the AWOL did not terminate in this case, because the accused did not inform the summary court-martial of his status and went AWOL after the court-martial.)

d) Apprehension of a known absentee by military authorities terminates an unauthorized absence.

(1) The authorities need not be of the same armed force as the accused. *United States v. Coates*, 10 C.M.R. 123 (C.M.A. 1953).

(2) But, record of trial must evince military authority's knowledge of status and intent to exercise control. *United States v. Gaston*, 62 M.J. 404 (2006) (action by "dorm manager" informing the accused that his squadron was looking for him not enough to constitute termination by apprehension; dorm manager did not indicate why unit was looking for accused and once notified, accused voluntarily surrendered by going to the front of the dorm).

e) Apprehension of a known absentee by civil authorities, acting at the request and on behalf of military authorities, terminates an unauthorized absence. *United States v. Garner*, 23 C.M.R. 42 (C.M.A. 1957); *see also United States v. Hart*, 47 C.M.R. 686 (A.C.M.R. 1973).

(1) Where a service member is apprehended by civilian authorities for a civilian offense, and the authorities indicate a willingness to turn the member over to military control, the failure or refusal of military officials to take control of the member constructively terminates the absence. *United States v. Lanphear*, 49 C.M.R. 742 (C.M.A. 1975). *But see United States v. Bowman*, 49 C.M.R. 406 (A.C.M.R. 1974) (holding that the Army has no affirmative duty to seek the release of a service member it knows is in civilian jail pending civilian charges).

(2) Defense counsel must determine all relevant facts concerning an accused's apprehension by civilian authorities and return to military control to competently advise an accused before entering a guilty plea to an unauthorized absence terminated by apprehension. *United States v. Evans*, 35 M.J. 754, 757 n.1 (N.M.C.M.R. 1992).

f) Delivery to military authority. If a known absentee is delivered by anyone to military authority, this terminates the absence. MCM, pt. IV, ¶ 10.c.(10)(c).

11. For a discussion of trial defense counsel's obligations concerning disclosure of documents, see *United States v. Province*, 45 M.J. 359 (C.A.A.F. 1997) (in which defense counsel, during pretrial negotiations, gave prosecutors a written pass given to the accused, thus allowing the government to sever one long AWOL charge into two AWOL charges; the court held defense counsel was not unethical or ineffective because counsel used the document to secure a favorable deal for his client and because the government could have obtained the document elsewhere).

D. *Mens Rea* Under Article 86, UCMJ.

1. Specific intent is not an element of the Article 86 offenses, but it is necessary to plead and prove specific intent for certain aggravating factors (*e.g.*, intent to avoid field maneuvers or field exercises). MCM, pt. IV, ¶¶ 10c(3) and (4).

2. Unauthorized absence requires is a general intent crime, whereas desertion under Article 85 requires specific intent. *United States v. Holder*, 22 C.M.R. 3 (C.M.A. 1956).

E. Attempts. Attempted AWOL may be a lesser included offense of desertion and attempted desertion. *United States v. Evans*, 28 M.J. 753 (A.F.C.M.R. 1989), *aff'd*, 29 M.J. 331 (C.M.A. 1989).

F. Multiplicity/Unreasonable Multiplication of Charges.

1. Multiplicity: AWOL & breaking restriction covering same time period. *United States v. Hudson*, 58 M.J. 357 (C.A.A.F. 2004).

2. Unreasonable multiplication of charges: multiple failures to repair & dereliction of duty. *United States v. Taylor*, 26 M.J. 7 (C.M.A. 1988).

G. Lesser included Offenses.

1. Article 86(1) is not a lesser included offense of Article 86(3). *United States v. Reese*, 7 C.M.R. 292 (A.B.R. 1953).

2. Article 86(3) is not a lesser included offense of Article 86(1) or (2). *United States v. Sturkey*, 50 C.M.R. 110 (A.C.M.R. 1975).

IX. MISSING MOVEMENT. UCMJ ART. 87.

A. Background. The offense of missing movement is a relative newcomer to military criminal law, arising from problems encountered in World War II when members of units or crews failed to show up when their units or ships departed. Article 87 was designed to cover offenses more serious than simple AWOL but less severe than desertion. *United States v. Smith*, 2 M.J. 566 (A.C.M.R. 1976), *aff'd*, 4 M.J. 210 (C.M.A. 1978) (not discussing the missing movement offense).

B. Elements. MCM, pt. IV, ¶ 11.b.

1. That the accused was required in the course of duty to move with a ship, aircraft or unit;

2. That he knew of the prospective movement of the ship, aircraft, or unit;

3. That the accused missed the movement; and

4. That the missed movement was either through design or neglect.

C. Two Forms of Missing Movement.

1. Through design.

a) "Design" refers to doing an act intentionally or on purpose. It requires specific intent to miss the movement. MCM, pt. IV, ¶ 11.c.(3).

b) Missing movement through design, the more serious offense, has a maximum punishment of dishonorable discharge, total forfeitures, and confinement for two years. MCM, pt. IV, ¶ 11.e.(1).

2. Through neglect.

a) "Neglect" means the omission to take such measures as are appropriate under the circumstances to assure presence with a ship, aircraft, or unit at the time of a scheduled movement, or doing some act without giving attention to its probable consequences in connection with the prospective movement, such as a departure from the vicinity of the prospective movement to such a distance as would make it likely that one could not return in time for the movement. MCM, pt. IV, ¶ 11.c.(4).

b) The maximum punishment for missing movement through neglect is a bad conduct discharge, total forfeitures, and confinement for one year. MCM, pt. IV, ¶ 11.e.(2).

D. General Requirements.

1. "Movement" includes neither practice marches of short duration with a return to the point of departure nor minor changes in location of a unit such as from one side of a post to another. MCM, pt. IV, ¶ 11c(1). Movement missed must be substantial in terms of duration, distance and mission. Thus, missing a port call for MAC flight constituted missing movement of an aircraft within meaning of Article 87. *United States v. Graham*, 16 M.J. 460 (C.M.A. 1983); *United States v. Blair*, 24 M.J. 879 (A.C.M.R. 1987) *aff'd*, 27 M.J. 438 (C.M.A. 1988). *But see United States v. Gibson*, 17 M.J. 143 (C.M.A. 1984) (failure to report for an ordinary commercial flight does not constitute missing movement as it is not the type of movement contemplated by Article 87).

2. In a case involving missing movement involving a civilian aircraft, the government must show that the accused was required to travel on that aircraft. *United States v. Kapple*, 40 M.J. 472 (C.M.A. 1994).

3. The accused must have actual knowledge of the prospective movement. Knowledge of the exact hour or even of the exact date of the movement is not required. MCM, pt. IV, ¶ 11c(5).

4. The accused's knowledge may be shown by circumstantial evidence. *United States v. Chandler*, 48 C.M.R. 945 (C.M.A. 1974) (reversing conviction because the evidence was legally insufficient to prove actual knowledge).

5. Some authority supports the proposition that UCMJ Article 87 does not reach every instance in which a service member misses a movement but is applicable only when the accused has an essential mission related to the movement, *e.g.*, is an integral member of the unit or crew whose absence would potentially disrupt the mission. *Compare United States v. Gillchrest*, 50 C.M.R. 832 (A.F.C.M.R. 1975) (finding that service member missing a commercial aircraft to Turkey as part of PCS did not meet Congressional intent behind the missing movement offense) *and United States v. Smith*, 2 M.J. 566 (A.C.M.R. 1976) *aff'd*, 4 M.J. 210 (C.M.A. 1978) (holding that missing movement to site of two-day bivouac 12 miles downrange did not constitute missing movement; "[h]ard and fast rules relating to the duration, distance and mission of the 'movement' are not appropriate, but

rather those factors plus other concomitant circumstances must be considered collectively, in order to evaluate the potential disruption of the unit caused by a soldier's absence"), *with United States v. Lemley*, 2 M.J. 1196 (N.C.M.R. 1976) (holding that accused, who was being escort from brig and missed specific Pan Am flight listed on orders, did miss "movement") *and United States v. St. Ann*, 6 M.J. 563 (N.C.M.R. 1978)(holding that missing a commercial flight while on orders constitutes missing movement even when the accused is not a member of the crew or traveling with his unit).

6. Going AWOL and proceeding to a place more than 1200 miles away was a failure to exercise due care contemplated in missing movement through neglect. *United States v. Mitchell*, 3 M.J. 641 (A.C.M.R. 1977).

7. Missing a two-week winter exercise that took place on the same installation as the unit's location in Alaska supported missing a movement by design. *United States v. Jones*, 37 M.J. 571 (A.C.M.R. 1993).

8. An eight-hour "dependent's cruise" by aircraft carrier is not a "minor" change in the location of the ship. The focus of the statutory prohibition is upon the movement itself, and not its purpose. *United States v. Quezada*, 40 M.J. 109 (C.M.A. 1994).

9. An essential element of missing movement is that the movement actually occurred. This element may be inferred if the accused holds a ticket for a regularly scheduled commercial flight. *United States v. Kapple*, 36 M.J. 1119 (A.F.C.M. R. 1993), *rev'd on other grounds*, 40 M.J. 472 (C.M.A. 1994).

10. Missing the move, rather than a particular mode of travel, is the gravamen of missing movement. *United States v. Smith*, 26 M.J. 276 (C.M.A. 1988).

11. Military judge erred by using the accused's plea of guilty to AWOL as evidence to establish an essential element of a separate charge of missing movement to which a plea of not guilty had been entered. *United States v. Wahnon*, 1 M.J. 144 (C.M.A. 1975).

E. Multiplicity and Lesser included Offenses.

1. An accused cannot be punished for both AWOL of minimal duration and missing movement through neglect or through design when the same absence forms the basis for both charges. *United States v. Baba*, 21 M.J. 76 (C.M.A. 1985); *United States v. Posnick*, 24 C.M.R. 11 (C.M.A. 1957); *United States v. Bridges*, 25 C.M.R. 383 (C.M.A. 1958). *See also United States v. Traxler*, 39 M.J. 476 (C.M.A. 1994) (finding that missing movement of aircraft and disobedience of an officer's order to board the aircraft were not multiplicious).

2. An AWOL of extended duration is not multiplicious with missing movement. *United States v. Olinger*, 47 M.J. 545 (N-M. Ct. Crim. App. 1997), *aff'd*, 50 M.J. 365 (C.A.A.F. 1999).

3. Failure to repair is a lesser included offense of missing movement. *United States v. Smith*, 2 M.J. 566 (A.C.M.R. 1976), *aff'd*, 4 M.J. 210 (C.M.A. 1978).

X. DESERTION. UCMJ ART. 85.

A. Types of Desertion. Desertion exists when any member of the armed forces:

1. Without authority, goes or remains absent from his or her unit, organization, or place of duty, with intent to remain away permanently. *United States v. Horner*, 32 M.J. 576 (C.G.C.M.R. 1991); or

2. Quits his or her unit, organization or place of duty with intent to avoid hazardous duty or to shirk important service. *United States v. Hocker*, 32 M.J. 594 (A.C.M.R. 1991); or

3. Without being separated from one of the armed forces, enlists or accepts an appointment in another of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States.

4. Additionally, a commissioned officer is in desertion if, after tender of a resignation and before its acceptance, he quits his post or proper duties without leave and with intent to remain away permanently.

B. Elements of Desertion with Intent to Remain Away Permanently. (The most common form of desertion). MCM, pt. IV, ¶ 9.b.(1).

1. The accused absented himself from his unit, organization, or place of duty;

2. That the absence was without authority;

3. That the accused, at the time the absence began or at some time during the absence, intended to remain away from his unit, organization, or place of duty permanently; and

4. The accused remained absent until the date alleged.

5. If the absence was terminated by apprehension, that element is added.

C. Less Common Forms of Desertion.

1. Desertion with intent to avoid hazardous duty or to shirk important service. MCM, pt. IV, ¶ 9b(2).

a) Prospective duty as a medic at Fort Sam Houston during Persian Gulf War qualified as important service. *United States v. Swanholm*, 36 M.J. 743 (A.C.M.R. 1992).

b) Thirty-day sentence to brig not important service for purposes of desertion. *United States v. Wolff*, 25 M.J. 752 (N.M.C.M.R. 1987).

c) Being an accused at a special court-martial is not important service. *United States v. Walker*, 26 M.J. 886 (A.F.C.M.R. 1988) (accused still found guilty, however, because he had an intent to remain away permanently). *See* TJAGSA Practice Note, *Being an Accused: "Service," But Not "Important Service,"* Army Law., Apr. 1989, at 55 (discussing *Walker*).

2. Desertion before notice of acceptance of resignation. MCM, pt. IV, ¶ 9.b.(3).

D. Desertion Terminated by Apprehension.

1. In addition to the four elements of desertion listed above, if the accused's absence was terminated by apprehension, the Government may allege termination by apprehension as an aggravating factor.

2. If alleged in the specification and proved beyond a reasonable doubt, termination by apprehension increases the maximum confinement from two years to three years. MCM, pt. IV, ¶ 9.e.(2)(a) and (b).

3. Termination by apprehension may apply to all forms of desertion except absence with intent to avoid hazardous duty or to shirk important service, as the maximum

punishment for this latter most serious form of desertion is already a DD and five years. MCM, pt. IV, ¶ 9.e.(1).

4. An accused may be convicted of desertion terminated by apprehension even though he was apprehended by civilian authorities for a civilian offense and thereafter notified the civilian authorities of his AWOL status. *United States v. Fields*, 32 C.M.R. 193 (C.M.A. 1962); *United States v. Babb*, 19 C.M.R. 317 (C.M.A. 1955); *United States v. Northern*, 42 M.J. 638 (N-M. Ct. Crim. App. 1995). Apprehension by civilian authorities and the subsequent return to military authorities for an offense unrelated to one's military status does not in and of itself prove that the return was involuntary. *United States v. Washington*, 24 M.J. 527 (A.F.C.M.R. 1987).

E. Termination Generally. Desertion did not terminate when military authorities requested civilian authorities deny a deserter bail until resolution of civilian charges. *United States v. Asbury*, 28 M.J. 595 (N.M.C.M.R. 1989).

F. Attempted Desertion. Attempted desertion should be charged under Article 85 rather than under Article 80. MCM, pt. IV, ¶ 4c(6)(a).

G. *Mens Rea* for Desertion. The offenses of desertion and absence without leave are similar in most respects, except for the intent element involved in desertion. *See United States v. Horner*, 32 M.J. 576 (C.G.C.M.R. 1991). The remaining elements of desertion are the same as those for AWOL and are discussed *supra*, ¶ II, this chapter.

1. Desertion is a specific intent crime. *United States v. Holder*, 22 C.M.R. 3 (C.M.A. 1956).

2. Evidence of intent may be based upon all the facts and circumstances of the case. Length of absence, actions and statements of the accused, and the method of termination of the absence (apprehension or voluntary surrender) are some factors to be considered. MCM, pt. IV, ¶ 9c(1)(c)(iii). Many of the circumstantial factors listed in the MCM can cut both ways, and may be argued by either side; therefore, in order to sustain a desertion conviction, the Government ought to provide additional context favoring conviction rather than simply raising the circumstances at trial. Ultimately, a conviction for desertion is legally sufficient where, given the circumstances of the particular case, a reasonable factfinder could draw an inference of intent beyond a reasonable doubt. *United States v. Oliver*, 70 M.J. 64 (C.A.A.F. 2011).

3. The determination of whether an accused intended to avoid hazardous duty or shirk important service is subjective, and whether the service is "important" is an objective question dependent upon the totality of circumstances. *United States v. Gonzalez*, 42 M.J. 469 (1995).

4. The length of the absence alone is insufficient to establish an intent to desert; however, in combination with other circumstantial evidence, it may be sufficient. *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

5. The totality of circumstances surrounding the offense can negate specific intent to absent oneself permanently. *United States v. Logan*, 18 M.J. 606 (A.F.C.M.R. 1984).

6. Having an understandable or laudable motive to desert is not a defense if the evidence sufficiently establishes the elements. *United States v. Gonzalez*, 39 M.J. 742 (N.M.C.M.R. 1994), *aff'd* 42 M.J. 469 (1995).

7. Evidence of an accused's motive to quit her unit as gesture of protest because of moral or ethical reservations that the unit might commit war crimes is irrelevant to a

charge of desertion with intent to avoid hazardous duty or shirk important service. *United States v. Huet-Vaughn* 43 M.J. 105 (C.A.A.F. 1995).

8. Evidence of a 26-month absence while accused was on orders for a war zone and where he was apprehended a long distance from his unit was sufficient to establish intent to desert. *United States v. Mackey*, 46 C.M.R. 754 (N.C.M.R. 1972).

9. Evidence of a two-year absence in vicinity of assigned unit, termination by apprehension, and a previous absence, despite retention of an identification card, was sufficient to show an intent to desert. *United States v. Balagtas*, 48 C.M.R. 339 (N.C.M.R. 1972).

10. The intent to remain away permanently need not coincide with the accused's departure. A person must have had, either at the inception of the absence or at some time during the absence, the intent to remain away permanently. MCM, pt. IV, ¶ 9.c.(1)(c)(i).

11. In a case where desertion with intent to shirk important service was charged, infantry service in Vietnam was held to be "important service." *United States v. Moss*, 44 C.M.R. 298 (A.C.M.R. 1971). *See also United States v. Hocker*, 32 M.J. 594 (A.C.M.R. 1991) (accused's plea provident to desertion with intent to avoid hazardous duty where service was duty in Persian Gulf).

H. Pleading.

1. In view of the three types of intent encompassed in Article 85 (*i.e.*, intent to remain away permanently, intent to avoid hazardous duty, intent to shirk important service), the crime of desertion is not alleged unless the specific form of intent is stated in the specification. *United States v. Morgan*, 44 C.M.R. 898 (A.C.M.R. 1971) (the court found the accused guilty of the lesser included offense of AWOL).

2. "Desert" and "desertion" are terms of art which necessarily and implicitly include the requirement that the absence was without authority. *United States v. Lee*, 19 M.J. 587 (N.M.C.M.R. 1984) (specification that alleges that the service member "did desert" is the equivalent of alleging that the members did without authority and with the intent to remain away permanently absent himself from his unit).

3. AWOL under Article 86 is a lesser included offense of most forms of desertion. MCM, pt. IV, ¶ 9.d.

XI. DEFENSES TO UNAUTHORIZED ABSENCE.

A. Introduction. This section treats defenses as they relate to unauthorized absence only. For a complete treatment of defenses to court-martial charges, see *infra*, chapter 5.

B. Statute of Limitations.

1. In time of war, there is no statute of limitations for AWOL and desertion. Article 43(a). For example:

a) After the armistice on 27 July 1953, hostilities in Korea were no longer "in time of war." *United States v. Shell*, 23 C.M.R. 110 (C.M.A. 1957) (holding that unauthorized absence that began on 4 August 1953 was subject to statute of limitations).

b) After 10 August 1964, hostilities in Vietnam constituted "in time of war" for suspension of the statute of limitations. *United States v. Anderson*, 38 C.M.R. 386 (C.M.A. 1968). "Time of war" ended 27 January 1973. *United States v.*

Reyes, 48 C.M.R. 832 (A.C.M.R. 1974); *see United States v. Robertson*, 1 M.J. 934 (N.C.M.R. 1976).

2. If the unauthorized absence begins in time of peace, the statute of limitations, if raised, will bar prosecution if the offense was committed more than 5 years before receipt of sworn charges by the summary court-martial convening authority. UCMJ art. 43(b). The statute of limitations is tolled while the accused is AWOL, beyond the authority of the United States to apprehend him, in custody of civil authorities, or in the hands of the enemy. However, AWOL is not a continuing offense, so the statute of limitations begins to run as soon as the service member is reported as AWOL. *United States v. Miller*, 38 M.J. 121 (C.M.A. 1993). [Note: Prior to 24 November 1986, the statute of limitations was two years for AWOL and three years for desertion. *See Miller*, 38 M.J. at 122.]

3. Swearing of charges and receipt of the charges by the officer exercising summary court-martial jurisdiction over the unit tolls the statute of limitations for the offenses charged. UCMJ art. 43(b)(1). The critical question is whether the "sworn charges and specifications" are timely received, not whether the same charge sheet received by the summary court-martial convening authority is used at the court-martial. *United States v. Miller*, 38 M.J. 121, 124 (C.M.A. 1993); *United States v. Johnson*, 3 M.J. 623 (N.C.M.R. 1977).

4. Where charges have been preferred and received by the summary court-martial convening authority and the statute of limitations has thus been tolled, minor amendments to the specifications do not void the tolling of the statute. *United States v. Arbic*, 36 C.M.R. 448 (C.M.A. 1966).

5. It is permissible to prefer charges against an accused with an open-ended termination date and forward them to the summary court-martial convening authority (to stop the running of the statute of limitations), and then add a termination date when it is known. *United States v. Reeves*, 49 C.M.R. 841 (A.C.M.R. 1975).

6. Dismissal of charges that are barred by the statute of limitations does not preclude a later trial on a charge sheet that was properly received by the summary court-martial convening authority within the period provided by the statute of limitations. *United States v. Jackson*, 20 M.J. 83 (C.M.A. 1985).

7. Even if the charged offense is not barred by the statute of limitations, the accused cannot be convicted of a lesser included offense that is barred by the statute of limitations, unless there is an affirmative waiver. *United States v. Busbin*, 23 C.M.R. 125 (C.M.A. 1957).

8. If a lesser included offense is barred by the statute of limitations, the military judge must inform the accused and allow the accused to choose between protection under the statute of limitations or the instruction on the lesser included offense. R.C.M. 907(b)(2)(B); *United States v. Cooper*, 37 C.M.R. 10 (C.M.A. 1966); *United States v. Wiedemann*, 36 C.M.R. 521 (C.M.A. 1966).

9. The military judge has a duty to advise the accused of his right to assert the statute of limitations when it appears that the period of time has elapsed. *United States v. Rodgers*, 24 C.M.R. 36 (C.M.A. 1957); *overruled on other grounds by United States v. Miller*, 38 M.J. 121 (C.M.A. 1993); *United States v. Brown*, 1 M.J. 1151 (N.C.M.R. 1977) (no duty to advise the accused where referred charges mirrored the original charges that were timely received by the summary court-martial convening authority within the period provided by the statute of limitations and the original charge sheet was attached to the referred charge sheet).

10. The rights accorded an accused under the statute of limitations may be waived when the accused, with full knowledge of the privilege, fails to plead the statute in bar of the prosecution or sentence. *United States v. Troxell*, 30 C.M.R. 6 (C.M.A. 1960) (permitting an accused, charged with desertion, to plead guilty to AWOL and not assert the statute of limitations, IAW pretrial agreement).

11. When the statutory period has apparently elapsed, the burden of proof of showing timely charges is on the government. *United States v. Morris*, 28 C.M.R. 240 (C.M.A. 1959) (statute of limitations did not toll, because accused was not in territory in which the US had authority to apprehend him).

12. Computation of time. A year is 365 days during regular years and 366 days in leap year. The date of the offense counts as the first day of the running of the statute and the count proceeds forward to the day before receipt by the summary court-martial convening authority. *United States v. Tunnel*, 19 M.J. 819 (N.M.C.M.R. 1984), *aff'd* 23 M.J. 110 (C.M.A. 1986). *Contra United States v. Reed*, 19 M.J. 702 (N.M.C.M.R. 1984) (begins day after offense and concludes on day necessary action is accomplished to toll statute).

C. Former Jeopardy (Article 44, UCMJ).

1. No person may, without his consent, be tried a second time for the same offense. Article 44(a).

2. When jeopardy attaches.

a) A proceeding which, after introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused, is a trial. Article 44(c).

b) Withdrawal of charges after arraignment but before presentation of evidence does not constitute former jeopardy, and denial of a motion to dismiss charges at a subsequent trial is proper. *United States v. Wells*, 26 C.M.R. 289 (C.M.A. 1958).

c) Once tried for a lesser offense, accused cannot be tried for a major offense that differs from the lesser offense in degree only. Trial for AWOL bars subsequent trial for desertion. *United States v. Hayes*, 14 C.M.R. 445 (N.B.R. 1953).

d) "The protection against double jeopardy does not rest upon a surface comparison of the allegations of the charges; it also involves consideration of whether there is a substantial relationship between the wrongdoing asserted in the one charge and the misconduct alleged in the other." *United States v. Lynch*, 47 C.M.R. 498, 500 (C.M.A. 1973) (doctrine of former jeopardy precluded another trial for unauthorized absence from different unit and shorter time period). *But see United States v. Robinson*, 21 C.M.R. 380 (A.B.R. 1956) (permitting, after conviction for an AWOL and after disapproval of findings and sentence by the convening authority, trial for AWOL for the same period but from a different unit than was previously charged); *United States v. Hutzler*, 5 C.M.R. 661, 664 n.3 (A.B.R. 1951).

e) Double jeopardy does not attach when charges are dismissed for violating the statute of limitations. Thus, the government is not barred from prosecuting the accused on a charge sheet that had properly been received by the summary court-martial convening authority within the period of the statute, following dismissal

of charges for the same offense (but on a different charge sheet) that was not received within the period of the statute. However, if evidence was introduced in the first proceeding, the first is considered a trial and jeopardy attaches. *United States v. Jackson*, 20 M.J. 83 (C.M.A. 1985).

f) Nonjudicial punishment previously imposed under Article 15 for a *minor* offense and punishment imposed under Article 13 for a *minor* disciplinary infraction may be interposed as a bar to trial for the same minor offense or infraction. R.C.M. 907(b)(2)(D)(iv).

(1) "Minor" normally does not include offenses for which the maximum punishment at a general court-martial could be dishonorable discharge or confinement for more than one year. MCM, pt. V, ¶ 1.e.

(2) If an accused has previously received punishment under Article 15 for other than a minor offense, the service member may be tried subsequently by court-martial; however, the prior punishment under Article 15 must be considered in determining the amount of punishment to be adjudged at trial if the accused is found guilty at the court-martial. *United States v. Jackson*, 20 M.J. 83 (C.M.A. 1985); *see* UCMJ art. 15(f); R.C.M. 1001(c)(1)(B); *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989) (accused must be given complete credit for any and all nonjudicial punishment suffered—day-for-day, dollar-for-dollar, and stripe-for-stripe).

(3) An AWOL of 5 days, which was accused's first offense, was a "minor offense" that should have been dismissed upon motion, after accused had previously been punished for the same offense under Article 15. *United States v. Yray*, 10 C.M.R. 618 (A.B.R. 1953).

D. Jurisdiction.

1. For jurisdiction generally, see DA Pam 27-173, pt. II.

2. The mere fact of expiration of enlistment during a status of unauthorized absence did not terminate jurisdiction or the AWOL. *United States v. Klunk*, 11 C.M.R. 92 (C.M.A. 1953).

3. When unauthorized absence has been alleged, an accused's status as a member of the armed forces must be proved beyond a reasonable doubt. *United States v. Marsh*, 15 M.J. 252 (C.M.A. 1983).

E. Impossibility: The Inability to Return to Military Control.

1. When a service member is, due to unforeseen circumstances, unable to return at the end of authorized leave through no fault of his own, he has not committed the offense of AWOL as the absence is excused. MCM, pt. IV, ¶ 10c(6); *see also United States v. Lee*, 16 M.J. 278 (C.M.A. 1983) (mechanical problems with automobile); *United States v. Calpito*, 40 C.M.R. 162 (C.M.A. 1969).

2. When a service member, *already in an AWOL status*, is unable to return because of sickness, lack of transportation or other disability, he remains in an AWOL status; however, the disability for part of the AWOL should be considered as an extenuating circumstance. MCM, pt. IV, ¶ 10c(6).

3. Types of impossibility in AWOL situations.

a) Impossibility due to physical disability.

(1) Where accused was ill at the end of his authorized leave and where, on medical advice, he remained in bed for several days before turning himself in to military authorities, the military judge should have given instructions on the defense of physical incapacity. *United States v. Amie*, 22 C.M.R. 304 (C.M.A. 1957); *see also United States v. Irving*, 2 M.J. 967 (A.C.M.R. 1976) ("[s]ickness which amounts to physical incapacity to report or otherwise comply with orders, and which is not self-induced, is a legal excuse"); *United States v. Edwards*, 18 C.M.R. 830 (A.F.B.R. 1955) (exceeding territorial limits of pass is not *per se* unauthorized absence).

(2) Evidence of accused's dental problems which went untreated because of a difference of professional opinion did not raise the defense of physical incapacity after the accused went AWOL to receive civilian dental treatment. *United States v. Watson*, 50 C.M.R. 814 (N.C.M.R. 1975).

(3) Evidence raised defense of physical inability where accused, returning to his ship, was robbed and knocked unconscious and, upon regaining consciousness the next day, immediately attempted to return to his ship. *United States v. Mills*, 17 C.M.R. 480 (N.C.M.R. 1954).

(4) The accused was robbed the night before he was due to return to his unit and made no effort to return other than to attempt to borrow money (refusing one offer), although he was aware of his duty to return and was physically able to do so. No defense of impossibility was found. In a footnote, the court wrote that the accused was derelict in his responsibilities, because he did not contact military authorities or seek the aid of any responsible civilian agency. *United States v. Bermudez*, 47 C.M.R. 68 (A.C.M.R. 1973).

b) Impossibility due to transportation misfortune.

(1) Where second lieutenant's car broke down while he was returning from a weekend pass and he elected to remain with his car until it was repaired, the Manual provision concerning "through no fault of his own" does not apply as his decision was for his own convenience. *United States v. Kessinger*, C.M.R. 261 (A.B.R. 1952).

(2) Where a second lieutenant postponed his return from leave to assist a friend in filing an accident report, the absence was not excusable as involuntary as no inability to return existed. *United States v. Scott*, 9 C.M.R. 241 (A.B.R. 1952).

(3) Where a second lieutenant mistakenly took a "hop" to Washington, D.C. rather than to Atlanta, and thereafter had difficulty obtaining transportation back to his unit, no valid defense was found. Rather, the evidence could be considered in extenuation and mitigation. *United States v. Mann*, 12 C.M.R. 367 (A.B.R. 1953).

c) Impossibility due to acts of God (sudden and unexpected floods; snow; storms; hurricanes; earthquakes; or any unexpected, sudden, violent, natural occurrence) can be a defense. If the particular act of nature may be expected to occur, it is not a defense because it is foreseeable (*e.g.*, a snowstorm after repeated snowstorm warnings in Minnesota in January).

d) Impossibility due to wrongful acts of third parties includes train wrecks, plane crashes, and explosions that are not caused by the accused. These situations present a legitimate defense of impossibility.

e) Impossibility due to civilian confinement.

(1) The inability to return to military control depends on the accused's status at time of confinement and on the results of the civilian trial. The table below summarizes the rule. *See generally* MCM, pt. IV, ¶ 10c(5).

Status of Service Member at Time of Confinement	**Result of Civilian Trial**		**Prosecution for AWOL?**
	Acquittal	***Conviction***	
(a) Delivery of soldier to civilian authorities under Article 14	X	X	No
(b) AWOL	X	X	Yes
(c) Absent with leave	X		No
(d) Absent with leave		X	Yes*
*AWOL begins at expiration of leave			

(2) Adjudication as a youthful offender is tantamount to a conviction within the meaning of MCM, pt. IV, ¶ 10.c.(5). *United States v. Myhre*, 25 C.M.R. 294 (C.M.A. 1958).

(3) A soldier who voluntarily commits an offense while on authorized leave and is apprehended and detained by civilian authorities may be charged with AWOL for the period after his leave expired until his return to military control. *United States v. Myhre*, 25 C.M.R. 294 (C.M.A. 1958).

(4) Where a service member, while AWOL, is apprehended, detained and acquitted by civilian authorities, absent evidence of an attempt to return to military control, the entire period of time is chargeable as AWOL. *United States v. Grover*, 27 C.M.R. 165 (C.M.A. 1958); *United States v. Bowman*, 49 C.M.R. 406 (A.C.M.R. 1974) (while AWOL, accused was arrested and convicted for a civilian offense; civilian authorities did not make the accused available to return to military control; the AWOL continued through the entire time period he was in civilian control).

(5) Where accused was granted "special leave" to answer civilian charges, he could not later be convicted of AWOL for the time spent in civilian jail if convicted by civilian authorities. *United States v. Northrup*, 31 C.M.R. 73 (C.M.A. 1961); *United States v. Williams*, 49 C.M.R. 12 (C.M.A. 1974).

(6) Absent an arrest on behalf of the military, an offer to turn the service member over to military authorities, or a notification that the civilian authorities are not going to prosecute, the Army does not have an

affirmative duty to seek the release to military authorities of an absent soldier held in a civilian jail on civilian charges. *United States v. Bowman*, 49 C.M.R. 406 (A.C.M.R. 1974) (distinguishing *United States v. Keaton*, 40 C.M.R. 212 (C.M.A. 1969)).

F. Mistake of Fact.

1. General intent crime: mistake of fact must be both honest and reasonable to constitute a defense. *United States v. Holder*, 22 C.M.R. 3 (C.M.A. 1956); *United States v. Scheunemann*, 34 C.M.R. 259 (C.M.A. 1964).

2. In specific intent crimes, such as desertion, however, the mistake of fact need only be honest. *United States v. Guest*, 46 M.J. 778 (Army Ct. Crim. App. 1997); R.C.M. 916(j).

3. When the evidence raises the defense of mistake, the government must disprove the defense beyond a reasonable doubt. *United States v. Thompson*, 39 C.M.R. 537 (A.B.R. 1968) (reversing conviction for desertion because the military judge failed to instruct on burden of proof for mistake of fact).

4. Mere speculation by the factfinder as to when an honest and reasonable mistake of fact ended and the unauthorized absence commenced is neither sufficient to sustain a conviction for AWOL nor the basis for a criminal conviction. *United States v. Morsfield*, 3 M.J. 691 (N.C.M.R. 1977).

5. A service member who was ordered to go home to await orders for Vietnam and who waited for 2-1/2 years for the orders that never arrived was not guilty of AWOL. *United States v. Davis*, 46 C.M.R. 241 (C.M.A. 1973); *see also United States v. Hale*, 42 C.M.R. 342 (C.M.A. 1970).

G. Duress.

1. Duress or coercion is a reasonably grounded fear on the part of an actor that he or another innocent person would be immediately killed or would immediately suffer serious bodily injury if he did not commit the act. Duress is a defense to all offenses except where the accused kills an innocent person. R.C.M. 916(h). *United States v. Hullum*, 15 M.J. 261 (C.M.A. 1983) (accused's absence may be excused, if he left because his life was endangered).

2. The defense of duress is not limited to those circumstances where the accused feels that he personally is going to immediately be killed or suffer serious bodily injury. *United States v. Jemmings*, 1 M.J. 414 (C.M.A. 1976) (accused pled guilty to housebreaking and, in the providence inquiry, he testified that he committed the act because he was scared that something would happen to his family if he did not); *see also United States v. Palus*, 13 M.J. 179 (C.M.A. 1982) (reversing conviction, where accused wrote bad checks to cover debts because he feared for his wife's safety, because evidence raised the duress defense).

3. The need of a service member to absent himself from a perilous situation at his duty station in order to find a safer place from threatened injury is not *normally* a good defense to AWOL. *See United States v. Wilson*, 30 C.M.R. 630 (N.B.R. 1960) (accused went AWOL because another service member threatened his life; but Board of Review affirmed the conviction because he did not eliminate the threat by going AWOL). *But see United States v. Hullum*, 15 M.J. 261 (C.M.A. 1983) (accused's absence may be excused, if he left because his life was endangered); *United States v. Roberts*, 15 M.J. 106 (C.M.A. 1983) (summary disposition) (finding that sexual harassment and immediate

threat to the physical safety of the accused's wife raised the defense of duress to an unauthorized absence).

4. Although sexual harassment may, in certain circumstances, be a defense to an unauthorized absence, it did not constitute duress when the second lieutenant conceded during the providence inquiry that she did not reasonably fear imminent death or serious bodily injury of her children when she went AWOL. *United States v. Biscoe*, 47 M.J. 398 (C.A.A.F. 1998).

5. An accused's fear that work to which he was assigned in the mess hall would aggravate his eye injury and commander's causing accused to be evicted forcibly from his off-post residence did not constitute the affirmative defense of duress in an AWOL case, because accused could not reasonably fear death or serious bodily injury. *United States v. Guzman*, 3 M.J. 740 (N.C.M.R.), *rev'd on other grounds*, 4 M.J. 115 (C.M.A. 1977).

6. The accused must reasonably apprehend immediate threat of death or serious bodily harm, and there must not be alternatives. *United States v. Olinger*, 50 M.J. 365 (C.A.A.F. 1999) (finding no "substantial basis" in law to reject the guilty plea, where accused went AWOL and missed a movement because he felt his wife's depression might kill her; during the providence inquiry, the accused failed to provide enough details of immediate threat of death or serious bodily harm and that there were no alternative sources of assistance for his wife other than going AWOL and missing movement).

7. Accused was not entitled to duress defense because he had a reasonable opportunity to avoid going AWOL. *United States v. Riofredo*, 30 M.J. 1251 (N.M.C.M.R. 1990) (finding that accused should have sought the assistance of the command to stop assaults by noncommissioned officer); R.C.M. 916(h); *see generally* TJAGSA Practice Note, *Duress and Absence Without Authority*, Army Law., Dec. 1990, at 34 (discussing *Riofredo*).

8. *United States v. Washington*, 57 M.J. 394 (C.A.A.F. 2002) *aff'd*, 58 M.J. 129 (C.A.A.F. 2003). Accused who was ordered and who refused to receive his sixth and final anthrax vaccination could not raise defense of duress. The defense requires an unlawful threat from a human being. Defense of duress is not raised by a reasonable belief that compliance with a lawful order will result in death or serious bodily injury.

XII. PROTECTED STATUS.

A. General. Articles 89, 90, and 91 cover offenses against superior commissioned officers and noncommissioned and warrant officers in the execution of office. Two conditions—superior status and the performance of the duties of office—provide increased protection to victims and increased punishment to violators of these Articles

B. "Superior Commissioned Officer" Defined. The victim's status as the superior commissioned officer of the accused is an element of crimes involving disrespect (Article 89), disobedience (Article 90(2)), and assault (Article 90(1)) in which the victim's status as a superior officer enhances the penalty. The following rules are applicable to each of the above offenses.

1. Accused & Victim in Same Armed Service. MCM pt. IV, ¶ 13(c)(1)(a).

a) The victim is the accused's "superior commissioned officer" if the victim is a commissioned officer superior in rank to the accused (not date of rank in the same grade).

b) The victim is the accused's "superior commissioned officer" if the victim is superior in command to the accused, even if the victim is inferior in grade to the accused.

c) The victim is not the accused's "superior commissioned officer" if the victim is superior in grade but inferior in command.

2. Accused & Victim in Diff. Armed Services. MCM pt. IV, ¶ 13(c)(1)(b).

a) The victim is the accused's "superior commissioned officer" if the victim is a commissioned officer and superior in the chain of command over the accused.

b) The victim is the accused's "superior commissioned officer" if the victim, not a medical officer nor a chaplain, is senior in grade to the accused and both are detained by a hostile entity so that recourse to the normal chain of command is prevented.

c) The victim is not the accused's "superior commissioned officer" merely because the victim is superior in grade to the accused. In *United States v. Peoples*, 6 M.J. 904, 905 (A.C.M.R. 1979), however, the court cited with approval an Article 15 given under the theory of Article 92(2) (failure to obey) for violating the order of an officer of another armed force who was not in the accused's chain of command.

d) In *United States v. Merriweather*, 13 M.J. 605 (A.F.C.M.R. 1982), the court disapproved the conviction of an airman of disrespect to two Navy medical officers. There was no command relationship where the accused merely spent two hours in a Navy emergency room. The court affirmed a conviction for the lesser included offense of disorderly conduct.

3. Commissioned Warrant Officers.

a) Both trial and defense counsel should be alert as to whether a warrant officer in a particular case is commissioned. Warrant officers are commissioned upon promotion to CW2. 10 U.S.C. § 582. Warrant Officer One (WO1) is not a commissioned officer.

b) "Commissioned officer" includes a commissioned warrant officer. 10 U.S.C. § 101(b)(2). *See also* R.C.M. 103 discussion.

c) In the Navy, a Chief Warrant Officer is a commissioned officer, the disobedience of whose order constitutes a violation of Article 90. *United States v. Kanewske*, 37 C.M.R. 298, 299 (C.M.A. 1967).

C. "Warrant Officer" or "Noncommissioned Officer" Defined. A victim's status as a WO or NCO is an element of those crimes involving insubordinate conduct toward such individuals, to include: disrespect (Article 91(3)), disobedience (Article 91(2)), and assault (Article 91(1)). Warrant or noncommissioned officer victims must be acting in execution of office.

1. Warrant Officers. Those individuals appointed as warrant officers to meet Army requirements for officers possessing particular skills and specialized knowledge. Although warrant officers usually perform specialized duties within the Army, they may under appropriate circumstances serve in command positions. *See* ¶ VI.B.3 above regarding "commissioned warrant officers."

2. Noncommissioned Officers.

a) Those in the rank of corporal (E-4) and above.

b) Not including a specialist (E-4).

c) Not including a victim of the rank of specialist (E-4) or below who is an "acting" NCO. *United States v. Lumbus & Sutton*, 49 C.M.R. 248 (C.M.A. 1974); *United States v. Evans*, 50 C.M.R. 198 (A.C.M.R. 1975). *See also* MCM, pt. IV, ¶ 15.c.(1).

D. "Superior" WO/NCO.

1. Article 91 protects warrant officers and noncommissioned officers from disrespect, assault, and disobedience when they are in execution of their office. The statute does not require a superior-subordinate relationship. *See United States v. Diggs*, 52 M.J. 251 (2000) (staff sergeant (E-6) that pushed sergeant (E-5) guilty of assaulting an NCO under Article 91).

2. If pleaded and proven, the fact the victim was superior to the accused and that the accused had knowledge of the victim's superior status is an aggravating factor that exposes the accused a greater maximum punishment. *See* MCM, pt. IV, ¶ 15c analysis. *See also United States v. White*, 39 M.J. 796 (N.M.C.M.R. 1994) (holding that Navy service member's plea of guilty to disrespect toward superior noncommissioned officer, where accused directed obscenities towards Air Force security police NCO apprehending him on an Air Force base, was provident).

E. Divestiture. Misconduct on the part of a superior in dealing with a subordinate may divest the former of his authority and thus destroy his protected status if it was substantial departure from the required standards of conduct. *See* MCM, pt IV, ¶ 13.c.(5).

1. Conduct amounting to divestiture. *United States v. Diggs*, 52 M.J. 251 (C.A.A.F. 2000) (striking accused); *United States v. Richardson*, 7 M.J. 320 (C.M.A. 1979) (racial slurs; calling accused "boy"); *United States v. Rozier*, 1 M.J. 469 (C.M.A. 1976) (unlawful apprehension coupled with unwarranted physical abuse); *United States v. Hendrix*, 45 C.M.R. 186 (C.M.A. 1972) (officer authorized to search the accused's quarters for narcotics exceeded the scope of his official authority to search and was not in the execution of his office when, over the accused's protests, he proceeded to read a letter found in an envelope which he could see contained no contraband); *United States v. Struckman*, 43 C.M.R. 333 (C.M.A. 1971) (inviting accused to fight); *United States v. Noriega*, 21 C.M.R. 322 (C.M.A. 1956) (officer victim serving as bartender at enlisted men's party); *United States v. Cheeks*, 43 C.M.R. 1013 (A.F.C.M.R. 1971) (sustained verbal abuse of prisoner); *United States v. Revels*, 41 C.M.R. 475 (A.C.M.R. 1969) (use of brute force on accused by confinement officer).

2. Conduct *not* amounting to divestiture. *United States v. Pratcher*, 17 M.J. 388 (C.M.A. 1984) (involvement in collecting debts contrary to regulation); *United States v. Lewis*, 12 M.J. 205 (C.M.A. 1982) (failure to give proper Article 31(b) warnings); *United States v. Lewis*, 7 M.J. 348 (C.M.A. 1979) (search that was subsequently determined to not be based on probable cause); *United States v. Middleton*, 36 M.J. 835 (A.C.M.R. 1977) (close personal friendship with subordinate); *United States v. King*, 29 M.J. 885 (A.C.M.R. 1989) (striking a prisoner who lunged at a guard); *United States v. Collier*, 27 M.J. 806 (A.C.M.R. 1988) (use of profane language) *rev'd in part on other grounds by*, 29 M.J. 365 (C.M.A. 1990); *United States v. Leach*, 22 M.J. 738 (N.M.C.M.R. 1986) (general allegations of "horseplay"); *United States v. Allen*, 10 M.J. 576 (A.C.M.R. 1980) (addressing accused as "boy" where accused did not regard use of term as racial slur and both the victim and accused were the same race); *United States v. Fetherson*, 8 M.J. 607, 609 (N.M.C.M.R. 1977) (illegal apprehension); *United States v. McDaniel*, 7 M.J. 522

(A.C.M.R. 1979) (sergeant who places drunken and protesting soldier in cold shower); *United States v. Vallenthine*, 2 M.J. 1170 (N.C.M.R. 1974) (escorting with one hand on shirt collar and other on seat of trousers); *United States v. Montgomery*, 11 C.M.R. 308 (A.B.R. 1953) (playing poker with subordinate officers).

3. If an NCO commits misconduct that divests him of his authority as an NCO, he may regain his protected status by desisting in the illegal conduct and attempting to resolve the matter within appropriate channels. *United States v. Diggs*, 52 M.J. 251 (C.A.A.F. 2000).

4. Divestiture is limited to offenses where the protected status of the victim is an element, but it does not necessarily extend to lesser included offenses. Although the accused may not be convicted of an assault upon a superior under Articles 90 or 91 when the victim's conduct divests himself of his status, the accused may be found guilty of the lesser included offense of assault under Article 128. *United States v. Richardson*, 7 M.J. 320 (C.M.A. 1979); *United States v. Johnson*, 43 C.M.R. 604 (A.C.M.R. 1970).

5. Members may find "partial" divestiture. *United States v. Sanders*, 41 M.J. 485 (C.A.A.F. 1995) (members found victim not in execution of office for purposes of assault, but he had not divesting himself of his rank status: "He had left his post, but not his stripes").

6. Divestiture does not apply to disobedience offenses. *See United States v. Cheeks*, 43 C.M.R. 1013 (A.F.C.M.R. 1971). *But see United States v. Collier*, 27 M.J. 806 (A.C.M.R. 1988) *rev'd in part on other grounds by*, 29 M.J. 365 (C.M.A. 1990). *See generally* Major Eugene R. Milhizer, *The Divestiture Defense and United States v. Collier*, Army Law., Mar., 1990, at 3

XIII. DISRESPECT.

A. Defined. UCMJ Articles 89 & 91(3).

1. Actions. *United States v. Ferenczi*, 27 C.M.R. 77 (C.M.A. 1958) (subordinate contemptuously turns and walks away from a superior who is talking to him); *United States v. Van Beek*, 47 C.M.R. 98 (A.C.M.R. 1973) (exploding gas grenade in absent officer's quarters – "gravamen of an Article 89 offense is not merely insult, but the undermining of lawful authority.").

2. Words. *United States v. Montgomery*, 11 C.M.R. 308 (A.B.R. 1953) ("Keep your Goddamn mouth shut, you field grade son-of-a-bitch or I'll tear you apart; I'll beat you to death you. . . . I'll bite your. . . off, you punk, you"); *United States v. Dornick*, 16 M.J. 642 (A.F.C.M.R. 1983) ("Hi, sweetheart").

3. Actions & words are not distinct bases—all circumstances of a case may be considered when determining whether disrespectful behavior in violation of Article 89 has occurred. *United States v. Najera*, 52 M.J. 247 (C.A.A.F. 2000).

B. Knowledge. The accused must be aware of the victim's status. *United States v. Payne*, 29 M.J. 899, 900 (A.C.M.R. 1989); MCM, pt. IV, ¶ 13c(2) & 15c(2).

C. Disrespect must be directed *toward* the victim. *United States v. Sorrells*, 49 C.M.R. 44 (A.C.M.R. 1974) (no disrespect when loud profanity was spoken in the presence of the superior but directed toward others present in the room); *see also United States v. Alexander*, 11 M.J. 726 (A.C.M.R. 1981) (accused's plea of guilty to disrespect to his first sergeant was not improvident on ground that his outburst was not directed toward that individual, where facts showed that accused became angry at having to open his locker for the first sergeant to check for contraband and he took his clothes out of his locker and threw them on floor at feet of first sergeant).

D. Pleading.

1. Disrespectful behavior must be alleged. If the words or acts that constitute the disrespectful conduct are innocuous, the pleadings will be fatally defective unless circumstances surrounding the behavior are alleged to detail the nature of insubordination. *United States v. Barber*, 8 M.J. 153 (C.M.A. 1979) (words, "If you have something to say about me, say it to my face," as spoken by a subordinate to a superior noncommissioned officer in the execution of his office, found to be disrespectful on their face; court read the language to constitute a demand by the subordinate that the superior conform his official conduct to a standard imposed by the subordinate); *United States v. Bartee*, 50 C.M.R. 51 (N.M.C.M.R. 1974) (statement to superior commissioned officer, "Man, I ain't getting no haircut," did constitute disrespect); *United States v. Sutton*, 48 C.M.R. 609 (A.C.M.R. 1974) (specification alleging accused said, "You had better get out of the man's room" held insufficient); *United States v. Smith*, 43 C.M.R. 796 (A.C.M.R. 1971) (specification alleging that accused referred to a male victim as "man" held insufficient); *United States v. Klein*, 42 C.M.R. 671 (A.C.M.R. 1970) (mere utterance of words, "People get hurt like that," did not constitute, per se, disrespectful language).

2. Failure to allege victim's status as "his superior commissioned officer" may be fatal. The omission of the pronoun "his" has been held to destroy a specification's legitimacy. *United States v. Carter*, 42 C.M.R. 898 (A.C.M.R. 1970); *United States v. Showers*, 48 C.M.R. 837 (A.C.M.R. 1974). *Contra United States v. Ashby*, 50 C.M.R. 37 (N.C.M.R. 1974) (failure to allege "his superior commissioned officer" was not fatal where the specification alleged the officer victim's rank and service, and both the enlisted accused and the officer victim were in the same service).

3. Disrespect, under Article 91, and provoking speech and gestures, under Article 117, are separate offenses and not multiplicious. *United States v. McHerrin*, 42 M.J. 672 (Army Ct. Crim. App. 1995).

E. Disrespect as a Lesser included Offense to Other Crimes.

1. Disobedience of a superior. MCM, pt. IV, ¶ 14d(3)(b); *United States v. Virgilito*, 47 C.M.R. 331 (C.M.A. 1973); *United States v. Croom*, 1 M.J. 635 (A.C.M.R. 1975). *But see United States v. Cooper*, 14 M.J. 758 (A.C.M.R. 1982) (disrespect not lesser included offense to disobedience where disrespect subsequent to disobedience).

2. Assault. *United States v. Van Beek*, 47 C.M.R. 98 (A.C.M.R. 1973).

3. Not communicating a threat. *United States v. Ross*, 40 C.M.R. 718 (A.C.M.R. 1969) (holding that disrespect, under Article 89, was not a lesser included offense of communicating a threat under Article 134, because the element "his superior commissioned officer" was not fairly alleged in the threat specification).

F. Additional Requirements for Disrespect to a Noncommissioned, Warrant, or Petty Officer.

1. The offensive words or conduct must be within the hearing or sight of the noncommissioned, warrant, or petty officer victim. This is not required in the case of a commissioned officer victim. MCM, pt. IV, ¶ 15.c.(5); *United States v. Van Beek*, 47 C.M.R. 98, 99 (A.C.M.R. 1973).

2. The noncommissioned, warrant, or petty officer victim, at the time of the offense, must be "in the execution of his office," to include any act or service required or authorized to be done by him because of statute, regulation, order of a superior or military usage. *United States v. Brooks*, 44 C.M.R. 873 (A.C.M.R. 1971) (holding off-

duty NCO working at EM Club as sergeant-at-arms in execution of his office); *United States v. Fetherson*, 8 M.J. 607, 610 (N.M.C.M.R. 1977) (holding off-duty NCO quelling disorderly conduct or maintaining order among subordinates in execution of his office).

3. An NCO of one branch of the armed forces is the "superior NCO" of an enlisted accused of another armed force only when the NCO is in a position of authority over the accused. *United States v. White*, 39 M.J. 796 (N.M.C.M.R. 1994).

4. A commissioned officer is protected even if acting in a private capacity and off duty. *United States v. Van Beek*, 47 C.M.R. 98, 99-100 (A.C.M.R. 1973); *United States v. Montgomery*, 11 C.M.R. 308 (A.B.R. 1953) (officer victim involved in poker game).

XIV. DISOBEDIENCE: PERSONAL ORDER. UCMJ ART. 90(2) & 91(2)

A. The Order.

1. The order must be directed to the accused specifically. It does not include violations of regulations, standing orders, or routine duties. MCM, pt. IV, ¶ 14c(2)(b); *United States v. Byers*, 40 M.J. 321 (C.M.A. 1994) (order revoking driving privileges signed by JAG was a routine administrative sanction for traffic offenses and was not a personal order by the post commander); *United States v. Ranney*, 67 M.J. 297 (C.A.A.F. 2009) (revocation of driving privileges issued automatically upon drunk driving arrest was not sufficient for purposes of Art. 90, but did support a conviction under Art. 92); *United States v. Gussen*, 33 M.J. 736 (A.C.M.R. 1991) (evidence that accused disobeyed an order issued by brigade commander to entire brigade, but relayed to the accused through NCOs, only supports finding of violation of orders in violation of Article 92 and not violation of a superior's personal order); *United States v. Selman*, 28 M.J. 627 (A.F.C.M.R. 1989) (letter to all minimum security prisoners setting forth restrictions was not a personal order to the accused).

2. Form of Order. As long as understandable, the form of the order and the method of transmittal are immaterial. MCM, pt. IV, ¶ 14.c.(2)(c); *United States v. McLaughlin*, 14 M.J. 908 (N.M.C.M.R. 1982) (use of the word "please" does not negate the order).

3. Scope of Order. In order to sustain the presumption of lawfulness of an order, the order must have a valid military purpose and must be a clear, narrowly drawn mandate. *United States v. Moore*, 58 M.J. 466 (2003) (rejecting a First Amendment overbroad attack and a Fifth Amendment vagueness attack on an article 90 violation because the order in question had a valid military purpose and was "sufficiently clear, specific, and narrowly drawn.").

a) The order must be a specific mandate to do or not to do a specific act. MCM, pt. IV, ¶ 14.c.(2)(b); *United States v. Womack*, 29 M.J. 88 (C.M.A. 1989) ("safe sex" order for HIV positive airman was "specific, definite, and certain."); *United States v. Warren*, 13 M.J. 160 (C.M.A. 1982) (ambiguous whether statement "settle down and be quiet" was order or mere counseling); *United States v. Mantilla*, 36 M.J. 621 (A.C.M.R. 1992) (order to "double time" to barracks to retrieve gear was positive command rather than advice); *United States v. Claytor*, 34 M.J. 1030 (N.M.C.M.R. 1992) (order to "shut up" on the heels of disrespectful language about a superior commissioned officer was a specific mandate to cease speaking and say nothing further).

b) *But see United States v. Mitchell*, 20 C.M.R. 295 (C.M.A. 1955) ("leave out the Orderly Room because I don't want to have any trouble with you" lacks specificity of meaning and extrinsic evidence can be used to clarify language);

United States v. Beattie, 17 M.J. 537 (A.C.M.R. 1983) (where superiors of intoxicated accused did not want him at his assigned place of duty, which was the motor pool, unclarified order to "return to his place of duty and go to work" was not a clear mandate).

4. Lawfulness of the order is a question of law that must be decided by the military judge.

a) *United States v. Diesher*, 61 M.J. 313 (C.A.A.F. 2005) (holding the legality of an order is an issue of law that must be decided by the military judge (citing *United States v. New*, 55 M.J. 95 (C.A.A.F. 2001)).

b) In 2005, MCM, Part IV, para. 14c(2)(a) was amended to clarify that the determination of lawfulness resides with the military judge, rather than the trier of fact. The analysis cites *United States v. New*, 55 M.J. 95 (C.A.A.F. 2001) as the basis for this change.

B. Knowledge.

1. The prosecution must prove, as an element of the offense, that the accused had actual knowledge of the order. MCM, pt. IV, ¶ 14c(2)(e); *United States v. Shelly*, 19 M.J. 325 (C.M.A. 1985); *United States v. Pettigrew*, 41 C.M.R. 191 (C.M.A. 1970) (although knowledge may be proven by circumstantial evidence, the knowledge must be actual and not constructive).

2. The prosecution must prove that the accused had actual knowledge of the status of the victim. MCM, pt. IV, ¶ 14c(2)(e); *United States v. Young*, 40 C.M.R. 36 (C.M.A. 1060) (voluntary intoxication raised issue of whether accused knew he was dealing with his superior officer); *United States v. Oisten*, 33 C.M.R. 188 (C.M.A. 1963); *United States v. Payne*, 29 M.J. 899 (A.C.M.R. 1989).

C. Willfulness of Disobedience.

1. Disobedience must be intentional defiance of authority. Failure to comply through heedlessness or forgetfulness is not "willful" (but it may violate Article 92). MCM, pt. IV, ¶ 14c(2)(f).

2. Intentional noncompliance, not "flaunting of authority," is required. *United States v. Ferenczi*, 27 C.M.R. 77 (C.M.A. 1958).

3. Voluntary intoxication might prevent the accused from having the willful state of mind required by Article 91. *United States v. Cameron*, 37 M.J. 1042 (A.C.M.R. 1993) (where accused was intoxicated and did not complete the assigned task of cleaning room by proscribed deadline, members should have been instructed on lesser included offense of failing to obey lawful order, under Article 92, which does not require willfulness).

D. Origin of the Order.

1. The alleged victim must be personally involved in the issuance of the order. *United States v. Ranney*, 67 M.J. 297 (C.A.A.F. 2009) (revocation of driving privileges issued without the knowledge or involvement of the Base Traffic Officer was not sufficient for purposes of Art. 90, but did support a conviction under Art. 92).

2. The order must originate from the alleged victim, and not be the order of a superior for whom the alleged victim is a mere conduit. *United States v. Marsh*, 11 C.M.R. 48 (C.M.A. 1953) (specification improperly alleged victim as a captain who was merely transmitting order from the Commanding General); *United States v. Sellers*, 30 C.M.R. 262 (C.M.A. 1961) (major was not a mere conduit, where he passed on order of colonel,

threw the weight of his rank and position into the balance, and added additional requirement); *United States v. Wartsbaugh*, 45 C.M.R. 309 (C.M.A. 1972) (setting aside Article 90 violation where the court characterized the company commander's order as "predicated upon…a battalion directive").

E. Time for Compliance. MCM, pt. IV, ¶ 14c(2)(g).

1. When an order requires immediate compliance, accused's statement that he will not obey and failure to make any move to comply constitutes disobedience. *United States v. Stout*, 5 C.M.R. 67 (C.M.A. 1952) (order to join combat patrol). Time in which compliance is required is a question of fact. *United States v. Cooper*, 14 M.J. 758 (A.C.M.R. 1982) (order to go upstairs and change clothes not countermanded by subsequent order to accompany victim to orderly room, because disobedience to first order already complete); *United States v. McLaughlin*, 14 M.J. 908 (N.M.C.M.R. 1982) (order to produce ID card required immediate compliance).

2. Immediate compliance is required by any order that does not explicitly or implicitly indicate that delayed compliance is authorized or directed. MCM, pt. IV, ¶ 14c(2)(g) (2008 amendment), *United States v. Schwabauer*, 34 M.J. 709 (A.C.M.R. 1992) (direct order to "stop and come back here" clearly and unambiguously required immediate obedience without delay), *aff'd*, 37 M.J. 338 (C.M.A. 1993). However, when time for compliance is not stated explicitly or implicitly, then reasonable delay in compliance does not constitute disobedience. MCM, pt. IV, ¶ 14c(2)(g). *United States v. Clowser*, 16 C.M.R. 543 (A.F.B.R. 1954) (delay resulting from a sincere and reasonable choice of means to comply with order to "go up to the barracks and go to bed" was not a completed disobedience).

3. When immediate compliance is required, disobedience is completed when the one to whom the order is directed first refuses and evinces an intentional defiance of authority. *United States v. Vansant*, 11 C.M.R. 30 (C.M.A. 1953) (order to return to his platoon and be there in one and a half hours necessitated immediate compliance, and refusal to comply constituted disobedience).

4. For orders that require preliminary steps before they can be executed, the recipient must begin the preliminary steps immediately or the disobedience is complete. *United States v. Wilson*, 17 M.J. 1032 (A.C.M.R. 1984) *pet. denied*, 19 M.J. 79 (C.M.A. 1984) (lieutenant's order to "shotgun" a truck, which entailed preparation prior to travel, was disobeyed when accused verbally refused three times and walked out of lieutenant's office).

5. Apprehension of an accused before compliance is due is a legitimate defense to the alleged disobedience. *See United States v. Williams*, 39 C.M.R. 78 (C.M.A. 1968).

6. If an order is to be performed in the future, the accused's present statement of intent to disobey does not constitute disobedience. *United States v. Squire*, 47 C.M.R. 214 (N.C.M.R. 1973).

F. Matters in Defense.

1. The order lacks content/specific mandate. *United States v. Bratcher*, 39 C.M.R. 125 (C.M.A. 1969); *United States v. Oldaker*, 41 C.M.R. 497 (A.C.M.R. 1969) (order "to train" given to basic trainee lacked content); *United States v. Couser*, 3 M.J. 561 (A.C.M.R. 1977) (order to resume training with company was proper); *United States v. Beattie*, 17 M.J. 537 (A.C.M.R. 1983) (order to "follow the instructions of his NCO's" lacked content).

2. "Ultimate offense" doctrine.

a) The order requires acts already required by law, regulation, standing orders, or routine (pre-existing) duty. *United States v. Bratcher*, 39 C.M.R. 125 (C.M.A. 1969) (order to "perform duties as a duty soldier, the duties to be performed and to be assigned to him by the First Sergeant" was not a specific mandate but rather an exhortation to do his duty as already required by law; order to obey the law can have no validity beyond the limit of the ultimate offense committed); *United States v. Sidney*, 48 C.M.R. 801 (A.C.M.R. 1974) (officer's order to comply with local regulations on registration and safekeeping of personal weapons should have been charged under Article 92(2)); *United States v. Wartsbaugh*, 45 C.M.R. 309 (C.M.A. 1972) (order to comply with battalion uniform directive should have been charged under Article 92(2)); *but cf. United States v. Traxler*, 39 M.J. 476 (C.M.A. 1994) (commander can lift otherwise routine duty "above the common ruck" to ensure compliance but not to merely enhance punishment).

b) Minor offenses may not be escalated in severity by charging them as violation of orders or willful disobedience of superiors. *United States v. Hargrove*, 51 M.J. 408 (1999); *United States v. Quarles*, 1 M.J. 231 (C.M.A. 1975) (holding maximum punishment cannot be increased by charging disobedience rather than failure to repair); *United States v. Loos*, 16 C.M.R. 52 (C.M.A. 1954) (holding "gravamen" of offense was failure to repair rather than failure to obey lawful order).

c) Violation of a personal order is punishable as a separate offense if it is given for the purpose of having the full authority of the superior's position and rank to ensure compliance. *United States v. Traxler*, 39 M.J. 476 (C.M.A. 1994) (willful disobedience of superior commissioned officer and missing movement); *United States v. Landwehr*, 18 M.J. 355 (C.M.A. 1984) (willful disobedience of superior commissioned officer and failure to repair); *United States v. Pettersen*, 17 M.J. 69 (C.M.A. 1983) (willful disobedience of superior noncommissioned officer and AWOL); *United States v. Greene*, 8 M.J. 796 (N.C.M.R. 1980); *United States v. United States v. Bethea*, 2 M.J. 892 (A.C.M.R. 1976); *States v. Bivins*, 34 C.M.R. 527 (A.B.R. 1964).

3. Repeated orders.

a) If the sole purpose of repeated personal orders is to increase the punishment for an offense, disobedience of the repeated order is not a crime. *United States v. Tiggs*, 40 C.M.R. 352 (A.B.R. 1968).

b) Repeated orders may constitute an unreasonable multiplication of charges. *United States v. Graves*, 12 M.J. 583 (A.F.C.M.R. 1981) (dismissing conviction for willful disobedience of lieutenant's order that immediately followed and was identical to order from sergeant, which was the basis of a separate conviction); *United States v. Greene*, 8 M.J. 796 (N.C.M.R. 1980) (subsequent orders of superior commissioned officers merely reiterating original order of petty officer could not form basis for additional convictions for willful disobedience of superior commissioned officers); *United States v. Bivins*, 34 C.M.R. 527 (A.B.R. 1964).

4. Violation of an order that is part of an apprehension constitutes resisting apprehension rather than disobedience of an order. *United States v. Nixon*, 45 C.M.R. 254 (C.M.A. 1974) (officer's order "to leave the . . . room and get into a jeep" was the

initial step of an apprehension, and disobedience should have been prosecuted under Article 95 rather than Article 90); *United States v. Burroughs*, C.M.R. 404 (A.C.M.R. 1974). *But see United States v. Jessie*, 2 M.J. 573 (A.C.M.R. 1977) (when already in custody, order to remain in building to reinforce status was independent lawful command).

5. The order is inconsistent with a service regulation. *United States v. Roach*, 29 M.J. 33 (C.M.A. 1989) (Coast Guard regulation on drug and alcohol policy).

6. The defense of conflicting orders. *United States v. Clausen*, 43 C.M.R. 128 (C.M.A. 1971); *United States v. Patton*, 41 C.M.R. 572 (A.C.M.R. 1969) ("criminal prosecution for disobedience of an order cannot be based upon a subordinate's election to obey one of two conflicting orders when simultaneous compliance with both orders is impossible"); *but cf. United States v. Hill*, 26 M.J. 876 (N.M.C.M.R. 1988) (no defense where accused obeyed neither of the conflicting orders but rather remained in his "rack").

7. Orders must not conflict with, or detract from, the scope or effectiveness of orders issued by higher headquarters. *United States v. Clausen*, 43 C.M.R. 128 (C.M.A. 1971); *United States v. Green*, 22 M.J. 711 (A.C.M.R. 1986).

8. Conscientious objection is not a defense to disobedience of lawful orders. *United States v. Johnson*, 45 M.J. 88 (C.A.A.F. 1996); *United States v. Walker*, 41 M.J. 462 (1995); *United States v. Austin*, 27 M.J. 227 (C.A.A.F. 1988).

9. State of mind defenses may apply. *United States v. Young*, 40 C.M.R. 36 (C.M.A. 1969).

XV. **VIOLATION OF A LAWFUL GENERAL REGULATION / ORDER. UCMJ ART. 92(1).**

A. Authority to Issue a General Order. MCM, pt. IV, ¶ 16c(1)(a).

1. President; Secretary of Defense; Secretary of Homeland Security; and Secretaries of the Army, Navy, and Air Force. (NOTE: EO 13397 (14 Oct. 2005) amended the MCM to change authority to issue a general order from the Secretary of Transportation to the Secretary of Homeland Security).

2. A GCM convening authority.

3. A flag or general officer in command.

4. Superiors commanders to (2) and (3) above.

5. To be a lawful general order, the order must be *issued* as the result of the personal decision of the person authorized to issue general orders. *United States v. Townsend*, 49 M.J. 175, 179-80 (C.A.A.F. 1998) (order signed by Acting Chief, Office of Personnel and Training was *issued* by the Commandant of the Coast Guard); *United States v. Bartell*, 32 M.J. 295 (C.M.A. 1991) (general order signed "By Direction"); *United States v. Breault*, 30 M.J. 833 (N.M.C.M.R. 1990) (general order signed by chief of staff).

B. Regulation Defects.

1. The regulation must prohibit conduct of the nature of that attributed to the accused in the specification. *United States v. Baker*, 40 C.M.R. 216 (C.M.A. 1969); *United States v. Sweitzer*, 33 C.M.R. 251 (C.M.A. 1963).

2. The regulation must apply to a group of persons that includes the accused. *United States v. Jackson*, 46 C.M.R. 1128 (A.C.M.R. 1973) (finding that regulation was intended to guide military police rather than the individual soldier).

3. The regulation must purport to establish criminal sanctions against individuals rather than mere guidance. *United States v. Green*, Army 20010446, 2003 Lexis 137 (Army Ct. Crim. App. June 6, 2003)(DoD Directive intended to update policies and responsibilities on drug abuse and prevention held to be general guidance and not punitive in nature); *United States v. Blanchard*, 19 M.J. 196 (C.M.A. 1985) (USAFE customs regulation was directory in nature); *United States v. Scott*, 46 C.M.R. 25 (C.M.A. 1972) (regulation establishing drug suppression policy was not punitive order); *United States v. Nardell*, 45 C.M.R. 101 (C.M.A. 1972) (SOP for club system was predominantly instructional guidance); *United States v. Benway*, 41 C.M.R. 345 (C.M.A. 10970); *United States v. Hogsett*, 25 C.M.R. 185 (C.M.A. 1958) (instruction interpreting postal laws was not general order); *United States v. Hode*, 44 M.J. 816 (A.F. Ct. Crim. App. 1996) (AFI 34-119 on the Alcoholic Beverage Program was not punitive); *United States v. Goodwin*, 37 M.J. 606 (A.C.M.R. 1993) (punitive regulation can refer to provisions in nonpunitive regulation); *United States v. Finsel*, 33 M.J. 739 (A.C.M.R. 1991) (task force commander's "Weapons Safety" letter was punitive in nature), *aff'd*, 36 M.J. 441 (C.M.A. 1993); *United States v. Asfeld*, 30 M.J. 917 (A.C.M.R. 1990) (AR 600-21, including sexual harassment policy provisions, was not a punitive regulation); *United States v. Brunson*, 30 M.J. 766 (A.C.M.R. 1990) (AR 600-15, providing guidance on handling complaints of indebtedness by soldiers, was not punitive); *United States v. Horton*, 17 M.J. 1131 (N.M.C.M.R. 1984) (regulation governing contacts with citizens of communist countries was punitive); *United States v. Stewart*, 2 M.J. 423 (A.C.M.R. 1975) (U.S. Army Japan Regulation 190-6 on control of privately owned weapons was not punitive).

4. It is not a defense that the regulation was superseded before the accused's conduct, if a successor regulation contained the same criminal prohibition and it was in force at the time of the accused's conduct, unless it misled the accused. *United States v. Grublak*, 47 C.M.R. 371 (A.C.M.R. 1973).

5. A regulation that is facially overbroad may be salvaged by including a *scienter* or *mens rea* requirement. *United States v. Bradley*, 15 M.J. 843 (A.F.C.M.R. 1983); *United States v. Cannon*, 13 M.J. 777 (A.C.M.R. 1982).

6. Local regulations must not conflict with or detract from the scope of effectiveness of a regulation issued by higher headquarters. *United States v. Green*, 22 M.J. 711 (A.C.M.R. 1986) (Fort Stewart regulation prohibiting soldiers from "[h]aving any alcohol in their system . . . during duty hours" was not enforceable because it detracted from the effectiveness of Army Regulation 600-85); *see United States v. Garcia*, 21 M.J. 127 (C.M.A. 1985).

7. United States Army, Europe, regulation that prohibited transporting persons without prescribed travel documents on the Helmstadt-Berlin autobahn in a vehicle with United States military registration was a "necessary and reasonable implementation by the United States military of an action required by the treaty and in furtherance of national policy." As such, the regulation could be enforced by criminal sanctions. *United States v. Stockman*, 17 M.J. 530 (A.C.M.R. 1983) (the accused, assigned to duty with the United States Forces in Berlin, violated the regulation by engaged in a conspiracy with two German Nationals to smuggle East German citizens into Berlin).

C. Knowledge.

1. Actual knowledge of the regulation or order is not an element of the crime. *United States v. Tolkach*, 14 M.J. 239 (C.M.A. 1982); *United States v. Tinker*, 27 C.M.R. 366

(C.M.A. 1959); *United States v. Leverette*, 9 M.J. 627 (A.C.M.R. 1980), *aff'd*, 9 M.J. 421 (C.M.A. 1980).

2. For knowledge to be presumed, a regulation must be properly published. *United States v. Tolkach*, 14 M.J. 239 (C.M.A. 1982) (Eighth Air Force general regulation not properly published because it was never received at base master publications library).

3. To be enforceable against service members, local regulations need not be published in the Federal Register. *United States v. Tolkach*, 14 M.J. 239 (C.M.A. 1982); *United States v. Academia*, 14 M.J. 582 (N.M.C.M.R. 1982).

D. Pleading.

1. A specification is defective if it fails to allege that the order or regulation is "general." *United States v. Koepke*, 39 C.M.R. 100 (C.M.A. 1969); *United States v. Baker*, 38 C.M.R. 144 (C.M.A. 1967) (specification alleging violation of a specific Division regulation fails to state offense under Article 92(1)); *but see United States v. Watkins*, 21 M.J. 208 (C.M.A. 1986); *United States v. Watson*, 40 C.M.R. 571 (A.B.R. 1969) (specification alleging violation of a specific "Army" regulation was sufficient; distinguishing *Koepke*).

2. The specification need not allege that an accused "wrongfully" violated a lawful general regulation, because the allegation of the violation itself implies the unlawful nature of the conduct. *United States v. Torrey*, 10 M.J. 508 (A.F.C.M.R. 1980).

3. Accused, a recruiter, was charged with violation of a sub-paragraph "6(d)" of lawful general order by providing alcohol to a person enrolled in the Delayed Entry Program (DEP). The panel found him guilty of violating the superior paragraph "6" of the same general order by wrongfully engaging in a non-professional, personal relationship with the same DEP member. Court held this was a fatal variance because the substituted offense was materially different from the one originally charged in the specification, and accused was prejudiced by depriving him the opportunity to defend against the substituted paragraph of the order. *United States v. Teffeau*, 58 M.J. 62 (C.A.A.F. 2003). Additionally, the manner in which the accused violated the regulation *must* be alleged. *United States v. Sweitzer*, 33 C.M.R. 251 (C.M.A. 1963).

E. Proof. At trial, the existence and content of the regulation will not be presumed; it must be proven with evidence or established by judicial notice. *United States v. Williams*, 3 M.J. 155 (C.M.A. 1977). In judge alone trials, failure to prove existence of regulation can be cured by proceeding in revision or by an appellate court taking judicial notice. *United States v. Mead*, 16 M.J. 270 (C.M.A. 1983).

F. Exceptions. The prosecution must prove beyond a reasonable doubt that the accused's conduct did not come within any exceptions to the regulation, once the evidence raises the issue . *United States v. Lavine*, 13 M.J. 150 (C.M.A. 1982); *United States v. Cuffee*, 10 M.J. 381 (C.M.A. 1981).

G. Application. Service member need not be assigned to command of officer issuing general regulation in order to be subject to its proscriptions. *United States v. Leverette*, 9 M.J. 627 (A.C.M.R. 1980) (soldier on leave visiting Fort Campbell convicted of violating local general regulation), *aff'd*, 9 M.J. 421 (C.M.A. 1980).

H. Misconduct Otherwise Proscribed by Punitive Articles. Neither a general regulation nor an order may be used to enhance punishment for misconduct already prohibited by the punitive articles. *United States v. Curry*, 28 M.J. 419 (C.M.A. 1989) (Article 93 preempted conviction

under Article 92 for disobedience of an order not to maltreat subordinates). *Cf.* MCM, pt. IV, ¶ 16e(1), (2) Note.

I. Attempts. Attempt to violate a regulation under Article 80 does not require knowledge of the regulation; the accused need only intend to commit the proscribed act. *United States v. Davis*, 16 M.J. 225 (C.M.A. 1983); *United States v. Foster*, 14 M.J. 246 (C.M.A. 1982).

J. Constitutional Rights. Where a regulation is attacked as unconstitutional or violative of a statute, "a narrowing construction" is mandated, if possible, to avoid the problem. *United States v. Williams*, 29 M.J. 112 (C.M.A. 1989) ("show and tell" regulation, narrowly construed to require service member to show physical possession or documentation of lawful disposition of controlled items, did not violate 5th amendment or Article 31).

XVI. FAILURE TO OBEY LOCAL ORDERS. UCMJ ART. 92(2).

A. The Order. Includes all other lawful orders issued by a member of the armed forces that the accused had a duty to obey. MCM, pt. IV, ¶ 16c(2)(a).

B. Limitation on Maximum Punishment. The maximum punishments set out in MCM, pt. IV, ¶ 16.e. include a dishonorable discharge and confinement for two years for violation of general regulations and a bad-conduct discharge and confinement for six months for disobedience of other lawful orders. A note, however, sets out certain limitations in this regard.

1. A note located after MCM, pt. IV, ¶ 16e(1) and (2) provides that these maximum punishments do not apply in the following cases:

a) If in the absence of the order or regulation which was violated or not obeyed the accused would on the same facts be subject to conviction for another specific offense for which a lesser punishment is prescribed; or

b) If the violation or failure to obey is a breach of restraint imposed as a result of an order.

c) In these instances, the maximum punishment is that prescribed elsewhere for that particular offense.

2. This limitation was commonly known as the "Footnote 5" limitation, because it was Footnote 5 to the Table of Maximum Punishments in older versions of the MCM.

3. This limitation is only operative, however, where the lesser offense is the "gravamen of the offense." *United States v. Timmons*, 13 M.J. 431 (C.M.A. 1982) (gravamen of the offense was not being in the authorized uniform in violation of Article 134 rather than failing to obey order of petty officer); *United States v. Showalter*, 35 C.M.R. 382 (C.M.A. 1965) (gravamen of offense was not being in the authorized uniform in violation of Article 134 rather than failing to obey a general regulation); *United States v. Yunque-Burgos*, 13 C.M.R. 54 (C.M.A. 1953); *United States v. Buckmiller*, 4 C.M.R. 96 (C.M.A. 1952) (seminal case establishing gravamen test and rejecting a "technical and entirely literal interpretation of the footnote").

4. The note's rationale has been applied to offenses other than Articles 92(1) and 92(2). *See United States v. Battle*, 27 M.J. 781 (A.F.C.M.R. 1988); *United States v. Burroughs*, 49 C.M.R. 404 (A.C.M.R. 1974) (using the maximum punishment provided for resisting apprehension under Article 95 rather than that for willful disobedience of a superior commissioned officer under Article 90, of which the accused was convicted).

C. Source of Order. The order may be given by a person not superior to the accused, but the person giving the order must have a special status that imposes upon the accused the duty to obey.

MCM, pt. IV, ¶ 16c(2)(c)(i); *United States v. Stovall*, 44 C.M.R. 576 (A.F.C.M.R. 1971) (security policeman).

D. Actual Knowledge. The accused must have actual knowledge of the order. MCM, pt. IV, ¶ 16c(2)(b); *United States v. Shelly*, 19 M.J. 325 (C.M.A. 1985) (directive by battery commander); *United States v. Curtin*, 26 C.M.R. 207 (C.M.A. 1958) (instruction on constructive knowledge was erroneous); *United States v. Henderson*, 32 M.J. 941 (N.M.C.M.R. 1991) (district order governing use of government vehicles by Marine recruiters), *aff'd*, 34 M.J. 174 (C.M.A. 1992); *United States v. Jack*, 10 M.J. 572 (A.F.C.M.R. 1980) (conviction set aside where accused violated local regulation concerning visiting hours in female barracks where sign posted at building's entrance did not designate issuing authority).

E. Negligent Disobedience Sufficient for Guilt. Failure to comply through heedlessness or forgetfulness can be sufficient for a conviction under Article 92. MCM, pt. IV, ¶ 14c(2)(f); *United States v. Jordan*, 21 C.M.R. 627 (A.F.B.R. 1955).

XVII. THE LAWFULNESS OF ORDERS.

A. Presumption of Lawfulness. Orders from superiors requiring the performance of military duties are presumed to be lawful. MCM, pt. IV, ¶ 14c(2)(a)(i); *United States v. McDaniels*, 50 M.J. 407 (C.A.A.F. 1999) (order to not drive personal vehicle after diagnosis of narcolepsy); *United States v. Nieves*, 44 M.J. 96 (C.A.A.F. 1996) (order prohibiting discussions with witnesses); *United States v. New*, 55 M.J. 95 (C.A.A.F. 2001) (order requiring soldier to wear United Nations blue beret and insignia).

B. Disobedience. A superior's order is presumed to be lawful and is disobeyed at the subordinate's peril. To sustain the presumption, the order must relate to military duty, it must not conflict with the statutory or constitutional rights of the person receiving the order, and it must be a specific mandate to do or not to do a specific act. In sum, an order is presumed lawful if it has a valid military purpose and is a clear, specific, narrowly drawn mandate. *United States v. Moore*, 58 M.J. 466 (C.A.A.F. 2003). The dictates of a person's conscience, religion, or personal philosophy cannot excuse disobedience. *United States v. Stockman*, 17 M.J. 530 (A.C.M.R. 1973).

C. Valid Military Purpose. The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a unit and directly with the maintenance of good order in the armed forces. MCM, pt. IV, ¶ 14c(2)(a)(iii). The order can affect otherwise private activity. *United States v. McDaniels*, 50 M.J. 407 (C.A.A.F. 1999) (order to not drive personal vehicle after diagnosis of narcolepsy); *United States v. Hill*, 49 M.J. 242 (C.A.A.F. 1999) (no-contact order issued by military police had valid military purpose of maintaining good order and discipline in the military community and to protect the alleged victim while during the investigation); *United States v. Padgett*, 48 M.J. 273 (C.A.A.F. 1998) (order requiring 25-year-old service member to terminate his romantic relationship with 14-year-old girl had valid military purpose); *United States v. Milldebrandt*, 25 C.M.R. 139 (C.M.A. 1958) (order to report, while on leave, financial conditions unrelated to the military did not have valid military purpose).

1. An order that has for its sole object a private end is unlawful, but an order that benefits the command as well as serving individuals is lawful. *United States v. Robinson*, 20 C.M.R. 63 (C.M.A. 1955) (use of enlisted personnel in Officers' Open Mess at Fort McNair).

2. Punishment.

a) Orders extending punishments beyond those lawfully imposed are illegal. *United States v. McCoy*, 30 C.M.R. 68 (C.M.A. 1960) (order to continue extra duty after punishment imposed under Article 15 already completed).

b) "Extra training" must be oriented to improving the soldier's performance of military duties. Such corrective measures assume the nature of training or instruction, not punishment. MCM, pt. I, ¶ 1g; AR 600-20, ¶ 4-6b (11 Feb 2009); *see United States v. Hoover*, 24 M.J. 874 (A.C.M.R. 1987) (requiring accused to live in pup tent for 3 weeks between the hours of 2200 and 0400 was unlawful punishment).

D. Overly Broad Limitation on Personal Right. An order that is "arbitrary and capricious, overly broad in scope, or to impose an unjust limitation on a personal right" is not lawful. *United States v. Milldebrandt*, 25 C.M.R. 139 (C.M.A. 1958) (order to report, while on leave, financial conditions unrelated to the military was not lawful); *United States v. Spencer*, 29 M.J. 740 (A.F.C.M.R. 1989) (order to turn over all civilian medical records to military clinic by specific date was unlawful, because it was broader and more restrictive of private rights and personal affairs than required by military needs and provided for by service regulation); *United States v. Jeffers*, 57 M.J. 13 (C.A.A.F. 2002) (no social contact order with female in unit with whom accused had adulterous relationship not overbroad).

1. Marriage. Regulations reasonably restricting marriages of foreign-based service personnel to local nationals are legal. *United States v. Wheeler*, 30 C.M.R. 387 (C.M.A. 1961) ("a military commander may, at least in foreign areas, impose reasonable restrictions on the right of military personnel of his command to marry"); *United States v. Nation*, 26 C.M.R. 504 (C.M.A. 1958) (six-month waiting period was unreasonable and arbitrary restraint on the personal right to marry).

2. "Safe sex" order to servicemember infected with HIV is lawful. *United States v. Dumford*, 30 M.J. 137 (C.M.A. 1990); *United States v. Womack*, 29 M.J. 88 (C.M.A. 1989).

3. A service member who violates the terms of a no-contact order is subject to punishment under either Article 90 or Article 92, without the necessity of proof that the contact was undertaken for an improper purpose. Public policy supports a strict reading of a no-contact order. A military commander who has a legitimate interest in deterring contact between a service member and another person is not required to sort through every contact to determine, after the fact, whether there was a nefarious purpose. *United States v. Thompkins*, 58 M.J. 43 (C.A.A.F. 2003).

4. Personal relationships and contacts. *United States v. Hill*, 49 M.J. 242 (C.A.A.F. 1999) (order to have no contact with alleged victim lawful); *United States v. Padgett*, 48 M.J. 273 (C.A.A.F. 1998) (order requiring 25-year-old service member to terminate his romantic relationship with 14-year-old girl lawful); *United States v. Nieves*, 44 M.J. 96 (C.A.A.F. 1996) (order prohibiting discussions with witnesses, during an investigation, was lawful); *United States v. Aycock*, 35 C.M.R. 130 (C.M.A. 1964) (order prohibiting accused from contacting witnesses concerning the charges was unlawful because it interfered with right to prepare a defense); *United States v. Wysong*, 26 C.M.R. 29 (C.M.A. 1958) (order "not to talk to or speak with any of the men in the company concerned with this investigation except in line of duty" was so broad in nature and all-inclusive in scope that it was illegal); *United States v. Mann*, 50 M.J. 689 (A.F. Ct. Crim. App. 1999) (order to "cease and refrain from any and all contact of any nature" with enlisted member with whom the accused allegedly fraternized, which indicated that accused's counsel had unrestricted access, was lawful); *United States v. Button*, 31 M.J.

897 (A.F.C.M.R. 1990) (order not to go to family quarters, where alleged sexual abuse victim lived, was lawful), *aff'd*, 34 M.J. 139 (C.M.A. 1992); *United States v. Hawkins*, 30 M.J. 682 (A.F.C.M.R. 1990) (order to have no contact with alleged victims and witness, unless by the area defense counsel, was lawful); *United States v. Wine*, 28 M.J. 688 (A.F.C.M.R. 1989) (order to disassociate from neighbor's estranged wife lawful); *United States v. Moore*, 58 M.J. 466 (C.A.A.F. 2003) (order "not to converse with the civilian workers" in the galley was lawful and not over broad when given after the accused violated a policy limiting interaction between civilian employees and servicemembers).

5. Alcohol.

a) Regulations establishing a minimum drinking age for service personnel in a command abroad are legal. *United States v. Manos*, 37 C.M.R. 274 (C.M.A. 1967).

b) A military member may also be lawfully ordered not to consume alcoholic beverages as a condition of pretrial restriction, if reasonably necessary to protect the morale, welfare, and safety of the unit or the accused; to protect victims or potential witnesses; or to ensure the accused's presence at the court-martial or pretrial hearings in a sober condition. *United States v. Blye*, 37 M.J. 92 (C.M.A. 1993).

c) Order not to consume alcohol must have a reasonable connection to military needs; *United States v. Stewart*, 33 M.J. 519 (A.F.C.M.R. 1991) (order not to consume alcoholic beverages to see if the accused was an alcoholic was invalid); *United States v. Kochan*, 27 M.J. 574 (N.M.C.M.R. 1988) (order not to drink alcohol until 21-years old was illegal).

6. Loans. Orders restricting loans between service members may be lawful, if there is a sufficient connection between the military's duty to protect the morale, discipline, and usefulness of its members. *United States v. McClain*, 10 M.J. 271 (C.M.A. 1981) (upholding conviction for violation of a regulation prohibiting loans between permanent party personnel and trainees at Fort Jackson); *United States v. Smith*, 1 M.J. 156 (C.M.A. 1975) (regulation prohibiting all loans for profit or any benefit without consent of commander, without a corresponding military need, was invalid as too restrictive); *United States v. Giordano*, 35 C.M.R. 135 (C.M.A. 1964) (order fixing a maximum legal rate of interest on loans among military members was lawful).

7. Writing checks. *United States v. James*, 52 M.J. 709 (Army Ct. Crim. App. 2000) (order "not to write any more checks" was lawful). *Contra United States v. Alexander*, 26 M.J. 796 (A.F.C.M.R. 1988) (order "not to write any checks" was much too broad to be considered valid).

8. Regulations may proscribe the use of customs-free privileges in Korea for personal gain or profit. *United States v. Lehman*, 5 M.J. 740 (A.F.C.M.R. 1978).

9. As long as not unreasonable and not unduly humiliating or degrading, an order to produce a urine specimen under direct observation is lawful. *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989).

10. Order to cooks to shower before reporting to work in the galley was lawful. *United States v. Horner*, 32 M.J. 576 (C.G.C.M.R. 1991).

11. Regulation prohibiting transportation of persons without prescribed travel documents on the Helmstadt-Berlin autobahn between former East and West Germany in a vehicle

with United States military registration was lawful and was not a violation of human rights or the Thirteenth Amendment. *United States v. Stockman*, 17 M.J. 530 (A.C.M.R. 1983).

12. Regulations requiring members of the service to obtain approval from their commanders before circulating petitions on military installations are lawful. *Brown v. Glines*, 444 U.S. 348 (1979) (Air Force had substantial governmental interest unrelated to the suppression of free expression; while 10 U.S.C. § 1034 ensures that individual servicemen can write to members of Congress without sending the communication through official channels, it does not cover the general circulation of a petition within a military base); *Secretary of the Navy v. Huff*, 444 U.S. 453 (1979) (similar Navy regulation).

E. Litigating the Issue of Lawfulness of the Order. Lawfulness of an order, although an important issue, is not a discrete element of a disobedience offense. Therefore, it is a question of law to be determined by the military judge. MCM pt. IV, ¶ 14c(2)(a). *United States v. Jeffers*, 57 M.J. 13 (C.A.A.F. 2002); *United States v. New*, 55 M.J. 95 (C.A.A.F. 2001); *But see United States v. Mack*, 65 M.J. 108 (C.A.A.F. 2007) (while the lawfulness of an order is a question of law to be determined by the military judge, submitting the question of lawfulness to a panel is harmless error when the accused fails to rebut the presumption of lawfulness).

XVIII. DERELICTION OF DUTY. UCMJ ART. 92(3).

A. Duty.

1. The duty may be imposed by treaty, statute, regulation, lawful order, SOP, or custom of the service. MCM, pt. IV, ¶ 16c(3)(a); *United States v. Dallamn*, 34 M.J. 274 (C.M.A. 1992) (no duty to perform medical examination prior to prescribing drugs to persons not entitled to military medical services), *aff'd*, 37 M.J. 213 (C.M.A. 1993); *United States v. Dupree*, 24 M.J. 319 (C.M.A. 1987) (Air Force regulation imposed duty to report drug abuse, but dereliction could not be sustained where prisoner's marijuana use was inextricably intertwined with accused guard's misconduct in taking prisoners off-base); *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986) (although Air Force regulation imposed duty to report drug abuse, the privilege against self-incrimination excuses non-compliance where, at the time the duty to report arose, the accused was already an accessory or principal to the illegal activity); *United States v. Grow*, 11 C.M.R. 77 (C.M.A. 1953) (failure of major general to secure classified information, as required by non-punitive Army regulation, constituted dereliction of duty); *United States v. Serianne*, 69 M.J. 8 (C.A.A.F. 2010) (USN duty to report DUI arrest unenforceable where superior regulation—Navy Articles—prohibits requirement for self-reporting imposed by lesser regulation).

2. "Duty" does not include non-military tasks voluntarily performed after regular duty hours for additional pay. *United States v. Garrison*, 14 C.M.R. 359 (A.B.R. 1954) (secretary/treasurer of NCO club).

3. The evidence must prove the existence of the duty beyond a reasonable doubt. *United States v. Tanksley*, 36 M.J. 428 (C.M.A. 1993) (evidence of duty to "acquire parts and materials necessary to maintain communication equipment" did not establish that accused "had a duty to acquire light sticks or bayonets properly, or indeed, at all").

B. Knowledge.

1. The accused must have known or should have known of the duty. MCM, pt. IV, ¶ 16b(3)(b), 16c(3)(b) (MCM added knowledge as element for negligent dereliction in

1986); *United States v. Pacheco*, 56 M.J. 1, (C.A.A.F. 2001) (accused's knowledge of his duty to safeguard a weapons cache and his willful dereliction of this duty was established by the taking of weapons as trophies); *United States v. Pratt*, 34 C.M.R. 731 (C.G.B.R. 1963) (evidence insufficient to establish that accused reasonably aware of facts necessitating initiation of rescue procedures).

2. Willful dereliction, which has a greater maximum punishment, requires actual knowledge of the duty. *United States v. Ferguson*, 40 M.J. 823, 833-34 (N.M.C.M.R. 1994).

3. There is no requirement that the accused know the source of the duty. *United States v. Markley*, 40 M.J. 581 (A.F.C.M.R. 1993).

C. Standards for Dereliction.

1. Willful nonperformance of duty. "Willful" means intentional. It requires doing an act knowingly and purposely, specifically intending the natural and probable consequences of the act. MCM, pt. IV, ¶ 16c(3)(c).

2. Negligent nonperformance of duty. "Negligence" is the lack of that degree of care that a reasonably prudent person would have exercised under the same or similar circumstances, *i.e.* simple negligence. MCM, pt. IV, ¶ 16c(3)(c); *United States v. Lawson*, 36 M.J. 415 (C.M.A. 1993) (improper posting of road guides in pairs and obtaining a roster of individuals to be posted); *United States v. Rust*, 38 M.J. 726 (A.F.C.M.R. 1993); *United States v. Dellarosa*, 30 M.J. 255 (C.M.A. 1990) (weather reporting); *United States v. Kelchner*, 36 C.M.R. 183 (C.M.A. 1966) (evidence insufficient to prove Navy commander negligently failed to supervise and assist subordinate's work); *United States v. Grow*, 11 C.M.R. 77 (C.M.A. 1953) (failure of major general to safeguard classified information); *United States v. Ferguson*, 12 C.M.R. 570 (A.B.R. 1953) (evidence insufficient to prove company commander was derelict in his instructions on safety measures; "in testing for negligence the law does not substitute hindsight for foresight").

3. Culpable inefficiency. "Culpable inefficiency" is inefficiency in the performance of a duty for which there is no reasonable or just excuse. MCM, pt. IV, ¶ 16c(3)(c); *United States v. Nickels*, 20 M.J. 225 (C.M.A. 1985) (not maintaining proper fiscal control over postal account); *see United States v. Dellarosa*, 30 M.J. 255, 259 (C.M.A. 1990) (finding the distinction between nonperformance and faulty performance no longer significant).

D. Ineptitude as a Defense. A person who fails to perform a duty because of ineptitude rather than by willfulness, negligence, or culpable inefficiency is not guilty of an offense. MCM, pt. IV, ¶ 16c(3)(c); *United States v. Powell*, 32 M.J. 117 (C.M.A. 1991) ("ineptitude as a defense is largely fact-specific, requiring consideration of the duty imposed, the abilities and training of the soldier upon whom the duty is imposed, and the circumstances in which he is called upon to perform his duty").

E. Dereliction of Duty as a Lesser Offense to Other Crimes.

1. Dereliction of duty, where the duty is premised upon a regulation or custom of the service, is not a lesser included offense of willful disobedience of a superior officer's order. *United States v. Haracivet*, 45 C.M.R. 674 (A.C.M.R. 1972).

2. Dereliction of duty can be a lesser included offense of failure to obey a general order or regulation or a lawful order, under Article 92. *United States v.* Green, Army 20010446, 2003 Lexis 137 (Army Ct. Crim. App. June 6, 2003)(DoD Directive on

possession of drug paraphernalia not punitive, but accused could be guilty of dereliction of duty); *United States v. Shavrnoch*, 49 M.J. 334 (1998) (Air Force regulation on underage drinking not punitive); *United States v. Bivins*, 49 M.J. 328 (1998) (Air Force regulation on underage drinking not punitive); *United States v. Green*, 47 C.M.R. 727 (A.F.C.M.R. 1973) (finding that dereliction of duty was lesser included offense of failure to obey a lawful order of NCO concerning submitting daily urine specimens at treatment center).

F. Pleading.

1. The specification must spell out the nature of the inadequate performance alleged. *United States v. Kelchner*, 36 C.M.R. 183 (C.M.A. 1966); *United States v. Long*, 46 M.J. 783 (C.M.A. 1997) (misuse of credit card for official government travel).

2. The specification need not set forth the particular source of the duty violated. *United States v. Moore*, 21 C.M.R. 544 (N.B.R. 1956).

3. The specification must allege nonperformance or faulty performance of a specified duty, and a bare allegation that an act was "not authorized" is insufficient. *United States v. Sojfer*, 44 M.J. 603 (N-M. Ct. Crim. App. 1996) (specification alleging that accused corpsman committed acts beyond the scope of his duties, *i.e.* breast and pelvic examinations, failed to state the offense of dereliction), *aff'd*, 47 M.J. 425 (C.A.A.F. 1998).

4. Variance between the nature of the inadequate performance alleged and the nature of the inadequate performance proven at trial may be fatal. *United States v. Smith*, 40 C.M.R. 316 (C.M.A. 1969) (accused charged with dereliction by failure to walk his post by sitting down upon his post, but evidence showed he left his post before being properly relieved, in violation of Article 113, and was found asleep in a building off his post); *United States v. Swanson*, 20 C.M.R. 416 (A.B.R. 1950) (accused charged with dereliction by *failure* to forward funds, but finding was failure to *properly handle* funds).

5. For the enhanced maximum punishment for willful dereliction, the specification must allege willfulness, including actual knowledge of the duty. *United States v. Ferguson*, 40 M.J. 823 (N.M.C.M.R. 1994).

G. Examples of Misconduct Constituting Dereliction of Duty.

1. Poor judgment in performance of duties can constitute dereliction. *United States v. Rust*, 41 M.J. 472 (C.A.A.F. 1995) (failure of on-call obstetrician to come to hospital to examine and admit patient showing signs of premature labor); *United States v. Sievert*, 29 C.M.R. 657 (N.B.R. 1959) (navigator, transiting narrow passage at night, failed to use all radars available to him and failed to react when faced with substantial discrepancies in position of ship).

2. Affirmative criminal acts can support a dereliction of duty offense where those acts fall within the scope of the duty. *United States v. Casey*, 45 M.J. 623, 629 (N-M. Ct. Crim. App. 1996) (theft of monies collected for phone charges); *United States v. Bankston*, 22 M.J. 896 (N.M.C.M.R. 1986) (stealing cash collected from video games); *United States v. Taylor*, 13 C.M.R. 201 (A.B.R. 1953) (lieutenant stole from mess fund, of which he was the custodian); *United States v. Voelker*, 7 C.M.R. 102 (A.B.R. 1953) (lieutenant spent money from special services fund provided to cover costs of transportation, food, and lodging for enlisted men on athletic team).

3. Loss to the Government or some other victim is not required for dereliction. *United States v. Nichels*, 20 M.J. 225 (C.M.A. 1985) (dereliction even though accused repaid or

arranged to repay the $3,000 lost due to the accused's failure to maintain proper fiscal control over postal account).

4. Failure to maintain alert and responsible watch supports conviction for dereliction of duty. *United States v. Stuart*, 17 C.M.R. 486 (A.B.R. 1954).

5. Willfully failing to properly use official time and government funds during TDY can constitute dereliction. *United States v. Mann*, 50 M.J. 689 (A.F. Ct. Crim. App. 1999) (during 5 duty days of TDY, the only legitimate business the accused Air Force major accomplished was a 45 minute conversation that could have taken place over the telephone; the accused was derelict in his duty to expend official time and funds only for legitimate governmental purposes by remaining TDY for personal reasons).

6. Failure to report changes in marital status affecting pay and allowances constitutes dereliction of duty. *United States v. Markley*, 40 M.J. 581 (A.F.C.M.R. 1994).

7. Even though civilians may have a First Amendment right to blow their nose on the American flag, the accused doing so while on flag-raising detail constituted dereliction of duty. *United States v. Wilson*, 33 M.J. 797 (A.C.M.R. 1991).

8. Failure to report or prevent crime. *See generally United States v. Thompson*, 22 M.J. 40 (C.M.A. 1986); *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986).

XIX. ENLISTMENT DEFINED.

A. Enlistment: A Contract that Changes "Status."

1. Valid Enlistments. *In re Grimley*, 137 U.S. 147 (1890) (finding valid enlistment, for jurisdictional purposes, where recruit lied about not being over the statutory maximum age of 35).

a) A valid contract creates military status, and a breach of the contract does not affect status.

b) Incapacity to contract and contracting involuntarily may prevent the existence of status.

2. Void Enlistments—No Status Due to Statutory Disqualifications.

a) Insanity, intoxication. 10 U.S.C. § 504.

b) Felons, deserters (secretaries may authorize exceptions). 10 U.S.C. § 504.

c) Age (minimum age - 17). 10 U.S.C. § 505.

d) Citizenship status. 10 U.S.C. § 3253.

B. Regulatory Enlistment Criteria. Army Regulation 601-210.

1. No prior service applicants - Chapter 2.

2. Prior service applicants - Chapter 3.

C. Regulatory Disqualifications.

1. Old rule: Regulations on enlistment qualifications are not only for the benefit of the service but also for the benefit of the applicant. Where recruiter misconduct amounts to a violation of Article 84, the resulting enlistment is void as contrary to public policy.

United States v. Russo, 1 M.J. 134 (C.M.A. 1975) (holding enlistment void, where accused suffered from dyslexia which severely impaired his ability to read and recruiter gave list of answers to qualification test).

2. *Russo* created a prophylactic rule that voided all enlistment contracts where recruiter misconduct existed. This resulted in numerous courts-martial where the accused defended by alleging the government had no jurisdiction over him because of recruiter misconduct. Congress responded by amending Article 2 to establish "constructive enlistments," in order to overrule *Russo* (*see* E. below); *see United States v. Quintal*, 10 M.J. 532 (A.C.M.R. 1980); *United States v. Gibson*, 43 M.J. 343, 346 n.3 (C.A.A.F. 1995).

D. Involuntary Enlistment.

1. *United States v. Catlow*, 48 C.M.R. 758 (C.M.A. 1974) (enlistment was involuntary and void at its inception, where accused entered into it after a civilian judge told him his only choice was between 5 years in jail or enlistment in the Army for 3 years).

2. *United States v. Lightfoot*, 4 M.J. 262 (C.M.A. 1974) (enlistment was voluntary, where accused, on advice of counsel, proposed military service as an alternative to confinement and the recruiter did not know that the criminal proceedings had been dismissed against the accused contingent on his entrance into the military). *See also*, *United States v. Ghiglieri*, 25 M.J. 687 (A.C.M.R. 1987).

E. The Codification of *In Re Grimley*.

1. In 1979, Article 2 was amended to read as follows:

> "(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) and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.
>
> (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 his 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."

2. Recruiter misconduct or intoxication at the time of the oath can be cured by "constructive enlistment." *United States v. Hirsch*, 26 M.J. 800 (A.C.M.R. 1988).

3. "Constructive enlistment" applies to reserve officer on active duty training (ADT). *United States v. Ernest*, 32 M.J. 135 (C.M.A. 1991).

4. A court-martial is competent to determine whether an enlistment was voidable because of misrepresentation. *Woodrick v. Divich*, 24 M.J. 147 (C.M.A. 1987). However, since a federal court *habeas corpus* proceeding was pending, the "demands of

comity" supported abating court-martial proceedings until the proceedings in the District Court were resolved.

XX. FRAUDULENT ENLISTMENT, APPOINTMENT, OR SEPARATION. UCMJ ART. 83.

A. Nature of The Offense. A fraudulent enlistment, appointment, or separation is one procured by either a knowingly false representation as to any of the qualifications or disqualifications prescribed by law, regulation, or orders for the specific enlistment, appointment, or separation, or a deliberate concealment as to any of those disqualifications. Matters that may be material to an enlistment, appointment, or separation include any information used by the recruiting, appointing, or separating officer in reaching a decision as to enlistment, appointment, or separation in any particular case, and any information that normally would have been so considered had it been provided to that officer. MCM, pt. IV, ¶ 7c(1).

B. Fraudulent Enlistment or Appointment.

1. False Representation or Concealment.

a) Testimony of the accused's recruiters and documentary evidence of his traffic violations proved that the accused willfully concealed offenses, the cumulative number of which would have disqualified him from enlistment, and supported a conviction for fraudulent enlistment. *United States v. Hawkins*, 37 M.J. 718 (A.F.C.M.R. 1993).

b) The accused perpetrated a fraudulent enlistment by enlisting in the Marine Corps using his brother's name. *United States v. Victorian*, 31 M.J. 830 (N.M.C.M.R. 1990) (holding, however, that the statute of limitations barred prosecution for fraudulent enlistment).

c) Falsely misrepresenting educational qualifications and willfully concealing arrest record constituted fraudulent extension of enlistment, which was not preempted by Article 83. *United States v. Weigand*, 23 M.J. 644 (A.C.M.R. 1986).

d) Accused fraudulently entered the Army on several occasions using, at varying times, eleven different names. *United States v. Brown*, 22 M.J. 597 (A.C.M.R. 1986).

2. Receipt of Pay or Allowances. An essential element of the offense of fraudulent enlistment or appointment is that the accused shall have received pay or allowances thereunder. Accordingly, a member of the armed forces who enlists or accepts an appointment without being regularly separated from a prior enlistment or appointment should be charged under Article 83 only if that member has received pay or allowances under the fraudulent enlistment or appointment. Also, acceptance of food, clothing, shelter, or transportation from the government constitutes receipt of allowances. Whatever is furnished the accused while in custody, confinement, or other restraint pending trial for fraudulent enlistment or appointment, however, is not considered an allowance. MCM, pt. IV, ¶ 7c(2).

C. Fraudulent Separation.

1. The accused procured a fraudulent separation from the Army by submitting, as her own, a urine sample obtained from a pregnant servicemember. The separation was invalid, and the accused remained subject to court-martial jurisdiction. *Wickham v. Hall*, 12 M.J. 145 (C.M.A. 1981). The 5th Circuit Court of Appeals affirmed a District Court ruling, in summary judgment, that Article 3(b) was constitutional. *Wickham v. Hall*, 706 F.2d. 713 (5th Cir. 1983).

2. Court-martial had jurisdiction to try and punish accused for offense of procuring his false separation from the Army. The accused apparently forged the signatures of several NCOs and the post commander in order to fraudulently obtain a DD Form 214 releasing him from active duty. *United States v. Cole*, 24 M.J. 18 (C.M.A. 1987) (upholding the constitutionality of Article 3(b)).

3. Accused was properly convicted, under Article 80, of attempting to procure a fraudulent separation from the Army. *United States v. Marshall*, 40 C.M.R. 138 (C.M.A. 1969); *see also United States v. Horns*, 24 C.M.R. 663 (A.F.B.R. 1957) (accused convicted of attempting to procure a fraudulent separation from the Air Force by making a false sworn statement that he was a homosexual and had engaged in homosexual activities; conviction set aside because of newly discovered psychiatric evidence).

D. One Offense. Procuring one's own enlistment, appointment, or separation by several misrepresentations or concealments as to qualifications for the one enlistment, appointment, or separation is only one offense under Article 83. MCM, pt. IV, ¶ 7c(3).

E. Interposition of the Statute of Limitations.

1. Plea of guilty to fraudulent enlistment was improvident, because prosecution of that offense was barred by the statute of limitations and the record failed to indicate that the accused was aware of the bar. *United States v. Victorian*, 31 M.J. 830 (N.M.C.M.R. 1990).

2. Defense counsel's failure to raise statute of limitations that barred accused's conviction for fraudulent enlistment fell below minimum acceptable level of competence demanded of attorneys. *United States v. Jackson*, 18 M.J. 753 (A.C.M.R. 1984), *aff'd in part, rev'd in part*, 20 M.J. 414 (C.M.A. 1985).

F. Related Offense. Fraudulent extension of enlistment by means of a false official statement, charged as a violation of Article 134, was not preempted by Article 83 nor Article 107. *United States v. Wiegand*, 23 M.J. 644 (A.C.M.R. 1986).

XXI. EFFECTING UNLAWFUL ENLISTMENT, APPOINTMENT, OR SEPARATION. UCMJ ART. 84.

A. Text. "Any person subject to this chapter who effects an enlistment or appointment in or separation from the armed forces of any person who is known to him to be ineligible for that enlistment, appointment, or separation because it is prohibited by law, regulation, or order shall be punished as a court-martial may direct." Article 84.

B. Explanation. The enlistment, appointment, or separation must have been prohibited by law, regulation, or order, and the accused must have then known that the person enlisted, appointed, or separated was eligible for the enlistment, appointment, or separation. MCM, pt. IV, para 8c.

C. Examples of Effecting an Unlawful Enlistment.

1. Accused recruiter, who had applicants that failed entrance examinations improperly retake the examinations in other jurisdictions, was guilty of effecting unlawful enlistment, under Article 84. *United States v. Hightower*, 5 M.J. 717 (A.C.M.R. 1978).

2. Accused effected unlawful enlistments and conspired to do so by involvement in a scam that provided ineligible applicants with bogus high school diplomas. *United States v. White*, 36 M.J. 284 (C.M.A. 1993).

XXII. CRUELTY AND MALTREATMENT. UCMJ ART. 93.

A. Introduction.

1. Text. "Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct." Article 93.

2. Elements.

a) That a certain person was subject to the orders of the accused; and

b) That the accused was cruel toward, or oppressed, or maltreated that person. MCM, pt. IV, ¶ 17b.

B. Nature of the Victim. The victim must be subject to the orders of the accused. This includes not only those under the direct or immediate supervision or command of the accused, but also any person (soldier or civilian) who is required by law to obey the lawful orders of the accused. *United States v. Sojfer*, 44 M.J. 603 (N-M. Ct. Crim. App. 1996) (E-3 seeking care at military medical facility could be "subject to the orders of" an E-6 corpsman since there was an important difference in rank which required the victim to obey the accused's orders), *aff'd*, 47 M.J. 425 (C.A.A.F. 1998); *but cf. United States v. Curry*, 28 M.J. 419 (C.M.A. 1989) (requiring more than seniority of rank to implicate Art. 93).

C. Nature of the Act. The cruelty, oppression, or maltreatment, although not necessarily physical, must be measured by an objective standard. Assault, improper punishment, and sexual harassment may constitute this offense. MCM, pt. IV, ¶ 17c(2).

1. Nature of superior's official position could place them in a "unique situation of dominance and control" and therefore bring ostensibly voluntary sexual relationship with a trainee within the definition of oppression and maltreatment, but not all personal relationships between superiors and subordinates, or between drill sergeants and their trainees, necessarily result in physical or mental pain or suffering; and government has the burden of proving that accused's conduct resulted in such physical or mental pain and suffering by an objective standard. *United States v. Johnson*, 45 M.J. 543 (Army Ct. Crim. App. 1997); *but see United States v. Fuller*, 54 M.J. 107 (C.A.A.F. 2000) (comment of sexual nature was not maltreatment by sexual harrassment because prosecution failed to prove that it offended the alleged victim); *U.S. v Goddard*, 54 M.J. 763 (N-.M Ct. Crim. App. 2000).

2. In a prosecution for maltreatment, it is not necessary to prove physical or mental harm or suffering on the part of the victim. It is only necessary to show, as measured from an objective viewpoint in light of the totality of the circumstances, that the accused's actions reasonably could have caused physical or mental harm or suffering. *United States v. Carson*, 57 M.J. 410 (C.A.A.F. 2002) (MP desk sergeant's indecent exposure of his penis to a subordinate female MP constituted maltreatment under Article 93).

D. Select Cases.

1. A consensual sexual relationship between a superior and a subordinate, without more, is not maltreatment. *United States v. Fuller*, 54 M.J. 107 (C.A.A.F. 2000) (even though relationship may have constituted fraternization, evidence did not evince "dominance and control" by the superior).

2. *U.S. v Goddard*, 54 M.J. 763 (N.M. Ct. Crim. App. 2000). A one time consensual sexual encounter with a female subordinate on the floor of the detachment's administrative office will not support a conviction for cruelty and maltreatment.

3. Cruelty, oppression, or maltreatment, although not necessarily physical, must be measured by an objective standard. The imposition of necessary or proper duties and the

exaction of their performance does not constitute this offense even though the duties are arduous or hazardous or both. However, the accused's intrusive body searches of female trainees, objectively viewed, reasonably could have caused mental harm or suffering based on testimony that a person subject to an EPW search could feel "violated," and testimony by a victim that she felt humiliated by the search. *United States v. Springer*, 58 M.J. 164 (C.A.A.F. 2003).

XXIII. FRATERNIZATION. UCMJ ART. 134.

A. Defining Wrongful Fraternization.

1. Military case law.

a) Military case law suggests that wrongful fraternization is more easily described than defined. Usually, some other criminal offense was involved when officers were tried for this offense. Whatever the nature of the relationship, each case was clearly decided on its own merits with a searching examination of the surrounding circumstances rather than focusing on the act itself.

b) The legal test for describing or defining fraternization is found in *United States v. Free*, 14 C.M.R. 466 (N.B.R. 1953): "Because of the many situations which might arise, it would be a practical impossibility to lay down a measuring rod of particularities to determine in advance what acts are prejudicial to good order and discipline and what are not. As we have said, the surrounding circumstances have more to do with making the act prejudicial than the act itself in many cases. Suffice it to say, then, that each case must be determined on its own merits. Where it is shown that the acts and circumstances are such as to lead a reasonably prudent person, experienced in the problems of military leadership, to conclude that the good order and discipline of the armed forces has been prejudiced by the compromising of an enlisted person's respect for the integrity and gentlemanly obligations of an officer, there has been an offense under Article 134.

2. The Manual for Courts-Martial specifically includes fraternization between officer and enlisted personnel as an offense under UCMJ art. 134. The elements of the offense are:

a) That the accused was a commissioned or warrant officer;

b) That the accused fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;

c) That the accused then knew the person(s) to be (an) enlisted member(s);

d) That such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and

e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. MCM, pt. IV, ¶ 83b.

3. AR 600-20, paras. 4-14 and 4-15 (11 Feb 2009), define improper superior-subordinate relationships, to include several specified prohibited relationships. The regulation is punitive, so violation may be punished under Article 92.

4. Case law and regulatory guidance can assist in developing a template for determining improper superior-subordinate relationships or wrongful fraternization. Additional

scrutiny should be given to relationships involving (1) direct command/supervisory authority, or (2) power to influence personnel or disciplinary actions. "[A]uthority or influence . . . is central to any discussion of the propriety of a particular relationship." DA Pam 600-35 (21 Feb 2000). These relationships are most likely to generate adverse effects.

B. Charging Fraternization.

1. Enlisted fraternization may be charged as a violation of UCMJ art. 134. *United States v. Clarke*, 25 M.J. 631 (A.C.M.R. 1987), *aff'd*, 27 M.J. 361 (C.M.A. 1989); *United States v. Carter*, 23 M.J. 683 (N.M.C.M.R. 1986); *United States v. March*, 32 M.J. 740 (A.C.M.R. 1991). Additionally, Article 134 has been successfully used to prosecute instances of officer-officer fraternization, *United States v. Callaway*, 21 M.J. 770 (A.C.M.R. 1986).

2. In addition to AR 600-20, many commands have published regulations and policy letters concerning fraternization. Violations of regulations or policy letters are punishable under Article 92, if:

a) The regulation or policy letter specifically regulates individual conduct without being vague or overbroad. *See United States v. Callaway*, 21 M.J. 770 (A.C.M.R. 1986); *United States v. Adams*, 19 M.J. 996 (A.C.M.R. 1985); *United States v. Moorer*, 15 M.J. 520 (A.C.M.R. 1983), *aff'd in part, rev'd in part*, 16 M.J. 451 (C.M.A. 1983); *United States v. Hoard*, 12 M.J. 563 (A.C.M.R. 1981);

b) The regulation or policy letter indicates that violations of the provisions are punishable under the UCMJ (directory language may be sufficient); and

c) Knowledge: Service members are presumed to have knowledge of lawful general regulations if they are properly published. Actual knowledge of regulations or policy letters issued by brigade-size or smaller organizations must be proven. *See generally United States v. Mayfield*, 21 M.J. 418 (C.M.A. 1981); *United States v. Tolkack*, 14 M.J. 239 (C.M.A. 1982); *see also United States v. Tedder*, 24 M.J. 176, 1981 (C.M.A. 1987).

C. Options Available to Commanders.

1. Counsel the individuals involved.

2. Pursue other non-punitive measures (*e.g.*, reassignment, oral or written admonitions or reprimands, adverse OER/EER, bar to reenlistment, relief, administrative elimination).

3. Consider nonjudicial or punitive action.

a) If the offense amounts to a social relationship between an officer and an enlisted person and violates good order and discipline, it may be charged under UCMJ art. 134.

b) If the relationship violates other offenses such as adultery, sodomy, indecent acts, maltreatment, etc., the conduct should be alleged as such.

c) Other articles may be charged depending upon the specific facts of the case.

d) The conduct may be in violation of a regulation or order and charged under Art 92.

D. Applications.

1. Sexual activity.

a) *United States v. Froehlke*, 390 F. Supp. 503 (D.D.C. 1975). Upheld conviction of warrant officer for undressing and bathing an enlisted woman (not his wife) with whom he had been drinking. Offense of unlawful fraternization held not unconstitutionally vague.

b) *United States v. Hoard*, 12 M.J. 563 (A.C.M.R. 1981). "[W]rongfully socializing, drinking, and engaging in sexual intercourse with female receptees in violation of cadre-trainee regulation."

c) *United States v. Lowery*, 21 M.J. 998 (A.C.M.R. 1986), *aff'd*, 24 M.J. 347 (C.M.A. 1987). Conviction upheld when accused officer had sexual intercourse with enlisted female, formerly under his command, where the female would not have gone to the accused's office to make an appointment but for the superior-subordinate relationship.

d) *United States v. Tedder*, 24 M.J. 176 (C.M.A. 1987). Charges of unbecoming conduct based on officer having sexual relationship with enlisted woman Marine and seeking to have subordinates arrange dates for him with another subordinate Marine were not impermissibly vague.

e) *United States v. Parrillo*, 31 M.J. 886 (A.F.C.M.R. 1990), *aff'd* 34 M.J. 112 (C.M.A. 1992) Sexual relations with enlisted members under the accused officer's supervision violated an Air Force custom against fraternization.

f) *United States v. Sanchez*, 50 M.J. 506 (A. F. Ct. Crim. App. 1998). Accused cannot be convicted of both conduct unbecoming (Art. 133) and fraternization (Art. 134) when the misconduct alleged in the specifications is identical; fraternization gets dismissed. Those fraternization allegations not alleged in conduct unbecoming specifications remain. Court cites *United States v. Harwood*, 46 M.J. 26, 28 (1997) in support.

g) *United States v. Rogers*, 54 M.J. 244 (2000). Evidence legally sufficient to sustain Art. 133 conviction for the offense of conduct unbecoming an officer by engaging in an unprofessional relationship with a subordinate officer in appellant's chain of command. AF Court holds there is no need to prove breach of custom or violation of punitive regulation.

2. Homosexual conduct.

a) *United States v. Lovejoy*, 42 C.M.R. 210 (C.M.A. 1970). Accused convicted of sodomy and fraternization with enlisted member of submarine crew. Sodomy occurred at accused's on-shore apartment, which he had invited enlisted sailor to share.

b) *United States v. Pitasi*, 44 C.M.R. 31 (C.M.A. 1971). Charges of sodomy set aside on appeal as unproven but conviction for fraternization based on same relationship upheld.

c) *United States v. Free*, 14 C.M.R. 466 (N.B.R. 1953). Accused convicted of sharing liquor with enlisted sailor in his quarters; sailor testified that after accepting invitation to spend the night in accused's quarters, he was awakened in night by accused getting into bed with him.

3. Drugs and other illegal activities.

a) *United States v. Graham*, 9 M.J. 556 (N.C.M.R. 1980). Navy lieutenant convicted under Article 133 for conduct unbecoming an officer for smoking marijuana on shore with members of his ship's crew.

b) *United States v. Chesterfield*, 31 M.J. 942 (A.C.M.R. 1990). Drinking and smoking hashish with subordinates constituted fraternization.

4. Excessive socializing.

a) *United States v. Arthur*, 32 M.J. 541 (A.F.C.M.R. 1990). Accused officer's romantic relationship with an enlisted co-worker did not constitute fraternization.

b) *United States v. McCreight*, 43 M.J. 483 (C.A.A.F. 1996). Conviction for fraternization sustained where 1LT showed partiality and preferential treatment to senior airman; associated with airman on a first name basis at work and during numerous social contacts, including drinking and gambling; repeatedly allowed the same airman to stay in his apartment; and on one occasion drank with same airman under circumstances where the accused was the "designated drunk" and the airman was the designated driver. No sexual aspect alleged or proven. Fraternization does not require sexual conduct. *Accord United States v. Nunes*, 39 M.J. 889 (A.F.C.M.R. 1994) ("That no sexual relationship was alleged is irrelevant. This case is a useful corrective to the common notion that fraternization perforce must include sexual hanky-panky.").

5. Proof of custom and other facts.

a) *United States v. Wales*, 31 M.J. 301 (C.M.A. 1990). Accused's conviction for fraternization was reversed because the judge did not instruct that the members must find that the accused (an Air Force officer) was the supervisor of the enlisted member at the time of the alleged fraternization, and because the government did not prove that the accused's conduct violated a custom of the service. To prove a custom of the military service, proof must be offered by a knowledgeable witness--subject to cross-examination--about that custom.

b) *United States v. Appel*, 31 M.J. 314 (C.M.A. 1990). If the government relies on a violation of a custom as fraternization, it must prove the custom (Air Force accused). Proof of a military custom may not be based on judicial notice.

c) *United States v. Thompson*, 31 M.J. 781 (A.C.M.R. 1990). Military judge is entitled to take judicial notice of a post regulation proscribing fraternization.

d) *United States v. Johanns*, 20 M.J. 155 (C.M.A. 1985), *cert. denied* 474 U.S. 850 (1985). Decision of A.F.C.M.R. that "[C]ustom in the Air Force "against fraternization has been so eroded as to make *criminal prosecution* against an officer for engaging in mutually voluntary, private, non-deviate sexual intercourse with an enlisted member, neither under his command or supervision, unavailable.

e) *United States v. Fox*, 34 M.J. 99 (C.M.A. 1992). Air Force fraternization specification must at least imply existence of a superior-subordinate or supervisory relationship and court members must be instructed that to find the accused guilty they must find the existence of such a relationship.

f) *United States v. Blake*, 35 M.J. 539 (A.C.M.R. 1992). Specification alleging fraternization between Army 1SG and female NCO in his company was fatally defective where it failed to allege a violation of Army custom, which is an essential element.

g) *United States v. Boyett*, 37 M.J. 872 (A.F.C.M.R. 1993), *aff'd* 42 M.J. 150 (1995). Determination in previous case (*Johanns*) that custom against fraternization in the Air Force had been so eroded as to make criminal prosecution against officer for engaging in mutually voluntary, private, nondeviate sexual intercourse with enlisted member, neither under his command nor supervision, unavailable was limited to state of customs reflected in record in that case, and would not preclude every prosecution for fraternization based on such conduct. (Per Heimberg, J., with three Judges concurring and one Judge concurring separately).

h) *United States v. Brown*, 55 M.J. 375 (C.A.A.F. 2001). The military judge did not abuse his discretion when he admitted the nonpunitive Air Force Pamphlet (AFP) 36-2705, Discrimination and Sexual Harassment (28 February 1995) over defense objection. In so ruling, the CAAF agreed with the military judge that the AFP was relevant to establish notice of the prohibited conduct and the applicable standard of conduct in the Air Force community to the appellant. Additionally, the CAAF stated that in cases were evidence of the custom of the service is needed to prove an element of an offense, it is likely that the probative value will out weigh the prejudicial effect.

XXIV. IMPERSONATING AN OFFICER, WARRANT OFFICER, OR NONCOMMISSIONED OFFICER. UCMJ ART. 134.

A. General. The offense does not depend upon the accused deriving a benefit from the deception or upon some third party being misled, but rather upon whether the acts and conduct would adversely influence the good order and discipline of the armed forces. *United States v. Messenger*, 6 C.M.R. 21 (C.M.A. 1952); *United States v. Frisbie*, 29 M.J. 974 (A.F.C.M.R. 1990); Winthrop, Military Law and Precedents 726 (2d ed., 1920 Reprint); MCM, pt. IV, ¶ 86c(1); TJAGSA Practice Note, *Impersonating an Officer and the Overt Act Requirement*, Army Law., Jul. 1990, at 42 (discussing *Frisbie*).

B. Intent. Intent to defraud may be plead and proven as an aggravating factor. MCM, pt. IV, ¶ 86b.

C. Related Offenses. Impersonating an officer, warrant officer, or noncommissioned officer differs from the offense of impersonating a CID agent or other agent of the federal government, in that the accused is not required to act out the part of the officer. Instead, merely posing as an officer is sufficient. *United States v. Felton*, 31 M.J. 526 (A.C.M.R. 1990); *United States v. Wesley*, 12 M.J. 886 (A.C.M.R. 1981); *United States v. Reece*, 12 M.J. 770 (A.C.M.R. 1981); *United States v. Adams*, 14 M.J. 647 (A.C.M.R. 1982); *see also* TJAGSA Practice Note, *Impersonating a CID Agent and the Overt Act Requirement*, Army Law., Mar. 1991, at 21 (discusses *Felton*); Cooper, *Persona Est Homo Cum Statu Quodam Consideratus*, Army Law., April 1981, at 17.

XXV. MALINGERING. UCMJ ART. 115.

A. General. The essence of this offense is the design to avoid performance of any work, duty, or service which may properly or normally be expected of one in the military service. Whether to avoid all duty, or only a particular job, it is the purpose to shirk which characterizes the offense. Hence, the nature or permanency of a self-inflicted injury is not material on the question of guilt, nor is the seriousness of a physical or mental disability which is a sham. Evidence of the extent of the self-inflicted injury or feigned disability may, however, be relevant as a factor indicating the presence or absence of the purpose. MCM, pt. IV, ¶ 40c(1).

B. Elements.

1. The accused was assigned to, or was aware of prospective assignment to, or availability for, the performance of work, duty, or service.

a) All soldiers are inferred to be aware of their general, routine military duties. *United States v. Mamaluy*, 27 C.M.R. 176 (C.M.A. 1959).

b) With regard to special duties or prospective assignments (*e.g.*, emergency deployment to hostile regions), the government must establish that accused had actual knowledge of such duties.

2. The accused feigned illness, physical disablement, mental lapse or derangement, or intentionally inflicted injury upon himself or herself.

a) *United States v. Pedersen*, 8 C.M.R. 63 (C.M.A. 1953). Accused was charged with intentionally shooting himself in order to be discharged from the Army but testified at trial that the injury was accidentally inflicted. No one witnessed the shooting, and the government had no admissible evidence with which to impeach the accused. As a result, the court held that the prosecution had failed in its proof and dismissed the charges.

b) *United States v. Kisner*, 35 C.M.R. 125 (C.M.A. 1964). Accused was charged with deliberately shooting himself in the foot in order to avoid transfer to Korea. After initially declaring that the injury was accidentally incurred, he confessed to intentionally inflicting the wound in order to avoid deployment to Korea. Because the record was devoid of any independent evidence to corroborate the confession, the Court of Military Appeals reversed the conviction and dismissed the charge.

c) *United States v. Belton*, 36 C.M.R. 602 (A.B.R. 1966). Accused on orders to Vietnam, who refused to eat food over a period of time, resulting in his debility, intentionally inflicted self-injury for purposes of Article 115.

3. The accused's purpose or intent in doing so was to avoid the work, duty or service.

a) The words "work," "duty," and "service" are not restricted to one context or sense. The breadth of these terms would seem to cover all aspects of a serviceperson's official existence. Unquestionably, what the law intended to proscribe was a self-inflicted injury, which would prevent the injured party from being available for the performance of all military tasks. *See United States v. Mamaluy*, 27 C.M.R. 176 (C.M.A. 1959) (Cutting his wrist to escape confinement was sufficient to allege a purpose to avoid either work, duty, or service.); *United States v. Guy*, 38 C.M.R. 694 (N.B.R. 1967) (Intentional self-injury for the purpose of avoiding disciplinary action was sufficient to avoid either work, duty, or service); *United States v. Johnson*, 28 C.M.R. 629 (N.B.R. 1959) (a sailor who persuaded a friend to cut off his thumb was convicted of conspiracy to maim himself and malingering when the act was done as a means of avoiding further military duty).

b) Intent or purpose may be established by circumstantial evidence, and it may be inferred that a person intended the natural and probable consequences of an act intentionally performed by him. *United States v. Houghton*, 32 C.M.R. 3 (C.M.A. 1962); *but see United States v. Lawrence*, 10 M.J. 752 (A.C.M.R. 1981) (court held that evidence which established only that the accused injured himself in order to halt an investigation into a false report he had filed was insufficient to support a conviction for malingering).

c) Unsuccessfully attempting to commit suicide to avoid prosecution constitutes malingering. *United States v. Johnson*, 26 M.J. 415 (C.M.A. 1988).

d) Evidence of prior misconduct may be admissible against the accused for the limited purpose of establishing his wrongful intent. *See United States v. Brown*, 38 C.M.R. 445 (A.B.R. 1967) (where the accused was charged with malingering by intentionally shooting himself in the foot while on a combat mission in Vietnam, evidence that he had quit as a point man for a patrol the day before the shooting and had skulked in bringing up the rear and wanted to be evacuated and complained of headaches was relevant on the issue of intent).

C. Defense of Accident. *United States v. Harrison*, 41 C.M.R. 179 (C.M.A. 1970). Where an accused charged with malingering by intentionally shooting himself in the foot for the purpose of avoiding duty in the field testified he had a faulty weapon which discharged accidentally while he was dozing, the instructions on the elements of the offense and the defense of accident were prejudicially inconsistent where the court was advised it must find the accused intentionally inflicted injury upon himself by shooting himself in the foot, but the instructions on accident

included the statement that even though the act is unintentional, it is not excusable where it was a result of or incidental to an unlawful act.

D. To Avoid Assigned Duty. *See United States v. Yarborough*, 5 C.M.R. 106 (C.M.A. 1952) (malingering to avoid assigned duty while before the enemy constitutes misbehavior punishable under UCMJ art. 99). *See also*, *United States v. Glover*, 33 M.J. 640 (N.M.C.M.R. 1991) (testimony required from people who knew what restrictions had been placed on accused's activity to show he was attempting to avoid assigned duties.)

E. Without Intent to Avoid Military Duty. *See United States v. Taylor*, 38 C.M.R. 393 (C.M.A. 1968). In *Taylor*, the evidence pertaining to a charge of malingering in violation of UCMJ art. 115 showed that the accused superficially slashed his arms with a razor blade in the presence of two cell mates in the brig, representing at the time that he wanted to outdo the performance of another inmate who had done the same thing earlier. The law officer instructed that intentional injury without a purpose to avoid service but under circumstances to the prejudice of good order and discipline was a lesser included offense, and the court could validly find the accused not guilty of the portion of the specification alleging the purpose of the injury to have been avoiding service and the accused guilty of being disorderly to the prejudice of good order and discipline in the armed forces in violation of Article 134, UCMJ. Held: Article 115 does not pre-empt the spectrum of self-inflicted injuries. *See also United States v. Ramsey*, 40 M.J. 71 (C.M.A. 1994).

XXVI. **LOSS, DAMAGE, DESTRUCTION, OR WRONGFUL DISPOSITION OF MILITARY PROPERTY. UCMJ ART. 108.**

A. "Military Property" Defined.

1. "Military property is all property, real or personal, owned, held, or used by one of the armed forces of the United States. It is immaterial whether the property sold, disposed, destroyed, lost, or damaged had been issued to the accused, to someone else, or even issued at all. If it is proved by either direct or circumstantial evidence that items of individual issue were issued to the accused, it may be inferred, depending on all the evidence, that the damage, destruction, or loss proved was due to the neglect of the accused. Retail merchandise of service exchange stores is not military property under this article." MCM, ¶ 32c(1).

2. For purposes of both Article 108 and Article 121, all appropriated funds belonging to the United States are within the meaning of the term "military property of the United States." *United States v. Hemingway*, 36 M.J. 349 (C.M.A. 1993). *See generally* TJAGSA Practice Note, *Defining Military Property*, Army Law., Oct. 1990, at 44.

3. Myriad items can constitute military property, including: Watches, *United States v. Ford*, 30 C.M.R. 3 (C.M.A. 1960); Examinations, *United States v. Reid*, 31 C.M.R. 83 (C.M.A. 1961); Electric Drill, *United States v. Foust*, 20 C.M.R. 907 (A.B.R. 1955); A gate, *United States v. Meirthew*, 11 C.M.R. 450 (A.B.R. 1953); Sheets, mattress, and mattress cover, *United States v. Burrell*, 12 C.M.R. 943 (A.F.B.R. 1953); Sinks, pipes, and window casements, *United States v. Tomasulo*, 12 C.M.R. 531 (A.B.R. 1953); Camera in ship's store, *United States v. Simonds*, 20 M.J. 279 (C.M.A. 1985); Blankets, *United States v. Blevins*, 34 C.M.R. 967 (A.F.B.R. 1964).

4. Military property does not include:

a) Postal funds. *United States v. Spradlin*, 33 M.J. 870 (N.M.C.M.R. 1991).

b) Nonappropriated fund organization property, which is not furnished to a military service for use by the military service. *United States v. Geisler*, 37

C.M.R. 530 (A.C.M.R. 1965) (property of officer's club); *see United States v. Ford*, 30 M.J. 871 (A.F.C.M.R. 1990) (*en banc*); *United States v. Thompson*, 30 M.J. 905 (A.C.M.R. 1990); *see generally* TJAGSA Practice Note, *Appropriated Funds as Military Property*, Army Law., Jan. 1991, at 44.

c) Army and Air Force Exchange Service (AAFES) property. *United States v. Underwood*, 41 C.M.R. 410 (A.C.M.R. 1969); *United States v. Schelin*, 12 M.J. 575 (A.C.M.R. 1981), *aff'd*, 15 M.J. 218 (C.M.A. 1983). Navy courts have held, however, that property of the Navy Exchange is military property. *United States v. Mullins*, 34 C.M.R. 694 (N.C.M.R. 1964); *United States v. Harvey*, 6 M.J. 545 (N.C.M.R. 1978).

B. Property Need Not Have Been Personally Issued**.** The purpose of Article 108 is to ensure that all military property, however obtained and wherever located, is protected from loss, damage, or destruction. As such, all persons subject to the UCMJ have an affirmative duty to preserve the integrity of military property. *United States v. O'Hara*, 34 C.M.R 721 (N.B.R. 1964).

C. Pleading. The specification must as a whole or directly state that the property was *military* property of the United States. *United States v. Rockey*, 022 C.M.R. 372 (A.B.R. 1956); *United States v. Schiavo*, 14 M.J. 649 (A.C.M.R. 1982).

D. Multiplicity. Larceny and wrongful disposition of the same property are separately punishable. *United States v. West*, 17 M.J. 145 (C.M.A. 1984); *see also United States v. Harder*, 17 M.J. 1058 (A.F.C.M.R. 1983) (larceny and wrongful sale are separately punishable). *But see United States v. Teters*, 37 M.J. 370 (C.M.A. 1993) (holding that the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not ("elements test")).

E. Unlawful Sale of Military Property.

1. "Sale" defined. The term "sale" means an actual or constructive delivery of possession in return for a "valuable consideration," and the passing of such title as the seller may possess, whatever that title may be. *United States v. Blevins*, 34 C.M.R. 967 (A.F.B.R. 1964).

2. "Sale" distinguished from larceny.

a) The sale of property implies the transfer of at least ostensible title to a purchaser in return for consideration. When the evidence merely shows that the accused, according to prior arrangements, stole property and delivered it to one or more of his fellow principals in the theft, receiving payment for his services, no sale is made. *United States v. Walter*, 36 C.M.R. 186 (C.M.A. 1966).

b) Under proper circumstances, one transaction can constitute both a larceny and wrongful sale of the same property. *United States v. Lucas*, 33 C.M.R. 511 (A.C.M.R. 1962) (Accused, without authority and with intent to steal, took automotive parts out of a government salvage yard and later sold them at a civilian junk yard. The larceny was complete when the automotive parts were taken from the salvage yard; and the act of selling such parts did not constitute the final element of the larceny offense.)

c) Lack of knowledge as defense. Because the offense of wrongful sale of government property involves a general criminal intent, lack of knowledge as to ownership of the property constitutes an affirmative defense provided the accused's actions are based on an honest and reasonable mistake. *United States*

v. Germak, 31 C.M.R. 708 (A.F.B.R. 1961); *United States v. Pearson*, 15 M.J. 888 (A.C.M.R. 1983).

d) Multiplicity. An accused can be separately found guilty of wrongful sale under Article 108 and concealment under Article 134 of the same military property. *United States v. Wolfe*, 19 M.J. 174 (C.M.A. 1985). *But see United States v. Teters*, 37 M.J. 370 (C.M.A. 1993) (holding that the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not ("elements test")).

F. Wrongful Disposition of Military Property. Disposing of military property by any means other than sale is an offense under Article 108 if such disposition is made without proper authority. For example, giving military property away without proper authorization constitutes an offense under this article. It makes no difference if the surrender of the property is temporary or permanent. *United States v. Banks*, 15 M.J. 723 (A.C.M.R. 1983), *aff'd*, 20 M.J. 166 (C.M.A. 1985); *See also United States v. Reap*, 43 M.J. 61 (1995) (accused who gave another marine a starlight scope and tool boxes outside of regular supply channels and without receipts was guilty of violating Article 108 when he had no color of authority to distribute the supplies).

G. Damaging, Destroying, or Losing Military Property.

1. Loss, damage, or destruction of military property under this provision may be the result of intentional misconduct or neglect.

2. Damage. Removing the screws that secure the nose landing gear inspection window of a military aircraft was legally sufficient to support the damage element required under Article 108. The word "damage" must be reasonably construed to mean any change in the condition of the property that impairs its operational readiness. The government was not required to prove that the accused had a motive to wrongfully damage military property in order to secure a conviction for the offense. *United States v. Daniels*, 56 M.J. 365 (C.A.A.F. 2002).

3. Willfulness. Willful damage, destruction, or loss is one that is intentionally occasioned. It refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences thereof. *United States v. Boswell*, 32 C.M.R. 726 (C.G.B.R. 1962). Willful damage is a lesser included offense of sabotage under 18 U.S.C. § 2155. *United States v. Johnson*, 15 M.J. 676 (A.F.C.M.R. 1983); *see United States v. Washington*, 29 M.J. 536 (A.F.C.M.R. 1989); TJAGSA Practice Note, *Damaging Property and Mens Rea*, Army Law., Feb. 1990, at 66.

a) *United States v. George*, 35 C.M.R. 801 (A.F.B.R. 1965). Evidence that the accused removed perishable medical serums from a refrigerator in a medical warehouse in the tropics and left them at room temperature was sufficient to establish a willful destruction of government property although the purpose in removing the serums was to steal the refrigerator. The evidence established that the removal was intentional, and showing that the accused had a fully conscious awareness of the probable ultimate consequences of his purposeful act was unnecessary.

b) *United States v. Creek*, 39 C.M.R. 666 (A.C.M.R. 1967). The evidence was insufficient to sustain a conviction of willfully and wrongfully destroying an M26 fragmentation hand grenade, military property of the United States, where evidence existed that some sort of explosive device was detonated and some witnesses expressed the opinion it was a grenade because of the sound and damage done, when they all admitted it could have been anything else and

another witness said it sounded like recoilless rifle fire while others declined to express an opinion.

c) *United States v. Barnhardt*, 45 C.M.R. 624 (C.G.C.M.R. 1971). Where the accused placed six metal objects in the starboard reduction gear of the cutter on which he was assigned and later, at the suggestion of a petty officer in whom he had confided, removed only the four objects he could see without reporting the remaining two, which he stated he thought might have fallen into the slump, the accused's plea of guilty to willfully damaging military property was provident; the intentional quality of the accused's conduct had not changed to negligence by his removal of some but not all of the foreign, metal objects from the gear.

d) *United States v. Hendley*, 17 C.M.R. 761 (A.F.B.R. 1954). The accused, who had been drinking, took a military police sedan without authority and was chased at high speed. In trying to evade his pursuers, he weaved in and out of traffic; narrowly missed one oncoming vehicle; subsequently sideswiped another; and finally went out of control, left the road, and smashed into several trees. The Board of Review only approved negligent damage to military property.

e) *United States v. Peacock*, 24 M.J. 410 (C.M.A. 1987). Placing rivets and nuts in an auxiliary fuel tank, thus temporarily impairing the aircraft's operational readiness, constitutes willful damage to military property.

4. Negligence. Loss, destruction, or damage is occasioned through neglect when it is the result of a want of such attention of the foreseeable consequences of an act or omission as was appropriate under the circumstances.

a) *United States v. Ryan*, 14 C.M.R. 153 (C.M.A. 1954). The doctrine of *res ipsa loquitur* is not applicable to a prosecution for damaging a military vehicle through neglect, and the mere happening of a collision with resulting damage is not in itself sufficient to support a conviction for violation of Article 108. Negligence must be affirmatively established by the prosecution evidence. Here, the accused was found guilty of damaging a government vehicle through neglect. No evidence indicated that the accused was driving at an excessive speed or in any sort of reckless manner, or that he was under the influence of alcohol, or that at the time of the accident he was engaged in the violation of traffic or other safety regulations of any nature. HELD: The evidence was wholly insufficient to support findings of guilt.

b) *United States v. Foster*, 48 C.M.R. 414 (N.C.M.R. 1973). Conviction based on accused's guilty plea set aside and dismissed where providence inquiry established that accused, while on guard, operated a government forklift without permission and that while he was doing so the hydraulic brake line malfunctioned. No evidence of accused's actual negligence was established by the government.

c) *United States v. Stuck*, 31 C.M.R. 148 (C.M.A. 1961). Although evidence was presented that a Navy vehicle turned over to the accused in good condition was damaged, and witnesses testified they saw the vehicle bump and heard a noise as the accused drove it through a gate, and evidence of paint scratches on the vehicle and the gate post indicated he must have struck the gate post, the evidence was insufficient to establish beyond a reasonable doubt that the vehicle was damaged through the accused's negligence. This is because the accused testified he had driven over a rock, evidence indicated that the road approaching

the gate was bumpy and full of holes, and the gate was held open by a rock which could have been moved onto the road.

d) *United States v. Lane*, 34 C.M.R. 744 (C.G.B.R. 1963). The evidence was legally and factually sufficient to sustain findings of guilty of damaging and suffering damage to a Coast Guard vessel through neglect where the accused voluntarily and intentionally turned two wheels controlling flood valves on a floating drydock in which the vessel was berthed, thereby consciously setting in motion a sequence of events which a reasonably prudent man would expect to end in some kind of harm; and if, as the court found, the precise form and shape of the injury to the vessel was not specifically intended, then it was the result of a lack of due solicitude on the part of the accused made punishable under Article 108.

e) *United States v. Traweek*, 35 C.M.R. 629 (A.B.R. 1965). Evidence that a government helicopter in operating condition was parked, tied down, and covered and that it was subsequently found untied, uncovered and turned over on its side and wrecked and that the accused, who was on guard at the helicopter site, was lying unconscious a short distance from it was sufficient to corroborate accused's confession that he entered the helicopter to warm himself and caused the damage when he started the motor to generate heat.

f) *United States v. Miller*, 12 M.J. 559 (A.F.C.M.R. 1981). Article 108 offense made out where accused who had control of a military truck permitted an unlicensed 16-year-old military dependent to operate truck resulting in accident and damage to vehicle.

H. Suffering the Loss, Damage, Destruction, Sale or Wrongful Disposition of Military Property.

1. The word "suffer," as used in the UCMJ, does not have a meaning other than that accorded to it in the ordinary and general usage, *i.e.*, is to allow, to permit, and not to forbid or hinder; also, to tolerate and to put up with. *United States v. Johnpier*, 30 C.M.R. 90 (C.M.A. 1961).

2. In charging an accused with the loss of military property, the word "suffer" may properly be used in alleging willful or intentional misconduct by the accused, as well as negligent dereliction on his part. *United States v. O'Hara*, 34 C.M.R. 721 (N.B.R. 1964); *see also* MCM, pt. IV, ¶ 32c(2).

3. Where a member of the naval service intentionally loses military property by willfully pushing it over the side of his ship, he may be charged under Article 108 of willfully suffering the loss or wrongfully disposing of military property. *United States v O'Hara*, 34 C.M.R. 721 (N.B.R. 1964).

I. Value.

1. Under all theories of prosecution under Article 108, UCMJ, the government must establish as an element of proof the value of the property destroyed, lost, or sold, or the amount of damage to that property. MCM, pt. IV, para 32b.

2. "In the case of loss, destruction, sale, or wrongful disposition, the value of the property controls the maximum punishment which may be adjudged. In the case of damage, the amount of damage controls. As a general rule, the amount of damage is the estimated or actual cost of repair by the government agency normally employed in such work, or the cost of replacement, as shown by government price lists or otherwise, whichever is less." MCM, pt. IV, ¶ 32c(3).

3. In the case of the wrongful sale of stolen military property, it is the time of taking at which value is to be determined and the burden is on the prosecution to establish the property condition as of that time. *United States v. Steward*, 20 C.M.R. 247 (C.M.A. 1955).

4. Documents such as accounts receivable are not writings representing value. While they may record or even reflect value, they do not represent value as do negotiable instruments or other documents used to acquire goods or services. *United States v. Payne*, 9 M.J. 681 (A.F.C.M.R. 1980) (Accused who destroyed telephone toll records representing money owed to the Government by telephone users could not be convicted of destroying $4,000 in government property represented by the toll tickets. Instead, only a conviction for destruction of property of "some value" could stand).

5. Various documents have been held to have the value they represent, including checks made out to other payees, *United States v. Windham*, 36 C.M.R. 21 (C.M.A. 1965); money orders, *United States v. Sowards*, 5 M.J. 864 (A.F.C.M.R. 1978); airline tickets, *United States v. Stewart*, 1 M.J. 750 (A.F.C.M.R. 1975); and gasoline coupons, *United States v. Cook*, 15 C.M.R. 622 (A.F.B.R. 1954).

6. A government price list is competent evidence of value, and may be the best method of proving the market value of government property; however, it is an administrative determination of value, not binding on a court-martial, but entitled to its consideration. Value also may be inferred from the nature of property. A court may properly consider other evidence of value; for example, the property's serviceability. *United States v. Thompson*, 27 C.M.R. 119 (C.M.R. 1958); *United States v. Downs*, 46 C.M.R. 1227 (N.C.M.R. 1973).

PART II: THE GENERAL ARTICLES

XXVII. CONDUCT UNBECOMING AN OFFICER. UCMJ ART. 133.

A. Conduct "must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents." William Winthrop, *Military Law and Precedents* 711-12 (2d ed.1920)).

B. All that is required is for the offender's conduct to fall below the level of conduct expected of officers and to seriously expose him to public opprobrium. *United States v. Rogers*, 54 M.J. 244, 256 (C.A.A.F. 2000).

C. Private conduct may constitute an offense under Article 133, UCMJ, and there is no requirement that the conduct be otherwise criminal. United States v. *Moore*, 38 M.J. 490 (C.M.A. 1994); *United States v. Norvell*, 26 M.J. 477, 481 (C.M.A.1988). Conduct constitute an offense elsewhere under the UCMJ. *United States v. Taylor*, 23 M.J. 314, 318 (C.M.A.1987).

D. Applies to female officers. *United States v. Norvell*, 26 M.J. 477 (C.M.A.1988).

E. Acts Covered. Includes acts punishable under other articles of the UCMJ and offenses not so listed, except for minor derelictions that do not satisfy the requirements of Article 133. *United States v. Taylor*, 23 M.J. 314 (C.M.A. 1987) (UCMJ art. 133 conviction affirmed even where misconduct does not violate a punitive article); *United States v. Wolfson*, 36 C.M.R. 722 (A.B.R. 1965) (not every deviation in conduct constitutes unbecoming conduct; to be actionable conduct must be morally unbefitting and unworthy). Examples include:

1. Child Pornography. *United States v. Forney*, 67 M.J. 271 (C.A.A.F. 2009). Conduct involving child pornography, including receipt and possession, can constitute conduct unbecoming an officer. This can include both actual and virtual child pornography. *But see United States v. Amazaki*, 67 M.J. 666 (A. Ct. Crim. App. 2009) (holding that, under the facts, as a matter of due process, the accused was not "on fair notice that his unwitting possession of child pornography . . . was negligent or that his conduct in failing to discover, delete, or secure these images amounted to conduct unbecoming an officer and gentleman.").

2. Drugs. *United States v. Graham*, 9 M.J. 556 (N.C.M.R. 1980); *United States v. Maderia*, 38 M.J. 494 (C.M.A. 1994) (publicly associating with person known by the accused to be a drug smuggler and discussing drug use and possibility of assistance in drug smuggling operations).

3. Sex. *United States v. Coronado*, 11 M.J. 522 (A.F.C.M.R. 1981) (even though the offense occurred off the military installation, jurisdiction was properly exercised by general court-martial which convicted accused of conduct unbecoming an officer and gentleman by performing acts of sodomy on an enlisted man); *United States v. Jefferson*, 21 M.J. 203 (C.M.A. 1986) (adultery and fraternization); *United States v. Shobar*, 26 M.J. 501 (A.F.C.M.R. 1988) (sexual exploitation of civilian waitress under the accused's supervision); *United States v. Frazier*, 34 M.J. 194 (C.M.A. 1992) (officer's engaging in open and intimate relationship with wife of enlisted soldier constituted conduct unbecoming an officer).

4. Sexual Harassment. *United States v. Lofton*, 69 M.J. 386 (C.A.A.F. 2011) (a senior male officer made repeated, unwanted comments in attempts to establish a personal and unprofessional relationship with a senior female noncommissioned officer, who was not his immediate subordinate).

5. Indecent language and conduct. *United States v. Parini*, 12 M.J. 679 (A.C.M.R. 1981) (colonel attempted to extract sexual favors from subordinates in return for favorable treatment); *United States v. Hartwig*, 35 M.J. 682 (A.C.M.R. 1992) (officer was properly convicted of conduct unbecoming based on his letter containing sexually suggestive comments to 14 year-old girl in response to her letter of support for Operation Desert Storm), *aff'd*, 39 M.J. 125 (C.M.A. 1994); *United States v. Moore*, 38 M.J. 490 (C.M.A. 1994) (private remarks to sex partner in adulterous relationship regarding oral and anal sex were indecent and degrading and not protected by First Amendment); *see also United States v. Mazer*, 58 M.J. 691 (N-M. Ct. Crim. App. 2003) (making suggestive, explicit and indecent statements on an internet chat room to someone the accused believed to be a 14-year old girl), *set aside on other grounds, remanded by*, 60 M.J. 344 (C.A.A.F. 2004).

6. Homosexual conduct.

a) *United States v. Harvey*, 67 M.J. 758 (A.F. Ct. Crim. App. 2009). Conduct that falls within a recognized liberty interest under *Lawrence*, as applied to the military through *Marcum*, may nonetheless be punished under Article 133. Under the circumstances of this case, fellatio between consenting adults "evince[d] . . . a degree of indecorum that disgraced and dishonored the appellant and seriously compromised his standing as an officer."

b) *United States v. Modesto*, 39 M.J. 1055 (A.C.M.R. 1994) (off-post, off-duty, cross-dressing at gay club was conduct unbecoming); *see generally* TJAGSA Practice Note, *Cross-Dressing as an Offense*, Army Law., Mar. 1991, at 42.

7. Lying and breaches of trust. *United States v. Lindsay*, 11 M.J. 550 (A.C.M.R. 1981) (lying to a criminal investigator about a subject of official investigation is conduct unbecoming an officer and gentleman. Even though making a false statement to a CID agent was, at the time, generally not an offense absent an independent duty to account the special status of an officer and the position of trust he occupies makes the intentional deceit a crime under Article 133); *United States v. Timberlake*, 18 M.J. 371 (C.M.A. 1984) (forging false PCS orders); *United States v. Gunnels*, 21 C.M.R. 925 (A.B.R. 1956) (taking money to procure a discharge); *United States v. Rushatz*, 30 M.J. 525 (A.C.M.R. 1990) (advising junior officers how to overstate rent for off-post housing using backdated receipts), *aff'd*, 31 M.J. 450 (C.M.A. 1990).

8. Financial impropriety. *United States v. Brunson*, 30 M.J. 766 (A.C.M.R. 1990) (failing to pay a just debt); *United States v. Jenkins*, 39 M.J. 843 (A.C.M.R. 1994) (negligently writing 76 dishonored checks and six false letters purportedly from bank officials).

9. Physical contact. *United States v. Isaac*, 59 M.J. 537 (C.G. Ct. Crim. App. 2003) (officer pled guilty to three specifications of Art. 133 for "forcefully" picking up and carrying three different female enlisted personnel on three separate occasions).

10. Obstruction of Justice. Can include obstruction of foreign criminal investigations or proceedings. *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009); *United States v. Schweitzer*, 68 M.J. 133 (C.A.A.F. 2009).

11. Miscellaneous conduct. *United States v. Schumacher*, 11 M.J. 612 (A.C.M.R. 1981) (officer's public intoxication); *United States v. Bonar*, 40 C.M.R. 482 (A.B.R. 1969) (affirming conviction for driving in violation of a state justice of the peace's court order); *United States v. Norvell*, 26 M.J. 477 (C.M.A. 1988) (dishonorable catheterization to avoid giving a valid urine sample, and then informing an enlisted person of this); *see*

TJAGSA Practice Note, *Drugs, Sex and Commissioned Officers: Recent Developments Pertaining to Article 133, UCMJ*, Army Law., Feb. 1989, at 62 (discusses *Norvell*); *United States v. Lewis*, 28 M.J. 179 (C.M.A. 1989) (charging a fellow officer for tutoring in leadership); *see* TJAGSA Practice Note, *Charging "Tuition" Can Constitute Conduct Unbecoming an Officer and a Gentleman*, Army Law., Aug. 1989, at 36 (discusses *Lewis*); *United States v. Bilby*, 39 M.J. 467 (C.M.A. 1994) (soliciting someone to violate a federal statute); *United States v. Miller*, 37 M.J. 133 (C.M.A. 1993) (failing to report child abuse by spouse and failing to obtain necessary medical care for abused child).

12. Conviction reversed for visiting legal brothel with enlisted members where the accused did not seek or engage in sex, *United States v. Guaglione*, 27 M.J. 268 (C.M.A. 1988); *see generally* TJAGSA Practice Note, *Drugs, Sex, and Commissioned Officers: Recent Developments Pertaining to Article 133, UCMJ*, Army Law., Feb. 1989, at 62 (discusses *Guaglione*), and for merely loaning money to a subordinate. *United States v. Smith*, 16 M.J. 694 (A.F.C.M.R. 1983).

F. Article 133 is not unconstitutionally void for vagueness. *Parker v. Levy*, 417 U.S. 733 (1974).

G. Pleadings.

1. Referencing an unconstitutional statutory definition of child pornography in the pleadings and instructing the members using the unconstitutional statutory definition created instructional error in an Article 133 child pornography case. *United States v. Forney*, 67 M.J. 271 (C.A.A.F. 2009) (Effron, C.J., concurring in the result) (Erdmann, J., dissenting).

2. Failing to allege the act was dishonorable or conduct unbecoming an officer is not necessarily fatal. *United States v. Wolfson*, 36 C.M.R. 722 (A.B.R. 1966); *United States v. Wilson*, 14 M.J. 680 (A.F.C.M.R. 1982).

3. Allegations of "undue familiarity" and "excessive social contacts" with married female service members were legally insufficient. *United States v. Kroop*, 38 M.J. 470 (C.M.A. 1993). *But cf. United States v. Boyett*, 42 M.J. 150 (C.A.A.F. 1995) (affirming conviction for unprofessional close personal relationship, including sexual intercourse, with enlisted person not under accused's supervision); *United States v. Rogers*, 54 M.J. 244 (C.A.A.F. 2000) (specification that LTC had "unprofessional relationship of undue familiarity" with LT in his command did state an offense).

4. LIOs.

a) Where the underlying acts of misconduct are the same, a service disorder or discredit under Article 134 is a lesser included offense of conduct unbecoming an officer under Article 133. *United States v. Cherukuri*, 53 M.J. 68 (C.A.A.F. 2000), *aff'd by* 54 M.J. 448 (C.A.A.F. 2001); *see also United States v. Conliffe*, 67 M.J. 127 (C.A.A.F. 2009); *United States v. Harwood*, 46 M.J. 26 (C.A.A.F. 1997); *United States v. Rodriguez*, 18 M.J. 363, 368-369 n. 4 (C.M.A. 1984).

b) Where the underlying act of misconduct is the same, larceny under Article 121 is a lesser included offense of conduct unbecoming an officer under Article 133. *United States v. Frelix-Vann*, 55 M.J. 329 (C.A.A.F. 2001) (Army captain pled guilty to one specification of conduct unbecoming and one specification of larceny for same underlying misconduct), *aff'd by* 56 M.J. 458 (C.A.A.F. 2002). *See also United States v. Timberlake*, 18 M.J. 371 (C.M.A. 1984) (violation of

punitive article, such as art. 123, forgery, is lesser included offense of conduct unbecoming when same underlying misconduct at issue).

5. Multiplicity. While any misconduct may be charged as an article 133 offense—even when chargeable as a violation of one of the other punitive articles—findings for both an article 133 offense and the same underlying offense may not stand. *United States v. Timberlake*, 18 M.J. 371 (C.M.A. 1984). Where service court found conduct unbecoming charge and obstructing justice charge multiplicious, no error in allowing the government to elect which finding to retain. *United States v. Palagar*, 56 M.J. 294 (C.A.A.F. 2002).

6. Unreasonable Multiplication of Charges (UMC). Four specifications of communicating sexually suggestive and sexually explicit language to a minor via e-mail, in violation of Art. 133, did not represent UMC, because they did not reflect the same act or transaction. Each specification identified a discrete and unique communication. *United States v. Mazer*, 58 M.J. 691 (N-M. Ct. Crim. App. 2003), *set aside on other grounds, remanded by* 60 M.J. 344 (C.A.A.F. 2004).

H. Punishment.

1. Maximum punishment is a dismissal, forfeiture of all pay and allowances, and confinement for a period not in excess of that authorized for the most analogous offense for which a punishment is prescribed by the MCM, or, if none is prescribed, for one year. MCM, pt. IV, ¶ 59e.

2. The maximum sentence that may be adjudged for a dupliciously pled specification under Article 133 will be that imposable for "the most analogous offense" with the greatest maximum punishment. *United States v. Hart*, 32 M.J. 101 (C.M.A. 1991).

XXVIII. THE GENERAL ARTICLE. UCMJ ART. 134.

A. Three Bases of Criminal Liability.

1. Conduct Prejudicial to Good Order and Discipline.

2. Conduct of a Nature to Bring Discredit upon the Armed Forces.

3. Conduct Constituting a Non-capital Crime.

B. Offenses Listed in MCM, pt. IV, ¶¶ 61-113.

1. Require proof of prejudice to good order and discipline *or* tendency to bring discredit upon the armed forces.

2. This list is nonexhaustive. Other novel offenses may be charged, provided the alleged misconduct satisfies the standard in one of the three clauses of Article 134 and the misconduct cannot be prosecuted under another article of the UCMJ.

C. Conduct Prejudicial to Good Order and Discipline (Clause 1).

1. Not every irregular, mischievous or improper act is a court-martial offense. MCM, pt. IV, ¶ 60c(2)(a). *United States v. Sadinsky*, 34 C.M.R. 343 (C.M.A. 1964); *United States v. Rowe*, No. 32852, 1999 CCA LEXIS 125 (A.F. Ct. Crim. App. Apr. 7, 1999)(unpublished) (allegation of knowing and willful harassment by repeated contact causing substantial emotional stress and reasonable fear of bodily harm was legally sufficient).

2. Conduct must be *directly* and *palpably* prejudicial to good order and discipline. *United States v. Sadinsky*, 34 C.M.R. 343 (C.M.A. 1964); *see United States v. Davis*, 26

M.J. 445 (C.M.A. 1988) (cross dressing); *United States v. Woods*, 28 M.J. 318 (C.M.A. 1989) (unprotected sexual intercourse where the accused has the HIV virus).

3. A breach of custom may result in a violation of clause one of Article 134. MCM, pt. IV, ¶ 60c(2)(b). *United States v. Smart*, 12 C.M.R. 826 (A.F.B.R. 1953). It must satisfy the following requirements: (1) long established practice; (2) common usage attaining the force of law; (3) not contrary to military law; and (4) ceases when observance has been abandoned.

D. Conduct of a Nature to Bring Discredit upon the Armed Forces (Clause 2).

1. Conduct must have the tendency to bring the service into disrepute or tend to lower it in public esteem. MCM, pt. IV, ¶ 60c(3); *United States v. Sullivan*, 42 M.J. 360 (C.A.A.F. 1995) (any reasonable officer would have known that asking strangers of the opposite sex intimate questions about their sexual activities, while using a false name and a fictional publishing company as a cover, was service discrediting conduct); *United States v. Sanchez*, 29 C.M.R. 32 (C.M.A. 1960) (sex act with chicken; "[W]hen an accused performs detestable and degenerate acts which clearly evince a wanton disregard for the moral standards generally and properly accepted by society, he heaps discredit on the . . . Government he represents.").

2. Considering "open and notorious" conduct. The time and place of conduct is considered by the finder of fact in weighing whether it is service-discrediting. For cases of this type, it is not necessary to prove that a third person actually observed the act, but only that it was reasonably likely that a third person would observe it. *United States v. Izquierdo*, 51 M.J. 421 (C.A.A.F. 1999) (sexual intercourse in barracks room while two roommates also in room, even though accused hung sheet that substantially blocked roommates' side of room); *United States v. Sims*, 57 M.J. 419 (2002) (not open and notorious when appellant was in his unlocked private dorm room, with a greater expectation of privacy than a shared room, and neither party had disrobed); *United States v. Carr*, 28 M.J. 661 (N.M.C.M.R. 1989) (intercourse on a public beach at night not likely to be seen).

3. Public knowdge not necessary. *United States v. Phillips*, 70 M.J. 161 (C.A.A.F. 2011)("The statute, which requires proof of the 'nature' of the conduct, does not require the government to introduce testimony regarding views of 'the public' or any segment thereof.") O*verruling sub-silentio United States v. Green*, 39 M.J. 606 (A.C.M.R. 1994)(holding that conduct will be service discrediting where civilians are aware of both the military status and the discrediting behavior; *see also United States v. Kirksey*, 20 C.M.R. 272 (C.M.A. 1955).

4. Violations of state or foreign law is not *per se* service discrediting. *United States v. Sadler*, 29 M.J. 370 (C.M.A. 1990).

E. Conduct Punishable Under First Two Theories. Prosecutors often charge and courts often affirm various offenses invoking both the language of Clause 1 and of Clause 2. When using the list below, be sure to distinguish whether the specific court treated the conduct as both PGO&D and SD, or exclusively as one or the other.

1. Historically, other offenses have also been prosecuted. *United States v. Light*, 36 C.M.R. 579 (A.B.R. 1965) (borrowing money from subordinates); *United States v. Baur*, 10 M.J. 789 (A.F.C.M.R. 1981) (obstruction of justice); *United States v. Pechefsky*, 13 M.J. 814 (A.F.C.M.R. 1982) (forging credit recommendations).

2. These listings are not exhaustive and other novel offenses may be charged under the first two theories of the article, providing the offenses are not prosecutable elsewhere in the UCMJ. *United States v. Wright*, 5 M.J. 106 (C.M.A. 1978).

a) *United States v. Erickson*, 61 M.J. 230 (C.A.A.F. 2005) (inhalation "huffing" nitrous oxide); *United States v. Glover*, 50 M.J. 476 (C.A.A.F. 1999) (inhaling Dust-Off, a cleaning product).

b) *United States v. Choate*, 32 M.J. 423 (C.M.A. 1991) ("mooning," under some circumstances, can be PGO&D).

c) *United States v. Johnson*, 4 M.J. 770 (A.C.M.R. 1978) (peeping tom).

d) *United States v. Kopp*, 9 M.J. 564 (A.F.C.M.R. 1980) (wrongfully setting off a false alarm in a residential building at Air Force base).

e) *United States v. Woods*, 28 M.J. 318 (C.M.A. 1989) (unprotected sexual intercourse where the accused has the AIDS virus); *see also United States v. Morris*, 30 M.J. 1221 (A.C.M.R. 1990).

f) *United States v. Davis*, 26 M.J. 445 (C.M.A. 1988) (on-post cross-dressing); *United States v. Guerrero*, 33 M.J. 295 (C.M.A. 1991), *cert. denied*, 502 U.S. 1096 (1992) (off-post cross-dressing).

g) *United States v. King*, 34 M.J. 95 (C.M.A. 1992); *United States v. Perez*, 33 M.J. 1050 (A.C.M.R. 1991) (adultery).

h) *United States v. Sullivan*, 42 M.J. 360 (C.A.A.F. 1995) (non-consensual, obscene phone calls).

i) *United States v. Warnock*, 34 M.J. 567 (A.C.M.R. 1991) (photographing nude female officer with her consent and showing negatives to enlisted paramour NOT prejudicial to good order and discipline under the circumstances).

j) *United States v. Henderson*, 32 M.J. 941 (N.M.C.M.R. 1991), *aff'd*, 34 M.J. 174 (C.M.A. 1992) (sexually exploiting recruits).

k) *United States v. Stone*, 40 M.J. 420 (C.M.A. 1994) (falsely claiming during a speech to high school students to have been a special forces leader in Iraq).

l) *United States v. Vaughan*, 58 M.J. 29 (C.A.A.F. 2003) (child neglect where soldier-mom left infant at home, unattended for several hours).

m) *United States v. Saunders*, 59 M.J. 1 (C.A.A.F. 2003) (harassment/stalking). Be cognizant of preemption concerns (Art. 120a, Stalking).

n) *United States v. Farence*, 57 M.J. 674 (C.G. Ct. Crim. App. 2002), *pet. denied*, 58 M.J. 203 (2003) (displaying images depicting bestiality to subordinates while on duty).

o) Child Pornography. See Ch. 3, Part II, Para. II.G.

(1) *United States v. Irvin*, 60 M.J. 23 (C.A.A.F. 2004) (child pornography).

(2) *United States v. Mason*, 60 M.J. 15 (C.A.A.F. 2004) (virtual, as well as actual, child pornography).

(3) *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006) (knowing possession of images depicting sexually explicit conduct by minors, whether actual or virtual).

3. Speech Offenses.

a) *Parker v. Levy*, 417 U.S. 733 (1974) (upholding application of Article 134 to "a commissioned officer publicly urging enlisted personnel to refuse to obey orders which might send them into combat," and finding that such conduct "was unprotected under the most expansive notions of the First Amendment.")

(1) "While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections." *Id.* at 758.

(2) "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Id.* at 758.

b) *United States v. Priest*, 45 C.M.R. 338 (C.M.A. 1972) (upholding the accused's conviction under Article 134 for making disloyal statements, including statements protesting U.S. involvement in Vietnam, in a publications where copies were made available to servicemembers at the Navy Exchange, the Washington Navy Yard, and at a Pentagon newsstand).

(1) "[T]he right of free speech in the armed services is not unlimited and must be brought into balance with the paramount consideration of providing an effective fighting force for the defense of our Country." *Id.* at 344.

(2) "Our inquiry, therefore, is whether the gravity of the effect of accused's publications on good order and discipline in the armed forces, discounted by the improbability of their effectiveness on the audience he sought to reach, justifies his conviction." *Id.* at 344–45.

c) *United States v. Wilcox*, 66 M.J. 442 (C.A.A.F. 2008). In determining whether speech can be punished under Article 134 as prejudicial to good order and discipline, or service-discrediting, a balance must be struck "between the essential needs of the armed forces and the right to speak out as a free American." Before reaching this balancing test, though, there are two threshold determinations: (1) whether the speech is otherwise protected under the First Amendment, and (2) whether the government proved the elements of the Article 134 offense. In addressing the first prong, certain types of speech lack protection under the First Amendment. They include fighting words, dangerous speech, and obscenity. In the military, dangerous speech is that which "interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops." *See United States v. Brown*, 45 M.J. 389, 395 (C.A.A.F. 1996). In addressing the second prong, the CAAF stated that in order to prove the element of an Article 134 offense involving speech where the question is whether the conduct is prejudicial to good order and discipline, the government must prove that there is a "direct and palpable connection between speech and the military mission." *See Priest, supra*, at 343. In order to prove that the conduct is service-discrediting, there

must be "a direct and palpable connection between [the] speech and the military mission or military environment." In *Wilcox*, the court held that the accused's statements on the Internet were not unprotected speech. The postings were not dangerous speech because the language did not "interfere[ ] with or prevent[ ] the orderly accomplishment of the mission or present[ ] a clear danger to loyalty, discipline, mission, or morale of the troops." Furthermore, the court concluded that the language did not constitute fighting words and was not obscene. As the language was protected speech, the court next addressed the connection between the speech and the military. The court found that the connection between the accused's statements and the military was so "tenuous and speculative as to be legally insufficient to support the conclusion" that his conduct was either prejudicial to good order and discipline or service discrediting. Concluding that the speech is protected and that the government did not prove the elements of an Article 134 charge, the court did not conduct the balancing test between the First Amendment protections and the needs of the military.

d) *United States v. Blair*, 67 M.J. 566 (C.G. Ct. Crim. App. 2009). Accused, while in civilian clothes, posted Ku Klux Klan recruiting flyers in an airport bathroom. Plea to "wrongfully recruit[ing] for, solicit[ing] membership in, and promot[ing] the activities of the Ku Klux Klan," "while publicly displaying an affiliation with the Armed Services," which conduct was of a nature to bring discredit to the Armed Forces, was provident. The court concluded that "publicly displaying an affiliation with the Armed Services" includes conduct that takes place in an area available to the public, whether or not another person is actually present. In this case, there was a sufficient factual basis for his plea because there was the possibility that a member of the public who knew him to be in the Coast Guard could have readily seen him posting the flyers. Next, the court applied the *United States v. Wilcox*, 66 M.J. 442 (C.A.A.F. 2008), and found that the conviction was warranted despite First Amendment concerns. Considering matters presented at sentencing, including the airport director's testimony that it "made [him] sick" when he found out that the source of the flyers was an active duty Coast Guardsman, the CGCCA found that "the potential effects, both stated and inherent, of [the accused's] conduct on the Coast Guard's reputation outweigh [his] interest in his right to speak out while on government business at the airport."

F. Crimes and Offenses Not Capital (Clause Three).

1. Specific Federal Statute.

a) Example: Threat Against the President Under 18 U.S.C. § 871. *United States v. Ogren*, 54 M.J. 481 (C.A.A.F. 2001) (threat made while in pretrial confinement for unrelated charges: " . . . I'm going to find Clinton and blow his f_____ brains out").

b) The offense must occur in a place where the law in question applies. MCM, pt. IV, ¶ 60c(4)(c)(i); *see United States v. Williams*, 17 M.J. 207 (C.M.A. 1984); *United States v. Clark*, 41 C.M.R. 82 (C.M.A. 1969); *United States v. Kolly*, 48 M.J. 795 (N-M. Ct. Crim. App. 1998) (federal child porn statute applied extraterritorially to offenses servicemember committed in Japan).

c) Elements of the federal statute are controlling. *United States v. Ridgeway*, 13 M.J. 742 (A.C.M.R. 1982).

d) A servicemember can be convicted of an attempt to commit a federal offense under clause three, even if the underlying federal statute has no attempt provision. *United States v. Craig*, 19 M.J. 166 (C.M.A. 1985).

e) A specification containing allegations of fact insufficient to establish a violation of a designated federal statute may nonetheless be sufficient to constitute a violation of either clause one or two, Article 134. *United States v. Mayo*, 12 M.J. 286 (C.M.A. 1982); *United States v. Wagner*, 52 M.J. 634 (N-M. Ct. Crim. App. 1999); *see also United States v. Robbins*, 48 M.J. 745 (A.F. Ct. Crim. App. 1998), *modified in part*, 52 M.J. 159 (1999)(Sullivan, J. dissenting); *United States v. Gould*, 13 M.J. 734 (A.C.M.R. 1982).

f) Examples.

(1) Soliciting a minor (or not). *United States v. Brooks*, 60 M.J. 495 (C.A.A.F. 2005). Appellant was convicted of violating 18 U.S.C. § 2422(b) under Article 134, Clause 3, for attempting to commit the offense of carnal knowledge with a victim under the age of twelve, and wrongfully soliciting an individual under the age of eighteen to engage in a criminal sexual act. Appellant never communicated directly with a minor or a person he believed was a minor. A conviction under Sec. 2422(b) does not require direct inducement of a minor, nor does it require an actual minor. The relevant intent is the intent to persuade or to attempt to persuade, not the intent to commit the actual sexual act. In this case appellant acted with the intent to induce a minor to engage in unlawful sexual activity, and then completed the attempt with actions that strongly corroborated the required culpability. *See also United States v. Amador*, 61 M.J. 619 (A.F. Ct. Crim. App. 2005).

(2) Storing stolen explosives. *United States v. Disney*, 62 M.J. 46 (C.A.A.F. 2005). Appellant stole ordnance from several military training events. Appellant was convicted of one specification of larceny of military property under Article 121 and one specification of storing stolen explosives in violation of 18 U.S.C. § 842 (h) under clause 3 of Article 134.

2. State Law: Federal Assimilative Crimes Act (FACA). 18 U.S.C. §13.

a) Adopts un-preempted state offenses as the local federal law of application.

b) The purpose of FACA is to fill the gaps left by the patchwork of federal statutes. *United States v. Robbins*, 52 M.J. 159 (C.A.A.F. 1999); *United States v. Picotte*, 30 C.M.R. 196 (C.M.A. 1961).

c) "Offenses" may include any non-regulatory statutory prohibition that provides for some form of punishment if violated. *United States v. White*, 39 M.J. 796 (N.M.C.M.R. 1994) (assimilating provisions of state motor vehicle code denominated as "violations" rather than "crimes", but which provide for penal sanctions). *But cf. United States v. Clinkenbeard*, 44 M.J. 577 (A.F. Ct. Crim. App. 1996) (reaching contrary result).

d) Applies state law whether enacted before or after passage of FACA. *United States v. Rowe*, 32 C.M.R. 302 (C.M.A. 1962).

e) State law may not be assimilated if the act or omission is punishable by any enactment of Congress. *Lewis v. United States*, 523 U.S. 155, 118 S.Ct. 1135

(1998). *Lewis* establishes a two-part test (This test should be applied in conjunction with the related, but similar Article 134 preemption analysis discussed below):

(1) Is the accused's "act or omission…made punishable by any enactment of Congress?" If not, then assimilate. If so, ask:

(2) Do the relevant federal statutes preclude application of the state law? Specifically, would the application of the state law interfere with the achievement of a federal policy, effectively rewrite an offense definition that Congress carefully considered, or run counter to Congressional intent to occupy the entire field under consideration?

f) The FACA may not be used to extend or narrow the scope of existing federal criminal law. *Lewis v. United States*, 523 U.S. 155, 118 S.Ct. 1135 (1998); *United States v. Perkins*, 6 M.J. 602 (A.C.M.R. 1978); see also *United States v. Robbins*, 52 M.J. 159 (1999).

g) Jurisdiction.

(1) The government must establish exclusive or concurrent federal jurisdiction before FACA is applicable. *See United States v. Dallman*, 34 M.J. 274 (C.M.A. 1992), *aff'd*, 37 M.J. 213 (C.M.A. 1993).

(2) A guilty plea may be sufficient to establish jurisdiction required by the Act. *United States v. Kline*, 21 M.J. 366 (C.M.A. 1986); *United States v. Jones*, 34 M.J. 270 (C.M.A. 1992).

G. Child Pornography.

1. There is no enumerated crime addressing child pornography in the UCMJ and the President has not listed a child pornography offense under Article 134. Crimes in the military that involve child pornography must be charged under a general article (Article 133 or Article 134). There are two ways to charge child pornography crimes using Article 134:

a) Charge the criminal conduct using Article 134, clauses 1 and 2.

b) Charge a violation of an applicable federal statute using Article 134, clause 3.

2. Clauses 1 and 2, Article 134.

a) "It is a mystery to me why, after this [c]ourt's ten-year history of invalidating convictions for child pornography offenses under clause 3, and of upholding convictions for such offenses under clause 2, we continue to see cases charged under clause 3." *United States v. Medina*, 66 M.J. 21, 29 n.1 (C.A.A.F. 2008) (Stucky, J., dissenting).

b) Possession of child pornography may be charged as a Clause 1 or Clause 2 offense. *United States v. Irvin*, 60 M.J. 23 (C.A.A.F. 2004).

c) Virtual Child Pornography under Clauses 1 and 2.

(1) *United States v. Mason*, 60 M.J. 15 (C.A.A.F. 2004) ("The receipt or possession of "virtual" child pornography can, like "actual" child

pornography, be service-discrediting or prejudicial to good order and discipline.”).

(2) *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006) (“The knowing possession of images depicting sexually explicit conduct by minors, whether actual or virtual, when determined to be service-discrediting conduct or conduct prejudicial to good order and discipline, is an offense under Article 134”).

d) Referencing an unconstitutional statutory definition of child pornography in the pleadings and instructing the members using the unconstitutional statutory definition created instructional error in an Article 133 child pornography case. *United States v. Forney*, 67 M.J. 271 (C.A.A.F. 2009) (Effron, C.J., concurring in the result) (Erdmann, J., dissenting). This analysis should also apply if the offense was charged under clauses 1 and 2 of Article 134.

e) The nature of the images is not dispositive as to whether receiving such images is PGO&D or SD. *United States v. O’Connor*, 58 M.J. 450 (C.A.A.F. 2003) (providence inquiry failed to establish whether accused pled guilty to possession of virtual or actual child pornography; no LIO of clause 1 or clause 2 because no discussion of PGO&D or SD).

f) Although *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008) provides the current state of the law regarding the relationship between the three clauses of Article 134, the following cases were affirmed under clause 2 of Article 134:

(1) *United States v. Sapp*, 53 M.J. 90 (C.A.A.F. 2000) (after finding that the military judge failed to adequately advise the accused of the elements of federal offense of possession of child pornography, under 18 U.S.C. § 2252(a)(4)(A), which he was charged with violating under clause 3 of Article 134, the Air Force court did not err by affirming the lesser included offense of service-discrediting conduct, under clause 2 of Article 134.

(2) *United States v. Augustine*, 53 M.J. 95 (C.A.A.F. 2000) (affirming under clause 2 rather than clause 3 of Article 134).

(3) *United States v. Hays*, 62 M.J. 158 (C.A.A.F. 2005) (holding the plea inquiry did not implicate the appellant’s First Amendment rights, thus placing the analysis under *Sapp* and *Augustine*; although the MJ did not discuss with appellant whether his conduct was service discrediting or prejudicial to good order and discipline, there is no doubt that appellant was aware of the impact of his conduct on the image of the armed forces; affirmed under Clause 2).

3. Clause 3, Article 134.

a) *See generally* MCM, pt. IV, ¶ 60c(4).

b) Key federal statutes. The following federal statutes are available for charging various conduct involving the production, possession, transportation, and distribution of child pornography:

(1) 18 U.S.C. § 2251, Sexual Exploitation of Children. Among other prohibitions, this provision covers the use of minors in the production of child pornography.

(2) 18 U.S.C. § 2252, Certain Activities Relating to Material Involving the Sexual Exploitation of Minors. This child pornography provision was the predecessor to the computer-specific 18 U.S.C. § 2252A.

(3) 18 U.S.C. § 2252A, Certain Activities Relating to Material Constituting or Containing Child Pornography. This is the federal provision that most comprehensively covers the use of computers and the Internet to possess, transport, and distribute child pornography.

(4) Statutory Definitions. 18 U.S.C. § 2256 contains the applicable definitions for child pornography offenses.

c) Recent Amendments.

(1) The Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358 (Oct. 8, 2008) (adds "using any means or facility of interstate or foreign commerce" to several sections in 18 USC 2251, 2251A, 2252, and 2252A).

(2) The Enhancing the Effective Prosecution of Child Pornography Act of 2007, Pub. L. No. 110-358 (Oct. 8, 2008) (adds to 18 USC 2252(a)(4) and 2252A(a)(5) the following language after "possesses": "or knowingly accesses with intent to view").

(3) The Providing Resources, Officer, and Technology to Eradicate Cyber Threats to Our Children Act of 2008 (or The PROTECT Our Children Act of 2008), Pub. L. No. 110-401 (Oct. 13, 2008) (Sec 301 prohibits broadcast of live images of child abuse, Sec. 302 amends the definition of "visual image" under 18 USC 2256(5) by inserting "and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format", Sec. 304 prohibits the adaptation or modification of an image of an identifiable minor to produce child pornography).

d) Pleading Child Pornography Offenses Using Clause 3.

(1) *See* MCM, pt. IV, ¶ 60c(6).

(2) *See infra* Chapter 7, Appendix B.

e) Actual versus Virtual Children.

(1) Using the CPPA and Clause 3, Article 134.

(a) In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the U.S. Supreme Court held that specific language within the definition of child pornography in the 1996 Child Pornography Prevention Act (CPPA) was unconstitutional. Specifically, the definition impermissibly prohibited “virtual” child pornography in contravention of the First Amendment. The “virtual image” language was contained in § 2256(8)(B) and § 2256(8)(D).

(b) Following *Ashcroft*, the CAAF made the “actual” character of visual depictions of child pornography a

factual predicate for guilty pleas under the CPPA. *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003).

(c) Either the "appears to be" language or "conveys the impression" language found in the CPPA's unconstitutional definition of child pornography can trigger the requirement to prove an "actual" child was used to make an image of child pornography. *United States v. Wolford*, 62 M.J. 418 (C.A.A.F. 2006).

(2) Using Clauses 1 and 2, Article 134. Child pornography, whether virtual or actual, can be prejudicial to good order and discipline and service-discrediting. *See United States v. Mason*, 60 M.J. 15 (C.A.A.F. 2004); *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006).

f) Issues.

(1) Constitutionality of the Federal statute.

(a) In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the U.S. Supreme Court held that specific language within the definition of child pornography in the 1996 Child Pornography Prevention Act (CPPA) was unconstitutional. Specifically, the definition impermissibly prohibited "virtual" child pornography in contravention of the First Amendment. The "virtual image" language was contained in § 2256(8)(B) and § 2256(8)(D).

(b) The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (Apr. 30, 2003), which amended 18 U.S.C. § 2252A to include a provision that prohibits the solicitation and pandering of child pornography. *United States v. Williams*, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008) (holding the Act to be neither impermissibly vague nor overbroad and holding that offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment).

(c) The Protection of Children Against Sexual Exploitation Act, 18 U.S.C. § 2252. Constitutional because its prohibition against knowing transport, shipment, receipt, distribution, or reproduction of a visual depiction of a minor engaged in sexually explicit conduct requires that the accused know that the performer in the depiction was a minor, thereby satisfying First Amendment concerns. *United States v. X-Citement Video*, 115 S.Ct. 464 (1994); *United States v. Maxwell*, 42 M.J. 568 (A.F. Ct. Crim. App. 1995), *reversed in part United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996) (transmission of visual images electronically through the use of an on-line computer service is "transport in interstate or foreign commerce' in light of legislative intent

to prevent the transport of obscene material in interstate commerce regardless of the means used to effect that end and statute is constitutional in light of *United States v. X-Citement Video*, 115 S.Ct. 464 (1994) (statute contains a scienter requirement because the word "knowingly" must be read as applying to the words "use of a minor").

(2) Extraterritoriality. Practitioners in overseas and deployed locations should ensure that the federal statute is applicable to the conduct at issue.

(a) *United States v. Martinelli*, 62 M.J. 52 (C.A.A.F. 2005). Appellant pled guilty, in relevant part, to sending, receiving, reproducing, and possessing child pornography under Article 134, Clause 3, in violation of the CPPA. The conduct was charged using 18 U.S.C. §2252A(a)(1–3). Appellant's misconduct took place in Germany, both at an off-post internet café, and in his on-post barracks room. HELD: 1) The CPPA is not extraterritorial as there is no evidence of specific congressional intent to extend its coverage; 2) domestic application is possible under a "continuing offense" theory for *sending* material that flowed through servers in the United States; 3) appellant's plea to specification 1 under clause 3 of Article 134 is improvident under *O'Connor* because of the focus on the unconstitutional definition of child pornography and the lack of focus on "actual" vs. "virtual" images; and 4) there was no reference to appellant's conduct as service discrediting or prejudicial to good order and discipline. Strong dissents from both C.J. Gierke and J. Crawford.

(b) *United States v. Reeves*, 62 M.J. 88 (C.A.A.F. 2005). The accused was stationed in Hanau, Germany and used the on-post library computer to receive and print out images of child pornography that had been sent over the Internet. While still in Germany, he also used a videocamera to record sexually explicit imagery of two German girls from about 200 feet away. His conduct was charged using 18 U.S.C. §§ 2251 and 2252A(a)(1–3). Citing *Martinelli*, the court held none of the following acts were continuing offenses with conduct that occurred in the United States, and as such, there could be no domestic application of the CPPA: (1) possession of child pornography at an on-post public library, land used by and under the control of the federal government; (2) receiving child pornography that had been transmitted through the internet; and (3) using minors to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct.

(3) Definitions. *United States v. Kuemmerle*, 67 M.J. 141 (C.A.A.F. 2009). The CPPA does not define "distribute." The court looked to three sources for a definition of the term: (1) the plain meaning, (2) the manner Article III courts have interpreted the term, and (3) the guidance that the

UCMJ provides through parallel provisions. *See also United States v. Craig*, 67 M.J. 742 (N-M. Ct. Crim. App. 2009) (military judge read part of the definition of "distribute" from Article 112a, stating, "Distribute means to deliver to the possession of another.") .

(4) Method of Distribution.

(a) Yahoo! Briefcase. *United States v. Navrestad*, 66 M.J. 262 (C.A.A.F. 2008). Sending a hyperlink to a Yahoo! Briefcase during an internet chat session, where the Briefcase contained images of child pornography, does not constitute either distribution of child pornography as defined in the CPPA or possession of child pornography as affirmed by the ACCA under Clauses 1 and 2, where the link itself only provides a roadmap to the child pornography and where the accused did not download or print any of the images to his own computer. The accused was initially charged under Clause 3 of Article 134, but Clause 1 and 2 language was added to both specifications prior to arraignment. Convictions for both possession under Clauses 1 and 2, and distribution under the CPPA were set aside. Note: Yahoo! discontinued its Briefcase service on 30 March 2009.

(b) KaZaA. *United States v. Ober*, 66 M.J. 393 (C.A.A.F. 2008). Using KaZaA to search for and download child pornography from host users over the Internet constituted transportation of child pornography in interstate commerce for purposes of 18 U.S.C. § 2252A(a)(1) because "a user's download caused an upload on the host user's computer."

(c) Peer-to-Peer Software in General. *United States v. Christy*, 65 M.J. 657 (A. Ct. Crim. App. 2007). The accused downloaded peer-to-peer software and set up a "shared files" folder. As part of his licensing agreement with the software company, he agreed to share all files in that folder, i.e., his child pornography, with other users. While the term "distribution" is not defined in the statute, definitions found in federal case law are broad enough to cover the act of posting images in a shared file folder and agreeing to allow others to download from the folder. Additionally, the accused's conduct was "knowing" under the CPPA, as he admitted during his providence inquiry that he knew 1) that he was posting his child pornography images in a shared file folder, and 2) that anyone with the same peer-to-peer software both had his permission and the general ability to download the files he posted.

(5) Lesser included offenses: Clause 1 and Clause 2. The use of Clause 1 and Clause 2 as a LIO to a Clause 3 offense has recently been limited by the CAAF holding in *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008). The court holds that in order for either Clause 1 or Clause 2 to be considered as a LIO to a Clause 3 offense, the Clause 3 specification

should contain Clause 1 or Clause 2 language. If Clause 1 or Clause 2 language is absent from a Clause 3 offense, the opinion may yet allow for Clause 1 or Clause 2 to operate as a LIO provided the military judge clearly explains Clause 1 and Clause 2 and how they can operate as a LIO to the accused. Prudence, however, dictates that counsel plead the Clause 1 and/or Clause 2 language to avoid the issue at trial.

(6) Evidence to determine age of models. *United States v. Russell*, 47 M.J. 412 (C.A.A.F. 1998) (accused admitted that he guessed the models were "13 or older"; a pediatrician testified that the females shown in the exhibits were not more than 15.5 years old; and members were able to look at the pictures and use their common sense and experience to conclude that the girls were under age 18); *United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996) (government was only required to prove that accused believed the images depicted minors to support conviction for knowingly transporting or receiving child pornography in interstate commerce (18 U.S.C. § 2252); government was not required to prove that accused had basis for actual knowledge of the subjects' ages). *United States v. Cendejas*, 62 M.J. 334 (C.A.A.F. 2006) (factfinder can make the determination that pornographic images are actual children based upon a review of the images alone).

g) Other Applications.

(1) *United States v. Kuemmerle*, 67 M.J. 141 (C.A.A.F. 2009). As the CPPA does not expressly define "distribute," the court looked to three sources for a definition of the term: (1) the plain meaning, (2) the manner Article III courts have interpreted the term, and (3) the guidance that the UCMJ provides through parallel provisions. Considering these sources, under the CPPA, distribution of child pornography through the Internet consists of two acts: (1) the posting of the image, where the image left the possession of the original user, and (2) the delivery of the image, where another user accessed and viewed the image. Here, the accused posted the image to his Yahoo! profile prior to his entry on active duty. The court reasoned that the profile serves as a "'public bulletin board' such that all Internet users can access information posted by the profile's owner." Although this was done prior to entering active duty, he accessed the account while on active duty and could have removed the image. The offense of distribution occurred while he was on active duty when the ICE agent accessed and viewed the image that he had posted for others to view.

(2) *United States v. Craig*, 67 M.J. 742 (N-M. Ct. Crim. App. 2009). As 18 U.S.C. § 2252A does not define "distribute," the military judge read part of the definition of "distribute" from Article 112a, stating, "Distribute means to deliver to the possession of another." the plain meaning of the term "distribute" includes "the transfer of an item from the possession of one person into the possession of another." The military judge provided a correct statement of the law in defining "distribute."

(3) *United States v. Smith*, 61 M.J. 696 (N-M. Ct. Crim. App. 2005) (Appellant engaged in marketing adult entertainment for profit on the

internet, posting hundreds of photos of females engaged in sexually explicit conduct, many of them minors. Among other offenses, appellant ultimately pled guilty to violating 18 U.S.C. § 2257, under Clause 3, Article 134 for managing a website containing these depictions without maintaining proper records of each performer as that section requires. HELD: Appellant's failure to determine the age and record the identity of the child performer bore a direct relationship to the Government's interest in preventing child pornography).

(4) "Lascivious exhibition" category of sexually explicit conduct prohibited by § 2251(a). *United States v. Roderick*, 62 M.J. 425 (C.A.A.F. 2006) (applying the "Dost" factors to determine "lascivious exhibition").

(5) In prosecuting a violation of 18 U.S.C. § 2252 (a)(2) by knowingly receiving sexually explicit depictions of minors that have been transported in interstate commerce, "knowingly" applies to the sexually explicit nature of the materials and the ages of the subjects. The Government does not have to prove that the accused knew that the sexually explicit depictions passed through interstate commerce. The interstate commerce element is merely jurisdictional. *United States v. Murray*, 52 M.J. 423 (C.A.A.F. 2000).

h) Multiplicity/UMC.

(1) *United States v. Purdy*, 67 M.J. 780 (N-M. Ct. Crim. App. 2009). The accused downloaded child pornography from the Internet onto his personal computer while stationed in Belgium. He then downloaded the images from the hard drive onto a compact disk and reformatted the hard drive, but retained the compact disk. He was charged with both receiving and possessing child pornography under Clause 3 of Art. 134. He pled guilty to both offenses under Clauses 1 and 2. In this case, his act of saving the images to the CD-ROM "was a clear exercise of dominion . . . separate and apart" from his receipt of the images at an earlier point in time. The conviction for both offenses was proper and the military judge did not commit plain error.

(2) *United States v. Craig*, 67 M.J. 742 (N-M. Ct. Crim. App. 2009). The accused used "LimeWire," a peer-to-peer file-sharing software program to search for and download child pornography. He downloaded the child pornography into a "share" folder on his hard drive. He kept some of the images in the "share" folder, copied some to compact disks, and deleted others. He pled guilty to both receipt and possession of child pornography under 18 U.S.C. § 2252A using Clause 3 of Art. 134. The court held that these two specifications were not facially duplicative and therefore military judge did not commit plain error in failing to dismiss these specifications as multiplicious. The charges of receipt and possession "address at least two criminal actions by the [accused] each of which occurred at a different time within the charged time period and involved separate media.

H. Limitations on the Use of Article 134, UCMJ.

1. The Preemption Doctrine. MCM, pt. IV, ¶ 60c(5)(a). (See also the discussion of FACA preemption above).

a) Article 134 cannot be used to prohibit conduct already prohibited by Congress in UCMJ arts. 78 & 80-132.

b) Under the test provided in *United States v. Wright*, 5 M.J. 106 (C.M.A. 1978), conduct is already prohibited if:

(1) Congress intended to limit prosecutions for certain conduct to offenses defined in specific articles of the UCMJ, **and**

(2) The offense sought to be charged is composed of a residuum of elements of an enumerated offense under the UCMJ.

c) Applications.

(1) Prosecution under Article 134, Clause 1 for inhalation ("huffing") nitrous oxide is not preempted by Article 112a. *United States v. Erickson*, 61 M.J. 230 (C.A.A.F. 2005).

(2) Federal Statutes: Prosecution for attempting to engage a minor in illegal sexual activity (sodomy and carnal knowledge) in violation of 18 U.S.C. § 2422(b) is not preempted by Articles 80, 120, or 125. *United States v. Kowalski*, 69 M.J. 705 (C.G. Ct. Crim. App. 2010). Prosecution of bank fraud under 18 U.S.C. § 1344 is not be preempted by Article 132. *United States v. Tenney*, 60 M.J. 838 (N-M. Ct. Crim. App. 2005); Prosecution under 18 U.S.C. § 842 (h) for possession of stolen explosives is not preempted. *United States v. Canatelli*, 5 M.J. 838 (A.C.M.R. 1978).

(3) State Statutes: State statute prohibiting wrongfully eluding a police officer is not preempted. *United States v. Kline*, 21 M..J. 366 (C.M.A. 1986); State auto burglary statute is not preempted. *United States v. Sellars*, 5 M.J. 814 (A.C.M.R. 1978); State statute prohibiting hunting at night is not preempted. *United States v. Fishel*, 12 M.J. 602 (A.C.M.R. 1981); State statute prohibiting the unlawful termination of another's pregnancy is not preempted by Articles 118 and 119. *United States v. Robbins*, 52 M.J. 159 (C.A.A.F. 1999); State child abuse statute is not preempted *per se*; however, evidence establishes no more than assault under article 128. *United States v. Irvin*, 21 M.J. 184 (C.M.A. 1985), *cert. denied*, 479 U.S. 852 (1986); *see also United States v. Wallace*, 49 M.J. 292 (C.A.A.F. 1998).

(4) Preempted Statutes: State statute prohibiting false reports of crimes is preempted. *United States v. Jones*, 5 M.J. 579 (A.C.M.R. 1978); Prosecution of cable television fraud using Hawaii statute is preempted by an applicable federal statute on cable television fraud, 47 U.S.C. § 553 (a) & (b). *United States v. Mitchell*, 36 M.J. 882 (N.M.C.M.R. 1993), *aff'd*, 40 M.J. 270 (C.M.A. 1994), *cert. denied* 513 U.S. 1041 (1994).

2. The Capital Crime Exception. MCM, pt. IV, ¶ 60c(5)(b).

a) Capital crimes are those crimes made punishable by death under the common law or by statute of the United States.

b) Capital crimes may not be tried under Article 134. Only non-capital offenses may be prosecuted under article 134. *United States v. French*, 27 C.M.R. 245 (C.M.A. 1959).

3. Crimes Punishable under Article 92. MCM, pt. IV, ¶ 60c(2)(b).

a) Violations of "customs of the service" that are now contained in regulations should be charged as violations of Article 92, if the regulation is punitive.

b) *United States v. Caballero*, 49 C.M.R. 594 (C.M.A. 1975) (setting aside a conviction under Art. 134 for possession of drug paraphernalia, holding that possession of drug paraphernalia is properly prosecuted under Art. 92, where an order or regulation proscribing such possession exists).

c) *United States v. Borunda*, 67 M.J. 607 (A.F. Ct. Crim. App. 2009). The AFCCA interpreted *Caballero* "to mean that when a lawful general order or regulation proscribing the possession of drug paraphernalia exists, an order which by definition is punitive," the offense must be charged under Art. 92(1), UCMJ, and not Art. 134. In the absence of a lawful general order or regulation, the Government is at liberty to charge the conduct under another theory of Article 92 or Article 134.

I. Pleading Considerations.

1. Pleading the Terminal Element in Clause 1 and 2 Offenses.

a) Historically, enumerated Article 134 offenses did not require the explicit pleading of the terminal element within the specification. However, *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) marks a dramatic shift in charging Article 134 offenses. Article 134 offenses charged under Clause 1 or 2 should explicitly allege the terminal element, notwithstanding the language of the MCM and prior case law holding otherwise. Specifications that fail to explicitly allege the terminal element will receive increased scrutiny to determine if the terminal element is necessarily implied.

b) Explicit Pleading. The *Fosler* court reaffirms that a specification provides sufficient notice when it alleges every element of the charged offense either expressly or by necessary implication as reflected in R.C.M. 307(c)(3). In the context of Article 134, the court states "[a]n accused must be given notice as to which clause or clauses [of Article 134] he must defend against." When the terminal element is not expressly alleged, the court analyzes whether the element is necessarily implied.

c) Necessary Implication. With respect to whether the terminal element is necessarily implied, the court looks at historical precedent and stare decisis, including the MCM and *Parker v. Levy*, 417 U.S. 733 (1974). CAAF notes that increased emphasis on constitutional notice requirements in recent cases has changed both U.S. Supreme Court and CAAF LIO jurisprudence and "circumsrib[ed] the extent to which Article 134 – and particularly its terminal element – can be implied." The court states that the historical practice of implying the terminal element and stare decisis supporting this practice "has been substantially eroded." Merely alleging that a crime is an Article 134 offense does

not imply the terminal element and, therefore, the specification does not provide adequate notice – even when coupled with words of criminality (i.e., "wrongfully") in the specification.

d) Notice is the legal issue; plain error is the test.

(1) Contested trials: Failing to allege the terminal element is error because the accused does not know against which theory of criminality he must defend. If the specification is challenged for a failure to state an offense at a contested trial, the remedy is dismissal. See *Fosler*, 70 M.J. at 226.

(2) Guilty pleas: Despite error failing to allege the terminal element, "in the context of a guilty plea, where the error is alleged for the first time on appeal, whether there is a remedy for the error will depend on whether the error has prejudiced the substantial rights of the accused. A court will not "find prejudice and disturb the providence of a plea where the providence inquiry clearly delineates each element of the offense and shows that the [accused] understood 'to what offense and under what legal theory [he was] pleading guilty.'" *United States v. Ballard*, ___ M.J. ___ (C.A.A.F 2012). See also *United States v. Watson*, ___M.J.___(C.A.A.F. 2012); *United States v. Nealy*, ___M.J.___(C.A.A.F. 2012).

2. Clause Three.

a) Each element of the federal or assimilated statute must be alleged expressly or by necessary implication. MCM, pt. IV, ¶ 60c(6)(b).

b) The federal or assimilated state statute *should* be identified. MCM, pt. IV, ¶ 60c(6)(b).

c) Clause 1 and 2 offenses are not *per se* LIOs of Clause 3. Consequently, in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) and *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008), it is prudent to add language to the Clause 3 specification alleging that the conduct was prejudicial to good order and discipline and/or service discrediting.

d) Sample specifications. *See* Chapter 7, Appendix B.

3. Article 134 offenses are not *per se* LIOs of offenses arising under other articles of the UCMJ. Consequently, applying *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994), *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008), and *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009), practitioners should use extreme care when the MCM suggests that offenses under Article 134 are lesser included offenses of offenses arising under the enumerated articles of the UCMJ.

J. Punishment.

1. For the offenses listed in MCM, pt. IV, paras. 61-113, the specified punishments control. R.C.M. 1003(c)(1)(A).

2. For other offenses, the following rules apply:

a) If the offense is either included in, or closely related to, an offense listed in paras. 61-113, then the penalty provided in the MCM for the listed offense

applies. *United States v. Sellars*, 5 M.J. 814 (A.C.M.R. 1978) (state auto burglary statute was closely related to Article 130 housebreaking and should therefore be punished consistent with article 130 punishments); R.C.M. 1003(c)(1)(B)(i).

b) If an unlisted offense is included in a listed crime and is closely related to another, or is equally related to two or more listed offenses, the lesser punishment of the related crimes shall apply. R.C.M. 1003(c)(1)(B)(i). This is the opposite rule from that of Article 133, where the greater punishment applies. *See* section XXII.D.2., *supra*.

c) If the punishment for an unlisted offense cannot be determined by applying the above tests (a & b), which is usually the case, then the punishment is that provided by the civilian statute or authorized by the custom of the service. R.C.M. 1003(c)(1)(B)(ii).

(1) The accused was charged with and knowingly receiving visual depictions of minors engaging in sexually explicit conduct under Clauses 1 and 2 of Article 134. The military judge did not err in referencing the analogous federal statute, 18 USC § 2252(a)(2) to determine the maximum punishment, "when every element of the federal crime, except the jurisdictional element, was included in the specification." *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007).

(2) Prosecution under 18 U.S.C. § 842 (h), for possession of stolen explosives, is punished under penalties provided in the federal statute. *United States v. Canatelli*, 5 M.J. 838 (A.C.M.R. 1978).

(3) Prosecution under 4 U.S.C. § 3, for wrongfully and dishonorably defiling the American flag, is punished under the penalties provided in the statute. *United States v. Cramer*, 24 C.M.R. 31 (C.M.A. 1957).

PART III: WARTIME-RELATED OFFENSES AND ESPIONAGE

XXIX. WARTIME-RELATED OFFENSES.

A. Offenses Available.

1. Desertion. UCMJ art. 85.
2. Assaulting or Willfully Disobeying Superior Commissioned Officer. UCMJ art. 90.
3. Misbehavior Before the Enemy. UCMJ art. 99.
4. Subordinate Compelling Surrender. UCMJ art. 100.
5. Improper Use of a Countersign. UCMJ art. 101.
6. Forcing A Safeguard. UCMJ art. 102.
7. Captured or Abandoned Property. UCMJ art. 103.
8. Aiding the Enemy. UCMJ art. 104.
9. Misconduct as a Prisoner. UCMJ art. 105.
10. Spies. UCMJ art. 106.
11. Espionage. UCMJ art. 106a.

12. Misbehavior of a Sentinel or Lookout. UCMJ art. 113.

13. Malingering. UCMJ art. 115.

14. Straggling. UCMJ art. 134.

15. Offenses by a Sentinel. UCMJ art. 134.

16. Other Offenses.

a) Failure to Obey Lawful General Regulation. UCMJ art. 92.

b) Dereliction of Duty. UCMJ art. 92.

c) Violation of Federal Statutes. UCMJ art. 134.

B. The "Triggers". Typically the offenses listed above can occur or become aggravated only when one of the two triggers below exist.

1. Time of War.

2. Before the Enemy.

C. Time Of War.

1. Definition. "Time of war" means a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that time of war exists. R.C.M. 103(19).

a) Definition applies only to R.C.M. 1004(c)(6) and to Parts IV and V of the Manual.

b) The UCMJ does not define "time of war." R.C.M. 103(19), analysis.

c) The Court of Military Appeals (now Court of Appeals for the Armed Forces) has held that "time of war," as used in the UCMJ, does not necessarily mean declared war. Whether a time of war exists depends on the purpose of the specific article in which the phrase appears.

d) For purposes of Art. 2a(10), "time of war" means a war formally declared by Congress. *United States v. Avarette*, 41 C.M.R. 363 (C.M.A. 1970).

e) Vietnam conflict was time of war for purposes of suspension of the statute of limitations under Article 43. *United States v. Anderson*, 38 C.M.R. 386 (C.M.A. 1968).

2. The court has examined the following circumstances to determine if time of war exists:

a) The nature of the conflict, *i.e.* there must exist armed hostilities against an organized enemy. *United States v. Shell*, 23 C.M.R. 110, 114 (C.M.A. 1957);

b) The movement and numbers of United States forces in the combat area;

c) The casualties involved;

d) Legislation, executive orders or proclamations concerning the hostilities. *United States v. Bancroft*, 11 C.M.R. 3 (C.M.A. 1953).

3. Geographical limitation of time of war.

a) Not limited with respect to Article 43, UCMJ. *United States v. Anderson*, 38 C.M.R. 386 (C.M.A. 1968).

b) May be limited for other purposes. *See United States v. Taylor*, 15 C.M.R. 232 (C.M.A. 1954); *United States v. Ayers*, 15 C.M.R. 220 (C.M.A. 1954).

4. For a more broad discussion of the impact of "time of war" on offenses for purposes of Article 43, *see infra* Chapter 5, para. XVI.F.

D. Applications.

1. Offenses which can occur only in time of war.

a) Improper use of a countersign. UCMJ art. 101.

b) Misconduct as a prisoner. UCMJ art. 105.

c) Spies. UCMJ art. 106.

2. Offenses which are capital offenses in time of war.

a) Desertion. UCMJ art. 85.

b) Willful Disobedience of a Superior Commissioned Officer's Order. UCMJ art. 90.

c) Misbehavior As A Sentinel. UCMJ art. 113.

d) Rape/Homicide. *See* R.C.M. 1004(c)(6).

3. Offenses where time of war is an aggravating factor.

a) Drug offenses. UCMJ art. 112a.

b) Malingering. UCMJ art. 115.

c) Offenses by a Sentinel. UCMJ art. 134.

XXX. MISBEHAVIOR BEFORE THE ENEMY. UCMJ ART. 99.

A. Enemy Defined. Organized forces in time of war or any hostile body, including civilians, that may oppose U.S. forces. *United States v. Monday*, 36 C.M.R. 711 (A.B.R. 1966), *pet. denied*, 37 C.M.R. 471 (C.M.A. 1969).

B. Before The Enemy.

1. A question of tactical relation not of distance. A reasonable possibility of being called into action is sufficient. *United States v. Sperland*, 5 C.M.R. 89 (C.M.A. 1952).

2. Subsequent enemy contact may not be used to establish misconduct before the enemy. *United States v. Terry*, 36 C.M.R. 756 (N.B.R. 1965), *aff'd*, 36 C.M.R. 348 (C.M.A. 1966).

C. Nine Forms of the Offense.

1. Running away.

2. Shamefully abandoning, surrendering, or delivering up command, unit, place, ship or military property.

3. Endangering safety.

4. Casting away arms or ammunition.

5. Cowardly conduct.

6. Quitting place of duty to plunder or pillage.

7. Causing false alarms.

8. Willfully failing to do utmost to encounter the enemy.

9. Failure to afford relief and assistance.

D. Elements. Each form has its own set of elements. An example, Article 99(5), is below:

1. That the accused committed an act of cowardice;

2. That this conduct occurred while the accused was before the enemy; and

3. That this conduct was the result of fear.

E. Applications.

1. Cowardice is misbehavior motivated by fear. Fear is the natural feeling of apprehension when going into battle. *United States v. Smith*, 7 C.M.R. 73 (C.M.A. 1953).

2. The mere display of apprehension does not constitute the offense. *United States v. Barnett*, 3 C.M.R. 248 (A.B.R. 1951).

3. An intent to avoid combat does not in itself justify an inference of fear. *United States v. Yarborough*, 5 C.M.R. 106 (C.M.A. 1952).

4. Refusal to proceed against the enemy because of illness is not cowardice unless motivated by fear. *United States v. Presley*, 40 C.M.R. 186 (C.M.A. 1969).

5. Article 99 covers the area of misbehavior before the enemy offenses. Art. 134 is not a catch-all. *United States v. Hamilton*, 15 C.M.R. 383 (C.M.A. 1954).

XXXI. WAR TROPHIES.

A. Captured Or Abandoned Property. UCMJ art. 103.

1. Soldiers must give notice and turn over to the proper authorities without delay all captured or abandoned enemy property.

2. Soldiers can be punished for:

a) Failing to carry out duties described in ¶ 1 above.

b) Buying, selling, trading or in any way disposing of captured or abandoned public or private property.

c) Engaging in looting or pillaging.

B. Unlawful Importation, Transfer, and Sale of a Dangerous Firearm. 26 U.S.C. §§ 5844, 5861.

XXXII. STRAGGLING. UCMJ ART. 134.

A. Elements.

1. That the accused, while accompanying the accused's organization on a march, maneuvers, or similar exercise, straggled.

2. That the straggling was wrongful, and

3. That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

B. Explanation.

1. "Straggle" means to wander away, to stray, to become separated from, or to lag or linger behind.

2. Must plead specific mission or maneuver. *See* MCM, pt. IV, ¶ 107(c).

XXXIII. ESPIONAGE. UCMJ ART. 106A.

A. Nature of the Offense. Article 106a establishes a peace time espionage offense which is different from spying, another wartime offense, under Article 106, UCMJ.

B. Three Theories for Espionage Cases.

1. Violation of general regulations;

2. Assimilation of federal statutes under Article 134, clause 3;

3. Violation of Article 106 or 106a. *See United States v. Baba*, 21 M.J. 76 (C.M.A. 1985).

C. Elements of Art 106a.

1. The accused communicated, delivered, or transmitted information relating to the national defense;

2. Information was communicated and delivered to a foreign government;

3. That the accused did so with the intent or reason to believe that such matter would be used to the injury of the United States or to the advantage of a foreign nation. MCM, pt. IV, ¶ 30b(1).

D. Attempted Espionage. Unlike most UCMJ offenses, Article 106a covers both espionage and any attempted espionage.

1. Accused's actions in enlisting aid of fellow sailor en route to delivering material to foreign embassy, removing classified documents from ship's storage facility and converting them to his own personal possession, and traveling halfway to embassy to deliver went beyond "mere preparation" and guilty plea to charge of attempted espionage was provident. *United States v. Schoof*, 37 M.J. 96 (C.M.A. 1993).

2. Where accused took several classified radio messages to Tokyo in order to deliver them to a Soviet agent named "Alex," his conduct was more than mere preparation and constituted attempted espionage in violation of article 106a, UCMJ. *United States v. Wilmouth*, 34 M.J. 739 (N.M.C.M.R. 1991).

E. Espionage as a Capital Offense.

1. Accused must commit offense of espionage or attempted espionage; and

2. The offense must concern:

a) Nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense retaliation against large scale attack;

b) War plans;

c) Communications intelligence or cryptographic information; or

d) Major weapons system or major elements of defense strategy. MCM, pt. IV, ¶ 30b(3).

F. Applications.

1. *United States v. Richardson*, 33 M.J. 127 (C.M.A. 1991) (case reversed because MJ erred in instructing panel that intent requirement for offense of attempted espionage would be satisfied if accused acted in bad faith "or otherwise without authority" in disseminating information).

2. *United States v. Peri*, 33 M.J. 927 (A.C.M.R. 1993) (accused's conscious, voluntary act of conveying defense information across the East German border and then intentionally delivering himself and the information into custody and control of East German authorities constituted "delivery," as required to prove espionage).

3. *United States v. Wilmoth*, 34 M.J. 739 (N.M.C.M.R. 1991) (Art. 106a includes both espionage and attempted espionage and an essential element of attempted espionage is an act that amounts to more than mere preparation).

4. *United States v. Schoof*, 37 M.J. 96 (C.M.A. 1993) (accused's actions in enlisting aid of fellow sailor en route to delivering material to foreign embassy, removing classified documents from ship's storage facility and converting them to his own personal possession, and traveling halfway to embassy to deliver went beyond "mere preparation" and guilty plea to charge of attempted espionage was provident).

United States v. Sombolay, 37 M.J. 647 (A.C.M.R. 1993) (to be convicted of espionage, information or documents passed by accused need not be of the type requiring a security classification, but gravamen of offense is the *mens rea* with which accused has acted, not impact or effect of act itself, *i.e.*, did accused intend to harm the United States or have reason to believe that his conduct would harm the United States).

XXXIV. OFFENSES AGAINST THE PERSON. UCMJ Arts. 128, 120a, 134

A. Simple Assault / Battery. MCM, pt. IV, ¶ 54; UCMJ art. 128.

Under the UCMJ, assault is defined as an attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated. An assault can therefore be committed in one of three separate ways: **by offer, by attempt, or by battery**. UCMJ art. 128.

1. Assault by Offer.

a) An act or omission that foreseeably puts another in reasonable apprehension that force will immediately be applied to his person is an assault by offer provided the act or omission involved is either intentional or culpably negligent. The gravamen of this offense is the placing of the victim in reasonable apprehension of an immediate unlawful touching of his person. The fact that the offered touching cannot actually be accomplished is no defense provided the victim is placed in reasonable apprehension. MCM, pt. IV, ¶ 54d.

b) Victim's apprehension of harm.

(1) The ability to inflict injury need not be real but only reasonably apparent to the victim. For example, pointing an unloaded pistol at another in jest constitutes an assault by intentional offer if the victim is aware of the attack and is placed in reasonable apprehension of bodily injury. *United States v. Bush*, 47 C.M.R. 532 (N.C.M.R. 1973).

(2) The victim's belief that the accused does not intend to inflict injury vitiates the offense under the theory of offer. *United States v. Norton*, 4 C.M.R. 3 (C.M.A. 1952).

(3) The victim's apprehension of impending harm must be reasonable. *See United States v. Hernandez*, 44 C.M.R. 500 (A.C.M.R. 1971).

c) Mere words or threats of future violence are insufficient to constitute an offer-type assault. *United States v. Hines*, 21 C.M.R. 201 (C.M.A. 1956) (working the bolt of a loaded weapon so that it was ready for instant firing, coupled with a statement indicating a present intent to use the weapon, was more than mere preparation and constituted an act of assault); *see also United States v. Milton*, 46 M.J. 317 (C.A.A.F. 1997) (holding that words alone are generally not sufficient to constitute an assault by offer, but assault may occur where circumstances surrounding threat may constitute assault if victim feels "reasonable apprehension").

d) An accused who tries but fails to offer violence to frighten a victim may be guilty of an attempt to commit an assault by offer under UCMJ art. 80. *United States v. Locke*, 16 M.J. 763 (A.C.M.R. 1983). Whether an "attempted offer to batter" is an offense under the UCMJ remains an open question. *See United States v. Anzalone*, 41 M.J. 142 (C.M.A. 1994). *Cf. United States v. Williamson*, 42 M.J. 613 (N-M. Ct. Crim. App. 1995).

e) The culpably negligent offer. Culpable negligence is defined in MCM, pt. IV, ¶ 44c(2)(a)(i) as a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. *United States v. Pittman*, 42 C.M.R. 720 (A.C.M.R. 1970); *United States v. Gibson*, 39 M.J. 1043 (A.C.M.R. 1994), *aff'd*, 43 M.J. 343 (1995). "The actor need not actually intend or foresee those consequences: it is only necessary that a reasonable person in such circumstances would have realized the substantial and unjustified danger created by his act." *United States v. Baker*, 24 M.J. 354, 356 (C.M.A. 1987). The absence of intent to do bodily harm is not a defense. *United States v. Redding*, 34 C.M.R. 22 (C.M.A. 1963). An example of such an assault would be a situation wherein the accused knowingly conducts rifle target practice in a built up area and thus frightens innocent bystanders into a reasonable belief of imminent injury.

2. Assault by Attempt.

a) An overt act that amounts to more than mere preparation and is done with apparent present ability and with the specific intent to do bodily harm constitutes an assault by attempt. MCM, pt. IV, ¶ 54c.

b) More than mere preparation to inflict harm is required. *United States v. Crocker*, 35 C.M.R. 725 (A.F.B.R. 1965) (where the accused with open knife advances towards his victim at the time when an affray is impending or is in progress and comes within striking distance, this amounts to more than mere preparation and is sufficient to complete the offense).

(1) Words alone, or threats of future harm, are insufficient. *United States v. Hines*, 21 C.M.R. 201 (C.M.A. 1956).

(2) An apparent ability to inflict bodily harm must exist. *United States v. Hernandez*, 44 C.M.R. 500 (A.C.M.R. 1971) (no offense where Government failed to prove that instrument used under the circumstances was likely to result in harm); *United States v. Smith*, 15 C.M.R. 41 (C.M.A. 1954) (accused need not be within actual striking distance of victim to constitute apparent ability to inflict harm).

c) *Mens Rea*. Attempt-type assault requires a specific intent to inflict bodily harm upon the victim. MCM, pt. IV, ¶ 54c.

(1) Victim's apprehension of impending harm is unnecessary. MCM, pt. IV, ¶ 54c(1)(b)(i). *See United States v. Anzalone*, 41 M.J. 142 (C.M.A. 1994); *United States v. Van Beek*, 47 C.M.R. 99 (A.C.M.R. 1973).

(2) *United States v. Davis*, 49 C.M.R. 463 (A.C.M.R. 1974). Firing pistol over the heads of victims, without the intent to injure them, is insufficient for assault by attempt.

3. Battery.

a) An intentional or culpably negligent application of force or violence to the person of another by a material agency constitutes a battery. *See generally United States v. Schoolfield*, 40 M.J. 132 (C.M.A. 1994) (discussing alternative theories of battery in the context of an HIV case).

b) Any offensive touching will suffice. *See United States v. Sever*, 39 M.J. 1 (C.M.A. 1994) (nonconsensual kiss); *United States v. Bonano-Torres*, 29 M.J. 845 (A.C.M.R. 1989), *aff'd*, 31 M.J. 175 (C.M.A. 1990) (nonconsensual kiss and touching buttons on blouse); *United States v. Madigar*, 46 M.J. 802 (C.G. Ct. Crim. App. 1997) (unnecessary exposure to X-ray radiation was sufficient physical touching); *United States v. Banks*, 39 M.J. 571 (N.M.C.M.R. 1993), *aff'd*, 40 M.J. 320 (C.M.A. 1994) (smoke inhalation).

c) *Mens Rea*.

(1) Unlawful touching must be the result of an intentional or culpably negligent act. A culpably negligent act requires a negligent act/omission coupled with a culpable disregard for the foreseeable consequences to others. *See United States v. Turner*, 11 M.J. 784 (A.C.M.R. 1981) (contrasting an intentional battery with a culpably negligent battery; the court agreed that the accused who threw a rake at an MP, hitting him on the arm, had in fact committed a battery, but it split on whether the violent act was intentional or culpably negligent).

(2) *United States v. Gibson*, 43 M.J. 343 (C.A.A.F. 1995) (playing with and dropping a 40mm grenade round was a culpably negligent act sufficient to support a charge of aggravated assault (by battery); a reasonable soldier should have known what the object was and that dropping it would create a substantial and unjustified danger to bystanders).

(3) *United States v. Banks*, 39 M.J. 571 (N.M.C.M.R. 1993) (finding the accused was culpably negligent when he consumed alcohol while cooking and passed out, thereby causing stove to catch fire and causing smoke inhalation injury to his infant son), *aff'd*, 40 M.J. 320 (C.M.A. 1994).

(4) *United States v. Mayo*, 50 M.J. 473 (C.A.A.F. 1999) (intentionally throwing a 19-month-old child, while playing, with sufficient force and from sufficient height to fracture the child's femur may be a culpably negligent act).

d) Consent is not always a defense. *United States v. Arab*, 55 M.J. 508 (A. Ct. Crim. App. 2001) (consent not a defense to assault consummated by battery arising from sadomasochistic activities involving an accused's wife, where the nature of injuries and means used suggested the wife was subjected to extreme pain); *United States v. Dumford*, 28 M.J. 836 (A.F.C.M.R. 1989), *aff'd*, 30 M.J. 137 (C.M.A. 1990), *cert. denied*, 498 U.S. 854 (1990) (consent not a defense to assault for sexual activity where the accused has the AIDS virus); *United States v. Bygrave*, 46 M.J. 491 (1997) (victim's informed consent is no defense to a charge of aggravated assault for unprotected intercourse by HIV-infected accused); *United States v. Brantner*, 28 M.J. 941 (N.M.C.M.R. 1989) (consent not a defense to assault by using unsterilized needles); *United States v. O'Neal*, 36 C.M.R. 189 (C.M.A. 1966) (both parties to a mutual affray are guilty of assault); *United States v. Holmes*, 24 C.M.R. 762 (A.F.B.R.) (consent not a defense if the injury more than trifling or there is a breach of public order); *cf. United States v. Rath*, 27 M.J. 600 (A.C.M.R. 1988) (child may consent to some types of assault); *United States v. Serrano*, 51 M.J. 622 (N.-M. Ct. Crim. App. 1999) (act likely to produce grievous bodily harm or death); *United States v. Booker*, 25 M.J. 114 (C.M.A. 1987) & *United States v. Outhier*, 45 M.J. 326 (C.A.A.F. 1996) (consent invalid where obtained by fraud).

e) Notice of Lack of Consent. *United States v. Johnson*, 54 M.J. 67 (2000) (where there was a friendly relationship involving touchings that were not offensive and the victim never protested against backrubs, the government had to prove that the accused was on notice of lack of consent), *aff'd by* 55 M.J. 243 (C.A.A.F. 2001).

f) Justification. *See also* Chapter 5, Defenses.

(1) Certain persons may be justified in touching others even without their permission. *See, e.g.*, *United States v. McDaniel*, 7 M.J. 522 (A.C.M.R. 1979) (no assault for NCO to place drunk and protesting soldier in a cold shower to sober him up). *See* R.C.M. 916(c).

(2) Parental discipline defense. *See generally United States v. Rivera*, 54 M.J. 489 (2001); *United States v. Robertson*, 36 M.J. 190 (C.M.A. 1991); *United States v. Brown*, 26 M.J. 148 (C.M.A. 1988). Requirements:

(a) Proper parental purpose. Force used for safeguarding or promoting the welfare of the minor, including prevention or punishment of misconduct.

(b) Reasonable force. Force must not be intended, or known to create a substantial risk of, serious bodily injury, disfigurement, extreme pain or mental distress, or gross degradation.

B. Aggravated Assault With a Dangerous Means, Weapon or Force. UCMJ art. 128(b)(1).

1. Aggravated assault with a dangerous weapon, means, or force includes the assault theories of offer, attempt, and battery. MCM, pt. IV, ¶ 54b(4)(a).

2. Dangerous. A means/force/weapon is dangerous when used in a manner likely to produce grievous bodily harm. *United States v. Hernandez*, 44 C.M.R. 500 (C.M.A. 1971) (claymore mine, under the circumstances, not used as a dangerous weapon). The offense is not established by the subjective state of mind of the victim but by an objective test as to whether the instrument is used as a dangerous weapon. *United States v. Cato*, 17 M.J. 1108 (A.C.M.R. 1984). The mere use of a weapon in the course of an assault is sufficient whether or not the accused actually intended to employ the weapon to accomplish the assault. *United States v. Griffin*, 50 M.J. 480 (C.A.A.F. 1999).

a) Government must prove natural and probable consequence of means or force used would be death or grievous bodily harm. *United States v. Outhier*, 45 M.J. 326 (C.A.A.F. 1996); Whether a particular means is a "means likely" depends on two findings: 1) the risk of harm must be more than fanciful, speculative, or remote possibility; and 2) the natural and probable consequence of inflicting injury by such means must be death or grievous bodily harm. *United States v. Weatherspoon*, 49 M.J. 209 (C.A.A.F. 1998).

b) Firearms. An unloaded firearm is not a dangerous weapon within the meaning of Article 128 in an offer-type assault, even if the victim reasonably believed the weapon was capable of inflicting imminent death or grievous bodily harm. *United States v. Davis*, 47 M.J. 484 (C.A.A.F. 1998). *Cf. United States v. Smith*, 2 C.M.R. 256 (A.B.R. 1951) (pistol as bludgeon is a dangerous weapon); *United States v. Lamp*, 44 C.M.R. 504 (A.C.M.R. 1971) (functional carbine with rounds in magazine but not chambered is a dangerous weapon); *United States v. Bean*, 62 M.J. 264 (C.A.A.F. 2006) (engaging the safety of a loaded, operable firearm does not remove its character as a dangerous weapon). *United States v. Cato*, 17 M.J. 1108 (A.C.M.R. 1984) (jammed rifle a dangerous weapon). [*Note*: Under UCMJ art. 134, a person can be convicted for carrying a concealed weapon provided it is shown that the weapon was "dangerous." *United States v. Thompson*, 14 C.M.R. 38 (C.M.A. 1954). The term "dangerous weapon" has a different meaning in connection with the art. 134 offense than it does in connection with the offense of aggravated assault. Under UCMJ art. 134, the term "dangerous weapon" includes an unloaded pistol. *United States v. Ramsey*, 18 C.M.R. 588 (A.F.B.R. 1954); *United States v. Brungs*, 14 C.M.R. 851 (A.F.B.R. 1954).]

c) Fists. *United States v. Kenne*, 50 C.M.R. 217 (A.C.M.R. 1975); *United States v. Saunders*, 25 C.M.R. 89 (C.M.R. 1958); *United States v. Vigil*, 13 C.M.R. 30 (C.M.A. 1953); *United States v. Whitfield*, 35 M.J. 535 (A.C.M.R. 1992); *United States v. Debaugh*, 35 M.J. 548 (A.C.M.R. 1992).

d) Belt buckle. *United States v. Patterson*, 21 C.M.R. 135 (C.M.A. 1956).

e) Beer bottle. *United States v. Straub*, 30 C.M.R. 156 (C.M.A. 1961).

f) Butter knife. *United States v. Lewis*, 34 C.M.R. 980 (A.B.R. 1964).

g) Stick. *United States v. Ealy*, 39 C.M.R. 313 (A.B.R. 1967).

h) CS/riot grenade. *United States v. Aubert*, 46 C.M.R. 848 (A.C.M.R. 1972); *United States v. Schroder*, 47 C.M.R. 430 (A.C.M.R. 1973).

i) AIDS (HIV) virus.

(1) *United States v. Dacus*, 66 M.J. 235 (C.A.A.F. 2008). In a guilty plea to aggravated assault, a medical doctor provided sentencing evidence for the accused that his viral load was very low and when combined with the use of a condom, the likelihood of transmission of HIV was very low. Under *United States v. Witherspoon*, 49 M.J. 208 (C.A.A.F. 1998), whether the means is "likely" has two prongs: "(1) the risk of harm and (2) the magnitude of the harm." As the court stated in *Witherspoon*, "Where the magnitude of harm is great, there may be an aggravated assault even though the risk of harm is statistically low." Citing *United States v. Joseph*, 37 M.J. 392 (C.M.A. 1993), the court stated that "[T]he question is not the statistical probability of HIV invading the blood, but rather the likelihood of the virus causing death or serious bodily harm *if* it invades the body." Additionally, "the probability of infection need only be more than merely a fanciful, speculative, or remote possibility." Assessing the second *Witherspoon* prong, the court found that the evidence in this case did not conflict with the accused's plea to aggravated assault because death or grievous bodily harm is a natural and probable consequence if HIV were transmitted by sexual intercourse. Moving to the first *Witherspoon* prong, the court concluded that the risk of HIV transmission in this case was low and remote, but more than fanciful or speculative. Considering both prongs, the court concluded that while the risk may have been low, the magnitude of harm was significant.

(2) Other Cases: *United States v. Joseph*, 37 M.J. 392 (C.M.A. 1993); *United States v. Johnson*, 30 M.J. 53 (C.M.A. 1990); *United States v. Stewart*, 29 M.J. 92 (C.M.A. 1989); *United States v. Bygrave*, 46 M.J. 491 (1997) (consent no defense); *United States v. Schoolfield*, 36 M.J. 545 (A.C.M.R. 1992), *aff'd*, 40 M.J. 132 (C.M.A. 1994); *United States v. Klauck*, 47 M.J. 24 (C.A.A.F. 1997). *But see United States v. Perez*, 33 M.J. 1050 (A.C.M.R. 1991) (unprotected sexual intercourse by HIV infected soldier did not constitute an assault by battery where the evidence indicated that the accused's vasectomy prevented transfer of the virus).

j) Other sexually transmitted diseases. *United States v. Reister*, 40 M.J. 666 (N.M.C.M.R. 1994) (genital herpes).

k) Tent pole. *United States v. Winston*, 27 M.J. 618 (A.C.M.R. 1988).

l) Bed extender. *United States v. Wilson*, 26 M.J. 10 (C.M.A. 1988).

m) Unsterilized needle. *United States v. Brantner*, 28 M.J. 941 (N.M.C.M.R. 1989).

3. Grievous bodily harm is defined as serious bodily injury such as broken bones and deep cuts. MCM, pt. IV, ¶ 54c.

4. An assault and threat, which occur at the same time, are multiplicious for sentencing. *United States v. Morris*, 41 C.M.R. 731 (A.C.M.R. 1970); *United States v. Metcalf*, 41 C.M.R. 574 (A.C.M.R. 1969).

5. LIOs: Assault with a dangerous weapon. Where the evidence shows that an intoxicated accused pointed a loaded firearm at others, having first threatened them verbally and with a knife, and assuming a firing position, the lesser included offense of

simple assault is not reasonably raised, whether the safety is engaged or not. *United States v. Bean*, 62 M.J. 264 (C.A.A.F. 2005).

C. Aggravated Assault By Intentionally Inflicting Grievous Bodily Harm. UCMJ art. 128(b)(2).

1. Requires non-negligent battery resulting in grievous bodily harm.

2. Specific intent to inflict grievous bodily harm is necessary. *United States v. Groves*, 10 C.M.R. 39 (C.M.A. 1953) (error not to instruct on defense of intoxication).

3. Aggravated assault by intentionally inflicting grievous bodily harm is multiplicious with maiming under Article 124 when the same actions give rise to both convictions. *United States v. Allen*, NMCM 9800849, 2003 Lexis 169 (N-M. Ct. Crim. App. July 30, 2003).

D. Assault and Communication of Threat Distinguished. An assault (UCMJ art. 128) is an attempt or offer to do bodily harm with unlawful force or violence. Communication of a threat (UCMJ art. 134) embraces a declaration or intent to do bodily harm. Both offenses therefore relate to infliction of physical injury. When committed simultaneously upon the same victim, they are properly a single offense for punishment purposes. *United States v. Lockett*, 7 M.J. 753 (A.C.M.R. 1979); *United States v. Morris*, 41 C.M.R. 731 (A.C.M.R. 1970); *United States v. Conway*, 33 C.M.R. 903 (A.F.C.M.R. 1963).

E. Stalking, UCMJ art. 120a.

1. Implementing Executive Order signed 18 April 2007 (E.O. 13430). ISSUES:

a) The criminal act is a "course of conduct," defined by the statute as:

(1) A repeated maintenance of visual or physical proximity to a specific person, or

(2) A repeated conveyance of verbal threat, written threats, or threats implied by conduct, or a combination of such threats, directed at or towards a specific person.

b) "Repeated," in the definition of "course of conduct," means two or more occasions.

c) Be alert to the implications of these statutory definitions for conduct occurring in barracks, or on a ship, or in a deployed environment where soldiers are compelled to be in close visual or physical proximity to one another.

d) Note that threats conveyed by computer are not expressly incorporated in the statutory definition. To prosecute a course of conduct based on threats conveyed by computer, consider litigating whether computer-conveyed threats are "written" for purposes of the statute. In the alternative, assimilate a state or federal offense to prosecute computer-conveyed threats. Be cognizant of the preemption doctrine (*see* discussion on Preemption, Chapter 3, The General Article, *supra*).

2. There are no reported cases under this article.

F. Child Endangerment. MCM, pt. IV, ¶ 68a, UCMJ art. 134.

1. This is a new offense as of October 2007. *See* Executive Order 13447, dated 28 September 2007.

2. There are no reported cases under this article, however, as the Analysis states, child neglect was recognized in *United States v. Vaughn*, 58 M.J. 29 (2003) (in light of service

custom, norms of states, and service-discrediting nature of offense, child neglect is punishable under Article 134, even if no harm results to the child).

3. Elements:

a) That the accused had a duty of care of a certain child;

b) That the child was under the age of 16 years;

c) That the accused endangered the child's mental or physical health, safety, or welfare through design or culpable negligence; and

d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

4. Issues.

a) Culpable negligence is more than simple negligence and is a negligent act accompanied by a culpable disregard for the forseeable consequences to others of that act or omission. MCM, pt. IV, ¶ 68a(c)(3).

b) As in *Vaughn, supra*, there is no requirement of actual physical or mental harm to the child. MCM, pt. IV, ¶ 68a(c)(4).

c) Age of the victim is a factor in determining the quantum of negligence. The explanation provides several examples of acts to assist in determining whether an act is negligent, and if so, whether the negligence rises to the level of culpable negligence. *See* MCM, pt. IV, ¶ 68a(c)(6).

XXXV. HOMICIDES. UCMJ ARTs. 118, 119, & 134.

A. Common Law Classifications.

1. At common law, homicides are classified as justifiable, excusable, or criminal. Justifiable homicides are those commanded or authorized by law; they are not punishable. Excusable homicides are those in which the killer is to some extent at fault but where circumstances do not justify infliction of full punishment for criminal homicide; *i.e.*, the killing remains criminal but the penalty is reduced. Any killing that is not justifiable or excusable is criminal homicide -- either murder, manslaughter, or negligent homicide.

2. "Born Alive" Rule. *United States v. Nelson*, 53 M.J. 319 (C.A.A.F. 2000). The UCMJ does not define "human being" for the purposes of Articles 118 and 119, but Congress intended those articles to be construed with reference to the common law. A child is "born alive" if it: (1) was wholly expelled from its mother's body, and (2) possessed or was capable of an existence by means of a circulation independent of that of the mother. Even if the child never took a breath of air from its own lungs, the child's capability to do so is sufficient. *But see* UCMJ, Article 119a, Death or Injury to an Unborn Child.

B. Causation.

1. Generally. *See also* Chapter 5, Defenses.

2. Death From Multiple Causes.

a) *United States v. Gomez*, 15 M.J. 954 (A.C.M.R. 1982) (adopts two-part time of death standard: either irreversible cessation of circulatory and respiratory functions, or irreversible cessation of total brain functions).

b) *United States v. Schreiber*, 18 C.M.R. 226 (C.M.A. 1955) (accused held responsible for death even if his gunshot wound, following a severe beating of the victim by another, only contributed to the death by causing shock).

c) *United States v. Houghton*, 32 C.M.R. 3 (C.M.A. 1962) (in child abuse death, contributing to or accelerating the death of the victim sufficient to establish responsibility).

3. The Fragile Victim. If the wound, though not ordinarily fatal, causes the death of the victim, the accused is responsible. *United States v. Eddy*, 26 C.M.R. 718 (A.B.R. 1958).

4. Negligent or improper medical treatment of the victim will not excuse the accused unless it constitutes gross negligence or intentional malpractice. *United States v. Baguex*, 2 C.M.R. 424 (A.B.R. 1952) (death by asphyxiation from aspiration into lungs of blood from facial injuries); *United States v. Eddy*, 26 C.M.R. 718 (A.B.R. 1958).

5. Accused's act need not be the sole cause of death, or the latest/most immediate cause of death. *United States v. Romero*, 1 M.J. 227 (C.M.A. 1975) (accused guilty of negligent homicide in overdose death after helping victim position syringe); *see also United States v. Mazur*, 13 M.J. 143 (C.M.A. 1982) (accused guilty of involuntary manslaughter by culpable negligence when assisted victim who could no longer inject self with heroin).

6. Accused is responsible if his act caused the victim to kill herself unintentionally or by her negligence. *See United States v. Schatzinger*, 9 C.M.R. 586 (N.B.R. 1953).

7. Intervening cause.

a) An unforeseeable, independent, intervening event that causes the victim's death may negate causation by the accused. *See United States v. Riley*, 58 M.J. 305 (2003) (holding doctors' failure to diagnose appellant's pregnancy was <u>not</u> an intervening cause of the baby's death sufficient to relieve appellant of criminal liability (negligent birthing of child)).

b) Contributory negligence by the victim must loom so large in comparison to the accused's conduct as to be an intervening cause. *United States v. Oxendine*, 55 M.J. 323 (2001) (victim's voluntary participation in a dangerous joint venture, being held outside a third-story window by his ankles, was <u>not</u> an intervening cause).

c) When an accused's wrongful acts set in motion an unbroken, foreseeable chain of events resulting in another's death, his conduct is the proximate cause of the death. *United States v. Stanley*, 60 M.J. 622 (A.F. Ct. Crim. App. 2004) (accused violently shook a 6-week old infant, who was resuscitated at the emergency room but remained in a persistent vegitative state; infant died upon removal of life support; the decision to remove life support did not "loom so large" as to relieve the accused of criminal liability); *see also United States v. Markert*, 65 M.J. 677 (N-M. Ct. Crim. App. 2007) (weapon horseplay resulted in Marine being shot in head; removal of life support was not an intervening cause).

C. Premeditated Murder. UCMJ art. 118(1).

1. Intent. Requires a specific intent to kill *and* consideration of the act intended to bring about death. The intent to kill need not be entertained for any particular or considerable length of time and the existence of premeditation may be inferred from the circumstances surrounding the killing. MCM, pt. IV, ¶ 43c(2)(a). *See generally United States v. Eby*, 44 M.J. 425 (1996).

a) The "premeditated design to kill" does not have to exist for any particular or measurable length of time. *United States v. Sechler*, 12 C.M.R. 119 (C.M.A. 1953).

b) Intent only to inflict grievous bodily harm is insufficient. *United States v. Mitchell*, 7 C.M.R. 77 (C.M.A. 1953).

c) The distinction between premeditated murder and unpremeditated murder is sufficiently clear to withstand constitutional challenge. *United States v. Curtis*, 44 M.J. 106, 147 (C.A.A.F. 1996); *United States v. Loving*, 41 M.J. 213 at 279-80 (C.M.A. 1994), *aff'd*, 517 U.S. 748 (1996).

d) Premeditation is not a question of time but of reflection. *United States v. Cole*, 54 M.J. 572 (Army Ct. Crim. App. 2000), *aff'd*, 55 M.J. 466 (C.A.A.F. 2001).

e) Instructions. Because of the potential confusion to panel members in making the distinction between premeditated and unpremeditated murder, counsel should consider requesting instructions in addition to the pattern instruction in the *Military Judges Benchbook*. *See United States v. Eby*, 44 M.J. 425 (C.A.A.F. 1996); *United States v. Hoskins*, 36 M.J. 343 (C.M.A. 1993), *cert. denied*, 513 U.S. 809 (1994).

2. Proof of Premeditation.

a) The existence of premeditation may be inferred from the circumstances. MCM, pt. IV, ¶ 43c(2)(a).

b) Inferred from the viciousness of the assault. *United States v. Ayers*, 34 C.M.R. 116 (C.M.A. 1964).

c) Inferred from the number of blows and the nature and location of injuries. *United States v. Teeter*, 12 M.J. 716 (A.C.M.R. 1981), *aff'd in part*, 16 M.J. 68 (C.M.A. 1983); *United States v. Williams*, 39 M.J. 758 (A.C.M.R. 1994).

d) Inferred from prior anger and threats against the victim. *United States v. Bullock*, 10 M.J. 674 (A.C.M.R. 1981), *aff'd*, 13 M.J. 490 (C.M.A. 1982).

e) Inferred from the fact that the weapon was procured before killing. *United States v. Mitchell*, 2 M.J. 1020 (A.C.M.R. 1976).

f) Inferred from accused's elaborate preparations preceding the murder, elaborate precautions to avoid detection, and brutal nature of the attack on the victim. *United States v. Matthews*, 13 M.J. 501 (A.C.M.R. 1982), *rev'd as to sentence*, 16 M.J. 354 (C.M.A. 1983).

g) Inferred from lack of provocation; disadvantage of victim; and nature, extent and duration of attack. *United States v. Viola*, 26 M.J. 822 (A.C.M.R. 1988), *cert. denied*, 490 U.S. 1020 (1989).

h) Other circumstances. *United States v. Curtis*, 44 M.J. 106 (C.A.A.F. 1996) (after clearly premeditated murder of first victim accused stabbed victim's wife who came to his aid and then indecently assaulted her); *United States v. Curry*, 31 M.J. 359 (C.M.A. 1990) (violent shaking of child victim, coupled with the accused's demeanor at hospital, prior abuse of child, and incredible explanation of injuries); *United States v. Levell*, 43 M.J. 847 (N-M. Ct. Crim. App. 1996) (opening gun case, walking to victim laying on the ground, saying "what do you think of this," then firing fatal shots showed accused reflected with a cool mind

on killing victim); *United States v. Shanks*, 13 M.J. 783 (A.C.M.R. 1982) (homicidal act part of conspiracy); *see also United States v. Cooper*, 28 M.J. 810 (A.C.M.R. 1989), *aff'd*, 30 M.J. 201 (C.M.A. 1990); *United States v. Nelson*, 28 M.J. 553 (A.C.M.R. 1989).

3. Transferred Intent. *See* MCM, pt. IV, ¶ 43c(2)(b).

a) *United States v. Black*, 11 C.M.R. 57 (C.M.A. 1953) (where the accused shot first victim with intent to murder and the bullet passed through his body striking a second, unintended victim, the accused was properly convicted of murder as to both victims).

b) *United States v. Willis*, 46 M.J. 258 (C.A.A.F. 1997) (accused's act of pulling trigger three times at nearly point blank range, moving the pistol between each shot with the evident intent of covering small area occupied by intended victim and her husband was sufficient to infer accused's intent to kill intended victim's husband under doctrine of transferred intent).

4. State of Mind Defenses. All state of mind defenses apply to reduce premeditated murder to unpremeditated murder; however,

a) Voluntary intoxication may reduce premeditated murder to unpremeditated murder or murder by murder by inherently dangerous act, but it may not reduce premeditated or unpremeditated murder to manslaughter or any other lesser offense. *United States v. Morgan*, 37 M.J. 407 (C.M.A. 1993); M.C.M. pt. IV, ¶ 43c(2)(c). Accused can still be convicted of premeditated murder even though accused drank alcohol if his behavior clearly established that he fully appreciated what he was doing before, during, and after the murder. *United States v. Glover*, No. 9901132 (Army Ct. Crim. App. Nov. 7, 2002) (unpublished).

b) Rage or personality disorder do not necessarily reduce to unpremeditated murder. *United States v. Roukis*, 60 M.J. 925 (Army Ct. Crim. App. 2005) *aff'd*, 62 M.J. 212 (2005) ("The fact that appellant may have been enraged at the time of the killing, whether as a result of his particular personality disorder or the circumstances of his marriage, 'does not necessarily mean that he was deprived of the ability to premeditate or that he did not premeditate.'").

5. Punishment.

a) Maximum: Death. Capital case procedures are set forth in R.C.M. 1004. The M.C.M. capital procedures were held to be constitutional in *Loving v. United States*, 517 U.S. 748 (1996).

b) Mandatory Minimum: Imprisonment for life with eligibility for parole. M.C.M., pt. IV, ¶ 43d(2)(e).

D. Unpremeditated Murder. UCMJ art. 118(2).

1. Nature of Act. The offense can be based on an act or omission to act where there is a duty to act; *United States v. Valdez*, 35 M.J. 555 (A.C.M.R. 1992) (parent's deliberate failure to provide medical and other care to his child which resulted in child's death supported charge of murder), *aff'd*, 40 M.J. 491 (C.M.A. 1994). *See also United States v. Nelson*, 53 M.J. 319 (C.A.A.F. 2000)(holding that a mother who chose to give birth without medical assistance and failed to check on the health of her newborn for over an hour, resulting in the child's death, could be guilty of involuntary manslaughter based on culpable negligence in her duty to care for the child); *but see United States v. Riley*, 47 M.J. 603 (A.F. Ct. Crim. App. 1997) (murder conviction set aside and finding of

involuntary manslaughter of an accused who sought no medical attention during pregnancy or delivery), *modified and aff'd*, 58 M.J. 305 (C.A.A.F. 2003) (involuntary manslaughter conviction set aside in favor of negligent homicide conviction because accused's failure to seek medical care was not culpably negligent).

2. Intent. Accused must have either a specific intent to kill or inflict great bodily harm.

a) The inference of intent. A permissive inference is recognized that a person intends the natural and probable consequences of an act purposely done by him. *United States v. Owens*, 21 M.J. 117 (C.M.A. 1985); *United States v. Varraso*, 21 M.J. 129 (C.M.A. 1985); *see United States v. Wilson*, 26 M.J. 10 (C.M.A. 1988).

b) Great bodily harm. A serious injury not including minor injuries such as a black eye or bloody nose, but includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injury. MCM, pt. IV, ¶ 43c(3)(b).

c) All state of mind defenses apply except voluntary intoxication. MCM, pt. IV, ¶ 43c(2)(c). Voluntary intoxication cannot defeat capacity of accused to entertain intent to kill or inflict great bodily harm required for unpremeditated murder; one who voluntarily intoxicates himself or herself cannot be heard to complain of being incapable, by virtue of that intoxication, of intentionally committing acts leading to death of another person. *United States v. Morgan*, 37 M.J. 407 (C.M.A. 1993).

3. Heat of passion defense reduces unpremeditated murder to voluntary manslaughter. See paragraph H, below.

a) Heat of passion must be caused by adequate provocation. The provocation must be adequate to excite uncontrollable passion in a reasonable person. MCM, pt. IV, ¶44c(1)(b).

4. Transferred intent also applies to unpremeditated murder. MCM. pt. IV, ¶ 43c(3)(a) ("The intent need not be directed toward the person killed"). *See United States v. Willis*, 43 M.J. 889 (A.F. Ct. Crim. App. 1996), *aff'd*, 46 M.J. 258 (C.A.A.F. 1997).

5. Maximum Punishment: Life imprisonment, with or without eligibility for parole. MCM, pt. IV, ¶ 43e(2). RCM 1003(b)(7).

E. Murder While Doing An Inherently Dangerous Act. UCMJ art. 118(3).

1. In General. Alternative theory to unpremeditated murder.

2. Intent.

a) Specific intent not required. *United States v. McMonagle*, 38 M.J. 53 (C.M.A. 1993) (firing a weapon indiscriminately in an inhabited area during a sham firefight in Panama during Operation JUST CAUSE).

b) Knowledge. Accused must have known that the probable consequence of his act would be death or great bodily harm. *United States v. Berg*, 30 M.J. 195 (C.M.A. 1990), *aff'd on reconsideration*, 31 M.J. 38 (C.M.A. 1990). MCM, pt. IV, ¶ 43c(4)(b).

c) Death-causing act must be intentional. *United States v. Hartley*, 36 C.M.R. 405 (C.M.A. 1966).

d) The act must evidence wanton heedlessness of death or great bodily harm. MCM, pt. IV, ¶ 43c(4)(a).

3. Nature of Act. The conduct of the accused must be inherently dangerous to "another", *i.e.*, at least one other person. This is a change Congress made in the law pursuant to the National Defense Authorization Act for Fiscal Year 1993 in response to *United States v. Berg*, 31 M.J. 38 (C.M.A. 1990), in which the Court of Military Appeals required the accused's conduct to endanger more than one other person.

4. Malice Requirement. For a discussion of the malice required, see *United States v. Vandenack*, 15 M.J. 230 (C.M.A. 1983) (no defense that accused did not intend to cause death or great bodily injury, provided the act showed wanton disregard of human life).

5. Voluntary intoxication not a defense. MCM, pt. IV, ¶ 43c(3)(c).

6. Examples of Inherently Dangerous Conduct.

a) *United States v. McMonagle*, 38 M.J. 53 (C.M.A. 1993) (firing a weapon indiscriminately in an inhabited area during a sham firefight in Panama during Operation JUST CAUSE).

b) *United States v. Hartley*, 36 C.M.R. 405 (C.M.A. 1966) (shooting into a crowded room).

c) *United States v. Judd*, 27 C.M.R. 187 (C.M.A. 1959) (shooting into a house trailer with two others present).

d) *United States v. Vandenack*, 15 M.J. 230 (C.M.A. 1983) (speeding and intentionally running red light after a prior accident).

F. Felony Murder. UCMJ art. 118(4).

1. Statutory Penalty: death or life imprisonment.

2. In General. Homicide must be committed during the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson. *United States v. Jefferson*, 22 M.J. 315 (C.M.A. 1986).

3. Intent. No specific intent required, except that of underlying felony. *United States v. Hamer*, 12 M.J. 898 (A.C.M.R. 1982).

4. Causation. Causal relationship between felony and death must be established. *United States v. Borner*, 12 C.M.R. 62 (C.M.A. 1953).

5. Multiplicity. Felony murder is multiplicious with premeditated murder, *United States v. Teeter*, 16 M.J. 68 (C.M.A. 1983), and with unpremeditated murder. *United States v. Hubbard*, 28 M.J. 27 (C.M.A. 1989).

6. Capital Punishment.

a) In *Enmund v. Florida*, 458 U.S. 782 (1982), the Supreme Court held that to impose the death penalty for felony murder the accused must have killed or have had the intent to kill.

b) *Tison v. Arizona*, 481 U.S. 137 (1987) (expands *Enmund*, holding that the Eighth Amendment does not prohibit the death penalty where the accused is a major participant in a felony that results in murder and "the mental state is one of reckless indifference").

c) R.C.M. 1004(c)(8) allows the death penalty only if the accused was the actual perpetrator of the killing. CAAF has held that this factor requires proof of an intent to kill or reckless indifference to human life. *Loving v. Hart*, 47 M.J. 438 (C.A.A.F. 1998).

d) Accused's pleas of guilty to unpremeditated murder and robbery by means of force and violence were, in context, pleas to the capital offense of felony murder. *United States v. Dock*, 28 M.J. 117 (C.M.A. 1989).

7. Instructions. Where members could have reasonably found that accused formed the intent to steal from victim either prior to the infliction of the death blows or after rendering him helpless, he was not entitled to an instruction that, to be convicted of felony-murder he had to have the intent to commit the felony at the time of the actions which caused the killing. *United States v. Fell*, 33 M.J. 628 (A.C.M.R. 1991).

G. Attempted Murder. UCMJ art. 80. Attempted murder requires a specific intent to kill.

1. Although a service member may be convicted of murder if he commits homicide without an intent to kill, but with an intent to inflict great bodily harm (UCMJ art. 118(2)) or while engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life (UCMJ art. 118(3)), those states of mind will not suffice to establish attempted murder. *United States v. Roa*, 12 M.J. 210 (C.M.A. 1982).

2. Beyond mere preparation. Where the purported co-conspirator was acting as a government agent at all relevant times, the court would consider only the acts of the accused in determining whether the planned murder-for-hire went beyond mere preparation, so as to constitute attempted murder. *United States v. Owen*, 47 M.J. 501 (Army Ct. Crim. App. 1997).

H. Voluntary Manslaughter. UCMJ art. 119(a).

1. Defined. An unlawful killing done with an intent to kill or inflict great bodily harm but done in the heat of sudden passion caused by adequate provocation.

a) Article 119(a) as a lesser-included offense. When the evidence places heat of passion and adequate provocation at issue in the trial, the military judge must instruct the members, *sua sponte*, on the lesser included offense of voluntary manslaughter. *United States v. Wells*, 52 M.J. 126 (C.A.A.F. 1999).

b) Objective requirements.

(1) Adequate provocation so as to excite uncontrollable passion in a reasonable man. Adequate provocation is an objective concept. *United States v. Stark*, 17 M.J. 519 (A.C.M.R. 1984) (insulting, teasing, and taunting remarks are inadequate provocation). *But cf. United States v. Saulsberry*, 43 M.J. 649 (Army Ct. Crim. App. 1995) (finding adequate provocation after sustained taunting and simple assault), *aff'd*, 47 M.J. 493 (C.A.A.F. 1998).

(2) Provocation not sought or induced.

(3) Unspent at moment killing occurs. *United States v. Bellamy*, 36 C.M.R. 115 (C.M.A. 1966) (whether a particular provocation has spent its force & what constitutes a reasonable time for cooling off are questions of fact for the panel/fact-finder). The rage must continue throughout the attack. *United States v. Seeloff*, 15 M.J. 978 (A.C.M.R. 1983).

c) Subjective requirements. The accused must in fact have been acting under such a heat of passion, fear, or rage. *See United States v. Staten*, 6 M.J. 275 (C.M.A. 1979); *United States v. Jackson*, 6 M.J. 261 (C.M.A. 1979).

d) Sufficiency of proof. Despite defense claim that accused acted in sudden heat of passion, conviction of premeditated murder of wife's lover was supported by sufficient evidence, including the obtaining of a special knife, decapitation of the victim, and comment to onlookers that "this is what happens when you commit adultery." *United States v. Schap*, 44 M.J. 512 (Army Ct. Crim. App. 1996), *aff'd*, 49 M.J. 317 (C.A.A.F. 1998) (once raised at trial, Gov't must disprove its existence beyond a reasonable doubt).

e) Marital infidelity *alone* is not enough to justify voluntary manslaughter, still need to show accused was deprived of ability to premeditate or that the accused did not premeditate. *United States v. Roukis*, 60 M.J. 925 (Army Ct. Crim. App. 2005) *aff'd*, 62 M.J. 212 (2005).

2. Attempted Voluntary Manslaughter. The offenses of *attempted* voluntary manslaughter and assault with intent to commit voluntary manslaughter require a showing of accused's specific intent to kill. A showing only of a specific intent to inflict great bodily harm will be insufficient to establish these offenses. *United States v. Barnes*, 15 M.J. 121 (C.M.A. 1983).

I. Involuntary Manslaughter Resulting From A Culpably Negligent Act. UCMJ art. 119(b)(1).

1. Intent. The standard of culpable negligence applies. MCM, pt. IV, ¶ 44c(2).

2. Culpable negligence. "A degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others." MCM, pt. IV, ¶ 44c(2)(a)(i).

a) Consequences are "foreseeable" when a reasonable person, in view of all the circumstances, would have realized the substantial and unjustifiable danger created by his acts. *United States v. Oxendine*, 55 M.J. 323 (2001) (holding a drunk victim by his ankles out of a third-story window without safety devices as part of a game of trust).

b) Applications:

(1) Horseplay with Weapon. *United States v. Markert*, 65 M.J. 677 (N-M. Ct. Crim. App. 2007).

(2) Drug overdose death of another. *United States v. Henderson*, 23 M.J. 77 (C.M.A. 1986) (providing drug, encouraging use, providing private room, presence); *United States v. Mazur*, 13 M.J. 143 (C.M.A. 1982) (assisting fellow soldier to inject heroin into his vein); *see generally* Milhizer, *Involuntary Manslaughter and Drug Overdose Death: A Proposed Methodology*, Army Law., Mar. 1989, at 10.

(3) Child Abuse. *United States v. Stanley*, 60 M.J. 622 (A.F. Ct. Crim. App. 2004) (accused violently shook a 6-week old infant, who was resuscitated at the emergency room but remained in a persistent vegitative state; infant died upon removal of life support; the decision to remove life support did not "loom so large" as to relieve the accused of criminal liability); *United States v. Brown*, 26 M.J. 148 (C.M.A. 1988) (violently shaking a child); *United States v. Baker*, 24 M.J. 354 (C.M.A. 1987) (violently throwing child to an unpadded floor); *United States v. Mitchell*, 12 M.J. 1015 (A.C.M.R. 1982) (beating a child who would not stop crying).

(4) Participating in a dangerous joint venture. *United States v. Oxendine*, 55 M.J. 323 (C.A.A.F. 2001) (accused helped hang drunk Marine out of a third story window during thrill-seeking game with other Marines; drunk Marine fell to his death).

(5) Giving car keys to a drunk. *United States v. Brown*, 22 M.J. 448 (C.M.A. 1986).

(6) Failing to follow safety rules and driving after brakes failed. *United States v. Cherry*, 22 M.J. 284 (C.M.A. 1986).

(7) Culpably negligent surgical procedures. *United States v. Ansari*, 15 M.J. 812 (N.M.C.M.R. 1983); *but see United States v. Billig*, 26 M.J. 744 (N.M.C.M.R. 1988).

(8) Failure of parent to seek medical care for child. *United States v. Martinez*, 48 M.J. 689 (Army Ct. Crim. App. 1998), *aff'd*, 52 M.J. 22 (1999); *United States v. Nelson*, 53 M.J. 319 (C.A.A.F. 2000); *but see United States v. Riley*, 58 M.J. 305 (2003) (intentionally unassisted delivery of a baby where medical care was readily available was not culpably negligent so as to support a finding of involuntary manslaughter; found negligent homicide).

3. Proximate Causation.

a) "To be proximate, an act need not be the sole cause of death, nor must it be the immediate cause--the latest in time and space preceding the death. But a contributing cause is deemed proximate only if it plays a material role in the victim's [death]." *United States v. Cooke*, 18 M.J. 152, 154 (C.M.A. 1984) (quoting *United States v. Romero*, 24 C.M.A. 39, 1 M.J. 227, 230, 51 C.M.R. 133 (C.M.A. 1975)).

b) *United States v. Stanley*, 60 M.J. 622 (A.F. Ct. Crim. App. 2004) (accused violently shook a 6-week old infant, who was resuscitated at the emergency room but remained in a persistent vegitative state; infant died upon removal of life support; the decision to remove life support did not "loom so large" as to relieve the accused of criminal liability).

4. Effect of Contributory Negligence. The deceased's or a third party's contributory negligence may exonerate the accused if it "looms so large" in comparison with the accused's negligence that the accused's negligence is no longer a substantial factor in the final result. *United States v. Cooke*, 18 M.J. 152 (C.M.A. 1984).

5. Charge of involuntary manslaughter based upon culpably negligent failure to act requires, as a threshold matter, proof of a legal duty to act. *United States v. Cowan*, 42 M.J. 475 (C.A.A.F. 1995).

6. Involuntary manslaughter by culpable negligence <u>not</u> raised when death is the result of an intentional assault. *United States v. Wilson*, 26 M.J. 10 (C.M.A. 1988).

7. Pleading. When charged under a culpable negligence theory, an involuntary manslaughter specification must allege that death was a reasonably foreseeable consequence of the accused's misconduct. *United States v. McGhee*, 29 M.J. 840 (A.C.M.R. 1989); *see generally* TJAGSA Practice Note, *The Scope of Assault*, Army Law., Apr. 1990, Oct. 67, 68-70 (discusses *McGhee*). After United States v. Jones (

J. Involuntary Manslaughter While Perpetrating An Offense Directly Affecting The Person Of Another. UCMJ art. 119(b)(2).

1. Requires an act affecting some particular person as distinguished from an offense affecting society in general. MCM, pt. IV, ¶ 44c(2)(b).

2. Applications.

a) Assault. *United States v. Jones*, 30 M.J. 127 (C.M.A. 1990); *United States v. Wilson*, 26 M.J. 10 (C.M.A. 1988); *United States v. Madison*, 34 C.M.R. 435 (C.M.A. 1964); *see generally* TJAGSA Practice Note, *Involuntary Manslaughter Based Upon an Assault*, Army Law., Aug. 1990, at 32 (discusses *Jones*); *but see United States v. Richards*, 56 M.J. 282 (2002) (insufficient evidence to necessitate involuntary manslaughter instruction).

b) Drug Overdose Death of Another. *United States v. Sargent*, 18 M.J. 331 (C.M.A. 1984) (mere sale of drugs is not an offense "directly affecting the person of another"); *see also United States v. Dillon*, 18 M.J. 340 (C.M.A. 1984); *see generally* Milhizer, *Involuntary Manslaughter and Drug-Overdose Deaths: A Proposed Methodology*, Army Law., Mar. 1989, at 10.

K. Death or Injury to an Unborn Child. UCMJ Article 119a.

1. Implementing Executive Order signed 18 April 2007. ISSUES:

a) Article 119a exempts the following individuals from prosecution:

(1) Any person authorized by state or federal law to perform abortions for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

(2) Any person for any medical treatment of the pregnant woman or her unborn child; or

(3) Any woman with respect to her unborn child.

b) Intentional Killing of an Unborn Child or Attempts. UCMJ art. 119a specifically states that an individual who intentionally kills an unborn child or attempts to kill an unborn child will be punished under Articles 80, 118, or 119. Nonetheless, Part IV, ¶ 44a.b.(3) & (4) provide elements for an offense involving the intentional killing of an unborn child as well as elements for an offense involving attempts to do so. These elements require the specific intent to kill the unborn child.

c) Scienter. For injuring or killing an unborn child, the government need not prove: 1) that the accused knew the victim was pregnant, nor 2) that the accused should have known that the victim was pregnant. Additionally, for these two offenses, the government need not prove that the accused specifically intended to cause the death of, or bodily injury to, the unborn child.

d) Punishment. Such punishment, other than death, as a court-martial may direct, but shall be consistent with the offense had it occurred to the unborn child's mother.

2. No reported cases on this offense. *But see United States v. Robbins*, 52 M.J. 159 (1999) (prosecuting accused for involuntary manslaughter by terminating the pregnancy

of his wife, in violation of § 2903.04 of the Ohio Revised Code, as assimilated by the Assimilative Crimes Act (ACA)).

L. Negligent Homicide. UCMJ art. 134.

1. Intent. The standard is simple negligence—the absence of due care. An intent to kill or injure is not required. MCM, pt. IV, ¶ 85c(1).

2. Simple Negligence Standard.

a) *See generally United States v. Gargus*, 22 M.J. 861 (A.C.M.R. 1986).

b) *United States v. Riley*, 58 M.J. 305 (C.A.A.F. 2003) (giving birth in hospital bathroom in a manner creating an unreasonable risk of injury, resulting in the death of the newborn). The *Riley* case demonstrates the comparison between involuntary manslaughter (culpable negligence) and negligent homicide (simple negligence). An inexperienced, immature lay person, giving birth for the first time, could not foresee the potential for explosive and unexpected birth and the likelihood of the baby's resultant *death*. Nevertheless, the appellant's simple negligence was the proximate cause of the baby's death and was sufficient to sustain a conviction for negligent homicide because *some* injury was foreseeable.

3. Relationship with Other Homicide Offenses.

a) Negligent homicide is not an LIO of premeditated murder. *United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011).

b) Negligent homicide is not an LIO of involuntary manslaughter. *United States v. McMurrin*, 70 M.J. 15 (C.A.A.F. 2011).

4. Applications.

a) *United States v. McDuffie*, 65 M.J. 631 (A.F. Ct. Crim. App. 2007) (accused diagnosed with sleep apnea, drove vehicle, fell asleep, and drifted into oncoming traffic; involuntary manslaughter conviction set aside and affirmed as negligent homicide).

b) *United States v. Martinez*, 42 M.J. 327 (C.A.A.F. 1995) (allowing fellow soldier to drive accused's vehicle while under the influence of alcohol).

c) *United States v. Robertson*, 37 M.J. 432 (C.M.A. 1993) (failure to obtain medical treatment for child).

d) *United States v. Spicer*, 20 M.J. 188 (C.M.A. 1985) and *United States v. Romero*, 1 M.J. 227 (C.M.A. 1975) (conviction affirmed where accused helped another "shoot up" with heroin, resulting in that person's death by overdose).

e) *United States v. Greenfeather*, 32 C.M.R. 151 (C.M.A. 1962) (vehicle homicide).

f) *United States v. Cuthbertson*, 46 C.M.R. 977 (A.C.M.R. 1972) (aircraft homicide).

g) *United States v. Zukrigl*, 15 M.J. 798 (A.C.M.R. 1983) (failure to check on safety measures for a water crossing exercise).

h) *United States v. Perez*, 15 M.J. 585 (A.C.M.R. 1985) (negligently entrusting child to a babysitter who had a history of assaulting the child).

i) *United States v. Gordon*, 31 M.J. 30 (C.M.A. 1990) (horseplay on a rowboat with a nonswimmer); *see generally* TJAGSA Practice Note, *Negligent Homicide and a Military Nexus*, Army Law., Mar. 1991, at 28 (discusses *Gordon*).

j) *United States v. Billig*, 26 M.J. 744 (N.M.C.M.R. 1988) (offense may not be available for negligent surgical procedures).

k) *United States v. Kick*, 7 M.J. 82 (C.M.A. 1979) (offense of negligent homicide is a proper basis for criminal liability. Furthermore, it has not been preempted by other specified punitive articles, *i.e.*, UCMJ arts. 118 and 119).

5. Military courts have so far refused to use *res ipsa loquitur* to prove negligence in criminal cases. *United States v. Ryan*, 14 C.M.R. 153 (C.M.A. 1954); *United States v. Bryan*, 41 C.M.R. 184 (C.M.A. 1970); *United States v. Thomas*, 11 M.J. 315, 317 n. 2 (C.M.A. 1982).

6. Proximate Cause. The negligence must be the proximate cause of the death. Although proximate cause does not mean sole cause, it does mean a material and foreseeable cause. *United States v. Perez*, 15 M.J. 585 (A.C.M.R. 1983) (death of child foreseeable where mother left child with boyfriend who had twice previously seriously injured child).

XXXVI. KIDNAPPING. UCMJ ART. 134.

A. Elements.

1. That the accused seized, confined, inveigled, decoyed, or carried away a certain person;

2. That the accused then held such person against that person's will;

3. That the accused did so willfully and wrongfully; and

4. That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

B. Theories of Prosecution.

1. If the misconduct occurred in an area over which the United States exercises exclusive or concurrent jurisdiction, the accused may be charged with violating state penal law as assimilated into federal law by the Assimilative Crimes Act, 18 U.S.C. § 13, which, in turn, is incorporated into military law under the Clause 3 of Article 134.

2. If it meets the jurisdictional requirements of the Federal Kidnapping Act, 18 U.S.C. § 1201, which is also assimilated into military law by Clause 3 of Article 134, the crime may be prosecuted under that statute.

3. Kidnapping may be charged as conduct which is service-discrediting or prejudicial to good order and discipline, in violation of Article 134. *United States v. Jeffress*, 28 M.J. 409 (C.M.A. 1989).

C. Nature of Detention. In order to convict accused of kidnapping, there must be more than "incidental" detention.

1. Factors to consider in determining whether the detention was incidental include:

a) Whether there was confinement or carrying away and holding for a period of time;

b) The duration of detention;

c) Whether the detention occurred during the commission of a separate offense;

d) The character of any separate offense;

e) Whether the detention or asportation exceeded that which was inherent in any separate offense and, in the circumstances, showed a voluntary and distinct intention to move/detain the victim beyond that necessary to commit the separate offense at the place where the victim was first encountered; and

f) Whether there was any additional risk to victim beyond that inherent in commission of any separate offense. *United States v. Barnes*, 38 M.J. 72 (C.M.A. 1993) (evidence that victim was locked in room and detained for over two hours against her will during the commission of multiple assaults was more than incidental detention).

2. *United States v. Seay*, 60 M.J. 73 (C.A.A.F. 2004). Accused and accomplice removed victim from his home, strangled, and pinned victim to ground before stabbing victim to death. These acts of restraint and asportation (removing the victim from his home) occurred prior the actual murder and exceeded the acts inherent to the commission of the murder.

3. *United States v. Newbold*, 45 M.J. 109 (C.A.A.F. 1996) (victim was moved no more than 12 feet and was detained only long enough to complete the multiple indecent and aggravated assaults; however, movement of the victim limited the possibility of escape, and once the detention began, the subsequent offenses necessarily were "fed" by the increasingly more heinous actions of the assailants; thus, asportation was not merely incidental to other charged offenses, and evidence was sufficient to sustain guilty plea).

4. *United States v. Jeffress*, 28 M.J. 409 (C.M.A. 1989) (detention of victim consisted of moving her some 15 feet; she was moved from traveled area into greater darkness; there was increased risk of harm to the victim; dragging victim away from beaten path was not inherent in offense of forcible sodomy; factually sufficient to sustain a guilty plea to kidnapping).

5. *United States v. Broussard*, 35 M.J. 665 (A.C.M.R. 1992) (accused grabbed his wife from behind, dragged her into the bedroom, bound her arms and legs to furniture, and held her for a sufficient period of time).

6. *United States v. Caruthers*, 37 M.J. 1006 (A.C.M.R. 1993) (accused's asportation and holding of his wife were more than incidental; accused conceded his wife was seized or held when she was grabbed from behind, gagged, tied and dragged short distance away where she was held for two to three-hour period during commission of sexual assaults).

D. Inveigling. "Inveigle" means to lure, lead astray, or entice by false representations or other deceitful means. MCM, pt. IV, ¶ 92.c.(1).

1. *United States v. Blocker*, 32 M.J. 281 (C.M.A. 1991) (kidnapping conviction affirmed where accused inveigled 17-year-old victim to remain in car when he drove off highway and down dirt hiking path before raping her).

2. *United States v. Mathai*, 34 M.J. 33 (C.M.A. 1992) (NCO accused inveigled victim into his office by stating, "Follow me, Private," after which he prevented her from leaving the room several times and held her against her will).

E. The involuntariness of the seizure and detention is the essence of the offense of kidnapping. Once the offense is complete, the duration of the restraint is not germane, except for sentencing

purposes. *United States v. Bailey*, 52 M.J. 786 (A.F. Ct. Crim. App. 1999) (victim did not tell the accused she wanted to go home, and after initially getting out of the accused's truck and being carried back, she did not try to get out of the truck again; however, a victim is not required to voice lack of consent under the law; once the accused carried the unwilling victim back to his truck, the offense of kidnapping was complete), *aff'd*, 55 M.J. 38 (C.A.A.F. 2001).

F. Lesser Included Offenses. Reckless engangerment is not a lesser included offense of kidnapping. *United States v. Thompson*, 67 M.J. 106 (C.A.A.F. 2009).

XXXVII. MAIMING. UCMJ ART. 124.

A. Elements.

1. That the accused inflicted a certain injury upon a certain person;

2. That this injury seriously disfigured the person's body, destroyed or disabled an organ or member, or seriously diminished the person's physical vigor by the injury to an organ or member; and

3. That the accused inflicted this injury with an intent to cause some injury to a person.

B. Nature of Offense. The disfigurement, diminishment of vigor, or destruction or disablement of any member or organ must be a serious injury of a substantially permanent nature. However, the offense is complete if such an injury is inflicted even though there is a possibility that the victim may eventually recover the use of the member or organ, or that the disfigurement may be cured by surgery. MCM, pt. IV, ¶ 50.c.(1).

C. Intent. Maiming is a specific intent crime. The government must prove a specific intent to injure a person, **not** the specific intent to maim or inflict grievous bodily harm.

1. The 1969 Manual described maiming as a general intent crime. MCM, 1969, ¶ 203. This interpretation was based on *United States v. Hicks*, 20 C.M.R. 337 (C.M.A. 1956). *See also United States v. Tua*, 4 M.J. 761 (A.C.M.R. 1977).

2. The 1984 Manual, however, also relying on *Hicks*, describes maiming as requiring a specific intent to injure generally, <u>not</u> a specific intent to maim. MCM, pt. IV, ¶ 50c, analysis. *See United States v. Berri*, 33 M.J. 337 (C.M.A. 1991).

3. When grievous bodily harm has been inflicted by means of intentionally using force in a manner likely to achieve that result, it may be inferred that grievous bodily harm was intended. MCM, pt. IV, ¶ 54.c.(4)(b)(ii); *United States v. Allen*, 59 M.J. 515 (N-M. Ct. Crim. App. 2003) (circumstantial evidence of injury to infant victim sufficient to support inference of accused's intent to injure; affirmed conviction for maiming), *aff'd*, 59 M.J. 478 (C.A.A.F. 2004). [NOTE: Intent to inflict grievous bodily harm is not required for maiming, but the facts of this case supported that finding].

D. Injury.

1. Must be a serious injury of a substantially permanent nature.

2. Maiming may exist even if the injury can be cured by surgery, or if the disfigurement would not be visible under everyday circumstances. *United States v. Spenhoff*, 41 M.J. 772 (A.F. Ct. Crim. App. 1995) (scar on victim's buttocks). *But see United States v. McGhee*, 29 M.J. 840 (A.C.M.R. 1989) (where the scars to the victim's face and body, predominately on the buttocks, were not easily detectable to the casual observer, the injury was insufficient to support a maiming charge), *rev'd in part on other grounds*, 32 M.J. 322 (C.M.A. 1991).

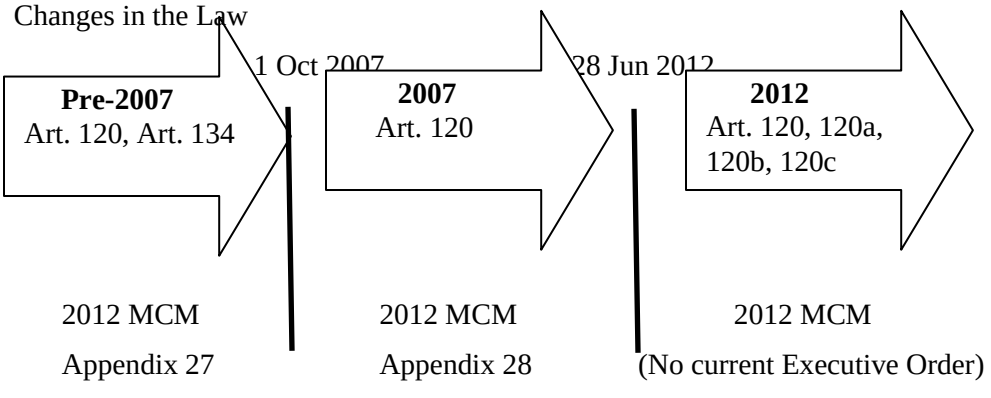
3. Disfigurement need not mutilate an entire body part, but it must cause visible bodily damage and significantly detract from the victim's physical appearance. *United States v. Outin*, 42 M.J. 603 (N-M. Ct. Crim. App. 1995) (scars sustained by child victim who was immersed in scalding water were clearly visible at trial and substantially permanent in nature supported conviction for maiming, even though doctor testified that scars would become less visible with passage of time); *United States v. Morgan*, 47 M.J. 644 (Army Ct. Crim. App. 1997) (permanent scarring and de-pigmentation of the infant victim's groin and buttocks, caused by the accused's immersing him in scalding water, was "perceptible and material" disfigurement within the meaning of Article 124, even though the injury would normally be covered from public view by clothing and affected a relatively small area of the child's skin).

XXXVIII. SEXUAL OFFENSES.

Based on significant comprehensive revisions to Article 120 in 2007 and again in 2011, as well as a number of judicial decisions and considerable policy changes, an extensive discussion of sexual crimes appears in **Volume 4 of the Criminal Law Deskbook (Tab C)**.

Because three different versions of Article 120, different laws may apply to the same case; therefore, practitioners must remain cognizant of (1) the date the offense occurred and (2) the statute of limitations when deciding which offenses to research.

A. Changes in the Law



B. Pre 2007 Sexual Offenses (outline subparagraph number)

Article 120

Adult Crime	Child Crime
- Rape (B.1)	- Carnal Knowledge (B.2)

Article 125

- Sodomy (B.3)

Article 134

Child Crimes
- Indecent Acts or Liberties with a Child (B.4)

Other Sexual Crimes
- Indecent Assault (B.5)
- Indecent Exposure (B.6)
- Indecent Acts (B.7)

1. Rape (pre-1 October 2007). MCM, App. 27, ¶ 45.

a) Elements.

(1) That the accused committed an act of sexual intercourse; and

(2) That the act of sexual intercourse was done by force and without consent.

b) Article 120 has no spousal exemption and is gender-neutral.

c) Any penetration, however slight, is sufficient. *United States v. Aleman*, 2 C.M.R. 269 (A.B.R. 1951).

d) In determining whether force and lack of consent occurred, a totality of the circumstances must be considered. *See United States v. Webster*, 40 M.J. 384, 386 (C.M.A. 1994).

e) Lack of Consent.

(1) Competence to consent.

(a) No consent exists where victim is incompetent, unconscious, or sleeping. *United States v. Booker*, 25 M.J. 114 (C.M.A. 1987); *United States v. Robertson*, 33 C.M.R. 828 (A.F.B.R. 1963); *United States v. Maithai*, 34 M.J. 33 (C.M.A. 1992); *United States v. Grier*, 53 M.J. 30 (C.A.A.F. 2000).

(b) A child of tender years is incapable of consent. *United States v. Aleman*, 2 C.M.R. 269 (A.B.R. 1951); *United States v. Thompson*, 3 M.J. 168 (C.M.A. 1977); *see United States v. Huff*, 4 M.J. 816 (A.C.M.R. 1978) (because victim is under 16, proof of age is proof of nonconsent allowing fresh complaint evidence).

(2) Resistance by Victim.

(a) The lack of consent required is more than mere lack of acquiescence. If a victim in possession of his or her mental faculties fails to make lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that the victim did consent. *See* MCM, App. 27, ¶ 45.c.(1)(b).

(b) If victim is capable of resistance, evidence must show more than victim's lack of acquiescence. *United States v. Bonano-Torres*, 31 M.J. 175 (C.M.A. 1990) (acquiescence to intercourse with accused so the "victim" could go to sleep is insufficient for rape).

(c) Consent may be inferred unless victim makes her lack of consent "reasonably manifest by taking such measures of resistance as are called for by the circumstances." *United States v. Tollinchi*, 54 M.J. 80 (C.A.A.F. 2000) (holding successful resistance by intoxicated seventeen-year-old victim to oral sodomy, followed by lack of resistance to intercourse, rendered rape conviction legally insufficient).

(d) Verbal protest may be sufficient to manifest a lack of consent sufficient to support rape. *United States v. Webster*, 40 M.J. 384 (C.M.A. 1994) (evidence of unwavering and repeated verbal protest in context of a surprise nonviolent sexual aggression by boyfriend was considered reasonable resistance).

(3) Resistance by Victim Not Required.

(a) Consent may not be inferred if resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties. All the surrounding circumstances are to be considered in determining whether a victim gave consent, or whether he or she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm. *See* MCM, pt. App. 27, ¶ 45.c.(1)(b).

(b) Proof of rape of a daughter by her father may not require physical resistance if intercourse is accomplished under long, continued parental duress. *United States v. Dejonge*, 16 M.J. 974 (A.F.C.M.R. 1983); *see United States v. Palmer*, 33 M.J. 7 (C.M.A. 1991); *see United States v. Davis*, 52 M.J. 201 (1999); *United States v. Young*, 50 M.J. 717 (Army Ct. Crim. App. 1999) (compulsion may apply even when child is not a minor); *see generally* TJAGSA Practice Note, *Proving Lack of Consent for Intra-Family Sex Crimes*, Army Law., Jun. 1990, at 51.

(c) Cooperation with assailant after resistance is overcome by numbers, threats, or fear of great bodily harm is not consent. *United States v. Burt*, 45 C.M.R. 557 (A.F.C.M.R. 1972); *United States v. Evans*, 6 M.J. 577 (A.C.M.R. 1978); *United States v. Lewis*, 6 M.J. 581 (A.C.M.R. 1978).

(d) Whether the rape victim was justified in resisting by words alone involves a factual issue whether she viewed physical resistance as impractical or futile. *United States v. Burns*, 9 M.J. 706 (N.C.M.R. 1980).

(4) Mistake as to Consent. An honest and reasonable mistake of fact to the victim's consent is a defense. *United States v. Hibbard*, 58 M.J. 71 (2003); *United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988); *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984); *United States v. Davis*, 27 M.J. 543 (A.C.M.R. 1988); *United States v. True*, 41 M.J. 424 (1995) (mistake of fact as to victim's consent to intercourse cannot be predicated upon accused's negligence; mistake must be honest and reasonable); *United States v. Traylor*, 40 M.J. 248 (C.M.A. 1994) (mistake of fact as to consent is not reasonable when based upon belief by accused that victim would consent to intercourse with anyone); *United States v. Parker*, 54 M.J. 700 (Army Ct. Crim. App. 2000)

(evidence factually insufficient to sustain conviction where accused claimed he mistakenly believed that the victim consented to intercourse and sodomy where she and the accused engaged in a consensual relationship for several months before the first alleged rape, she sent mixed signals to the accused about their relationship and the relationship included consensual sexual acts).

(5) Consent Obtained by Fraud. Consent obtained by fraud in the inducement (*e.g.*, lying about marital status or desire to marry, a promise to pay money or to respect sexual partner in the morning) will not support a charge of rape. Consent obtained by fraud in factum (*i.e.*, a misrepresentation of act performed or some aspects of identity) can support a rape charge. *United States v. Booker*, 25 M.J. 114 (C.M.A. 1987).

(6) Identity of partner. The victim's consent is not transferable to other partners. *United States v. Traylor*, 40 M.J. 248 (C.M.A. 1994) (victim consented to sexual intercourse with one soldier but during intercourse, another soldier, the accused, penetrated the victim without first obtaining her consent and victim was not aware of the accused's presence until he had already penetrated her without consent).

f) Relationship Between Elements of Lack of Consent and Force. Although force and lack of consent are separate elements, there may be circumstances in which the two are so closely intertwined that both elements may be proved by the same evidence. Consent induced by fear, fright, or coercion is equivalent to physical force. Such constructive force may consist of expressed or implied threats of bodily harm. *United States v. Simpson*, 58 M.J. 368, 377 (C.A.A.F. 2003).

g) Force.

(1) When constructive force is not at issue and the victim is capable of resisting, some force more than that required for penetration is necessary; persistent sexual overtures are not enough. *United States v. Bonano-Torres*, 31 M.J. 175 (C.M.A. 1990).

(2) If a victim is incapable of consenting, no greater force is required than that necessary to achieve penetration. *United States v. Grier*, 53 M.J. 30 (C.A.A.F. 2000).

(3) *United States v. Cauley*, 45 M.J. 353 (C.A.A.F. 1996) (sufficient force where victim testified that she accompanied the accused without protest to his private quarters knowing that the accused intended to engage in sexual intercourse and offered no physical resistance as the accused removed her clothing and positioned her on the bed, but further testified that before sexual intercourse she told accused "no" several times and that she did "not want to do this" and "wanted to go home", that she turned her face when he attempted to kiss her and that he used his legs to pry her legs open). *But see United States v. King*, 32 M.J. 558 (A.C.M.R. 1991) (evidence insufficient to show requisite force).

(4) Constructive Force.

(a) If resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties, there is no consent and the force involved in penetration will suffice. *See* MCM, App. 27, ¶ 45.c.(1)(b).

(b) Constructive force, as a substitute for actual force, may consist of express or implied threats of bodily harm. *United States v. Bradley*, 28 M.J. 197 (C.M.A. 1989) (threat of imprisoning husband); *United States v. Hicks*, 24 M.J. 3 (C.M.A. 1987); *United States v. Palmer*, 33 M.J. 7 (C.M.A. 1991) (parental figure can exert a psychological force over child that is constructive force).

(c) Force can be subtle and psychological, and need not be overt or physically brutal. *United States v. Torres*, 27 M.J. 867 (A.F.C.M.R. 1989) *clarified*, 1989 CMR LEXIS 1042 (A.F.C.M.R. Nov. 15, 1989); *United States v. Sargent*, 33 M.J. 815 (A.C.M.R. 1991), *aff'd*, 36 M.J. 14 (C.M.A. 1992).

(d) Constructive force in the form of parental compulsion is not limited to cases in which the victim is under 16 years of age. Age is one factor to consider in determining whether victim's resistance was overcome by parental compulsion. *United States v. Young*, 50 M.J. 717 (Army Ct. Crim. App. 1999) (accused started to "groom" and "condition" his stepdaughter when she was five years old; sexual intercourse started when she was 11 years old; accused was convicted of raping his stepdaughter from when she was 16 to 20 years old).

(e) Rank disparity alone is not sufficient to show constructive force. Other factors are relevant. *United States v. Simpson*, 58 M.J. 368, 377 (C.A.A.F. 2003) (accused was in a power relationship, not a dating one, with the trainees he was accused of raping and the court noted: (1) the accused's physically imposing size; (2) his reputation in the unit for being tough and mean; (3) his position as a noncommissioned officer; (4) his actual and apparent authority over each of the victims in matters other than sexual contact; (5) the location and timing of the assaults, including his use of his official office and other areas within the barracks in which the trainees were required to live; (6) his refusal to accept verbal and physical indications that his victims were not willing participants; and (7) the relatively diminutive size and youth of his victims, and their lack of military experience; and finally, the accused's abuse of authority in ordering the victims to isolated locations where the charged offenses occurred).

(f) *United States v. Bright*, 66 M.J. 359 (C.A.A.F. 2008). The accused was a drill sergeant and was convicted of raping a female trainee on three separate occasions. The court concluded there was insufficient evidence, based on totality of circumstances, regarding lack of consent. First, the court observed that the record is devoid of any evidence that PVT W manifested a lack of consent or took any measures to resist sexual intercourse. She made arrangements to meet him at a hotel knowing that sex would occur and she made her own way to the hotel to meet him. On two occasions, she arrived at the hotel first and waited for him. Additionally, even though she resisted sodomy on one occasion, there is no evidence that she resisted "normal sexual intercourse" in any way, verbal or physical. The court next concluded that there is no evidence to support the inference that resistance would have been futile or that he resistance would have been overcome by threats of death or grievous bodily harm. The accused never threatened her physically—the only threat was to take away her pass status. Finally, the court distinguished PVT W's perceived futility of resistance from the facts in *United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003) (where the accused ordered his victims into isolated areas, initiated sexual activity, and then refused to accept "verbal and physical indications that his victims were not willing participants") and *United States v. Clark*, 35 M.J. 432 (C.M.A. 1992) (where the accused cornered the victim in a "small shed with brick walls and a metal door and . . . positioned himself between the door and the victim").

h) Lesser Included Offenses. When considering the lesser included offenses under the "old Article 120," it is important to consider the lesser included offenses as they existed prior to October 2007. However, it is also important to consider the current case law with regard to lesser included offense. *See United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008); *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009); *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). While Appendix 27 of the 2012 MCM contains the "old Article 120" offenses as well as the "old Article 134" offenses, that, at the time were considered lesser included offenses, **you must** consider the strict elemental test in determining what are the **actual lesser included offenses**. In order for an accused to be on notice of a lesser included offense, the government must allege every element, expressly or by necessary implication, including the terminal element of an Article 134 offense.

(1) Carnal knowledge. Carnal knowledge is a lesser included offense of rape when the pleading alleges that the victim has not yet attained the age of 16 years. *See infra* ¶ V.B.2, this chapter.

(2) Attempted rape.

(a) Accused who was dissuaded by the victim from completing the rape and abandoned the act could be found

guilty of attempted rape. *United States v. Valenzuela*, 15 M.J. 699 (A.C.M.R. 1983), *aff'd in part, rev'd in part on multiplicity grounds*, 16 M.J. 305 (C.M.A. 1983). *But see United States v. Byrd*, 24 M.J. 286 (C.M.A. 1987) (voluntary abandonment is a defense to attempted rape, but evidence insufficient to establish defense in this case). *See* MCM, pt. IV, ¶ 4.c.(4); *supra*, ch. 2, ¶ I.E.

(b) *United States v. Polk*, 48 C.M.R. 993 (A.F.C.M.R. 1974) (gross and atrocious attempt to persuade the victim to consent to intercourse is not attempted rape but may be indecent assault).

i) Multiplicity.

(1) Rape and aggravated assault are multiplicious for findings. *United States v. Sellers*, 14 M.J. 211 (C.M.A. 1982) (summary disposition); *see United States v. DiBello*, 17 M.J. 77 (C.M.A. 1983).

(2) Rape and communication of a threat are multiplicious for findings. *United States v. Hollimon*, 16 M.J. 164 (C.M.A. 1983).

(3) Two rapes of same victim are not multiplicious for any purpose where first rape completely terminated before second rape began. *United States v. Ziegler*, 14 M.J. 860 (A.C.M.R. 1982); *accord United States v. Turner*, 17 M.J. 997 (A.C.M.R. 1984).

(4) Rape and extortion are not multiplicious for findings or sentence. *United States v. Hicks*, 24 M.J. 3 (C.M.A. 1987).

(5) Rape and adultery charges are not multiplicious for findings. *United States v. Hill*, 1997 CAAF LEXIS 1093 (Sept. 30, 1997); *United States v. Mason*, 42 M.J. 584 (Army Ct. Crim. App. 1995).

(6) Rape, sodomy, and indecent acts or liberties with a child are separate offenses. *United States v. Cox*, 42 M.J. 647 (A.F. Ct. Crim. App. 1995), *aff'd*, 45 M.J. 153 (C.A.A.F. 1996).

j) Punishment.

(1) *United States v. Stebbins*, 61 M.J. 366 (C.A.A.F. 2005). Appellant pled guilty to rape and sodomy of a child under the age of twelve. LWOP is an authorized punishment for rape after November 18, 1997 (extending the reasoning of *United States v. Ronghi*, 60 M.J. 83 (C.A.A.F. 2004)).

(2) Capital Punishment.

(a) Although UCMJ art. 120(a) authorizes the death penalty for rape, a plurality of the Supreme Court in *Coker v. Georgia*, 433 U.S. 584 (1977) held that the death penalty for the rape of an adult woman was cruel and unusual punishment regardless of aggravating circumstances. R.C.M. 1004(c)(9), revised to account for *Coker*, limits the death penalty for rape to cases where the victim is under the age of 12 or where the accused maimed

or attempted to kill the victim. *See generally United States v. Straight*, 42 M.J. 244, 247 (C.A.A.F. 1995).

(b) In 2008, the Supreme Court held that the death penalty for the rape of a child is unconstitutional where the child was not killed. In *Kennedy v. Louisiana*, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008), the Court held that a Louisiana statute authorizing the imposition of the death penalty for the rape of a child under the age of 12 is prohibited by the Eighth Amendment and Fourteenth Amendments and is unconstitutional. The holding states specifically that "a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional." Slip Opinion at 10. The case does not include the UCMJ in its survey of jurisdictions that provide death as the maximum punishment for the rape of a child under 12 years of age. In denying a petition for rehearing based on the exclusion of the military from the survey of jurisdictions retaining the death penalty for child rape, the Court stated that the fact that the Manual for Courts-Martial "retains the death penalty for rape of a child or an adult . . . does not draw into question our conclusions that there is a consensus against the death penalty for the crime in the civilian context. . . ." Suggesting, perhaps, that there may be facts, circumstances, or policy reasons justifying death as a punishment for child rape when committed by a member of the military, the court declined to "decide whether certain considerations might justify differences in the application of the Cruel and Unusual Punishments Clause to military cases . . . ." *See Kennedy v. Louisiana*, No. 07-343 (U.S. Oct. 1, 2008) (statement accompanying denial of petition for rehearing).

2. Carnal Knowledge. MCM, App. 27, ¶ 45; UCMJ art. 120(b).

a) Elements.

(1) That the accused committed an act of sexual intercourse with a certain person;

(2) That the person was not the accused's spouse; and

(3) That at the time of the sexual intercourse the person was less than 16 years of age.

b) This offense is gender-neutral.

c) Article 120(d), UCMJ, provides special defense to carnal knowledge based upon mistake of fact as to the age of the victim.

(1) The accused bears both the burden of production and persuasion for this defense.

(2) The defense applies only if the victim has attained the age of 12.

(3) The accused must establish by a preponderance of the evidence that the mistake by the accused as to the age of the victim was both honest and reasonable.

d) Honest and reasonable mistake as to identity of accused's sexual partner constitutes a legal defense. *United States v. Adams*, 33 M.J. 300 (C.M.A. 1991).

e) The victim is not an "accomplice" for purposes of a witness credibility instruction. *United States v. Cameron*, 34 C.M.R. 913 (A.F.B.R. 1964).

f) Marriage.

(1) Government may prove that the accused and the prosecutrix were not married without direct evidence on the issue. *United States v. Wilhite*, 28 M.J. 884 (A.F.C.M.R. 1989).

(2) Carnal knowledge form specification is sufficient even though it does not expressly allege that the accused and his partner were not married. *United States v. Osborne*, 31 M.J. 842 (N.M.C.M.R. 1990).

g) Multiplicity. Carnal knowledge and adultery are not multiplicious for findings. *United States v. Booker*, No. 97-0913, 1999 CAAF LEXIS 637 (C.A.A.F. Feb. 19, 1999)(unpublished).

h) Statute of Limitations. *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000) (statute of limitations codified at 18 U.S.C. § 3283, which permits prosecution for offenses involving sexual or physical abuse of children under the age of 18 until the child reaches the age of 25, does not apply to courts-martial as UCMJ Article 43 provides the applicable statute of limitations for courts-martial). *Willenbring v. Neurauter*, 48 M.J. 152 (C.A.A.F. 1998) (statute of limitations under Article 43 does not bar trial for rape, as any offense "punishable by death" may be tried at any time without limitation, even if it is referred as a noncapital case), *aff'd*, 57 M.J. 321 (C.A.A.F. 2002).

3. Sodomy. MCM, pt. IV, ¶ 51; UCMJ art. 125.

a) Elements.

(1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.

(2) (If applicable) That the act was done with a child under the age of 16.

(3) (If applicable) That the act was done by force and without the consent of the other person.

b) Constitutionality.

(1) Before *Lawrence v. Texas*, 123 S.Ct. 2472 (2003), it was clear that Article 125 was constitutional, even as applied to private, consensual sodomy between spouses.

(2) *United States v. Allen*, 53 M.J. 402 (C.A.A.F. 2000) (Constitutional right to privacy (engaging in sexual relations within a marital relationship) must bear a reasonable relationship to activity that is in furtherance of the marriage. As part of a pattern of abuse, the accused beat his wife, solicited her to prostitute herself, and anally sodomized

her. Prior to the assaults, she had refused anal sodomy, because she was forcibly sodomized as a teenager).

(3) United *States v. Thompson*, 47 M.J. 378 (C.A.A.F. 1997) (accused could not claim that an act of consensual sodomy with his wife was protected by the constitutional right to privacy, where his wife performed fellatio on him in an attempt to divert his attention away from reloading a pistol which had misfired moments before when he put it against her head and pulled the trigger).

(4) Article 125's prohibition of "unnatural carnal copulation" is not unconstitutionally vague. *United States v. Scoby*, 5 M.J. 160 (C.M.A. 1978).

(5) *Lawrence*: However, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court overruled as unconstitutional a Texas law criminalizing consensual homosexual sodomy. In that case the Court stated that "[t]he State cannot demean a homosexual person's existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."

(6) Post-*Lawrence* cases:

(a) *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). Appellant was an NCO supervisor of junior airmen newly assigned to his flight. He regularly socialized with his subordinates, who often spent the night at his off-post home after parties. Appellant was charged, *inter alia*, with forcible sodomy under Art. 125 but was convicted of the lesser included offense of non-forcible sodomy. The CAAF affirmed Marcum's conviction, holding that as applied to appellant and in the context of his conduct, Art. 125 is constitutional. The court assumed without deciding that appellant's conduct involved private sodomy between consenting adults, appellant's conduct was nevertheless outside the liberty interest recognized in *Lawrence*. Specifically, appellant was the airman's supervising NCO and knew his behavior was prohibited by service regulations concerning improper senior-subordinate relationships. Here, the situation involved a person "who might be coerced" and a "relationship where consent might not easily be refused," facts the Supreme Court specifically identified as not present in *Lawrence*. The CAAF explicitly did not decide whether Art. 125 would be constitutional in other settings.

(b) *Marcum* 3-Part Test for determining when the Constitution allows the prohibition of sodomy:

(i) Is the accused's conduct within the liberty interest identified by the Supreme Court in *Lawrence*?

(ii) Does the conduct encompass any behavior or factors identified as outside the analysis in *Lawrence* (i.e., public acts, prostitution, minors, persons who might be injured or coerced or who might not easily refuse consent)?

(iii) Are there additional factors relevant solely in the military environment that affect the reach of the *Lawrence* liberty interest?

(c) *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004) (non-forcible sodomy that violated service regulations prohibiting improper relationships between members of different ranks; citing *Marcum*, his conduct fell outside any liberty interest recognized in *Lawrence*).

(d) *United States v. Christian*, 61 M.J. 560 (N-M. Ct. Crim. App. 2005) (consensual sodomy between accused, a recruiter, and "RW," originally a volunteer ASVAB tutor at the accused's recruiting office; although private and not specifically excepted under *Lawrence*, appellant's conduct implicated military-specific interests described in the third prong of the *Marcum* framework. Specifically, his role as a Marine recruiter & his violation of a recruit depot general order). *United States v. Bart*, 61 M.J. 578 (N-M. Ct. Crim. App. 2005) (consensual sodomy between co-workers in violation of SecNavy Instruction, involved adultery, and one partner murdered a spouse to continue the relationship combined to violate *Marcum* third prong).

(e) *United States v. Smith*, 66 M.J. 556 (C.G. Ct. Crim. App. 2008). Assuming *arguendo* that the conduct was not the result of extortion, the sodomy in this case was between two consenting first-class cadets in different chains of command. As such, the court observed that the conduct appeared to fall within the *Lawrence* liberty interest. However, addressing the *Marcum* factors, the court found that Coast Guard Academy regulations prohibit sexual activities between cadets on board military installations, even if consensual. As there is a regulation prohibiting the behavior, the court held that the conduct constituting sodomy fell outside the protected liberty interest recognized in *Lawrence v. Texas*.

(f) *United States v. Harvey*, 67 M.J. 758 (A.F. Ct. Crim. App. 2009). In a prosecution of sodomy under Art. 133 as conduct umbecoming, military judge did not err in failing to instruct the members on the *Marcum* factors. "Whether an act comports with law, that is, whether it is legal or illegal [in relation to a constitutional or statutory right of

an accused] is a question of law, not an issue of fact for determination by the triers of fact."

c) Acts Covered.

(1) "Unnatural carnal copulation" includes both fellatio and cunnilingus. *United States v. Harris*, 8 M.J. 52 (C.M.A. 1979).

(2) Some penetration, however, is required. UCMJ art. 125; *United States v. Barrow*, 42 M.J. 655 (A.F. Ct. Crim. App. 1995) (holding "intercourse" is a synonym for "copulation" and connotes act of penetration that the term "oral sex" does not), *aff'd*, 45 M.J. 478 (C.A.A.F. 1997); *United States v. Deland*, 16 M.J. 889 (A.C.M.R. 1983) *aff'd in part, rev'd in part on multiplicity grounds*, 22 M.J. 70 (C.M.A. 1986). Penetration, however slight, by male genital into orifice of human body except the vagina is sufficient. *United States v. Cox*, 23 M.J. 808 (N.M.C.M.R. 1986). Specification alleging "licking the genitalia" was not inconsistent with the penetration required for sodomy. *United States v. Cox*, 18 M.J. 72 (C.M.A. 1984); *United States v. Green*, 52 M.J. 803 (N-M. Ct. Crim. App. 2000) (victim's testimony that the accused's head was between her legs, his hands were on her thighs, her legs were spread apart, his mouth was on her vagina, he performed "oral sex," and he "was in between" her was sufficient to prove penetration). However, proof of licking, without proof of penetration, is insufficient for guilt. *United States v. Milliren*, 31 M.J. 664 (A.F.C.M.R. 1990); *see generally* TJAGSA Practice Note, *Sodomy and the Requirement for Penetration*, Army Law., Mar. 1991, at 30 (discussing *Milliren*).

d) Evidence is sufficient to prove forcible sodomy where the child victim submitted under compulsion of parental command. *United States v. Edens*, 29 M.J. 755 (A.C.M.R. 1989), *aff'd*, 31 M.J. 267 (C.M.A. 1990). Evidence of a threat by the accused to impose nonjudicial punishment upon the victim, under the circumstances, was not sufficient to prove forcible sodomy. *United States v. Carroway*, 30 M.J. 700 (A.C.M.R. 1990).

e) The defense is entitled to an accomplice instruction when the victim participates voluntarily in the offense. *United States v. Goodman*, 33 C.M.R. 195 (C.M.A. 1963).

f) Multiplicity.

(1) Attempted rape and forcible sodomy or rape and forcible sodomy arising out of the same transaction are separately punishable. *United States v. Dearman*, 7 M.J. 713 (A.C.M.R. 1979); *accord United States v. Rogan*, 19 M.J. 646 (A.F.C.M.R. 1984) (Burglary, rape, and sodomy were all separately punishable offenses since different societal norms were violated in each instance. Burglary is a crime against the habitation, rape an offense against the person, and sodomy an offense against morals); *United States v. Rose*, 6 M.J. 754 (N.C.M.R. 1978).

(2) Despite unity of time, offenses of sodomy and indecent liberties with a child were separate for findings and sentencing. *United States v. Cox*, 18 M.J. 72 (C.M.A. 1984). *Accord United States v. Cox*, 42 M.J. 647 (A.F. Ct. Crim. App. 1995), *aff'd* 45 M.J. 153 (C.A.A.F. 1996).

4. Indecent Acts or Liberties with a Child. MCM, App. 27, ¶ 87.

a) The discussion that follows pertains to Indecent Acts or Liberties with a Child as it existed under Article 134 prior to October 2007.

b) Elements.

(1) Physical contact.

(a) That the accused committed a certain act upon or with the body of a certain person;

(b) That the person was under 16 years of age and not the spouse of the accused.

(c) That the act of the accused was indecent;

(d) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and

(e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) No physical contact.

(a) That the accused committed a certain act;

(b) That the act amounted to the taking of indecent liberties with a certain person;

(c) That the accused committed the act in the presence of this person.

(d) That the person was under 16 years of age and not the spouse of the accused.

(e) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and

(f) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c) Not limited to female victim.

d) Consent is not a defense, as a child of tender years is incapable of consent. However, factual consent of an alleged victim is relevant on the issue of indecency. Consensual petting between an eighteen-year-old and a fifteen-year-old is not necessarily outside the scope of the offense of indecent acts with a child, but it is a question for the members under proper instructions. Here, the military judge committed plain error when she failed to provide adequately tailored instructions on the issue of indecency after a court-martial member asked for such instructions. *United States v. Baker*, 57 M.J. 330 (C.A.A.F. 2002).

e) Requires evidence of a specific intent to gratify the lust or sexual desires of the accused *or* the victim. *United States v. Johnson*, 35 C.M.R. 587 (A.B.R. 1965); *see United States v. Robertson*, 33 M.J. 832 (A.C.M.R. 1991) (absent a specific intent to gratify lust, accused's act of buying 14 year-old daughter a penis shaped vibrator and "motion lotion" did not amount to an indecent act), *rev'd on other grounds*, 37 M.J. 432 (C.M.A. 1993).

f) Physical presence required; constructive presence insufficient. *See United States v. Miller*, 67 M.J. 87 (C.A.A.F. 2008) (constructive presence through web-cam and Yahoo! chatroom insufficient for an attempted indecent liberties charge).

g) Application.

(1) Indecent acts.

(a) Physical contact is required. *United States v. Payne*, 41 C.M.R. 188 (C.M.A. 1970) (accused placed hand between child's legs); *United States v. Sanchez*, 29 C.M.R. 32 (C.M.A. 1960) (accused exposed his penis to child while cradling child in his arms.); *see United States v. Rodriguez*, 28 M.J. 1016 (A.F.C.M.R. 1989), *aff'd*, 31 M.J. 150 (C.M.A. 1990) (rubbing body against female patients); *United States v. Cottril*, 45 M.J. 485 (C.A.A.F. 1997) (accused touching child's vaginal area to the point of pain while bathing her was indecent, regardless of child's purported enjoyment of touchings, given accused's admissions that his acts excited his lust to point of masturbation).

(b) Offense of indecent acts or liberties with a child is not so continuous as to include all indecent acts or liberties with a single victim, without regard to their character, their interrupted nature, or different times of their occurrences, and accused may be charged with more than one offense as a result of one act with a single victim. *United States v. Neblock*, 45 M.J. 191 (C.A.A.F. 1996).

(2) Indecent liberties.

(a) No physical contact is required, but act must be done within the physical presence of the child. *United States v. Miller*, 67 M.J. 87 (C.A.A.F. 2008) (constructive presence through web-cam and Yahoo! chatroom insufficient for an attempted indecent liberties charge); *United States v. Brown*, 13 C.M.R. 10 (C.M.A. 1953) (accused's exposure of his penis to two young girls constituted an indecent liberty); see *United States v.* Thomas, supra at ¶ G.3. (participation of the child required); *see United States v. Robba*, 32 M.J. 771 (A.C.M.R. 1991) (victims presence implied); *see also United States v. Brown*, 39 M.J. 688 (N.M.C.M.R. 1993) (holding that a person sleeping in the room did not participate in accused's masturbation, and thus charge of indecent acts with another could not lie).

(b) Indecent liberties with a child can include displaying nonpornographic photographs if accompanied by the requisite intent. *United States v. Orben*, 28 M.J. 172 (C.M.A. 1989); *see* TJAGSA Practice Note, *Displaying Nonpornographic Photographs to a Child Can Constitute Taking Indecent Liberties*, Army Law., Aug. 1989, at 40 (discusses *Orben*); *United States v. Marrie*, 39 M.J. 993 (A.F.C.M.R. 1994) (showing victim material that, while not legally pornographic, is accompanied by behavior or language that demonstrates his intent to arouse his own sexual passions, those of the child, or both), *aff'd*, 43 M.J. 35 (C.A.A.F. 1995).

(c) Multiple acts of indecent liberties may occur simultaneously. *United States v. Lacy*, 53 M.J. 509 (N-M. Ct. Crim. App. 2000) (accused exposed his genitals, masturbated, and showed a pornographic video to two children simultaneously; the court adopted a "different victims" standard for indecent liberties, because the purpose of the offense is the protection of the individual person).

(d) Indecent liberties and indecent exposure are not necessarily multiplicious. *United States v. Rinkes*, 53 M.J. 741 (N-M. Ct. Crim. App. 2000) (accused's convictions of indecent liberties with a child and indecent exposure before an adult did not constitute an unreasonable multiplication of charges as considering the differing societal goals and victims, the specifications were aimed at distinctly separate criminal acts).

5. Indecent Assault. MCM, App. 27, ¶ 63.

a) The discussion that follows pertains to Indecent Assault as it existed under Article 134 prior to October 2007.

b) Elements.

(1) That the accused assaulted a certain person not the spouse of the accused in a certain manner;

(2) That the acts were done with the intent to gratify the lust or sexual desire of the accused; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of the good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c) Nonconsensual offense requiring assault or battery. The assault or battery need not be inherently indecent, lewd, or lascivious but may be rendered so by accompanying words and circumstances. *United States v. Wilson*, 13 M.J. 247 (C.M.A. 1982). *See United States v. Hester*, 44 M.J. 546 (Army Ct. Crim. App. 1996) (victim was a virtual stranger to accused and the two of them were engaged in official business of processing victim into the unit, touching of

victim's thigh was an offensive touching which, when done with specific intent to gratify the accused's lust, was an indecent assault).

d) Intent.

(1) Requires accused's specific intent to gratify his lust or sexual desires. *United States v. Jackson*, 31 C.M.R. 738 (A.B.R. 1962); *see also United States v. Birch*, 13 M.J. 847 (C.G.C.M.R. 1982) (kissing victim against her will without evidence of specific intent to gratify lust or sexual desires was only a battery); *United States v. Campbell*, 55 M.J. 591 (C.G. Ct. Crim. App. 2001) (although male accused's tickling and similar touchings of female shipmates was unwelcome, boorish, and improper, the court could not reasonably describe the actions as indecent); *United States v. Proper*, 56 M.J. 717 (C.G. Ct. Crim. App. 2002) (pulling coveralls of a female subordinate away from her chest factually insufficient to prove that accused acted with intent to gratify his sexual lusts or desires even though he made comments about her breasts).

(2) The assault or battery must be committed with a prurient state of mind. *United States v. Arviso*, 32 M.J. 616 (A.C.M.R. 1991) (evidence established specific intent of accused to gratify his lust or sexual desires when he inserted his finger into anus of female patients after examination by physicians); *United States v. Hoggard*, 43 M.J. 1 (1995) (holding evidence of attempted kiss legally insufficient to establish indecent intent); *United States v. Hester*, 44 M.J. 546 (Army Ct. Crim. App 1996).

e) Can be committed by a male on a woman not his spouse or by a female on a male not her spouse. *United States v. Johnson*, 17 M.J. 251 (C.M.A. 1984).

f) An accused can be found guilty of indecent assault and not guilty of rape even though both the victim and the accused acknowledge that intercourse occurred. *United States v. Watson*, 31 M.J. 49 (C.M.A. 1990); *United States v. Wilson*, 13 M.J. 247 (C.M.A. 1982).

g) Lack of consent.

(1) Unlike rape, mere lack of acquiescence is sufficient lack of consent for indecent assault; actual resistance is not required.

(2) If accused stops advances after he knows of lack of consent, evidence is legally insufficient for indecent assault. *United States v. Ayers*, 54 M.J. 85 (C.A.A.F. 2000) (government failed to prove lack of consent as there was no unwanted sexual touching as she was a "willing participant" when the accused touched her and kissed her, but when the accused tried to progress to sexual intercourse the 'victim' drew the line, and the accused did not cross that line, the 'victim' continued the relationship by calling the accused after the initial incident and agreed to meet him; during subsequent incident, accused stopped advances after 'victim' demonstrated lack of consent), *aff'd by* 55 M.J. 243 (C.A.A.F. 2001).

h) Mistake of fact defense. Accused's plea of guilty to indecent assault was provident even when accused stated during providency that "I personally just thought [at the time] that she was [consenting] and that it wasn't unreasonable;" statement failed to raise mistake of fact defense and was not in substantial

conflict with plea. *United States v. Garcia* 44 M.J. 496 (1996), *aff'd*, 48 M.J. 5 (C.A.A.F. 1997).

i) Indecent assault is lesser included offense of indecent acts with child. *United States v. Kibler*, 43 M.J. 725 (Army Ct. Crim. App. 1995), *aff'd*, 46 M.J. 160 (C.A.A.F. 1996), *cert. denied* 523 U.S. 1011 (1998).

6. Indecent Exposure. MCM, App. 27, ¶ 88.

a) The discussion that follows pertains to Indecent Exposure with a Child as it existed under Article 134 prior to October 2007.

b) Elements.

(1) That the accused exposed a certain part of the accused's body to public view in an indecent manner;

(2) That the exposure was willful and wrongful; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c) Negligent exposure is insufficient; "willfulness" is required. *United States v. Manos*, 25 C.M.R. 238 (C.M.A. 1958) (law enforcement officer viewed exposure through accused's window); *United States v. Stackhouse*, 37 C.M.R. 99 (C.M.A. 1967) (evidence was insufficient to sustain the accused's conviction of three specifications of indecent exposure where, in each instance, the accused was observed nude in his own apartment by passersby in the hallway looking in the partly open door of the apartment; such evidence is as consistent with negligence as with purposeful action and negligence is an insufficient basis for a conviction of indecent exposure); *accord United States v. Ardell*, 40 C.M.R. 160 (C.M.A. 1969); *United States v. Burbank*, 37 C.M.R. 955 (A.F.B.R. 1967) (plea of guilty to indecent exposure was not rendered improvident by stipulated evidence that the accused did nothing to attract attention to himself and may not even have been aware of the presence of the young females who saw him, where the accused admitted he had exposed himself in the children's section of the base library, a place so public an intent to be seen must be presumed); *United States v. Shaffer*, 46 M.J. 94 (1997) (evidence supported the conclusion that accused's exposures were "willful" so as to sustain conviction for indecent exposure where, on each occasion of exposure, accused was naked, facing out of his open garage, towards the street, in unobstructed view, during daylight hours and never made an attempt to cover himself or remove himself from view when seen).

d) "Public" exposure is required. To be criminal the exposure need not occur in a public place, but only be in public view. *United States v. Moore*, 33 C.M.R. 667 (C.G.B.R. 1963) (accused, who exposed his penis and made provocative gestures while joking with fellow seamen on board ship, was guilty of indecent exposure). "Public view" occurs when the exposure is done in a place and in a manner that is reasonably expected to be viewed by another. *United States v. Graham*, 56 M.J. 256 (2002) (accused exposed himself to his 15-year-old baby-sitter in the bedroom of his home by inviting her into the bedroom and then allowing his towel to drop in front of her. The accused's actions caused a normally private place, *i.e.*, the bedroom, to become public, as he reasonably

expected the babysitter to view his naked body), *aff'd*, 56 M.J. 266 (C.A.A.F. 2002).

e) Exposure must be "indecent." Nudity per se is not indecent; thus, an unclothed male among others of the same sex is generally neither lewd nor morally offensive. *United States v. Caune*, 46 C.M.R. 200 (C.M.A. 1973).

f) *United States v. Jackson*, 30 M.J. 1203 (A.F.C.M.R. 1990) (rejecting indecent acts with another and affirming indecent exposure instead).

g) Indecent exposure via webcam. *United States v. Ferguson*, No. 10-0020 (C.A.A.F. Mar. 22, 2010) (accused admitted sufficient facts to affirm conviction for indecent exposure via Internet webcam to a law enforcement agent posing as a teenager).

7. Indecent Acts With Another. MCM, App. 27 ¶ 90.

a) The discussion that follows pertains to Indecent Acts With Another as it existed under Article 134 prior to October 2007.

b) Elements.

(1) That the accused committed a certain wrongful act with a certain person;

(2) That the act was indecent; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c) An indecent act is defined as "that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene and repugnant to common propriety, but which tends to excite lust and deprave the morals with respect to sexual relations." MCM, App. 27 ¶ 90c.

d) Physical touching not required, but participation of another is required.

(1) *United States v. McDaniel*, 39 M.J. 173 (C.M.A. 1994) (accused's instructions to female recruits to disrobe, change positions, and bounce up and down while videotaping them without their knowledge was sufficient participation).

(2) *United States v. Brown*, 39 M.J. 688 (N.M.C.M.R. 1993) (some minimal observation or actual participation by another person is required for the offense to lie; a victim who is asleep while the accused masturbates in her presence will not suffice). *See also United States v. Thomas*, 25 M.J. 75 (C.M.A. 1987); *United States v. Murray-Cotto*, 25 M.J. 784 (A.C.M.R. 1988). *Contra United States v. Jackson*, 30 M.J. 1203 (A.F.C.M.R. 1990); *United States v. Kenerson*, 34 M.J. 704, (A.C.M.R. 1992); *United States v. Proctor*, 58 M.J. 792 (A.F. Ct. Crim. App. 2003); *but see United States v. Jackson*, 30 M.J. 1203 (A.F.C.M.R. 1990) (holding victim provided "inspiration," not participation).

(3) *United States v. Rollins*, 61 M.J. 338 (2005). Appellant was convicted of several 134 offenses, including an indecent act with JG, "by giving him a pornographic magazine and suggesting that they masturbate together." HELD: The indecent act specification is affirmed. A

reasonable factfinder could conclude that appellant committed a service discrediting indecent act "with" another by giving a person under the age of eighteen a pornographic magazine to stimulate mutual masturbation while in a parking lot open to the public.

(4) *United States v. Johnson*, 60 M.J. 988 (N-M. Ct. Crim. App. 2005). Appellant pled guilty, in relevant part, to indecent acts with another HELD: The indecent act specification is affirmed. Here, appellant's conduct in watching and encouraging his friend's sexual encounter constituted active participation, citing *United States v. McDaniel*, 39 M.J. 173 (C.M.A. 1994).

e) No specific intent is required. *United States v. Brundidge*, 17 M.J. 536 (A.C.M.R. 1983); *United States v. Jackson*, 31 C.M.R. 738 (A.B.R. 1972).

f) Acts covered.

(1) Acts not inherently indecent may be rendered so by the surrounding circumstances. *United States v. Proctor*, 34 M.J. 549 (A.F.C.M.R. 1992) (spanking young boys on the bare buttocks found to be indecent under the circumstances), *aff'd*, 37 M.J. 330 (C.M.A. 1993).

(2) Private, heterosexual, oral foreplay between two consenting adults that does not amount to sodomy is not an indecent act. *United States v. Stocks*, 35 M.J. 366 (C.M.A. 1992).

(3) Not limited to female victim.

(a) *United States v. Annal*, 32 C.M.R. 427 (C.M.R. 1963) (crime was committed when Army captain forcefully grabbed another male and tried to embrace him).

(b) *United States v. Holland*, 31 C.M.R. 30 (C.M.A.1961) (officer was convicted of indecent act by grabbing certain parts of the anatomy of another male officer).

(c) *United States v. Moore*, 33 C.M.R. 667 (C.G.B.R.1963) (consensual homosexual acts may constitute the offense of indecent acts with another).

(4) Consensual intercourse in the presence of others can constitute an indecent act. *United States v. Tollinchi*, 54 M.J. 80 (C.A.A.F. 2000); *United States v. Brundidge*, 17 M.J. 586 (A.C.M.R. 1983).

(5) Indecent acts, charged as a violation of UCMJ art. 134, need not involve another person. *United States v. Sanchez*, 29 C.M.R. 32 (C.M.A. 1960) (chicken); *United States v. Mabie*, 24 M.J. 711 (A.C.M.R. 1987) (corpse).

(6) Physically restraining victims in public restroom while accused masturbated is an indecent act. *United States v. Eberle*, 44 M.J. 374 (C.A.A.F. 1996).

(7) Fornication. Purely private sexual intercourse between unmarried persons is normally not punishable. *United States v. Hickson*, 22 M.J. 146 (C.M.A. 1986), *overruled on other grounds by United States v. Hill*, 48 M.J. 352 (C.A.A.F. 1997). Context in which the sex act is committed may constitute an offense (*e.g.*, public fornication, fraternization, etc.).

See United States v. Berry, 20 C.M.R. 325 (C.M.A. 1956) (two soldiers took two girls to a room where each soldier had intercourse with each of the girls in open view; such "open and notorious" conduct was service discrediting). *See also, United States v. Woodard*, 23 M.J. 514 (A.F.C.M.R. 1986) *vacated and remanded on other grounds*, 23 M.J. 400 (C.M.A. 1987), *findings set aside on other grounds*, 24 M.J. 514 (A.F.C.M.R. 1987) (private, consensual, intimate contact between a married officer and a 16-year-old babysitter was, under the circumstances, an indecent act).

(8) "Open and notorious" fornication between consenting adults was an offense under Article 134 prior to October 2007. The act is open and notorious when the participants know that a third party is present or when performed in such a place and under such circumstances that it is reasonably likely to be seen by others, even though others actually do not view the acts. Sexual intercourse in a barracks room behind a pinned up sheet, while two roommates were awake and suspicious, was open and notorious. *United States v. Izquierdo*, 51 M.J. 421 (C.A.A.F. 1999); *see United States v. King*, 29 M.J. 901 (A.C.M.R. 1989).

(a) Consensual fondling of a female soldier's breasts was not "open and notorious" conduct when it occurred in the accused's private bedroom with the door closed but unlocked. The accused was holding a promotion party with about forty attendees in a room next to his bedroom. Although there was a possibility that someone from the party would enter the bedroom and observe the sexual activity, the accused's plea to indecent acts was improvident because it was not reasonably likely that a third person would observe the conduct. *United States v. Sims*, 57 M.J. 419 (C.A.A.F. 2002).

(b) The accused's plea of guilty to committing an indecent act by videotaping intercourse and sodomy with his future wife was provident. The potential that the videotape would be viewed by others, together with the salacious effect on the person doing the taping and viewer alike, contributed to the conclusion that the act of videotaping was indecent. *United States v. Allison*, 56 M.J. 606 (C.G. Ct. Crim. App. 2001).

(9) Webcam cases. Broadcasting live sexual images to a child over the Internet via webcam may constitute indecent acts with another under Article 134. *See United States v. Parker*, No. 20080579 (A. Ct. Crim. App. Aug. 31, 2009) (unpub.). Where the child victim is actually a law enforcement officer, the courts have affirmed attempted indecent acts with another. *See United States v. Lorenz*, No. 20061071 (A. Ct. Crim. App. Apr. 20, 2009) (unpub.); *United States v. Miller*, No. 36829, 2009 WL 1508494 (A.F. Ct. Crim. App. Apr. 30, 2009) (unpublished).

g) Consent is not a defense. *United States v. Carreiro*, 14 M.J. 954 (A.C.M.R. 1982); *United States v. Johnson*, 4 M.J. 770 (A.C.M.R. 1978); *United States v. Woodard*, 23 M.J. 514 (A.C.M.R. 1986), *set aside on other grounds*, 24 M.J. 514

(A.F.C.M.R. 1987); *United States v. Thacker*, 37 C.M.R. 28 (C.M.A. 1966) (dicta).

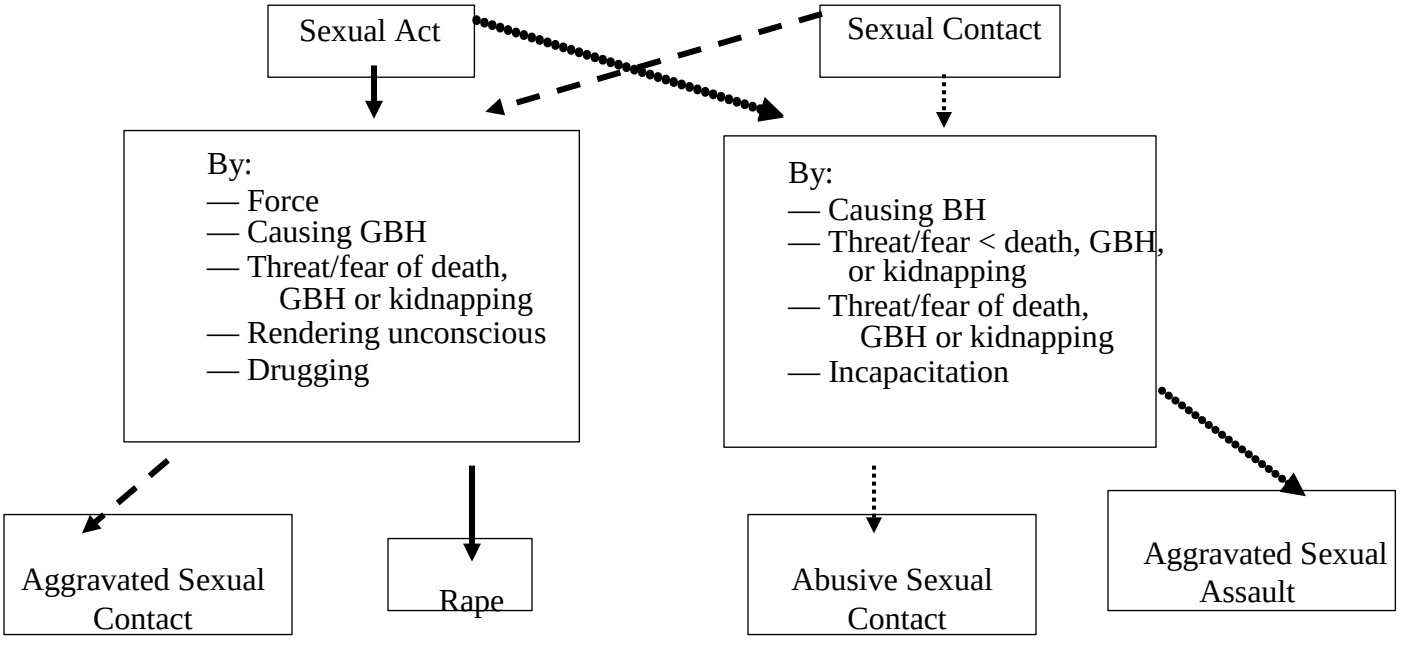
h) Fornication. Not a per se UCMJ violation. *United States v. Snyder*, 4 C.M.R. 15 (C.M.A. 1952). *See also United States v. Blake*, 33 M.J. 923 (A.C.M.R. 1991) (fornication, in and of itself, is not a crime in military law).

C. Article 120 (2007)

Adult Crimes
- Rape
- Aggravated Sexual Assault
- Aggravated Sexual Contact
- Abusive Sexual Contact
- Wrongful Sexual Contact

Child Crimes
- Rape of a Child
- Aggravated Sexual Contact with a Child
- Aggravated Sexual Assault of a Child
- Abusive Sexual Contact with a Child
- Aggravated Sexual Abuse of a Child
- Indecent Liberty With a Child

Other Sexual Crimes
- Indecent Acts
- Indecent Exposure
- Forcible Pandering



1. Rape, Sexual Assault, and Other Sexual Offenses (post-1 October 2007). MCM, pt. App. 28, ¶ 45; UCMJ art. 120 (2008).

a) Effective date: 1 October 2007. Implementing Executive Order signed 28 September 2007 (E.O. 13447).

b) Statute best considered in three parts: the "Big Four" offenses, the child sexual abuse offenses, and the remaining sexual offenses:

(1) The "Big Four" offenses: rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact.

(a) By adding "w/ a child" to each of these four, the titles for eight of the statute's fourteen offenses emerge.

(b) Consent and mistake of fact as to consent are affirmative defenses only available to these "Big Four" offenses.

(c) Statutory definitions for "sexual act" and "sexual contact," along with the set of attendant circumstances identified in the statute, combine to define each of the four offenses.

(2) The Child Sexual Abuse Offenses: rape of a child, aggravated sexual assault of a child, aggravated sexual abuse of a child, aggravated sexual contact with a child, abusive sexual contact with a child, and indecent liberty with a child.

(3) The four remaining sexual offenses include: indecent act, forcible pandering, wrongful sexual contact, and indecent exposure.

c) Start with defining whether or not a "sexual act" or a "sexual contact" has been committed, then determine which set of attendant circumstances apply to arrive at the proper offense.

(1) "Sexual Act" (MCM, App. 28, ¶ 45a(t)(1)).

(a) The penetration described by "sexual act" excludes male-on-male sexual activity.

(b) Broader conduct than merely sexual intercourse.

(c) If penetration accomplished by hand, finger, or any object, specific intent requirement that must be alleged and proved: "with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person."

(2) "Sexual Contact" (MCM, App. 28, ¶ 45a(t)(2)).

(a) May encompass same conduct proscribed by Article 125, Sodomy, including male-on-male sexual activity.

(b) Specific intent requirement for all sexual contacts that must be alleged and proved: "with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person."

(3) "Lewd Act" (MCM, App. 28, ¶ 45a(t)(10)).

(a) Requires intentional "skin-to-skin contact" with the genitalia of another person.

(b) Requires the specific intent "to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person."

(c) Applies only to Aggravated Sexual Abuse of a Child (Art. 120(f)).

(4) "Force" (MCM, App. 28, ¶ 45a(t)(5)).

(a) While "without consent" is no longer an element of any of the "Big Four" offenses, "force" is defined using terms that nonetheless invoke the concept of "consent." Specifically, the statute says force means action *to compel submission* of another or *to overcome or prevent another's resistance*. (emphasis added). These emphasized phrases may cause the government to prove lack of consent as part of its "force" proof.

(b) The concept of "constructive force," developed by case law prior to the revision of Article 120, is defined out of the new Article 120's definition of "force" and appears elsewhere in other statutory definitions.

(5) At this time, the difference between "rendering" another person unconscious or "administering" an intoxicant to another person (for purposes of establishing rape or aggravated sexual contact) and taking advantage of incapacitation (for purposes of establishing an aggravated sexual assault or abusive sexual contact) appears to be the extent to which the principal caused the victim's incapacitation.

(6) "Threatening or placing that other person in fear" of anything less than death or grievous bodily harm is defined at MCM, App. 28, ¶ 45a(t)(7) and National Defense Authorization Act, FY2006, PL 109-163, 119 Stat. 3260-1. This definition includes classic examples of the "old" Article 120's doctrine of constructive force. By statutory definition, "threatening" for purposes of establishing an aggravated sexual assault or an abusive sexual contact includes: A threat:

(a) To accuse a person of a crime;

(b) To expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt, or ridicule; or

(c) Through the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person.

(7) The Military Judge's Benchbook now contains a definition for "substantially incapacitated." *See* DA Pam 27-9, Military Judges' Benchbook, ¶ 3-45-5, subpara. d and ¶ 3-45-6, subpara. d.

d) Child Sexual Abuse Offenses.

(1) The six child sexual abuse offenses are: rape of a child (Art. 120(b)), aggravated sexual assault of a child (Art. 120(d)), aggravated sexual abuse of a child (Art. 120(f)), aggravated sexual contact with a child (Art. 120(g)), abusive sexual contact with a child (Art. 120(i)), and indecent liberty with a child (Art. 120(j)).

(2) Practitioners can best navigate the child sexual abuse framework by using the facts of the case to answer the following three questions:

(a) How old is the child (under 12, between 12 and 16, or over 16)?

(b) What type of sexual touching occurred (sexual act, sexual contact, lewd act, or some other type)?

(c) What type of inducement was employed (none, "rape-level," "aggravated sexual assault-level")?

Once answers to these three questions are obtained, the practitioner can then navigate the elements of the six child abuse offenses in order of severity.

(3) Aggravated Sexual Abuse of a Child. MCM, App. 28, ¶ 45a(f).

(a) Requires a "Lewd Act" as defined at MCM, App. 28, ¶ 45a(t)(10).

(b) Specific intent requirement for all lewd acts that must be alleged and proved: "with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person."

(4) Indecent Liberty with a Child. (MCM, App. 28, ¶ 45a(j)).

(a) Requires specific intent "to arouse, appeal to, or gratify the sexual desire of any person" or "to abuse, humiliate, or degrade any person."

(b) Physical touching is not required. *See* MCM, App. 28, ¶ 45a(t)(11).

(c) May include communication of indecent language and exposure of one's genitalia, anus, buttocks, or female areola or nipple to a child. *See* MCM, App. 28, ¶ 45a(t)(11).

(d) Requires "Physical Presence" with the child. *See* MCM, App. 28, ¶ 45a(j), (t)(11); *United States v. Miller*, 67 M.J. 87 (2008) (applying old Indecent Liberties with a Child provision in Art. 134, constructive presence through webcam is insufficient).

e) The remaining four offenses. The following notes are intended to alert the practitioner to issues involved with litigating these last four offenses.

(1) Wrongful Sexual Contact. MCM, App. 28, ¶ 45a(l).

(a) Relies on the same definition of "Sexual Contact" employed by the "Big Four" offenses.

(b) Sexual contact occurs "without that other person's permission." This language may impose an affirmative consent requirement on the principal. In other words, the statutory language seems to suggest that a principal must

ask for affirmative consent from the other party to engage in the conduct that might amount to sexual contact.

(c) The statutory language for this offense is taken directly from 18 U.S.C. § 2244(b).

(2) The following three offenses were all Article 134 offenses before the statutory change. As such, the implementing executive order, signed 28 October 2007, deleted these offenses from Article 134. In removing these offenses from Article 134, the requirement that the conduct be either prejudicial to good order and discipline or service discrediting has been eliminated.

(a) Indecent Act. MCM, App. 28, ¶ 45a(k). Proscribes "indecent conduct," which is defined by statute. Contains no specific intent requirement. The statutory language specifies "voyeurism"-types of offenses, but the *Benchbook* instruction also imports traditional concepts of "open and notorious" sexual behavior. *See* DA Pam 27-9, Military Judges' Benchbook, ¶ 3-45-9, note 2.

(b) Forcible Pandering. MCM, App. 28, ¶ 45a(l). Replaces only the "compel" portion of Article 134, Pandering.

(c) Indecent Exposure. MCM, App. 28, ¶ 45a(n). Proscribes exposure which occurs in an "indecent manner." "Indecent" is defined at MCM, App. 28, ¶ 45c(3).

f) Although a listing of lesser included offenses for the Article 120 offenses may be found both in paragraph (d) and (e) of the implementing executive order, *see* MCM, App. 28, ¶ 45d & e, practitioners should reference *infra* ¶ B.1.h, this chapter, for a general discussion on determining LIOs.

(1) *United States v. Alston*, 69 M.J. 214 (C.A.A.F. 2010)(finding that aggravated sexual assault by causing bodily harm is a lesser included offense of rape by force and that the military judge did not err in providing the instruction, even though neither party requested it).

(2) *United States v. Bailey*, No. 200800897 (N-M. Ct. Crim. App. Sep. 29, 2009) (unpub.). In a single incident, the accused engaged in various acts of sexual physical contact. He was charged with three specifications under Art. 120. Specification 1 alleged "sexual contact causing bodily harm," Specification 2 alleged abusive sexual contact, and Specification 3 alleged wrongful sexual contact. The accused pled guilty to Specification 3 (wrongful sexual contact), and not guilty to the other two specifications. The military judge accepted his plea to Specification 3, but also convicted him of abusive sexual contact, finding that "the previously pleaded-to wrongful sexual contact was committed by placing the victim in fear of physical injury or other harm, constituting abusive sexual contact." The military judge considered the two offenses "multiplicious for sentencing." The N-MCCA held that the two specifications were multiplicious for findings and the military judge erred in not dismissing the wrongful sexual contact specification upon

finding the accused guilty of the ”more aggravated abusive sexual contact” specification. The MCM lists wrongful sexual contact as an LIO of abusive sexual contact “depending on the factual circumstances.” *See* 2008 MCM, App. 28, ¶ 45.e.(8). The court reasoned that “the only significant difference between the specifications [is] the additional element of placing the victim in fear,” which was proven in the contested portion of the trial. As such, the military judge erred and there was prejudice in the form of an additional conviction, as well as increased punitive exposure. The court also found that the conviction for the specification constituted an unreasonable multiplication of charges. Although the specifications were merged for sentencing, corrective action with respect to the findings was necessary.

g) Affirmative Defenses.

(1) The 2007 version of Article 120 assigns burdens for all affirmative defenses raised in the context of an Article 120 prosecution: “The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist.”

(a) Unconsistutional Burden Shift. *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011) (where an accused raises the affirmative defense of consent to a charge of aggravated sexual assault by engaging in a sexual act with a person who was substantially incapacitated, the statutory interplay among the relevant provisions of Art 120, results in an unconstitutional burden shift to the accused.)

(b) Double-shift impossible. *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011) (where the members are instructed consistent with the statutory scheme, the error can not be cured with standard “ultimate burden” instructions.) This provision improperly assigns two separate burdens of persuasion to two separate parties on a single issue, creating a “legal impossibility.” *See also* Major Howard H. Hoege, III, *Overshift: The Unconstitutional Double Burden-Shift on Affirmative Defenses in the New Article 120*, Army Law., May 2007, at 2; *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (citing 9 J. Wigmore, Evidence § 2489 (3d ed. 1940)(stating, “the burden of persuasion ‘never shifts.’”).

(c) In the MJ Benchbook (DA Pam 27-9), the Army Trial Judiciary has taken the approach of treating affirmative defenses which will arise under Article 120 prosecutions just like the majority of other affirmative defenses recognized by the MCM and case law. In other words, “some evidence” will raise a defense and once the defense is raised, the government will have the burden of proving beyond a reasonable doubt that the affirmative defense

does not exist. *See, e.g.*, DA Pam 27-9, para. 3-45-3, note 10.

(d) See James G. Clark, "A Camel is a Horse Designed by Committee": Resolving Constitutional Defects in Uniform Code of Military Justice Article 120's Consent and Mistake of Fact as to Consent Defenses, ARMY LAW., July 2011, at 3.

(2) Facial Challenges.

(a) *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010). In a prosecution of an aggravated sexual contact involving force under Art. 120(e), the trial judge dismissed the charge, finding that consent was an "implied element" and concluding that Article 120 unconstitutionally shifted the burden of proof on an element from the Government to the defense. This occurred after the defense case in chief, before instructions and findings. The government appealed under Article 62 and the N-MCCA reversed, holding that, under the facts of the case, proof of the element of force does not require proof of lack of consent and the affirmative defense of consent does not unconstitutionally shift the burden of proof to the defense. The CAAF, in a 3-2 decision, affirmed the N-MCCA's decision, and remanded the record of trial to the military judge. The court made two key interpretations of the language of the new Article 120: (1) absence of consent is not a fact necessary to prove the crime of aggravated sexual assault, and (2) the words "consent is not an issue" in Article 120(r) do not prohibit the factfinder from considering evidence of consent when determining whether the prosecution has proved the element of force beyond a reasonable doubt (*see also Martin v. Ohio*, 480 U.S. 228 (1987)). Next, the court confirmed the interlocutory posture of the case, noting that there were no instructions, no closing arguments, and no findings. The court then found that the military judge erred in treating lack of consent as an element of the offense and in concluding that the affirmative defense scheme is unconstitutional. Although the court did not rule on the constitutionality of the statute as applied to the accused in this case due to its interlocutory nature, the court cautioned that the constitutionality may be affected by the content of instructions, the sequence of the instructions, and any waiver of instructions. In a dissenting opinion, which Judge Erdmann joined, Judge Ryan concludes that "' [force' and 'consent' . . . are two sides of the same coin," and "making consent an affirmative defense . . . relieves the government of [the burden of proof as to an element]

and unconstitutionally requires the defendant to disprove force."

(b) *United States v. Crotchett*, 67 M.J. 713 (N-M. Ct. Crim. App. 2009) (holding that a facial challenge to Art. 120(c), Aggravated Sexual Assault, fails because the court's "construction of the statute leads to the conclusion that Article 120(c)(2)(C) does not mandate a shift to the defense of the burden of proof as to any element).

(c) *United States v. Rozmus*, No. 200900052, 2009 WL 2893176 (N-M. Ct. Crim. App. Sep. 10, 2009) (unpub.) (facial challenge fails because court extends the holding of *Crotchett* to Article 120(c)(2)(b)).

(3) Instructions.

(a) *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010). The constitutionality of the statute may be affected by the content of instructions, the sequence of the instructions, and any waiver of instructions. "A properly instructed jury may consider evidence of consent at two different levels: (1) as raising a reasonable doubt as to whether the prosecution has met its burden on the element of force; and (2) as to whether the defense hasestablished an affirmative defense."

(b) *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011). In a prosecution of an aggravated sexual assault involving an incapacitated victim under Art. 120(c), the trial judge gave instructions for consent that mirrored the model instructions provided in the Military Judges' Benchbook and departed from the plain language from the statute regarding the assignment of burdens regarding the affirmative defense of consent. Specifically, the military judge instructed the members that "The prosecution has the burden to prove beyond a reasonable doubt that consent did not exist." The panel convicted the accused. *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011) ("Although, in the absence of a legally sufficient explanation, the military judge's decision not to employ the terms of the statute constituted error, we are satisfied that the error was harmless beyond a reasonable doubt.")

(c) *United States v. Rozmus*, No. 200900052, 2009 WL 2893176 (N-M. Ct. Crim. App. Sep. 10, 2009) (unpub.) (facial challenge fails because court extends the holding of *Crotchett* to Article 120(c)(2)(b), as applied challenge fails because no evidence of consent or mistake of fact as to consent raised at trial).

(4) Multiplicity and UMC.

(a) *United States v. Oliva*, No. 20080774 (A. Ct. Crim. App. Feb. 24, 2009) (unpublished). The accused, a drill

sergeant, was charged with two specifications of aggravated sexual assault under Art. 120. Specification 1 alleged that he "caused the victim . . . to engage in a sexual act, i.e., penetration of her genital opening with [his] finger, by causing bodily harm in the form of bruises on her arm." Specification 2 alleged that he "engaged in a sexual act, i.e., penetration of [the victim's] genital opening with his finger, by placing her in fear of [his] abuse of his military position to affect negatively her career." He pled not guilty to these offenses, however, he pled guilty to two specifications of the lesser included offense of wrongful sexual contact by "placing his finders in [her] vagina without legal justification or authorization and without her consent." He "pled guilty to the *identical* criminal conduct and acts for both specifications." the two specifications were multiplicious for findings and dismissed Specification 2. The accused pled guilty to two specifications of wrongful sexual contact for the exact same underlying conduct.

(b) *United States v. Bailey*, No. 200800897 (N-M. Ct. Crim. App. Sep. 29, 2009) (unpub.). In a single incident, the accused engaged in various acts of sexual physical contact. He was charged with three specifications under Art. 120. Specification 1 alleged "sexual contact causing bodily harm," Specification 2 alleged abusive sexual contact, and Specification 3 alleged wrongful sexual contact. The accused pled guilty to Specification 3 (wrongful sexual contact), and not guilty to the other two specifications. The military judge accepted his plea to Specification 3, but also convicted him of abusive sexual contact, finding that "the previously pleaded-to wrongful sexual contact was committed by placing the victim in fear of physical injury or other harm, constituting abusive sexual contact." The military judge considered the two offenses "multiplicious for sentencing." The N-MCCA held that the two specifications were multiplicious for findings and the military judge erred in not dismissing the wrongful sexual contact specification upon finding the accused guilty of the "more aggravated abusive sexual contact" specification. The MCM lists wrongful sexual contact as an LIO of abusive sexual contact "depending on the factual circumstances." *See* 2008 MCM, App. 28, ¶ 45.e.(8). The court reasoned that "the only significant difference between the specifications [is] the additional element of placing the victim in fear," which was proven in the contested portion of the trial. As such, the military judge erred and there was prejudice in the form of an additional conviction, as well as increased punitive exposure. The court also found that the conviction for the

specification constituted an unreasonable multiplication of charges.

(c) *United States v. Marshall*, No. 200900533 (N-M. Ct. Crim. App. Feb. 10, 2010) (unpub.). Accused engaged in sexual intercourse with an incapacitated victim. When victim awoke and tried to get him to stop, he withdrew, began masturbating over top of her, and ejaculated onto her hair, stomach, and shirt. The accused was convicted of both aggravated sexual assault and an indecent act, both under Art. 120. Charges were neither multiplicious nor an unreasonable multiplication of charges.

(d) *United States v. Swemley*, No. 200900359 (N-M. Ct. Crim. App. Apr. 29, 2010) (unpub.). Accused was charged with aggravated sexual assault of an incapacitated victim, but the panel convicted of the LIO of assault consummated by a battery by touching the victim and removing her clothing while she was asleep. The N-MCCA found that the military judge did not err in instructing on assault consummated by battery as an LIO of aggravated sexual assault and the accused received the requisite notice that he could be convicted of this lesser offense.

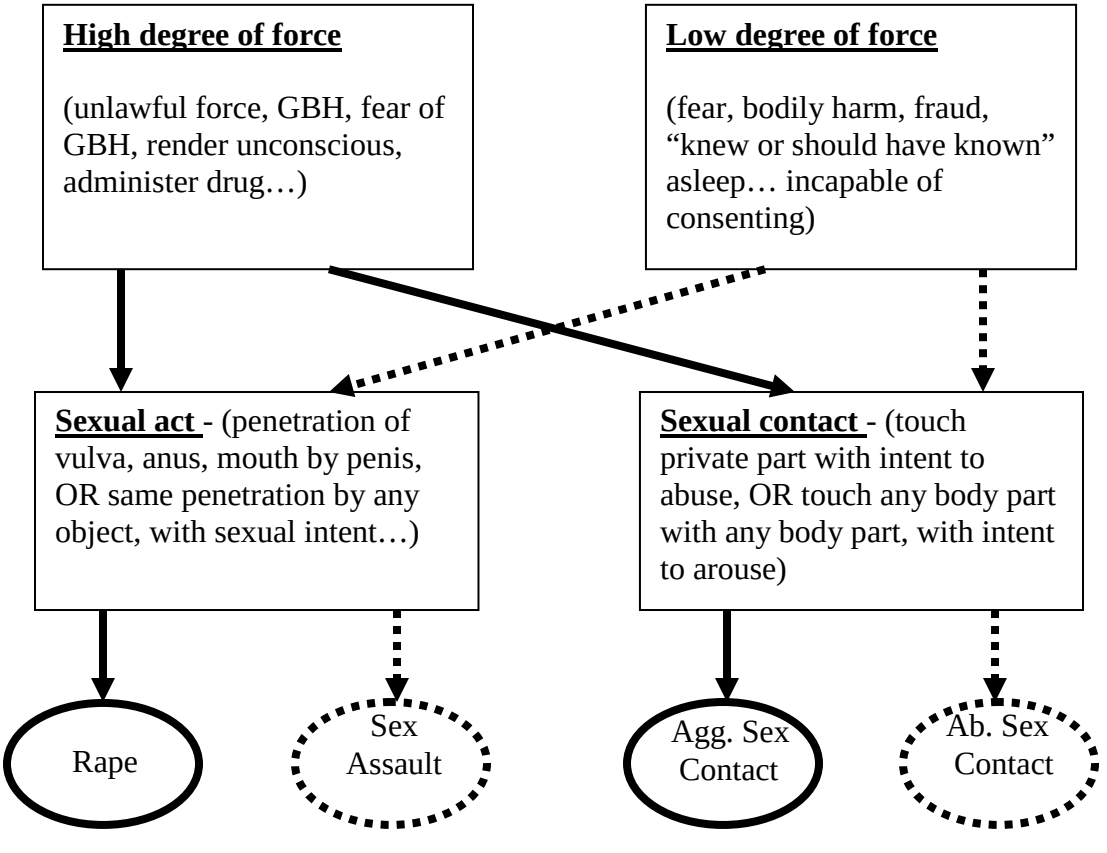
D. Article 120 (2012)

Adult Crimes (Art. 120) (D.1)
- Rape (D.1.b)
- Sexual Assault (D.1.c)
- Aggravated Sexual Contact
- Abusive Sexual Contact

Stalking (Art. 120a) (D.2)

Child Crimes (Art. 120b (D.3)
- Rape of a Child
- Sexual Assault of a Child
- Sexual Abuse of a Child

Other Sexual Crimes (Art. 120c) (D.4)
- Indecent Viewing, Visual Recording, or Broadcasting
- Indecent Exposure
- Forcible Pandering



1. Rape and Sexual Assault Generally. MCM, pt. IV, ¶ 45; UCMJ art. 120 (2012).

a) Effective date: 28 June 2012. As of 1 August 2012, an implementing executive order has yet to be signed. Therefore, the President has yet to prescribe elements, explanation, lesser included offenses, maximum punishments, and sample specifications under his authority pursuant to Article 36. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.

b) Rape. Statutory language: Any person subject to this chapter who commits a sexual act upon another person by—

(1) using unlawful force against that other person;

(2) using force causing or likely to cause death or grievous bodily harm to any person;

(3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;

(4) first rendering that other person unconscious; or

(5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct; is guilty of rape and shall be punished as a court-martial may direct.

c) Sexual Assault. Statutory language: Any person subject to this chapter who—

(1) Commits a sexual act upon another person by

(a) threatening or placing that other person in fear;

(b) causing bodily harm to that other person;

(c) making a fraudulent representation that the sexual act serves a professional purpose; or

(d) inducing a belief by any artifice, pretense, or concealment that the person is another person;

(2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or

(3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—

(a) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or

(b) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person;

is guilty of sexual assault and shall be punished as a court-martial may direct.

d) Aggravated Sexual Contact. Statutory language: Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.

e) Abusive Sexual Contact. Statutory language: Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

f) Statute is gender neutral.

g) Defenses. Marriage is not a defense.

h) Definitions. The definitions of sexual act and sexual contact have both been expanded from the 2007 definitions under Art. 120. Statutory language:

(1) Sexual Act. The term "sexual act" means—

(a) contact between the penis and the vulva or anus or mouth, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or

(b) the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(2) Sexual Contact. The term 'sexual contact' means—

(a) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or

(b) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person.

Touching may be accomplished by any part of the body.

(3) Sexual Contact. The term 'sexual contact' means—

2. Stalking. MCM, pt. IV, ¶ 45a; UCMJ art. 120a (2012).

a) Elements.

(1) That that accused wrongfully engaged in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm to himself or herself or a member of his or her immediate family;

(2) That the accused had knowledge, or should have had knowledge, that the specific person would be placed in reasonable fear of death or bodily harm to himself or herself or a member of his or her immediate family; and

(3) That the accused's acts induced reasonable fear in the specific person of death or bodily harm to himself or herself or to a member of his or her immediate family.

b) *See infra* ¶ E, Chapter I, the volume, for the discussion on Stalking.

3. Rape and Sexual Assault of a Child. MCM, pt. IV, ¶ 45; UCMJ art. 120b (2012).

a) Effective date: 28 June 2012. As of 1 August 2012, an implementing executive order has yet to be signed. Therefore, the President has yet to prescribe elements, explanation, lesser included offenses, maximum punishments, and sample specifications under his authority pursuant to Article 36. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.

b) Rape of a Child. Statutory language: Any person subject to this chapter who—

(1) commits a sexual act upon a child who has not attained the age of 12 years; or

(2) commits a sexual act upon a child who has attained the age of 12 years by—

(a) using force against any person;

(b) threatening or placing that child in fear;

(c) rendering that child unconscious; or

(d) administering to that child a drug, intoxicant, or other similar substance;

is guilty of rape of a child and shall be punished as a court-martial may direct.

c) Sexual Assault of a Child. Statutory language: Any person subject to this chapter who commits a sexual act upon a child who has attained the age of 12 years is guilty of sexual assault of a child and shall be punished as a court-martial may direct.

d) Sexual Abuse of a Child. Any person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child and shall be punished as a court-martial may direct.

e) The definition of lewd act has been expanded from the 2007 statutory language:

(1) The term 'lewd act' means—

(a) any sexual contact with a child;

(b) intentionally exposing one's genitalia, anus, buttocks, or female areola or nipple to a child by any means, including via any communication technology, with an

intent to abuse, humiliate, or degrade any person, or to arose or gratify the sexual desire of any person;

(c) intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or

(d) any indecent conduct, intentionally done with or in the presence of a child, including via any communication technology, that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

4. Other Sexual Misconduct. MCM, pt. IV, ¶ 45; UCMJ art. 120c (2012).

a) Effective date: 28 June 2012. As of 1 August 2012, an implementing executive order has yet to be signed. Therefore, the President has yet to prescribe elements, explanation, lesser included offenses, maximum punishments, and sample specifications under his authority pursuant to Article 36. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.

b) Indecent Viewing, Visual Recording, or Broadcasting. Statutory language: Any person subject to this chapter who without legal justification or lawful authorization—

(1) knowingly and wrongfully views the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy;

(2) knowingly photographs, videotapes, films, or records by any means the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy; or

(3) knowingly broadcasts or distributes any such recording that the person knew or reasonably should have known was made under the circumstances proscribed in paragraphs (1) and (2);

is guilty of an offense under this section and shall be punished as a court-martial may direct.

c) Forcible Pandering. Statutory language: Any person subject to this chapter who compels another person to engage in an act of prostitution with any person is guilty of forcible pandering and shall be punished as a court-martial may direct.

d) Indecent Exposure. Statutory language: Any person subject to this chapter who intentionally exposes, in an indecent manner, the genitalia, anus, buttocks, or female areola or nipple is guilty of indecent exposure and shall by punished as a court-martial may direct.

XXXIX. OFFENSES AGAINST PROPERTY.

A. Larceny and Wrongful Appropriation. MCM, pt. IV, ¶ 46; UCMJ art. 121.

1. Elements.

a) Larceny.

(1) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

(2) That the property belonged to a certain person;

(3) That the property was of a certain value, or of some value; and

(4) That the taking, obtaining, or withholding by the accused was with the intent *permanently* to deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner.

(5) [If the property is alleged to be military property, add the following element:] That the property was military property.

b) Wrongful appropriation.

(1) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

(2) That the property belonged to a certain person;

(3) That the property was of a certain value, or of some value; and

(4) That the taking, obtaining, or withholding by the accused was with the intent *temporarily* to deprive or defraud another person of the use and benefit of the property or temporarily to appropriate the property for the use of the accused or for any person other than the owner.

2. Types of Property Covered.

a) Must be tangible personal property. Article 121 lists the objects which can be the subject of larceny as "any money, personal property, or article of value of any kind."

b) Intangible items cannot be the subject of an Article 121 violation. *United States v. Mervine*, 26 M.J. 482 (C.M.A. 1988) (debt); *United States v. Dunn*, 27 M.J. 624 (A.F.C.M.R. 1988) (administrative costs).

c) Article 121 does not cover theft of services. Theft of taxicab services, phone services, use and occupancy of government quarters, and use of a rental car cannot be the subject of larceny under Article 121. *United States v. Abeyta*, 12 M.J. 507 (A.C.M.R. 1981); *United States v. Case*, 37 C.M.R. 606 (A.B.R. 1966); *United States v. Jones*, 23 C.M.R. 818 (A.F.B.R. 1956); *United States v. McCracker*, 19 C.M.R. 876 (A.F.B.R. 1955).

d) Theft of services may be prosecuted in any of the following ways: (1) under Article 134, UCMJ, as obtaining services under false pretenses or as dishonorably failing to pay just debts; (2) under 18 U.S.C. § 641 as assimilated into military law by Article. 134(3), UCMJ, if the services taken are property of the United States; (3) as a violation of a state statute assimilated through 18 U.S.C. § 13. *See United States v. Wright*, 5 M.J. 106 (C.M.A. 1978), and *United States v. Herndon*, 36 C.M.R. 8 (C.M.A. 1965); *see also United States v. Hitz*, 12 M.J. 695 (N.M.C.M.R. 1981) (accused was properly charged with and convicted

of unlawfully obtaining telephone services of the U.S. Navy in violation of UCMJ art. 134); *United States v. Roane*, 43 M.J. 93 (C.A.A.F. 1995); *United States v. Green*, 44 M.J. 631 (C.G. Ct. Crim. App. 1996) (obtaining services by false pretenses).

e) Larceny can be used to cover credit card misuse. *See generally United States v. Christy*, 18 M.J. 688 (N.M.C.M.R. 1984).

3. Element 1: That the accused wrongfully took, obtained, or withheld property (not services) from another. The drafters intended to codify only common law larceny, larceny by false pretenses, and larceny by conversion. *United States v. Mervine*, 26 M.J. 482 (C.M.A. 1988); *United States v. Tenney*, 15 M.J. 779 (A.C.M.R. 1983); *United States v. Herndon*, 36 C.M.R. 8 (C.M.A. 1965); *United States v. Dean*, 33 M.J. 505 (A.F.C.M.R. 1991).

a) Wrongful taking. Requires dominion, control, and asportation. *See generally United States v. Carter*, 24 M.J. 280 (C.M.A. 1987); *United States v. Smith*, 33 M.J. 527 (A.F.C.M.R. 1991), *aff'd*, 35 M.J. 138 (C.M.A. 1992); *United States v. Pacheco*, 56 M.J. 1 (C.A.A.F. 2001) (stealing war trophies). The taking, obtaining or withholding is wrongful if done without the knowing consent of the owner or other lawful authority. MCM, pt. IV, ¶ 46c(1)(d).

(1) *United States v. Sneed*, 38 C.M.R. 249 (C.M.A. 1968). Where accused's accomplices were government agents, larceny of government property could not stand as no taking ever occurred, *i.e.*, articles were never out of government control. *See United States v. Cosby*, 14 M.J. 3 (C.M.A. 1982) (accused can be guilty of wrongful taking even though property was released to him by competent authority); *see also United States v. Cassey*, 34 C.M.R. 338 (C.M.A. 1964) (OSI authorized accomplices to proceed with delivery of government property and then apprehended accused after delivery as he attempted to leave base).

(2) Asportation.

(a) Larceny by taking continues as long as asportation of the property continues. The original asportation continues as long as the perpetrator is not satisfied with the location of the goods and causes the flow of their movement to continue relatively uninterrupted. An accused's actions in joining an ongoing conspiracy to steal a duffel bag before two co-conspirators completed asportation of the property was legally sufficient to sustain convictions of conspiracy to commit larceny and larceny. *United States v. Whitten*, 56 M.J. 234 (C.A.A.F. 2002).

(b) Larceny continues as long as the asportation continues. *United States v. Escobar*, 7 M.J. 197 (C.M.A. 1979) (considering duration of larceny/asportation in context of establishing court-martial jurisdiction; accused stole jacket off post and carried it onto post, thus providing court-martial jurisdiction over the offense); *see also United States v. Henry*, 18 M.J. 773 (N.M.C.M.R. 1984) (accused's mistaken claim-of-right defense negated during

asportation phase) *aff'd in part, rev'd in part on multiplicity grounds*, 21 M.J. 172 (C.M.A. 1985).

(c) Because the crime of larceny continues through the asportation phase, anyone who *knowingly* assists in the actual movement of the stolen property is a principal in the larceny. No distinction is made whether the continuation of the asportation by one other than the actual taker was prearranged or the result of decisions made on the spur of the moment. *United States v. Escobar*, 7 M.J. 197 (C.M.A. 1979).

(d) Person who participates in on-going larceny may simply be an accessory after the fact, not a principal, depending upon the purpose of his participation. If participant's motive is to secure the fruits of the crime, the aider becomes a participant in the larceny and is chargeable with larceny; but if his motive is to assist the perpetrator to escape detection and punishment, he is properly charged as an accessory after the fact. *United States v. Manuel*, 8 M.J. 823 (A.F.C.M.R. 1979).

(e) Larceny complete when soldier having custody over items moved them to another part of central issue facility with felonious intent. As such, when accused received the property it was already stolen and his actions did not make him a principal to larceny but rather only a receiver of stolen property under Article 134. *United States v. Henderson*, 9 M.J. 845 (A.C.M.R. 1980).

(f) The assistance need not be prearranged. *United States v. Cannon*, 29 M.J. 549 (A.C.M.R. 1989). *See generally* TJAGSA Practice Note, *Larceny and Proving Asportation*, Army Law., Feb. 1990, at 67 (discusses *Cannon*).

(g) Asportation was ongoing when the accused helped the perpetrator of a larceny; therefore, the accused is guilty of larceny as an aider or abettor. *United States v. Keen*, 31 M.J. 1108 (N.M.C.M.R. 1989). *See generally* TJAGSA Practice Note, *Aiding and Abetting Larceny*, Army Law., Nov. 1990, at 40 (discussing *Keen*).

(3) Lost property. Taking an unexpired credit card found on a public sidewalk was larceny of lost property by wrongful taking since the card contained a clue as to the identity of the owner. *United States v. Wiederkehr*, 33 M.J. 539 (A.F.C.M.R. 1991); *but see United States v. Meeks*, 32 M.J. 1033 (A.F.C.M.R. 1991) (keeping a t-shirt found mixed in with accused's laundry where there was no clue as to the owner was not a larceny).

(4) Electronic transfers as a "taking."

(a) *United States v. Meng*, 43 M.J. 801 (A.F. Ct. Crim. App. 1995), *rev. denied*, 44 M.J. 47 (C.A.A.F. 1996) (data entries made by accused in his computerized finance

records to pay himself more BAS than he was eligible for was larceny).

(b) Where accused never took, obtained, withheld, or possessed the fees, guilty pleas to so much of larceny specifications as pertained to credit card and automatic teller machine (ATM) processing fees were legally improvident. *United States v. Sanchez*, 54 M.J. 874 (A. Ct. Crim. App. 2001) (court notes in dicta that the appellant would have been provident to obtaining services under false pretenses as to the bank processing fees).

b) Obtaining by false pretenses. A false pretense is a false representation of past or existing fact, which may include a person's power, authority or intention. Although the pretense need not be the sole cause inducing the owner to part with the property, it must be an effective and intentional cause of the obtaining. MCM, pt. IV, ¶ 46c(1)(e).

(1) Debit Card and ATM Transactions. *United States v. Lubasky*, 68 M.J. 260 (C.A.A.F. 2010) (accused obtained access to account by false pretenses, representing that he would use the funds only for the purposes victim authorized; evidence was legally sufficient to support a larceny).

(2) In loan application, false promises to repay may support larceny by false pretenses. *United States v. Cummins*, 26 C.M.R. 449 (C.M.A. 1958).

(3) Knowledge of fraud not imputed between government agents. *United States v. Williams*, 3 M.J. 555 (A.C.M.R. 1977), *rev'd on other grounds*, 4 M.J. 336 (1978).

(4) Insurance fraud larceny not complete until accused cashed settlement check. *United States v. Seivers*, 8 M.J. 63 (C.M.A. 1979), *aff'd*, 9 M.J. 397 (C.M.A. 1980).

(5) Sham marriage to obtain monetary benefits may support larceny by false pretenses. *United States v. Bolden*, 28 M.J. 127 (C.M.A. 1989).

(6) Obtaining services by false pretenses (long-distance telephone services) is charged under Article 134. *United States v. Flowerday*, 28 M.J. 705 (A.F.C.M.R. 1989); *United States v. Perkins*, 56 M.J. 825 (A. Ct. Crim. App. 2001).

(7) False pretenses and unauthorized pay/allowances.

(a) When Congress authorized basic allowance for housing for service members with "dependents," it did not intend to include a person linked to a service member only by a sham marriage. A marriage, as intended by Congress, is an undertaking by two parties to establish a life together and assume certain duties and obligations. A marriage entered into solely for the purpose of obtaining government benefits is a sham marriage and not entitled to BAH. *United States v. Phillips*, 52 M.J. 268 (C.A.A.F. 2000).

(b) A false pretense may exist by one's silence or by a failure to correct a known misrepresentation. The accused obtained use of government quarters at Fort Stewart, Georgia between 4 November 1994 and 14 January 1998 by misrepresenting that he was married, when in fact he was divorced. Even though he made no affirmative misrepresentation, his silence when his divorce became final and subsequent failure to correct a known misrepresentation constituted false representation sufficient to establish that he wrongfully obtained services under false pretenses, an Article 134 offense. The court specifically analogized obtaining services by false pretenses (Article 134) with larceny by false pretenses (Article 121). *United States v. Perkins*, 56 M.J. 825 (A. Ct. Crim. App. 2001) (ACCA formally adopted the position already taken by NMCCA and AFCCA).

(c) Procuring casual pay by misrepresentation or failing to inquire into legitimacy of casual pay does not amount to larceny by false pretenses. *United States v. Johnson*, 30 M.J. 930 (A.C.M.R. 1990).

(d) *United States v. Johnson*, 39 M.J. 707 (N.M.C.M.R. 1993), *aff'd*, 40 M.J. 318 (C.M.A. 1993) (larceny of BAQ and VHA by false pretenses when accused divorced his wife, knew that he was under a duty to report his change in marital status, but remained silent and exploited government reliance on his previous statement of marital status in order to continue receiving pay).

(e) *United States v. Bulger*, 41 M.J. 194 (C.M.A. 1994) (evidence that accused falsely declared his wife as a dependent and entered a false address for her in order to obtain increased BAQ and VHA allowances and had not paid support to her since their separation several years earlier, sufficiently established that accused misrepresented existing intention in applying for benefits to support larceny conviction of obtaining by false pretenses).

(8) Defrauding insurance company by killing insured or intentionally destroying property in order to collect insurance proceeds is larceny by false pretenses. *United States v. Garner*, 43 M.J. 435 (C.A.A.F. 1996).

(9) *United States v. Fenner*, 53 M.J. 666 (A.F. Ct. Crim. App. 2000) (sole lessee collected $225 from his 3 roommates for rent and utilities. After his roommates paid him one month, he told them that someone had stolen all the money, which was a lie. Each of the roommates agreed to pay an extra $75 per month for the next three months to replace the stolen money. The court affirmed the part of a specification that alleged larceny of $75 that one of the roommates paid the accused toward the supposedly stolen rent as the roommate paid the accused $75 under the false pretense that the money had been stolen).

c) Withholding. A "withholding" may arise as a result of a failure to return, account for, or deliver property to its owner when a return, accounting, or delivery is due, even if the owner has made no demand for the property; or it may arise as a result of devoting property to a use not authorized by its owner. Generally this is so whether the person withholding the property acquired it lawfully or unlawfully. MCM, pt. IV, ¶ 46c(1)(b). This theory encompasses the common law offenses of embezzlement and conversion.

(1) *United States v. Moreno*, 23 M.J. 622 (A.F.C.M.R.), *pet. denied*, 24 M.J. 348 (C.M.A. 1986) (accused wrote checks against money erroneously deposited in his account; intent to steal (withholding) may be formed after the property is obtained).

(2) Embezzlement requires a fiduciary relationship and a lawful holding. *United States v. Castillo*, 18 M.J. 590 (N.M.C.M.R. 1984); *see also United States v. McFarland*, 23 C.M.R. 266 (C.M.A. 1957).

(3) Intent to permanently deprive must be concurrent with the taking/withholding. *United States v. Sicley*, 20 C.M.R. 118 (C.M.A. 1955).

(4) Wrongful conversion requires an accounting to the owner. *United States v. Paulk*, 32 C.M.R. 456 (C.M.A. 1963).

(5) *United States v. Head*, 6 M.J. 840 (N.C.M.R. 1979) (larceny by withholding when a victim mistook accused to be a robber and handed his wallet to the accused who, at that time, formed the intent and took money from the wallet. Though he abandoned the wallet, the accused was responsible for larceny of the sum he took).

(6) Neither a receiver of stolen property nor an accessory after the fact can be convicted of larceny on the theory that, with knowledge of the identity of the owner, he withheld the stolen property from the owner. *United States v. Sanderson*, CM 438057 (A.C.M.R. 29 Jun. 79) (unpub.); *see also United States v. Jones*, 33 C.M.R. 167 (C.M.A. 1963).

(7) *United States v. Bilbo*, 9 M.J. 800 (N.C.M.R. 1980). Accused who lawfully obtained loans from fellow Marines but then failed to repay those loans was found guilty of wrongful appropriation, not larceny. N.C.M.R. further held that the Article 134 offense of dishonorable failure to pay just debts was supported by the evidence.

(8) *United States v. Hale*, 28 M.J. 310 (C.M.A. 1989). Retention of rental car beyond period contemplated by rental contract constitutes wrongful appropriation (unless intent to permanently deprive the owner of the property can be proven).

(9) Withholding of unauthorized pay or allowances. These cases differ from the cases annotated above in which unauthorized pay and allowances are *obtained* by false pretenses. The withholding cases discussed here involve either government error or a change in the serviceman's status, which effects his continued entitlement to the pay or allowance. The property is obtained lawfully.

(a) In the absence of a fiduciary duty to account, a withholding of funds otherwise lawfully obtained is not

larcenous. *United States v. Watkins*, 32 M.J. 327 (A.C.M.R. 1990); *United States v. Johnson*, 39 M.J. 707 (N.M.C.M.R. 1993); *but see United States v. Thomas*, 36 M.J. 617 (A.C.M.R. 1992)(accused had a duty to inform government of change in circumstances, failing to do so he is guilty of larceny of funds); *cf. United States v. Markley*, 40 M.J. 581 (A.F.C.M.R. 1994) (failure of duty to report change in marital status effecting entitlement to allowances may support conviction for dereliction of duty); *United States v. Antonelli*, 43 M.J. 183 (C.A.A.F. 1995) (allowances, including BAQ and VHA, remain the property of the United States unless they are used for their statutory or regulatory purposes), *aff'd*, 45 M.J. 12 (C.A.A.F. 1996).

(b) Once service member realizes that he or she is erroneously receiving pay or allowances and forms the intent to steal that property, the service member has committed larceny even without an affirmative act of deception or a duty to account for the funds. *United States v. Helms*, 47 M.J. 1 (C.A.A.F. 1997) (unanimously resolving issue left open in *United States v. Antonelli*, 43 M.J. 183 (C.A.A.F. 1995), *aff'd*, 45 M.J. 12 (C.A.A.F. 1996)); *United States v. Perkins*, 56 M.J. 825 (Army Ct. Crim. App. 2001).

(c) *United States v. Gray*, 44 M.J. 585 (N-M. Ct. Crim. App. 1996) (accused's silence after he discovered error of housing office and finance to continue his BAQ and VHA payments after government quarters were assigned was insufficient to support conviction for larceny by wrongful withholding absent any affirmative steps by accused to ensure that he would continue to be overpaid. Further, the accused fully expected the Navy to recoup overpayments eventually, without disciplinary action, as it had done in the past).

(d) *United States v. Stadler*, 44 M.J. 566 (A.F. Ct. Crim. App. 1996) (larceny of OHA and COLA allowances where accused continued to collect these allowances after his family returned to CONUS and he moved into government quarters), *aff'd*, 47 M.J. 206 (C.A.A.F. 1997).

(e) Evidence insufficient to establish that accused's spouse had possessory or ownership rights to BAQ at w/dep rate and thus failed to establish that accused had stolen BAQ from his wife. *United States v. Evans*, 37 M.J. 468 (C.M.A. 1993).

(f) Excess BAQ was "military property of the United States." *United States v. Dailey*, 37 M.J. 463 (C.M.A. 1993).

(10) Conversion. An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights. Black's Law Dictionary (5th Ed. 1979).

(a) *United States v. Cahn*, 31 M.J. 729 (A.F.C.M.R. 1990). Accused was guilty of larceny by conversion when he retained an ATM card lended to him for withdrawing $20 as a loan, used the card to withdraw $500, and then destroyed it.

(b) *United States v. Antonelli*, 35 M.J. 122 (C.M.A. 1992). Conversion theory of larceny may apply to accused who receives BAQ and VHA allowances to support his dependents, but who does not actually provide support.

4. Element 2: That the property described belonged to a person other than the accused.

a) The "owner" is the person or entity with the superior right to possession. MCM, pt. IV, ¶ 46c. *See United States v. Evans*, 37 M.J. 468 (C.M.A. 1993) (evidence insufficient to establish that accused's spouse had possessory or other ownership right to BAQ and, thus, failed to establish that accused stole BAQ from his spouse); *United States v. Cohen*, 12 M.J. 573 (A.F.C.M.R. 1981) (even though the checks were intended for various banks and credit unions, the United States had possession of the checks while they were in the mail; thus the charge of larceny from the United States was proper); *United States v. Jett*, 14 M.J. 941 (A.C.M.R. 1982) (victim is anyone with a superior right of possession to the accused, regardless of who has title); *United States v. Meadows*, 14 M.J. 1002 (A.C.M.R. 1982) (can commit larceny or wrongful appropriation by taking military equipment from one unit to another); *United States v. Leslie*, 13 M.J. 170 (C.M.A. 1982) (United States had a possessory interest in C.O.D. funds that postal clerk stole instead of forwarding to senders of C.O.D. parcels; therefore, charge of larceny from the United States was proper); *United States v. Lewis*, 19 M.J. 623 (A.C.M.R. 1984) (government retains ownership in TDY advance).

b) Debts or the administrative costs associated with a larceny are not the proper subjects of a larceny. *United States v. Mervine*, 26 M.J. 482 (C.M.A. 1988); *United States v. Dunn*, 27 M.J. 624 (A.F.C.M.R. 1988); TJAGSA Practice Note, *Larceny of a Debt: United States v. Mervine Revisited*, Army Law., Dec. 1988, at 29; TJAGSA Practice Note, L*arceny of Administrative Costs: United States v. Dunn*, Army Law., Mar. 1989, at 32.

c) Erroneous allegation of ownership not a fatal defect. *United States v. Craig*, 24 C.M.R. 28 (C.M.A. 1957).

d) To be guilty of larceny, accused must take property from one having a superior possessory interest. *United States v. Faircloth*, 45 M.J.172 (C.A.A.F. 1996) (accused forged endorsement in financing company's behalf on insurance check issued to accused and financing company as co payees to auto damage; during providency, accused admitted financing company had superior possessory interest).

5. Element 3: That the property in question was of a value alleged, or of some value.

a) Legitimate (retail) market value at time and place of theft must be established. *United States v. Lewis*, 13 M.J. 561 (A.F.C.M.R. 1982) (accused properly convicted of full value of item where he switched price tags and paid the lower price).

b) Government item. Government price lists can be used to establish value. *See* M.R.E 803(17).

c) Non-government item. Average retail selling price established by recent purchase price of like item, testimony of market expert, testimony of owner's opinion as to value, etc.

d) Value tokens. Writings representing value may be considered to have the value which they represent, even though contingently, at the time of the theft. MCM, pt. IV, ¶ 46c(1)(g)(iii). *See United States v. Windham*, 36 C.M.R. 21 (C.M.A. 1965); *United States v. Riverasoto*, 29 M.J. 594 (A.C.M.R. 1989) (drafted check—face value);*United States v. Cook*, 15 C.M.R. 622 (A.F.B.R. 1954) (gasoline coupons—face value); *United States v. Frost*, 46 C.M.R. 233 (C.M.A. 1973) (blank check—nominal value); *see also United States v. Falcon*, 16 M.J. 528 (A.C.M.R. 1983); *United States v. Stewart*, 1 M.J. 750 (A.C.M.R. 1973) (airline ticket—face value); *United States v. Tucker*, 29 C.M.R. 790 (A.B.R. 1960) (credit card—nominal value); *United States v. Payne*, 9 M.J. 681 (A.F.C.M.R. 1980) (accounts receivable—nominal value); *United States v. Sowards*, 5 M.J. 864 (A.F.C.M.R. 1978) (money orders—face value); *but see United States v. McCollum*, 13 M.J. 127 (C.M.A. 1982) (value can include what items might bring in illegal channels—"thieves value").

e) Value of property must reasonably approximate the loss. *United States v. Eggleton*, 47 C.M.R. 920 (C.M.A. 1973).

f) In *United States v. Batiste*, 11 M.J. 791 (A.F.C.M.R. 981), the court held that urine, which was to be sent to the laboratory for testing, was an article of value for purposes of larceny prosecution and the immediate substitution by accused of a like quantity of urine did not diminish the offense of wrongful appropriation.

6. Element 4: That the taking, obtaining, or withholding by the accused was with the intent [permanently/temporarily] to deprive or defraud another person of the use and benefit of the property or [permanently/temporarily] to appropriate the property for the use of the accused or for any other person other than the owner.

a) Concurrence of intent and wrongful act. The wrongful taking, obtaining or withholding must be accompanied by the intent to steal or wrongfully appropriate the property. Although a person gets property by a taking or obtaining which was not wrongful or which was without a concurrent intent to steal, a larceny is nevertheless committed if an intent to steal is formed after the taking or obtaining and the property is wrongfully withheld with that intent. MCM, pt. IV, ¶ 46c(1)(f)(i).

b) Intent may be proved by circumstantial evidence. *United States v. Zaiss*, 42 M.J. 586 (Army Ct. Crim. App. 1995) (intent to steal may be inferred when accused secretly takes property, hides it, and denies knowing anything about it).

c) Wrongful appropriation of government property requires a specific intent to deprive the government or a unit thereof of more than mere possession of its property. *United States v. McGowan*, 41 M.J. 406 (C.A.A.F. 1995). Taking

military equipment for maintenance does not constitute wrongful appropriation. *United States v. Taylor*, 44 C.M.R. 274 (C.M.A. 1972). Similarly, the incidental use of a government vehicle for private purposes does not constitute misappropriation, provided the vehicle is also used for authorized purposes without diversion or deviation. *United States v. Lutgert*, 40 C.M.R. 94 (C.M.A. 1969).

d) Mere borrowing without consent is not always an offense. *United States v. Harville*, 14 M.J. 270 (C.M.A. 1982); *United States v. Thomas*, 34 C.M.R. 3 (C.M.A. 1963) (borrowing clothes from barracks occupant can be defense to wrongful appropriation).

e) There may be a limited right of self-help to seize another's property in order to satisfy a debt or acquire security for it, if there is a prior agreement between the parties providing for such recourse, or if the soldier takes property honestly believing he has a superior claim of right to that specific property. *United States v. Jackson*, 50 M.J. 868 (Army Ct. Crim. App. 1999), *aff'd*, 53 M.J. 220 (C.A.A.F. 2000); *United States v. Gunter*, 42 M.J. 292 (C.A.A.F. 1995); *United States v. Smith*, 14 M.J. 68 (C.M.A. 1982).

(1) Self-help is not justified where the debt is uncertain; and the value of the property taken must reasonably approximate the loss. *United States v. Cunningham*, 14 M.J. 539 (A.C.M.R. 1982), *rev'd and remanded on other grounds*, 15 M.J. 282 (C.M.A. 1983); *United States v. Kelley*, 39 M.J. 1011 (A.C.M.R. 1994); *see also United States v. Eggleton*, 47 C.M.R. 920 (C.M.A. 1973).

(2) Honest mistake of fact by accused that he was entitled to receive property may be a defense to larceny. *United States v. Turner*, 27 M.J. 217 (C.M.A. 1988).

(3) "Claim of Right." A defense exists for a soldier who takes property from another honestly believing that he has a superior claim of right to that specific property. *United States v. Gunter*, 42 M.J. 292 (1995); *United States v. Jackson*, 50 M.J. 868 (Army Ct. Crim. App. 1999) (engagement ring and exercise bike given to fiancé).

(4) No right of retrieval is recognized for contraband. *United States v. Petrie*, 1 M.J. 333 (C.M.A. 1976).

(5) No right of accused to unilaterally elevate himself to position of secured creditor by grabbing at will chattels belonging to service member. *United States v. Martin*, 37 M.J. 546 (N.M.C.M.R. 1993)(taking of ring from service member who owed money as security for debt was wrongful taking).

f) Motive does not negate intent. For example, if the accused took an item as a joke or to teach the owner a lesson about security, the taking is nonetheless wrongful if, viewed objectively, harm was caused (*i.e.*, the owner is permanently or temporarily deprived of the use or benefit of the property). MCM, pt. IV, ¶ 46c(1)(f)(iii); *United States v. Kastner*, 17 M.J. 11 (C.M.A. 1983); *United States v. Johnson*, 17 M.J. 140 (C.M.A. 1984).

g) An accused that believes property to be abandoned lacks the *mens rea* required for larceny. *United States v. Malone*, 14 M.J. 563 (N.M.C.M.R. 1982);

see also MCM, pt. IV, ¶ 46c(1)(h)(i); *see also United States v. Turner*, 27 M.J. 217 (C.M.A. 1988); *United States v. Jones*, 26 M.J. 1009 (A.C.M.R. 1988).

h) Intent to pay for, replace, or return property is not a defense. MCM, pt. IV, ¶ 46c(1)(f)(iii)A)(B); *see United States v. Brown*, 30 M.J. 693 (A.C.M.R. 1990); *United States v. Woodson*, 52 M.J. 688 (C.G. Ct. Crim. App. 2000). *But see United States v. Boddie*, 49 M.J. 310 (C.A.A.F. 1998) (in dicta, the CAAF states that an intent to pay for property *may* be a defense if there is "a substantial ability to do so").

i) Intent to pay for, replace, or return money or a negotiable instrument having no special value above its face value, with the intent to return an equivalent amount, is a defense to larceny. *United States v. Hegel*, 52 M.J. 778 (C.G. Ct. Crim. App. 2000) (accused stole CityBank Visa card and used it, but because the accused claimed he intended to pay the bill in full when due, the plea of guilty to larceny of funds from CityBank was improvident).

j) Overdraft protection may negate intent to steal in cases of larceny by false pretenses involving bad checks. *United States v. McCanless*, 29 M.J. 985 (A.F.C.M.R. 1990); *see United States v. McNeil*, 30 M.J. 648 (N.M.C.M.R. 1990); *see generally* TJAGSA Practice Note, *Overdraft Protection and Economic Crimes*, Army Law., Jul. 1990, at 45.

k) Where transfer of possession occurred prior to act of accused, no wrongful taking or withholding has occurred. *United States v. Hughes*, 45 M.J. 137 (C.A.A.F. 1996)(accused merely placed lock on his assigned wall locker which contained property belonging to another soldier that was stored there without the permission of the accused).

7. Multiplicity.

a) When a larceny of several articles is committed at substantially the same time and place, it is a single larceny, even though the articles belong to different persons. MCM, pt. IV, ¶ 46c(1)(h)(ii); *United States v. Warner*, 33 M.J. 522 (A.F.C.M.R. 1991); *United States v. Ruiz*, 30 M.J. 867 (N.M.C.M.R. 1990); *United States v. Huggins*, 12 M.J. 657 (A.C.M.R. 1981), *aff'd in part, rev'd in part on multiplicity grounds*, 17 M.J. 345 (C.M.A. 1984); *United States v. Gutierrez*, 42 C.M.R. 521 (A.C.M.R. 1970); *United States v. Miller*, 2000 C.A.A.F. LEXIS 207 (Feb. 24, 2000) (contemporaneous theft of two different victims' checks, which the accused found in one victim's drawer, constituted a single larceny); *United States v. LePresti*, 52 M.J. 644 (N-M. Ct. Crim. App. 1999).

b) *United States v. Florence*, 5 C.M.R. 48 (C.M.A. 1952). Without evidence to justify joining larcenies into one specification and thereby increasing the penalty, the Government should have charged separately.

c) *United States v. Gillingham*, 1 M.J. 1193 (N.C.M.R. 1976). Theft of calculator from one office was not multiplicious with theft of second calculator, moments later, from adjoining office.

d) *United States v. Alvarez*, 5 M.J. 762 (A.C.M.R. 1978). Housebreaking and larceny in the same transaction were not multiplicious.

e) *United States v. Burney*, 44 C.M.R. 125 (C.M.A. 1971). Larceny and wrongful appropriation of a truck to transport stolen goods were not multiplicious.

f) *United States v. Harrison*, 4 M.J. 332 (C.M.A. 1978). Six larcenies and six facilitating false official statements were not multiplicious for sentencing purposes.

8. Divisible Property. *United States v. Pardue*, 35 C.M.R. 455 (C.M.A. 1965). Where the accused is charged only with larceny of an automobile, he may not be found not guilty of wrongful appropriation of the automobile but guilty of larceny of an essential part (*i.e.*, the tires). *See also United States v. Jones*, 13 M.J. 761 (A.F.C.M.R. 1982).

9. Permissive Inferences.

a) Inference of wrongfulness arising out of possession of recently stolen property. If the facts establish that property was wrongfully taken from the possession of the owner and that shortly thereafter the property was discovered in the knowing, conscious, exclusive, and unexplained possession of the accused, the fact-finder at trial may infer that the accused took the property. *United States v. Pasha*, 24 M.J. 87 (C.M.A. 1987); *United States v. Hairston*, 26 C.M.R. 334 (C.M.A. 1958); *United States v. Morton*, 15 M.J. 850 (A.F.C.M.R. 1983).

b) Passing cash register without offering to pay for an item concealed in the accused's pocket creates a permissive inference of intent to steal. *United States v. Wynn*, 23 M.J. 726 (A.F.C.M.R. 1986), *sentence vacated and remanded by*, 26 M.J. 232 (C.M.A. 1988).

c) A power of attorney is not a license to embezzle. *United States v. Willard*, 48 M.J. 147 (1998).

10. Variance.

a) Because the identity of the victim is not an essential element of either larceny or wrongful appropriation, a variance in establishing ownership of the item taken will not always be fatal to the government's case. *United States v. Craig*, 24 C.M.R. 28 (C.M.A. 1957) (variance regarding victim in larceny case not prejudicial error); *United States v. Davis*, 31 C.M.R. 486 (C.G.B.R. 1962) (identity of victim of wrongful appropriation not an essential element); *United States v. Roberto*, 31 C.M.R. 349 (A.B.R. 1961) (variance as to ownership of funds in larceny case not fatal).

b) Variance in the date of the larceny may be fatal when the theory of larceny also changes. *United States v. Wray*, 17 M.J. 735 (C.M.A. 1984) (change of dates and theory from taking to taking and withholding was fatal variance).

11. Larceny of Mail Matter. Theft of misaddressed mail is included within the offenses of stealing mail under Article 134. MCM, pt. IV, ¶ 93; UCMJ art. 134; *United States v. Fox*, 50 M.J. 444 (C.A.A.F. 1999).

12. Credit Card/Automatic Teller Machine Offenses.

a) "Wrongfully engaging in a credit, debit, or electronic transaction to obtain goods or money is an obtaining-type larceny by false pretense. Such use to obtain goods is usually a larceny of those goods from the merchant offering them." *See* 2008 MCM, pt. IV, ¶ 46.c(1)(h)(vi).

b) *United States v. Lubasky*, 68 M.J. 260 (C.A.A.F. 2010). The accused, under the guise of assisting the elderly victim with her finances, used her credit cards, ATM cards, and debit cards, for his own benefit.

(1) Credit card transactions. Under the facts of the case, the unauthorized use of credit cards to obtain cash advances and unspecified goods of a certain value, was not a larceny from the cardholder herself. In using the credit cards in this case, the accused did not obtain anything from the cardholder, but instead obtained items of value from other entities. As such, the court concluded that the proper subject of the credit-card-transaction larcenies in this case was not the cardholder.

(2) Debit/ATM Transactions. The accused obtained access to the victim's account by false pretenses, representing that he would use the funds only for the purposes she authorized. Any authority he had to access the victim's funds was limited by his "beneficiary status and [the accused's] fiduciary role." Although he had access to the account, his authority to use funds from the account was limited to purchasing items for the cardholder's benefit. Therefore, the evidence was legally sufficient to show that the accused wrongfully obtained money from her with the intent to permanently deprive her of it.

c) Any theory under Article 134 or Article 121 can support a conviction for credit card offenses. *United States v. Christy*, 18 M.J. 688 (N.M.C.M.R. 1984).

d) Larceny of another soldier's ATM card and the use of the card to make withdrawals are separate crimes and are separately punishable. *United States v. Garner*, 28 M.J. 634 (A.F.C.M.R. 1989); *United States v. Abendschein*, 19 M.J. 619 (A.C.M.R. 1984); *United States v. Jobes*, 20 M.J. 506 (A.F.C.M.R. 1985).

e) Withdrawals from several different accounts using one banking machine are separate crimes. *United States v. Aquino*, 20 M.J. 712 (A.C.M.R. 1985).

f) Defense contention that bank consented to withdrawals by not programming ATM to prevent withdrawals from accounts having insufficient funds was rejected. *United States v. Buswell*, 22 M.J. 617 (A.C.M.R. 1986).

g) Misuse of Gov't travel card.

(1) Dereliction of duty. Article 92(3). *United States v. Long*, 46 M.J. 783 (Army Ct. Crim. App. 1997).

(2) Violation of general regulation. Article 92(1). *United States v. Hughey*, 46 M.J. 152 (1997) (Air Force base regulation restricting use of government charge cards and establishing payment requirements was lawful general regulation).

13. Military Property As An Aggravating Factor For Larceny. *See supra* discussion of military property under Article 108, ch. 3, ¶ XX).

14. *See* Captain David O. Anglin, *Service Discrediting: Misuse, Abuse, and Fraud in the Government Purchase Card Program*, Army Law., August 2004, at 1.

B. Receiving Stolen Property. MCM, pt. IV, ¶ 106; UCMJ art. 134.

1. Charged as a violation of Article 134. *United States v. Wolfe*, 19 M.J. 174 (C.M.A. 1985).

2. The actual thief cannot be a receiver of the goods he has stolen. MCM, pt. IV, ¶ 106(c)(1); *United States v. Ford*, 30 C.M.R. 3 (C.M.A. 1960); *United States v. Henderson*, 9 M.J. 845 (A.C.M.R. 1980). Thus, the original asportation (carrying away) of the property must be completed by the thief before another can be found guilty of receiving stolen property. *United States v. Graves*, 20 M.J. 344 (C.M.A. 1985).

3. The soldier who receives stolen property innocently and later discovers that it is stolen cannot be guilty of receiving stolen property. *United States v. Rokoski*, 30 C.M.R. 433 (A.B.R. 1960). "Receive" means to accept custody of; one cannot "receive" that which is already in his possession. *United States v. Lowery*, 19 M.J. 754 (A.C.M.R. 1984).

4. Although a principal who is not the actual thief may be liable as a principal or receiver of stolen property, he may not be found guilty of both. *United States v. Cartwright*, 13 M.J. 174 (C.M.A. 1982); MCM, pt. IV, ¶ 106(c)(1).

5. A conspirator to the larceny may not be found guilty of being an accessory after the fact or a receiver of the stolen property. *United States v. Lampani*, 14 M.J. 22 (C.M.A. 1982).

C. Robbery. MCM, pt. IV, ¶ 47; UCMJ art. 122.

1. Elements.

a) That the accused wrongfully took certain property from the person or from the possession and in the presence of a person named or described;

b) That the taking was against the will of that person;

c) That the taking was by means of force, violence, or force and violence, or putting the person in fear of immediate or future injury to that person, a relative, a member of the person's family, anyone accompanying the person at the time of the robbery, the person's property, or the property of a relative, family member, or anyone accompanying the person at the time of the robbery.

d) That the property belonged to a person named or described;

e) That the property was of a certain or of some value; and

f) That the taking of the property by the accused was with the intent permanently to deprive the person robbed of the use and benefit of the property;

g) [If the robbery was committed with a firearm, add the following element:] That the means of force or violence or of putting the person in fear was a firearm.

2. Pleading.

a) Failure to allege ownership of the property. *United States v. Smith*, 40 C.M.R. 432 (A.B.R. 1968) (no error); *United States v. Goudeau*, 44 C.M.R. 438 (A.C.M.R. 1971) (implied from allegation that item was taken from the purse of a named victim).

b) Failure to allege a taking from the person or in the presence of the victim is fatal, but the specification may be sufficient to allege larceny. *United States v. Rios*, 15 C.M.R. 203 (C.M.A. 954); *United States v. Dozier*, 38 C.M.R. 507 (A.B.R. 1967).

c) Failure to allege a taking "against his or her will." *United States v. Smith*, 40 C.M.R. 432 (A.B.R. 1968) (no defect; implied from allegation that taking was by means of force and violence).

3. Robbery has two theories: taking by force and/or violence, *or* taking by putting in fear. The alleged theory must be proved; evidence of the non-alleged theory will not suffice. *See United States v. Hamlin*, 33 C.M.R. 707 (A.F.B.R. 1963). Consequently, most prosecutors allege both theories.

a) Theory 1: Taking by force and/or violence.

(1) Victim's fear unnecessary.

(2) Amount of force required:

(a) Overcomes actual resistance, or

(b) Puts victim in a position not to resist, or

(c) Overcomes the restraint of a fastening (*e.g.*, in snatching purse the thief breaks strap of purse).

(3) The sequence and relationship of application of force and the intent to steal. Force and intent must be contemporaneous, but need not be simultaneous. If the accused's force and violence place the victim in vulnerable circumstances, this is sufficient for robbery if thereafter, while the victim is still vulnerable, the accused formulates the intent and takes the property. *United States v. Chambers*, 12 M.J. 443 (C.M.A. 1982); *United States v. Washington*, 12 M.J. 1036 (A.C.M.R. 1982).

(4) Picking a victim's pocket by stealth is not sufficient force for robbery; however, jostling a victim in conjunction with picking his pocket is sufficient force for robbery. *United States v. Reynolds*, 20 M.J. 118 (C.M.A. 1985).

b) Theory 2: Taking by putting in fear.

(1) Demonstration of force or menaces.

(2) Victim placed in fear of death or bodily injury in the present or future to himself, relative, or anyone in his company at the time.

(a) Reasonable fear. The test for its existence is objective. *United States v. Bates*, 24 C.M.R. 738 (A.F.B.R. 1957).

(b) Sufficient to warrant giving up property.

(c) Sufficient to warrant making no resistance.

(3) Taking while fear exists.

4. Wrongful taking must be from the person or in the presence of the victim.

a) "Presence" for purposes of robbery means that possession or control is so imminent that force or intimidation is required to remove the property. *United States v. Cagle*, 12 M.J. 736 (A.F.C.M.R. 1982).

b) "In the presence" is satisfied where victim held by force while his property is secured from another building and destroyed before him. *United States v. Maldonado*, 34 C.M.R. 952 (A.B.R.), *rev'd on other grounds*, 35 C.M.R. 257 (C.M.A. 1964).

c) Property taken need not be from person of victim, but may be from victim's immediate control. *United States v. Hamlin*, 33 C.M.R. 707 (A.F.B.R. 1963).

d) No fatal variance exists between specification and proof where the former alleges "from the person" but evidence shows "in the presence." *United States v. McCray*, 5 M.J. 820 (A.C.M.R. 1978).

5. Robbery is a composite offense combining larceny with assault. *United States v. Chambers*, 12 M.J. 443 (C.M.A. 1982) (force applied after taking effected sufficient for robbery); *United States v. Brown*, 33 C.M.R. 17 (C.M.A. 1963).

6. Robbery requires a larceny by wrongful taking. The other theories of larceny, wrongful withholding or obtaining, will not suffice. *United States v. Brazil*, 5 M.J. 509 (A.C.M.R. 1978).

7. The intent to rob need not be focused upon specific property. An intent to deprive the victim of whatever is in a pocket or purse is sufficient. *United States v. Davis*, 6 M.J. 669 (A.C.M.R. 1978).

8. The intent to rob need not precede or be simultaneous with the taking of the property. It must only be contemporaneous with such taking. *United States v. Fell*, 33 M.J. 628 (A.C.M.R. 1991); *see also United States v. Washington*, 12 M.J. 1036 (A.C.M.R. 1982); *United States v. Henry*, 18 M.J. 773 (N.M.C.M.R. 1984) (intent to steal formulated during asportation phase) *aff'd in part, rev'd in part on multiplicity grounds*, 21 M.J. 172 (C.M.A. 1985).

9. Forcible taking of property belonging to one entity from multiple persons constitutes one robbery. *United States v. Szentmiklosi*, 55 M.J. 487 (2001), *aff'd*, 57 M.J. 103 (C.A.A.F. 2002).

10. Lesser included Offenses. Under the "elements test," the federal offense of bank larceny was not a lesser included offense of the federal offense of bank robbery, so the defendant was not entitled to a jury instruction on it. A textual comparison of the elements of the two offenses in 18 U.S.C. § 2113 demonstrates that bank larceny requires three elements not required for bank robbery: (1) intent to steal; (2) asportation; and (3) value exceeding $1,000. *Carter v. United States*, 120 S.Ct. 2159 (2000) (although larceny is a lesser included offense of robbery under the UCMJ, the significance of this 5-4 decision is how a majority of the Court mechanically applied the "elements test" by comparing the statutory text).

D. Waste, Spoil, or Destruction of Non-Military Property. MCM, pt. IV, ¶ 33; UCMJ art. 109.

1. Elements.

a) Wasting or spoiling of non-military property.

(1) That the accused willfully or recklessly wasted or spoiled certain real property in a certain manner;

(2) That the property was that of another person;

(3) That the property was of a certain value.

b) Destroying or damaging non-military property.

(1) That the accused willfully and wrongfully destroyed or damaged certain personal property in a certain manner;

(2) That the property was that of another person;

(3) That the property was of a certain value or the damage was of a certain amount.

2. Scope of UCMJ art. 109. All property, both real and personal, which is not military property of the United States.

a) Avis rental car, two passenger cars, a fence owned by a German corporation, and a German road marker. *United States v. Valadez*, 10 M.J. 529 (A.C.M.R. 1980).

b) Privately owned passenger car. *United States v. Bernacki*, 33 C.M.R. 175 (C.M.A. 1963).

c) Privately owned boat. *United States v. Priest*, 7 M.J. 791 (N.C.M.R. 1979).

d) Real and personal property belonging to officers' club. *United States v. Geisler*, 37 C.M.R. 530 (A.C.M.R. 1965).

e) Real and personal property belonging to post exchange. *United States v. Underwood*, 41 C.M.R. 410 (A.C.M.R. 1969); *United States v. Schelin*, 12 M.J. 575 (A.C.M.R. 1981), *aff'd*, 15 M.J. 210 (C.M.A. 1983); *contra United States v. Mullins*, 34 C.M.R. 694 (N.C.M.R. 1964) and *United States v. Harvey*, 6 M.J. 545 (N.C.M.R. 1978).

3. Real Property. This portion of Article 109 proscribes the willful or reckless waste or spoliation of the real property of another.

a) Real property is defined as land, and generally whatever is erected on or growing on or affixed to land. Black's Law Dictionary 1096 (5th ed. 1979).

b) The term "wastes" and "spoils", as used in this article, refers to such wrongful acts of voluntary destruction of or permanent damage to real property as burning down buildings, burning piers, tearing down fences, or cutting down trees. MCM, pt. IV, ¶ 33c(1).

c) To be punishable the destruction must be done either willfully, that is intentionally, or recklessly, that is through the culpable disregard of the foreseeable consequences of some voluntary act. For examples of both willful and reckless conduct see previous discussion of UCMJ art. 108.

4. Personal Property. This portion of Article 109 proscribes the willful and wrongful injury to non-military personal property.

a) Violation of this punitive article exists when personal, non-military property is either destroyed or damaged. To be destroyed, the property need not be completely demolished or annihilated, but need only be sufficiently injured to be useless for the purpose for which it was intended. Damage consists of any physical injury to the property. MCM, pt. IV, ¶ 33c(2).

b) Mere negligent or reckless conduct does not satisfy the specific intent necessary to constitute this offense.

(1) Offense of willful and wrongful damage to private property requires proof of an actual intent to damage, as distinguished from a reckless disregard of property. *United States v. Bernacki*, 33 C.M.R. 175 (C.M.A. 1963); *see also United States v. Valadez*, 10 M.J. 529 (A.C.M.R. 1980). Regardless of the intentional nature of the cause precipitating damage to personal, non-military property, in the absence of evidence that the

destruction or damage was the intended result of the accused, a conviction under this portion of Article 109 is not supported. *United States v. Jones*, 50 C.M.R. 724 (A.C.M.R. 1975).

(2) *United States v. Priest*, 7 M.J. 791 (N.C.M.R. 1979)(accused's admission that he acted in grossly negligent or reckless manner in operating a privately owned boat in shallow water was an insufficient basis for conviction of willfully damaging private personal property of another, in that such an offense must be committed "willfully").

(3) *United States v. Youkum*, 8 M.J. 763 (A.C.M.R. 1980) (evidence that accused got into his vehicle in a highly angered, vengeful state of mind, revved engine causing wheels to spin, reached high rate of speed in a short distance, aimed vehicle unerringly at victim as well as at parked vehicle from which victim had dismounted, and made no effort to stop until after he had damaged all three was sufficient circumstantial evidence to sustain conviction of willfully and wrongfully damaging vehicles).

(4) *United States v. Garcia*, 29 M.J. 721 (C.G.C.M.R. 1989). The accused must intend to cause the destruction or damage. Unintentionally breaking a jewelry case to take the contents is insufficient for guilt. *See* TJAGSA Practice Note, *Damaging Property and Mens Rea*, Army Law., Feb. 1990, at 66 (discusses *Garcia*).

(5) *United States v. White*, 61 M.J. 521 (N-M. Ct. Crim. App. 2005) (insufficient proof of *mens rea* in a willful damage to nonmilitary property case where accused threw himself in front of a vehicle driven by a Japanese national; he denied any intention of damaging the property, but rather claimed his purpose in jumping in front of the vehicle was to injure himself).

5. Pleading the offense. When charged with damage or destruction of non-military personal property, the government should allege that the accused acted in a "willful" manner. *But see United States v. Valadez*, 10 M.J. 529 (A.C.M.R. 1980) (inartfully drawn specification alleging the willful and wrongful damage of a private automobile by operating it in a reckless manner was not fatal).

6. Value. In the case of *destruction*, the value of the property destroyed controls the limit of punishment that may be adjudged, but in the case of *damage*, the amount thereof instead of the value of the property damaged is controlling. As a general rule, the amount of damage is the estimated or actual cost of repair by artisans employed in this work who are available to the community wherein the owner resides, or the replacement cost, whichever is less. See also the discussion of value pertaining to Article 108, UCMJ.

E. Crimes Violating Protected Places: Burglary, Housebreaking, and Unlawful Entry.

1. Elements.

a) Burglary. MCM, pt. IV, ¶ 55; UCMJ art. 129.

(1) That the accused unlawfully broke and entered the dwelling house of another;

(2) That both the breaking and entering were done in the nighttime; and

(3) That the breaking and entering were done with the intent to commit an offense punishable under Article 118 through Article 128, except Article 123a.

b) Housebreaking. MCM, pt. IV, ¶ 56; UCMJ art. 130.

(1) That the accused unlawfully entered a certain building or structure of a certain other person; and

(2) That the unlawful entry was made with the intent to commit a criminal offense therein.

c) Unlawful entry. MCM, pt. IV, ¶ 111; UCMJ art. 134.

(1) That the accused entered the real property of another or certain personal property of another which amounts to a structure usually used for habitation or storage;

(2) That such entry was unlawful; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

2. Protected Places.

a) Burglary.

(1) "Occupied" dwelling includes houses, apartments, hotel rooms, barracks rooms, but not tents. MCM, pt. IV, ¶ 55c(5).

(2) *United States v. Bailey*, 23 C.M.R. 862 (A.F.B.R. 1957) (affirming burglary conviction for breaking into barracks building to victimize occupant where the victim's room was not broken into).

(3) *United States v. Norman*, 16 M.J. 937 (A.C.M.R. 1983) (hotel room was dwelling place; specification was sufficient despite failing to allege occupancy of room by the victim).

(4) *See also United States v. Slovacek*, 24 M.J. 140 (C.M.A. 1984); *United States v. Fagan*, 24 M.J. 865 (N.M.C.M.R. 1987), *aff'd*, 28 M.J. 64 (C.M.A. 1989); *United States v. Thompson*, 32 M.J. 65 (C.M.A. 1991).

b) Housebreaking.

(1) Room, shop, store, office, apartment, stateroom, ship's hold, compartment of a vessel, inhabitable trailer, enclosed goods truck or freight car, tent, houseboat. MCM, pt. IV, ¶ 56c(4); *see generally* TJAGSA Practice Note, *Housebreaking Includes More Than Breaking Into a House*, Army Law., Apr. 1989, at 56.

(2) Authority to access. *United States v. Davis*, 56 M.J. 299 (C.A.A.F. 2002)(although the accused had authorized access to the key to a government warehouse where his unit's equipment was stored, his entry into the warehouse to steal items belonging to another unit, without any official or authorized purpose, was legally sufficient to prove the "unlawful entry" element of housebreaking. Factors to consider in

determining whether or not the entry was with proper authority include: (1) the nature and function of the building involved; (2) the character, status, and duties of the entrant, and even at times his identity; (3) the conditions of the entry, including time, method, ostensible purpose; (4) the presence or absence of a directive; (5) the presence or absence of an explicit invitation to the visitor; (6) the invitational authority of any purported host; and (7) the presence or absence of a prior course of dealing, if any, by the entrant with the structure, and its nature.)

(3) Other Applications: *United States v. Sutton*, 45 C.M.R. 118 (C.M.A. 1972)(inapplicable to track vehicle); *United States v. Hall*, 30 C.M.R. 374 (C.M.A. 1961)(protects railroad freight car used to store goods); *United States v. Scimeca*, 12 M.J. 937 (N.M.C.M.R. 1982)(protects walk-in freezer); *United States v. Cahill*, 23 M.J. 544 (A.C.M.R. 1986) (protects AAFES delivery van used for storage); *United States v. Demmer*, 24 M.J. 731 (A.C.M.R. 1987) (protects AAFES snack truck used for storage);

c) Unlawful entry.

(1) Dwelling house, garage, warehouse, tent, vegetable garden, orchard, stateroom.

(2) *United States v. Breen*, 36 C.M.R. 156 (C.M.A. 1966) (does not protect service member's barracks locker).

(3) *United States v. Gillin*, 25 C.M.R. 173 (C.M.A. 1958) (inapplicable to an automobile); *see also United States v. Reese*, 12 M.J. 770 (A.C.M.R. 1981).

(4) *United States v. Taylor*, 30 C.M.R. 44 (C.M.A. 1960) (inapplicable to troop aircraft used as a conveyance).

(5) *United States v. Love*, 15 C.M.R. 260 (C.M.A. 1954) (protects troop billeting tent).

(6) *United States v. Wickersham*, 14 M.J. 404 (C.M.A. 1983) (protects fenced storage area).

(7) *United States v. Fayne*, 26 M.J. 528 (A.F.C.M.R. 1988) (showing that accused's estranged wife granted him permission to take water bed precluded conviction for unlawful entry of wife's residence).

(8) *United States v. Jordan*, 57 M.J. 236 (2002). The accused's guilty plea to unlawful entry was improvident because it did not establish a basis for concluding that the accused's conduct was prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces. Boarding a sailboat without the permission of the owner could constitute the offense of unlawful entry under Article 134. However, the factual circumstances revealed in the providence inquiry did not objectively support the third element of the offense.

3. The government must allege that the place violated was owned by one other than the accused. *See generally United States v. Norman*, 16 M.J. 937 (A.C.M.R. 1983).

4. "Breaking" requirement applies only to burglary.

a) Burglary requires that a "breaking" occur. This element demands a substantial and forcible act. More than the passing of an imaginary line is required. A breaking, removing, or putting aside of something material constituting a part of a dwelling house and relied on as a security against invasion is required. *United States v. Hart*, 49 C.M.R. 693 (A.C.M.R. 1975). A breaking may be either actual or constructive. A constructive breaking occurs when the entry is gained by trick, false pretense, or by intimidating the occupants through violence or threats. MCM, pt. IV, ¶ 55c(2).

b) Pushing aside closed Venetian blinds and entering through an otherwise open window constitutes a breaking. *United States v. Thompson*, 29 M.J. 609 (A.C.M.R. 1989), *aff'd*, 32 M.J. 65 (C.M.A. 1991); *see generally* TJAGSA Practice Note, *Burglary and the Requirement for a Breaking*, Army Law., Jan. 1990, at 32 (discussing the A.C.M.R. opinion in *Thompson*).

c) Specification failing to allege "break and" prior to "enter" was fatally defective. *United States v. Hoskins*, 17 M.J. 134 (C.M.A. 1984).

d) No such breaking is required for either housebreaking or unlawful entry. An unauthorized entry of the protected area is sufficient.

5. Intent requirements.

a) None for unlawful entry. *United States v. Gillin*, 25 C.M.R. 173 (C.M.A. 1958).

b) Housebreaking.

(1) This offense requires a specific intent "to commit a criminal offense within." "Criminal offense" defined by MCM: "Any act or omission whichis punishable by courts-martial, except an act or omission constituting a purely military offense, is a 'criminal offense.'" MCM, pt. IV, ¶ 56c(3).

(2) *United States v. Walsh*, 5 C.M.R. 793 (A.F.B.R. 1952) (intoxication a defense to housebreaking). Intent to commit a criminal offense, which was element of housebreaking, had to refer to intent to commit the crime stated in the specification, not merely intent to commit "some crime." *United States v. Webb*, 38 M.J. 62 (C.M.A. 1993).

(3) The offense cannot be a purely military offense. *See* MCM, pt. IV, ¶ 56c(3). "Purely military offenses" are those that "by [their] express terms . . . appl[y] only to a 'member of the armed forces.'" *See United States v. Marsh*, 15 M.J. 252, 254 (C.M.A. 1983). Conduct unbecoming of an officer and a gentleman is a purely military offense for purposes of Article 130. *See United States v. Conliffe*, 67 M.J. 127 (C.A.A.F. 2009). *See United States v. Contreras*, 69 M.J. 120 (C.A.A.F. 2010)(indecent acts charged under Article 134 is not a "purely military offense.")

c) Burglary requires that at the time of the breaking the accused possess the specific intent to commit an offense described in Articles 118-128. An intent to commit a different offense will sustain a guilty finding of housebreaking only. *United States v. Kluttz*, 25 C.M.R. 282 (C.M.A. 1958); *see also United States v. Garcia*, 15 M.J. 685 (A.F.C.M.R. 1983).

d) Intent to commit criminal offense at time unlawful entry was made may be inferred from the time and manner that the entry was made and the conduct of the accused after entry. *United States v. Carter*, 39 M.J. 754 (A.F.C.M.R. 1994).

6. Multiplicity. Housebreaking with intent to commit larceny and larceny therein are not multiplicious. *United States v. Alvarez*, 5 M.J. 726 (A.C.M.R. 1978).

F. Arson. MCM, pt. IV, ¶ 52; UCMJ art. 126.

1. Elements.

a) Aggravated arson.

(1) Inhabited dwelling.

(a) That the accused burned or set on fire an inhabited dwelling;

(b) That this dwelling belonged to a certain person and was of a certain value; and

(c) That the act was willful and malicious.

(2) Structure.

(a) That the accused burned or set on fire a certain structure;

(b) That the act was willful and malicious;

(c) That there was a human being in the structure at the time;

(d) That the accused knew that there was a human being in the structure at the time; and

(e) That this structure belonged to a certain person and was of a certain value.

b) Simple arson.

(1) That the accused burned or set fire to certain property of another;

(2) That the property was of a certain value; and

(3) That the act was willful and malicious.

2. *Mens Rea*.

a) All degrees of arson require proof of willfulness and maliciousness; that is, not merely negligence or accident. MCM, pt. IV, ¶ 52c. Specific intent is not an element of aggravated or simple arson. *United States v. Acevedo-Velez*, 17 M.J. 1 (C.M.A. 1983) (intent requirement for aggravated arson met where accused set fire to a coat where there was a great possibility the building would catch on fire even though accused did not intend to burn the building); *see United States v. Marks*, 29 M.J. 1 (C.M.A. 1989); *United States v. Banta*, 26 M.J. 109 (C.M.A. 1988) (voluntary intoxication is not a defense); *United States v. Acevedo-Velez*, 17 M.J. 1 (C.M.A. 1983); *United States v. Caldwell*, 17 M.J. 8 (C.M.A. 1983).

b) In the offense of aggravated arson by setting fire to an inhabited dwelling, the accused's knowledge of the type or purpose of structure is not required. *United States v. Duke*, 37 C.M.R. 80 (C.M.A. 1966) (intoxication no defense).

Accused properly convicted of aggravated arson for burning his own residence that he intended to abandon and from which his family had moved . *United States v. Dasha*, 23 M.J. 66 (C.M.A. 1986).

c) Intentionally starting a fire and negligently failing to ensure it is extinguished is arson. *United States v. Crutcher*, 49 M.J. 236 (C.A.A.F. 1998) (accused made some effort to put out the fire he had started).

3. Actual burning or charring of alleged property or structure is required, and mere scorching or discoloration is insufficient. MCM, pt. IV, ¶ 52c(2)(c); *United States v. Littrell*, 46 C.M.R. 628 (A.B.R. 1972) (burning of desk within building insufficient to prove aggravated arson; affirmed lesser included offense of attempted aggravated arson).

4. Disorderly conduct as lesser included offense. *United States v. Evans*, 10 M.J. 829 (A.C.M.R. 1981) (accused could be convicted of disorderly conduct as a lesser included offense of arson where specification alleged that accused was disorderly in quarters by setting fire to commode seat in latrine of his billets room and proof reasonably established all elements of disorderly conduct).

5. Simple arson is a lesser included offense of attempted aggravated arson. *United States v. Dorion*, 17 M.J. 1064 (A.F.C.M.R. 1984).

6. Burning with intent to defraud is a violation of UCMJ art. 134. *See generally United States v. Banta*, *supra* at H.2.a.; *United States v. Fuller*, 25 C.M.R. 405 (C.M.A 1958); *United States v. Snearley*, 35 C.M.R. 434 (C.M.A. 1965); *United States v. Colyon*, 35 C.M.R. 870 (A.F.C.M.R. 1965).

G. Bad Check Offenses.

1. Introduction.

a) Two Offenses.

(1) Making, Drawing, or Uttering a check, Draft, or Order Without Sufficient Funds. MCM, pt. IV, ¶ 49; UCMJ art. 123a.

(2) Making and Uttering a Worthless Check by Dishonorably Failing to Maintain Funds. MCM, pt. IV, ¶ 68; UCMJ art. 134.

b) See generally Richmond, Bad Check Cases: A Primer for Trial and Defense Counsel, Army Law., Jan. 1990, at 3.

2. Article 123a: Making, drawing or uttering check, draft or order with intent to defraud or deceive. MCM, pt. IV, ¶ 49.

a) Elements:

(1) The accused makes, draws, utters or delivers a check/draft/order for payment of money upon a bank/depository.

(2) The above act is made while accused harbors either of the following specific intents:

(a) the *intent to defraud* by the procurement of an article or thing of value, or

(b) the *intent to deceive* for payment of any past due obligation, or for any other purpose.

(3) The accused knew at the time of committing the illegal act that he did not or would not have sufficient funds/credit in the bank/depository for payment in full upon presentment.

(4) For a good discussion and application of these elements, see *United States v. Carter*, 32 M.J. 522 (A.C.M.R. 1990).

b) Definitions. MCM, pt. IV, ¶ 49c.

(1) Written instruments covered. Includes any check, draft, or order for payment or money drawn upon any bank or other depository. *See, e.g.*, *United States v. Palmer*, 14 M.J. 731 (A.F.C.M.R. 1982) (union share drafts).

(2) "Bank" or "other depository". Includes any business regularly but not exclusively engaged in public banking activities.

(3) "Making" and "drawing." Synonymous words and refer to act of writing and signing instrument.

(4) "Uttering" and "delivering." Both mean transferring instrument to another, but "uttering" includes offering to transfer.

(5) "For the procurement." Means for purpose of obtaining any article or thing of value.

(6) "For the payment." Means for purpose of satisfying in whole or part any past due obligation.

(7) "Sufficient funds." Means account balance at presentation is not less than face amount of check.

(8) "Upon its presentment." The time the demand for payment is made upon presentation of the instrument to the depository on which it was drawn.

c) *Mens Rea*.

(1) "Intent to defraud" (UCMJ art. 123a(1)). An intent to obtain through misrepresentation, an article or thing of value with intent permanently or temporarily to apply it to one's own use or benefit. MCM, pt. IV, ¶ 49c(14). *See United States v. Sassaman*, 32 M.J. 687 (A.F.C.M.R. 1991).

(2) "Intent to deceive" (UCMJ art. 123a(2)). An intent to mislead, cheat, or trick another by means of a misrepresentation made for the purpose of gaining an advantage or of bringing about a disadvantage to another. MCM, pt. IV, ¶ 14c(15).

(3) "Intent to deceive" is not the same as "intent to defraud." *United States v. Wade*, 34 C.M.R. 287 (C.M.A. 1964) (specification fails to state offense which alleges "making a check with intent to deceive for the purpose of obtaining lawful currency").

d) Articles or thing of value.

(1) Need not actually be obtained. *United States v. Cordy*, 41 C.M.R. 670 (A.C.M.R. 1967).

(2) Includes every right or interest in property or contract, including intangible, contingent, or future interests. *United States v. Ward*, 35 C.M.R. 834 (A.F.B.R. 1965) (check used to procure auto insurance).

(3) Includes checks given as a gift. *United States v. Woodcock*, 39 M.J. 104 (C.M.A. 1994) (only advantage secured by accused was temporary aggrandizement in the eyes of the person to whom the checks were given).

e) "Past due obligation" or "any other purpose".

(1) "Past due obligation." Obligation to pay money which has legally matured prior to the making or uttering.

(2) "Any other purpose."

(a) Includes all purposes other than payment of past due obligation or the procurement of any article or thing of value, *e.g.*, paying an obligation not yet past due.

(b) Excludes checks made for the purpose of obtaining any article or thing of value covered by Article 123a(1), UCMJ. *United States v. Wade*, 34 C.M.R. 287 (C.M.A. 1964).

f) Knowledge.

(1) Requires present knowledge that bank account is presently, or will be, insufficient at time of presentment. *See United States v. Crosby*, 22 M.J. 854 (A.F.C.M.R. 1986); *United States v. Matthews*, 15 M.J. 622 (N.M.C.M.R. 1982).

(2) "Sufficient funds" relates to time of presentment.

(3) Neither proof of presentment nor refusal of payment is necessary, if it can otherwise be shown that accused had requisite intent and knowledge at time of making or uttering. For example: (a) drawn on nonexistent bank or (b) drawn on overdrawn or closed account.

(4) Conviction does not require proof that the accused knew that the account holders (from whom accused had stolen and used starter checks) had insufficient funds in their bank account. Proof of the accused's knowledge that he was not the owner of the account satisfies the knowledge requirement. *United States v. Guess*, 48 M.J. 69 (C.A.A.F. 1998).

(5) Past "floating" of checks several days before payday does not negate proof of intent. *United States v. Smith*, 49 M.J. 279 (C.A.A.F. 1998).

g) Post-dated check. *Compare United States v. Hodges*, 35 C.M.R. 867 (A.F.B.R. 1965) (check made with requisite knowledge and intent; conviction affirmed), *with United States v. Birdine*, 31 M.J. 674 (C.G.C.M.R. 1990) (post-dated check did not support conviction, because no intent to deceive by accused; accused believed the checks would be covered).

h) Statutory 5-day notice. MCM, pt. IV, ¶ 49c(17).

(1) Failure of maker to pay holder within 5 days after notice of non-payment is prima facie evidence that:

(a) Maker had intent to defraud or deceive.

(b) Maker had knowledge of insufficiency of funds.

(2) The above inference is only permissive and is rebuttable.

(3) Either failure to give notice or payment by accused within 5 days precludes prosecution use of inference, but it does not preclude conviction if elements are otherwise proved.

(4) Notice. *United States v. Jarrett*, 34 C.M.R. 652 (A.B.R. 1964) (reading of bad check charges to an account drawer by his detachment commander does not fulfill the statutory requirement of notice of dishonor); *United States v. Cauley*, 9 M.J. 791 (A.C.M.R. 1980), *rev'd on other grounds*, 12 M.J. 484 (C.M.A. 1982) (introduction at trial of letter from bank to accused's CO seeking his assistance in effecting payment of accused's dishonored checks did not alone constitute proper notice even though letter contained a notation indicating that a copy was to be forwarded to the accused).

(5) Period of redemption. The 5-day redemption period means 5 calendar days and is not limited to ordinary business days, at least when the terminal date is not a Sunday or holiday. Days are computed by excluding the first day and including the last day. *United States v. O'Briant*, 32 C.M.R. 933 (A.F.B.R. 1963).

i) Pleading check offenses.

(1) Specification charging that the accused, on divers occasions, uttered worthless checks was legally sufficient to protect the accused from subsequent prosecutions. *United States v. Carter*, 21 M.J. 665 (A.C.M.R. 1985); *see also United States v. Krauss*, 20 M.J. 741 (N.M.C.M.R. 1985).

(2) "Mega-specs" permitted, and maximum punishment is determined by the number and amount of the checks as if they had been charged separately. *United States v. Mincey*, 42 M.J. 376 (C.A.A.F. 1995) (*overruling United States v. Poole*, 26 M.J. 272 (C.M.A. 1988)).

(3) Failure to object to duplicitous pleading of bad-check offenses waives any complaint that accused might have had about the pleadings. *United States v. Mincey*, 42 M.J. 376 (C.A.A.F. 1995).

j) Defenses.

(1) Honest mistake of fact. *United States v. Callaghan*, 34 C.M.R. 11 (C.M.A. 1963) (belief funds credited to account a legitimate defense).

(2) Redemption beyond 5-day period. *United States v. Broy*, 34 C.M.R. 199 (C.M.A. 1964) (no defense).

(3) "The Gambler's Defense." The Gambler's Defense is no longer recognized for check offenses arising under UCMJ art. 123a. *United States v. Falcon*, 65 M.J. 386 (C.A.A.F. 2008) (declining to apply *United States v. Allbery*, 44 M.J. 226 (C.A.A.F. 1996) and *United States v.*

Wallace, 36 C.M.R. 148 (C.M.A. 1966) to the Article 123a line of cases which held 1) that transactions designed to facilitate gambling are against public policy and 2) that courts will not enforce obligations arising therefrom).

(4) Overdraft protection, relied upon by the accused without false pretenses, constitutes a defense to larceny and related bad check offenses. *United States v. McCanless*, 29 M.J. 985 (A.F.C.M.R. 1990); *see United States v. Crosby*, 41 C.M.R. 927 (A.F.C.M.R. 1969). Unilateral action by a bank in honoring checks, unknown to the accused, does not constitute a defense. *United States v. McNeil*, 30 M.J. 648 (N.M.C.M.R. 1990); *see generally* TJAGSA Practice Note, *Overdraft Protection and Economic Crimes*, Army Law., Jul. 1990, at 45.

(5) Reasonable expectation of payment. *United States v. Webb*, 46 C.M.R. 1083 (A.C.M.R. 1972) (accused who writes overdrafts but reasonably expects to have funds to deposit before presentment has a legitimate defense).

(6) Compulsive gambling not a defense where accused hoped to win large sums to redeem worthless checks. *United States v. Zojak*, 15 M.J. 845 (A.F.C.M.R. 1983).

3. Article 134: Worthless check by dishonorably failing to maintain sufficient funds. MCM, pt. IV, ¶ 68.

a) Elements.

(1) That the accused made and uttered to a certain party a check for the alleged purpose.

(2) That the accused did thereafter fail to place or maintain sufficient funds in or credit with the bank for payment of such check in full upon its presentment for payment.

(3) That such failure was dishonorable.

(4) That such failure was prejudicial to good order and discipline or was service discrediting.

b) "Dishonorable" failure to maintain sufficient funds.

(1) Bad faith, gross indifference, fraud or deceit is necessary. *United States v. Brand*, 28 C.M.R. 3 (C.M.A. 1959).

(2) Negligent failure insufficient. *United States v. Kess*, 48 C.M.R. 108 (A.F.B.R. 1973).

(3) Redemption negates evidence of dishonorableness. *United States v. Groom*, 30 C.M.R. 11 (C.M.A. 1960).

(4) Evidence sufficient. *United States v. Silas*, 31 M.J. 829 (N.M.C.M.R. 1990).

(5) May occur after initial presentment. *United States v. Call*, 32 M.J. 873 (N.M.C.M.R. 1991).

c) Defenses.

(1) Lack of sophistication regarding checking insufficient for guilt under either an Article 123a or Article 134 theory. *United States v. Elizondo*, 29 M.J. 798 (A.C.M.R. 1989); *see generally*, TJAGSA Practice Note, *Mens Rea and Bad Check Offenses*, Army Law., Mar. 1990, at 36 (discusses *Elizondo*).

(2) Honest mistake, not a result of bad faith or gross indifference, is a legitimate defense. *United States v. Connell*, 22 C.M.R. 18 (C.M.A. 1956).

(3) Bad checks written to satisfy gambling debts not enforceable on public policy grounds. *United States v. Allberry*, 44 M.J. 226 (C.A.A.F. 1996); *United States v. Wallace*, 36 C.M.R. 148 (C.M.A. 1966). *But see United States v. Green*, 44 M.J. 828 (Army Ct. Crim. App. 1996) (public policy defense applies only when there is a direct connection between the check cashing service and the gambling activity).

d) A lesser included offense to Article 123a, UCMJ. *United States v. Bowling*, 33 C.M.R. 378 (C.M.A. 1963). *But see United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009).

4. Larceny or wrongful appropriation by check. UCMJ art. 121.

a) Utilizes the theory of larceny by false pretenses. *United States v. Culley*, 31 C.M.R. 290 (C.M.A. 1962).

b) Intent required.

(1) Intent to deprive or defraud permanently or temporarily. *United States v. Cummins*, 26 C.M.R. 449 (C.M.A. 1958).

(2) Carelessness or negligence in bookkeeping insufficient. *United States v. Bull*, 31 C.M.R. 100 (C.M.A. 1961).

(3) Restitution is no defense, except as it is evidence tending to disprove the accused's alleged intent.

c) Money, personal property, a thing of value must be obtained. Payment of past due obligation insufficient.

d) Defenses.

(1) All state of mind defenses apply. *United States v. Rowan*, 16 C.M.R. 4 (C.M.A. 1954) (honest mistake).

(2) Gambling losses unenforceable. *United States v. Walter*, 23 C.M.R. 274 (C.M.A. 1957).

5. Evidentiary matters. In *United States v. Dean*, 13 M.J. 676 (A.F.C.M.R. 1982), the court held that checks and the notations thereon were admissible as business records under MRE 803(6). The court further held, after judicially noticing U.C.C. § 3-510(b), that the checks were self-authenticating under M.R.E 902(b)(9). *Cf. United States v. Matthews*, 15 M.J. 622 (N.M.C.M.R. 1982) (notations that checks were stolen not admissible under U.C.C. § 3-510).

6. Multiplicity. Uttering check with intent to defraud under Article 123a, UCMJ, and larceny of currency by the checks under Article 121 were multiplicious for findings. *United States v. Ward*, 15 M.J. 377 (C.M.A. 1983) (summary disposition); *see also United States v. Allen*, 16 M.J. 395 (C.M.A. 1983).

H. Forgery. MCM, pt. IV, ¶ 48; UCMJ art. 123.

1. Elements.

a) Forgery: making or altering.

(1) That the accused falsely made or altered a certain signature.

(2) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice; and

(3) That the false making or altering was with the intent to defraud.

b) Forgery: uttering.

(1) That a certain signature or writing was falsely made or altered;

(2) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice;

(3) That the accused uttered, offered, issued, or transferred the signature or writing;

(4) That at such time the accused knew that the signature or writing had been falsely made or altered; and

(5) That the uttering, offering, issuing or transferring was with the intent to defraud.

2. Two distinct types: making or altering, and uttering. MCM, pt. IV, ¶ 48b.

a) Falsely making checks is a separate offense from uttering them; these actions are not alternative methods of committing the forgery, but distinct types of forgery. *United States v. Albrecht*, 43 M.J. 65 (C.A.A.F. 1995).

3. Forgery and larceny distinguished: The difference between forgery and larceny is that forgery requires falsity in the making. The act is false because it purports to be the act of someone other than the actual signer (the accused). "[T]he crux of forgery is the false making of the writing." "The distinction between forgery and 'the genuine making of a false instrument' largely depends on whether the accused impersonates another person." "Generally, signing one's own name to an instrument – even with the intent to defraud – is not a forgery." It is larceny. *United States v. Weeks*, ___M.J.___ (C.A.A.F. 2012).

4. For either type, the document must have legal efficacy. *United States v. Hopwood*, 30 M.J. 146 (C.M.A. 1990); *United States v. Thomas*, 25 M.J. 396 (C.M.A. 1988); MCM, pt. IV, ¶ 48c(4); *see United States v. James*, 42 M.J. 270 (1995) (leave form has "legal efficacy"); *United States v. Ivey*, 32 M.J. 590 (A.C.M.R. 1991) (checking account application), *aff'd*, 35 M.J. 62 (C.M.A. 1992); *United States v. Victorian*, 31 M.J. 830 (N.M.C.M.R. 1990); *United States v. Johnson*, 33 M.J. 1030 (N.M.C.M.R. 1991) (urinalysis report message from drug lab was not a "document of legal efficacy" and as such could not be subject of forgery).

5. *See generally* TJAGSA Practice Note, *Court Strictly Interprets Legal Efficacy*, Army Law., Aug. 1990, at 35; TJAGSA Practice Note, *Legal Efficacy as a Relative Concept*, Army Law., Jan. 1990, at 34; TJAGSA Practice Note, *Forgery and Legal Efficacy*, Army Law., Jun. 1989, at 40.

6. The instrument "tells a lie about itself." *United States v. Blackmon*, 39 M.J. 705 (N.M.C.M.R. 1993) (signing another's name to "starter" checks from the accused's checking account appeared to impose liability upon the third party whose name was being signed) *aff'd*, 41 M.J. 67 (C.M.A. 1994).

7. Significant injury need not result. *United States v. Faircloth*, 45 M.J. 172 (C.A.A.F. 1996) (accused forged endorsement in financing company's behalf on insurance check, issued to accused and financing company as copayees to auto damage); *United States v. Sherman*, 52 M.J. 856 (Army Ct. Crim. App. 2000) (where the accused and co-conspirator opened savings accounts by falsely and fraudulently signing signature cards, the general bookkeeping, security, and insurance functions inherent in agreeing to maintain a bank account imposed sufficient legal liability on the banks to warrant forgery convictions, even where there was no initial deposit).

8. Maximum Punishment. In cases where multiple, discrete instances of check forgery are pled in one "mega-spec," the maximum punishment is calculated as if they had been charged separately, extending analysis of *United States v. Mincey*, 42 M.J. 376 (C.A.A.F. 1995) (maximum punishment of a bad-check "mega-spec" is calculated by the number and amount of the checks as if they had been charged separately) to check forgery. *United States v. Dawkins*, 51 M.J. 601 (C.A.A.F. 1999).

9. A credit application itself is not susceptible of forgery under Article 123, because it, if genuine, would not create any legal right or liability on the part of the purported maker. *United States v. Woodson*, 52 M.J. 688 (C.G. Ct. Crim. App. 2000).

10. "Double forgery." Forgery of an endorsement is factually and legally distinct from forgery of the check itself, because the acts impose apparent legal liability on two separate victims; thus, the government may charge the "double forgery" in two separate specifications. *United States v. Pauling*, 60 M.J. 91 (C.A.A.F. 2004).

I. Failure to Pay Just Debt. MCM, pt. IV, ¶ 71; UCMJ art. 134.

1. Elements.

a) That the accused was indebted to a certain person or entity in a certain sum;

b) That this debt became due and payable on or about a certain date;

c) That while the debt was still due and payable the accused dishonorably failed to pay this debt; and

d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

2. Evidence was legally sufficient to support conviction for dishonorable failure to pay a just debt where accused failed to make an arrangement for payment, had made late payments before, failed to contact rental agent even after formal notice, and surreptitiously vacated the apartment without paying, cleaning, or repairing damage. *United States v. Polk*, 47 M.J. 116 (C.A.A.F. 1997).

Guilty plea to offense was improvident where the military judge failed to define dishonorable conduct with respect to an AAFES debt, failed to elicit a factual predicate for dishonorable conduct regarding the debt, and failed to resolve inconsistencies which indicated an inability to pay the debt and a lack of deceit or evasion. A mere failure to pay a debt does not establish dishonorable conduct. Even a negligent failure to pay a debt is not dishonorable. The term "dishonorable" connotes a state of mind amounting to

gross indifference or bad faith, and is characterized by deceit, evasion, false promises, denial of indebtedness, or other distinctly culpable circumstances. *United States v. Bullman*, 56 M.J. 377 (C.A.A.F. 2002), *aff'd*, 57 M.J. 478 (C.A.A.F. 2002); *United States v. Burris*, 59 M.J. 700 (C.G. Ct. Ctim. App. 2004).

J. Altering a Public Record. MCM, pt. IV, ¶ 99; UCMJ art. 134.

Mere completion of a blank form indicating graduation for an Army school and presentment of that document to Army officials was not "wrongful alteration of public record," absent additional evidence of intent or attempt to use the document to alter the integrity of official Army record. *United States v. McCoy*, 47 M.J. 653 (Army Ct. Crim. App. 1997).

K. Frauds Against The United States. MCM, pt. IV, ¶ 58; UCMJ art. 132.

Submission of a travel voucher for a TDY trip "concocted" to primarily conduct personal business is a false claim under Article 132. *United States v. Mann*, 50 M.J. 689 (A.F. Ct. Crim. App. 1999).

XL. OFFENSES AGAINST THE ADMINISTRATION OF JUSTICE.

A. Resistance, Breach of Arrest, and Escape. MCM, pt. IV, ¶ 19; UCMJ art. 95.

1. Elements.

a) Resisting apprehension.

(1) That a certain person attempted to apprehend the accused;

(2) That said person was authorized to apprehend the accused; and

(3) That the accused actively resisted the apprehension.

b) Flight from apprehension.

(1) That a certain person attempted to apprehend the accused;

(2) That said person was authorized to apprehend the accused; and

(3) That the accused fled from the apprehension.

c) Breaking arrest.

(1) That a certain person ordered the accused into arrest;

(2) That said person was authorized to order the accused into arrest; and

(3) That the accused went beyond the limits of arrest before being released from that arrest by proper authority.

d) Escape from custody.

(1) That a certain person apprehended the accused;

(2) That said person was authorized to apprehend the accused; and

(3) That the accused freed himself or herself from custody before being released by proper authority.

e) Escape from confinement.

(1) That a certain person ordered the accused into confinement;

(2) That said person was authorized to order the accused into confinement; and

(3) That the accused freed himself or herself from confinement before being released to proper authority.

(4) [If the escape was from post-trial confinement, add the following element:] That the confinement was the result of a court-martial conviction.

2. Applications.

a) Resisting Apprehension.

(1) Article 95 now includes a prohibition against flight from apprehension, but prior to offenses occurring on 10 February 1996 (the FY 96 amendment to art. 95), subject's flight from apprehension, by itself, was insufficient to constitute resisting apprehension under Article 95, UCMJ. *United States v. Pritt*, 54 M.J. 47 (C.A.A.F. 2000); *United States v. Harris*, 29 M.J. 169 (C.M.A. 1989); *United States v. Burgess*, 32 M.J. 446 (C.M.A. 1991).

(2) *United States v. Malone*, 34 M.J. 213 (C.M.A. 1992) (attempt to prevent apprehension by accelerating stolen vehicle, driving around a police barricade, swerving to avoid another vehicle placed in his path, and scattering sentries posted at the gate constituted "active resistance" sufficient to satisfy Article 95).

(3) *United States v. Webb*, 37 M.J. 540 (A.C.M.R. 1993) (acts were sufficient to constitute the offense of resisting apprehension where he temporarily terminated his flight, turned, faced his pursuer, and adopted a "fighting stance," and allowed pursuer to approach within five feet before resuming flight).

(4) *United States v. Rhodes*, 47 M.J. 790 (Army Ct. Crim. App. 1998) (resistance of apprehension by civilian law enforcement officers with no military affiliation was not an offense under Article 95, because the apprehending officers were not within any category of individuals authorized to apprehend under R.C.M. 302).

(5) The prosecution must prove that the accused had "clear notice of the apprehension." *United States v. Diggs*, 52 M.J. 251 (C.A.A.F. 2000).

b) Escape.

(1) *United States v. Standifer*, 35 M.J. 615 (A.F.C.M.R. 1992) (unauthorized visits with wife did not constitute the offense of escape from confinement where the visits occurred with the consent of accused's escorts and accused did not "cast off" his moral suasion), *aff'd in part, rev'd in part on other grounds*, 40 M.J. 440 (C.M.A. 1994).

(2) *United States v. Felix*, 36 M.J. 903 (A.F.C.M.R. 1993) (plea of guilty to escape from correctional custody was provident where accused knowingly and freely admitted to status of physical restraint by being in correctional custody and stating that he avoided a monitor in order to depart) *aff'd*, 40 M.J. 356 (C.M.A. 1994)).

(3) *United States v. Anderson*, 36 M.J. 963 (A.F.C.M.R. 1993) (conviction for escape was not supported by evidence that accused was allowed to go off base with escort, that escort left accused at accused's apartment, intending that accused would return to base with his wife, and that accused then killed his wife and fled) *aff'd*, 39 M.J. 431 (C.M.A. 1994).

(4) Where soldier is placed in confinement and is then temporarily removed from confinement facility while remaining under guard of another soldier, prisoner remains in confinement status, for purposes of escape charge, regardless of whether guard is armed or otherwise has physical prowess to subdue prisoner. *United States v. Jones*, 36 M.J. 1154 (A.C.M.R. 1993).

(5) Once lawfully placed into confinement, unless released by proper authorities, a Soldier may be convicted of escape from confinement, regardless of the nature of the facility in which he is held. *United States v. McDaniel*, 52 M.J. 618 (Army Ct. Crim. App. 1999) (accused was under physical restraint while outside of confinement facility, as required for escape under Article 95, and the escape was from confinement rather than custody because of the accused's status at the time), *but see Edwards*, below.

(6) Until actually placed in a confinement facility, an escaping Soldier who has been ordered "into confinement" but not yet processed into the facility is guilty of an escape from custody. *United States v. Edwards*, 69 M.J. 375 (C.A.A.F. 2011)(clarifying *McDaniel*; accused had been ordered into confinement by unit commander but had not yet left the installation, escaping from custody while meeting with his TDS cousel).

B. False Official Statement. MCM, pt. IV, ¶ 31; UCMJ art. 107.

1. Elements.

a) That the accused signed a certain official document or made a certain official statement;

b) That the document or statement was false in certain particulars;

c) That the accused knew it to be false at the time of signing it or making it; and

d) That the false document or statement was made with the intent to deceive.

2. Relation to Federal Statute. Congress intended Article 107 to be construed *in pari materia* with 18 U.S.C. § 1001. *United States v. Jackson*, 26 M.J. 377 (C.M.A. 1988); *United States v. Aronson*, 25 C.M.R. 29 (C.M.A. 1957). The purpose of Article 107 is to protect governmental departments and agencies from the perversion of its official functions which might result from deceptive practices. *United States v.* Jackson, supra; *United States v. Hutchins*, 18 C.M.R. 46, 51 (C.M.A. 1955); *see generally*, TJAGSA Practice Note, *The Court of Military Appeals Expands False Official Statement Under Article 107, UCMJ*, Army Law., Nov. 1988, at 37. However, Article 107 is more expansive than 8 U.S.C. § 1001 "because the primary purpose of military criminal law—to maintain morale, good order, and discipline—has no parallel in civilian criminal law." *See United States v. Teffeau*, 58 M.J. 62 (C.A.A.F. 2003) *United States v. Day*, 66 M.J. 172 (C.A.A.F. 2008).

3. Relation to Perjury. The offense of false official statement differs from perjury in that a false official statement may be made outside a judicial proceeding and materiality is not an essential element. MCM, pt. IV, ¶ 3c(3). Materiality may, however, be relevant to the intent of the party making the statement. *Id.*; *see also United States v. Hutchins*, 18 C.M.R. 46 (C.M.A. 1955) (accused made a false official statement in connection with a line of duty investigation). Making a false official statement is not a lesser included offense of perjury. *United States v. Warble*, 30 C.M.R. 839 (A.F.C.M.R. 1960).

4. Meaning of "False." *United States v. Wright*, 65 M.J. 373 (C.A.A.F. 2007). While loading equipment for a deployment, the accused and another soldier stole four government computers. An officer investigating the theft of the computers interviewed the accused, who stated: "While loading up the connex's [*sic*], I noticed that four of the computers weren't on top of the box anymore." During the providence inquiry, the accused admitted that his statement was false because it meant that he did not know where the computers went. In fact, the accused knew exactly where the computers were located. The court found that the statement was false for purposes of Article 107 even though it was misleading, but true. The statement falsely implied that he had no explanation for the absence of the computers. The statement also falsely implied that the computers went missing while he was loading up the connex boxes.

5. Independent Duty to Account and the Meaning of Officiality.

a) Formerly, a false statement to an investigator, made by a suspect who had no independent duty to account or answer questions, was not official within the purview of Article 107. *United States v. Osborne*, 26 C.M.R. 235 (C.M.A. 1958); *United States v. Aronson*, 25 C.M.R. 29 (C.M.A. 1957); *see also United States v. Davenport*, 9 M.J. 364, 367-68 (C.M.A. 1980).

b) Later, the Court of Military Appeals determined that no independent duty to account was required if the accused falsely reported a crime. *United States v. Collier*, 48 C.M.R. 789 (C.M.A. 1974).

c) More recently, the court determined that officiality was not dependent upon an independent duty to account or initiation of a report. The focus is on the officiality of the statement—whether an official governmental function was perverted by a false or misleading statement.

(1) *United States v. Harrison*, 26 M.J. 474 (C.M.A. 1988) (accused's false statement to battalion finance clerk in order to obtain an appointment for payment violates Article 107).

(2) *United States v. Jackson*, 26 M.J. 377 (C.M.A. 1988) (misleading information provided by accused about a murder suspect's whereabouts, voluntarily given to law enforcement agents, constitutes a false official statement).

(3) *United States v. Goldsmith*, 29 M.J. 979 (A.F.C.M.R. 1990) (untrue responses to a civilian cashier constituted a false official statement).

(4) *United States v. Ellis*, 31 M.J. 26 (C.M.A. 1990) (anonymous note can constitute a false official statement); *see generally* TJAGSA Practice Note, *An Anonymous Note Can Constitute a False Official Statement*, Army Law., Mar. 1991, at 24 (discusses *Ellis*).

(5) *United States v. Hagee*, 37 M.J. 484 (C.M.A. 1993) (making and signing false official duty orders in order to deceive a private party who was entitled to rely on their integrity was a violation of Article 107).

(6) *United States v. Dorsey*, 38 M.J. 244 (C.M.A. 1993) (lying to investigator about reason for refusing a polygraph held to be an "official" statement).

(7) *United States v. Smith*, 44 M.J.369 (C.A.A.F. 1996) (falsifying an LES and ID card in order to obtain car loan was violation of Article 107; the official character of a false statement can be based upon its apparent issuing authority rather than the identity of the person receiving it or the purpose for which it is made).

(8) *United States v. Bailey*, 52 M.J. 786 (A.F. Ct. Crim. App 1999) (when AFOSI agents asked the accused, whom they suspected of threatening victims with guns and whose apartment they intended to search, whether his firearms were in his apartment, there was a clear governmental function underway), *aff'd*, 55 M.J. 38 (C.A.A.F. 2001).

(9) *United States v. Czeschin*, 56 M.J. 346 (C.A.A.F. 2002). Paragraph 31c(6)(a) of the Manual for Courts-Martial, which provides that a statement by an accused or suspect during an interrogation is not an official statement within the meaning of Article 107 if that person did not have an independent duty or obligation to speak, does not establish a right that may be asserted by an accused who is charged with violating Article 107. Statements to investigators can be prosecuted as false official statements.

(10) *United States v. Melbourne*, 58 M.J. 682 (N-M. Ct. Crim. App. 2003) (ruling that the language in the pre-2002 editions of the MCM, pt. IV, ¶ 31c(6)) is no longer an accurate **statement** of law, at least insofar as it would apply to **statements** made to law enforcement agents conducting **official** investigations).

(11) *United States v. McMahon*, 58 M.J. 362 (C.A.A.F. 2003) (accused convicted of false official statement for falsifying a certificate awarding himself a Bronze Star).

(12) *United States v. Day*, 66 M.J. 172 (C.A.A.F. 2008). False statements made to on-base emergency medical personnel were official for purposes of Art. 107, but false statements made to an off-base, civilian 911 operator were not.

6. Statement to Civilian Law Enforcement Authorities. Official statements include those made "in the line of duty". MCM, Part IV, ¶ 31c(1). An intentionally deceptive statement made by a service member to civilian authorities may be nonetheless "official" and within the scope of Article 107.

a) Analysis for Statements to Civilian Authorities.

(1) Duty status at the time of the statement is not determinative. False official statements are not limited those made in the line of duty. Statements made outside of a servicemember's duties may still implicate official military functions. *United States v. Day*, 66 M.J. 172 (2008).

(2) The critical distinction is whether the statements relate to the official duties of the speaker or hearer, and whether those official duties fall within the UCMJ's reach. *United States v. Day*, 66 M.J. 172 (2008).

(3) The courts have used the following language to link the official duties and the reach of the UCMJ:

(a) Statements are official for purposes of Article 107 where there is a "clear and direct relationship to the official duties" at issue and where the circumstances surrounding the statement "reflect a substantial military interest in the investigation." *United States v. Teffeau*, 58 M.J. 62 (C.A.A.F. 2003).

(b) Statements may be official where there is "a predictable and necessary nexus to on-base persons performing official military functions on behalf of the command." *United States v. Day*, 66 M.J. 172 (C.A.A.F. 2008).

b) Applications of Article 107 to False Statements to Civilian Authorities.

(1) *United States v. Day*, 66 M.J. 172 (C.A.A.F. 2008). False statements made to on-base emergency medical personnel were official for purposes of Art. 107, but false statements made to an off-base, civilian 911 operator were not.

(2) *United States v. Teffeau*, 58 M.J. 62 (C.A.A.F. 2003) (accused made false statements to local civilian police concerning an automobile accident in which a delayed-entry recruit was killed; the entire incident and investigation bore a direct relationship to the accused's duties and status as a recruiter; further, the subject matter of the police investigation was of interest to the military and within the jurisdiction of the courts-martial system).

(3) *United States v. Morgan*, 65 M.J. 616 (N-M. Ct. Crim. App. 2007) (holding statements to civilian authorities were not "official" for Article 107 purposes).

(4) *United States v. Holmes*, 65 M.J. 684 (N-M. Ct. Crim. App. 2007) (holding statements to civilian authorities were not "official" for Article 107 purposes).

(5) *United States v. Caballero*, 65 M.J. 674 (C.G. Ct. Crim. App. 2007) (holding that false statements to civilian police detectives investigating a shooting that had occurred off-post were not official for Article 107 purposes).

7. "Exculpatory No" Doctrine. A number of federal circuit courts apply this doctrine, which stands for the proposition that a person who merely gives a negative response to a law enforcement agent cannot be prosecuted for making a false statement. *See generally United States v. Solis*, 46 M.J. 31 (C.A.A.F. 1997).

a) Statutory and constitutional concerns do not support continued application of the doctrine under the UCMJ. *United States v. Solis*, 46 M.J. 31 (1997); *United States v Black*, 47 M.J. 146 (1997); United *States v. Nelson*, 53 M.J. 319 (C.A.A.F. 2000).

b) The doctrine was traditionally given limited scope under military law, but recent cases placed severe limits on its scope. *See United States v. Prater*, 32 M.J. 433 (C.M.A. 1991); *United States v. Frazier*, 34 M.J. 135 (C.M.A 1992); *United States v. Sanchez*, 39 M.J. 518 (A.C.M.R. 1993).

c) The doctrine does not apply to false swearing offenses under Article 134, UCMJ. *United States v. Gay*, 24 M.J. 304 (C.M.A. 1987).

d) The doctrine has no legitimate statutory or constitutional basis and is not a defense to 18 U.S.C. § 1001. *Brogan v. United States*, 118 S.Ct. 805 (1998).

8. Multiplicity. *See United States v. McCoy*, 32 M.J. 906 (A.F.C.M.R. 1991) (finding an accused guilty of violating Articles 107 and 131 when he lied to a trial counsel and the next day told the same lie in court is multiplicious for sentencing only).

9. Unreasonable Multiplication of Charges (UMC). *United States v. Esposito*, 57 M.J. 608 (C.G. Ct. Crim. App. 2002) (finding charging accused with false official statement and obstructing justice by making the same false statement was UMC. Also, charging accused with soliciting a false official statement and obstructing justice by that same solicitation was UMC).

10. Statute of Limitations. Prosecuting an accused for making a false official statement about instances of deviant sexual behavior that occurred outside the five-year statute of limitations for such offenses did not violate his due process rights. *United States v. Sills*, 56 M.J. 556 (A.F. Ct. Crim. App. 2001), *sentence set aside, rehearing granted by*, 58 M.J. 23 (C.A.A.F. 2002).

11. Statement. A physical act or nonverbal conduct intended by a soldier as an assertion is a "statement" that may form the basis for a charge of making "any other" false official statement under Article 107. *United States v. Newson*, 54 M.J. 823 (Army Ct. Crim App. 2001).

False Swearing. MCM, pt. IV, ¶ 79; UCMJ art. 134.

12. Elements. False swearing is the making, under a lawful oath, of any false statement which the declarant does not believe to be true. *United States v. Davenport*, 9 M.J. 364 (C.M.A. 1980). The offense of false swearing has seven elements: (1) that the accused took an oath or its equivalent; (2) that the oath or its equivalent was administered to the accused in a matter in which such oath or equivalent was required or authorized by law; (3) that the oath or equivalent was administered by a person having authority to do so, *United States v. Hill*, 31 M.J. 543 (N.M.C.M.R. 1990); (4) that upon this oath or equivalent the accused made or subscribed a certain statement; (5) that the statement was false; (6) that the accused did not then believe the statement to be true; and (7) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. MCM, pt. IV, ¶ 79b. It is service discrediting whether it occurs on or off post. *United States v. Greene*, 34 M.J. 713 (A.C.M.R. 1992).

13. Relation to Perjury. Although often used interchangeably, perjury and false swearing are different offenses. Perjury requires that the false statement be made in a judicial proceeding and be material to the issue. These requirements are not elements of false swearing, which is not a lesser included offense of perjury. *See United States v. Smith*, 26 C.M.R. 16 (C.M.A. 1958); *United States v. Byard*, 29 M.J. 803 (A.C.M.R. 1989); *United States v. Claypool*, 27 C.M.R. 533, 536 (A.B.R. 1958); *United States v. Kennedy*, 12 M.J. 620 (N.M.C.M.R. 1981); *United States v. Galchick*, 52 M.J. 815 (A.F. Ct. Crim.

App. 2000)(Article 32 investigation is judicial); MCM, pt. IV, ¶ 79c(1); *but see* MCM, pt. IV, ¶ 57c(1). The drafters make no attempt to reconcile this provision with the authorities cited above. *See* MCM, pt. IV, ¶ 57 analysis at A23-16 (2002 Ed.). This provision, however, may be reconciled with those authorities if read in light of *United States v. Warble*, 30 C.M.R. 839, 841 n* (A.F.B.R. 1967) ("We are not called upon to decide whether the *Smith* case (dealing with *Article 131[1] perjury* and false swearing, as contrasted with *statutory perjury* and false swearing) would be held to be in any wise controlling in a statutory perjury charge")(emphasis in original), *aff'd*, 30 C.M.R. 386 (C.M.A. 1961); UCMJ art. 131(2). False swearing and perjury should thus be pled in alternative specifications when appropriate.

14. A civilian police officer authorized by state statute to administer an oath may satisfy the element of false swearing that requires that the "oath or equivalent was administered by a person having authority to do so." The element does not require that the person administering the oath be authorized to do so under Article 136, UCMJ. *United States v. Daniels*, 57 M.J. 560 (N-M. Ct. Crim. App. 2002).

15. Requirement for Falsity.

a) The primary requirement for false swearing is that the statement actually be false. MCM, pt. IV, ¶ 79c(1). A statement need not be false in its entirety to constitute the offense of false swearing. *Id.*, Part IV, ¶ 79b. *See United States v. Fisher*, 58 M.J. 300 (C.A.A.F. 2003).

b) A statement that is technically, literally, or legally true cannot form the basis of a conviction even if the statement succeeds in misleading the questioner. Literally true but unresponsive answers are properly to be remedied through precise questioning. *United States v. Arondel De Hayes*, 22 M.J. 54 (C.M.A. 1986) (accused lied when he said that the listed items were "missing" as he had an explanation for their absence); *United States v. McCarthy*, 29 C.M.R. 574 (C.M.A. 1960) (accused's friends stole some hubcaps which accused allegedly denied during a subsequent investigation).

c) Doubts as to the meaning of an alleged false statement should be resolved in favor of truthfulness. *United States v. Kennedy*, 12 M.J. 620 (N.M.C.M.R. 1981) (only certain portions of accused's statements to a NIS agent were false).

d) The truthfulness of the statement is to be judged from the facts at the time of the utterance. *United States v. Purgess*, 33 C.M.R. 97 (C.M.A. 1963) (evidence was insufficient in law to establish that accused made a false statement when accused stated that the seat covers in his car came from a German concern where the evidence showed that they did in fact come from a German concern, albeit by way of government purchase and theft from government stock); *see United States v. Arondel De Hayes*, 22 M.J. 54 (C.M.A. 1986).

16. Two Witness Rule. The rule is applicable to false swearing. *United States v. Yates*, 29 M.J. 888 (A.C.M.R. 1989), *aff'd*, 31 M.J. 380 (C.M.A. 1990); *see* TJAGSA Practice Note, *Judge's Incorrect Ruling Correctly Affirmed*, Army Law., Apr. 1990, at 70 (discussing *Yates*). *See infra*, ¶ VII.D.5.a), this chapter.

17. Use of Circumstantial Evidence. *United States v. Veal*, 29 M.J. 600 (A.C.M.R. 1989); *see generally* TJAGSA Practice Note, *Using Circumstantial Evidence to Prove False Swearing*, Army Law., Jan. 1990, at 36 (discusses *Veal*); *United States v. Hogue*, 42 M.J. 533 (A.F. Ct. Crim. App. 1995) (urinalysis result plus expert testimony satisfies direct evidence requirement), *aff'd*, 45 M.J. 300 (C.A.A.F. 1996).

18. "Exculpatory No" Doctrine. The doctrine is not applicable to false swearing, as the primary concern is the sanctity of the oath. *United States v. Gay*, 24 M.J. 304 (C.M.A. 1987); *see United States v. Tunstall*, 24 M.J. 235 (C.M.A. 1987); *United States v. Purgess*, 33 C.M.R. 97 (C.M.A. 1963); *United States v. Kennedy*, 12 M.J. 620 (N.M.C.M.R. 1981).

C. Perjury. MCM, pt. IV, ¶ 57; UCMJ art. 131.

1. Elements.

a) Giving false testimony.

(1) That the accused took an oath or affirmation in a certain judicial proceeding or course of justice;

(2) That the oath or affirmation was administered to the accused in a matter in which an oath or affirmation was required or authorized by law;

(3) That the oath or affirmation was administered by a person having authority to do so;

(4) That upon the oath or affirmation that accused willfully gave certain testimony;

(5) That the testimony was material;

(6) That the testimony was false; and

(7) That the accused did not then believe the testimony to be true.

b) Subscribing false statement.

(1) That the accused subscribed a certain statement in a judicial proceeding or course of justice;

(2) That in the declaration, certification, verification, or statement under penalty of perjury, the accused declared, certified, verified, or stated the truth of that certain statement;

(3) That the accused willfully subscribed the statement;

(4) That the statement was material;

(5) That the statement was false; and

(6) That the accused did not then believe the statement to be true.

2. Distinguished From False Swearing and False Official Statement.

a) Although often used interchangeably, perjury and false swearing are different offenses. The primary distinctions are that perjury requires that the false statement be made in a judicial proceeding and be material to the issue, whereas these matters are not part of the offense of false swearing. As such, false swearing is not a lesser included offense of perjury. *United States v. Smith*, 26 C.M.R. 16 (C.M.A. 1958).

b) The offense of false official statement (UCMJ art. 107) differs from perjury in that such a statement can be made outside a judicial proceeding and materiality is not an essential element, but bears only on the issue of intent to deceive. It, too, is not a lesser included offense of perjury. *United States v. Warble*, 30 C.M.R. 839 (A.F.B.R. 1960).

3. "Judicial proceeding" includes a trial by court-martial and "course of justice" includes an investigation under Article 32, UCMJ. MCM, pt. IV, ¶ 57c(1).

4. Discussion of Elements.

a) That the accused took an oath or its equivalent in a judicial proceeding or at an Article 32 investigation.

(1) The oath must be one required or authorized by law. MCM, pt. IV, ¶ 57c(2)(d).

(2) Article 42(b), UCMJ, requires that each witness before a court-martial be examined under oath. R.C.M. 405(h)(1)(A) provides that all witnesses who testify at an Article 32 investigation do so under oath.

(3) R.C.M. 807 lists the various forms of oaths to be used at courts-martial and Article 32 investigations. A literal application of such formats is not essential. The oath is sufficient if it conforms in substance to the prescribed form. At the request of the party being sworn an affirmation may be substituted for an oath.

(4) DA Pam 27-9, Military Judges' Benchbook, ¶ 3-149, defines an "oath" as a formal, external pledge, coupled with an appeal to the Supreme Being, that the truth will be stated. An "affirmation" is a solemn and formal, external pledge, binding upon one's conscience that the truth will be stated.

(5) The oath must be duly administered by one authorized to administer it. MCM, pt. IV, ¶ 57c(2)(d).

(6) Articles 41(c) and 136(a), UCMJ, along with R.C.M. 405 and R.C.M. 807, set out in detail those persons authorized to administer oaths at judicial proceedings and Article 32 investigations.

(7) The president, military judge, trial counsel and assistant trial counsel for all general and special courts-martial, along with all investigating officers and judge advocates, are included in this group.

(8) If the accused is charged with having committed perjury before a court-martial, the jurisdictional basis of the prior court-martial must be proved beyond a reasonable doubt.

(a) Ordinarily this may be shown by introducing in evidence pertinent parts of the record of trial of the case in which the perjury was allegedly committed or by the testimony of a person who was counsel, the military judge, or a member of the court in that case to the effect that the court was so detailed and constituted. *See United States v. Giles*, 58 M.J. 634 (N-M. Ct. Crim. App. 2003) *rev'd on other grounds and remanded by*, 59 M.J. 374 (C.A.A.F. 2004).

(b) Where (1) the evidence at trial on charges of perjury before another court-martial did not identify the convening authority of that court-martial; (2) no appointing order was either recited or introduced; and (3) no other evidence providing a factual basis for concluding the prior court was

properly detailed and constituted is presented, the evidence was insufficient despite lack of objection by the defense at the trial level. *United States v. McQueen*, 49 C.M.R. 355 (N.C.M.R. 1974).

b) That the accused willfully gave what he believed to be false testimony at the proceeding in question.

(1) A witness may commit perjury by testifying that he knows a thing to be true when in fact he either knows nothing about it at all or is not sure about it, and this is so whether the thing is true or false in fact. MCM, pt. IV, ¶ 57c(2)(a).

(2) A witness may also commit perjury in testifying falsely as to his belief, remembrance, or impression, or as to his judgment or opinion. Thus, if a witness swears that he does not remember certain matters when in fact he does or testifies that in his opinion a certain person was drunk when in fact he entertained the contrary opinion, he commits perjury if the other elements of the offense are present. MCM, pt. IV, ¶ 57c(2)(a).

(3) To undermine the willfulness and knowledge elements of this offense the following defenses are available:

(a) Voluntary intoxication. Intoxication may so impair the mental processes as to prevent a person from entertaining a particular intent or reaching a specific state of mind. To successfully argue this defense in a perjury prosecution, the evidence must show that the accused was intoxicated at the time he testified. Evidence that he was intoxicated at the time of the event about which he testified is immaterial insofar as raising this defense is concerned. *United States v. Chaney*, 30 C.M.R. 378 (C.M.A. 1961).

(b) Mistake of fact. Evidence that an accused charged with perjury was intoxicated at the time of the events about which he testified raises the defense of mistake since such evidence relates to his ability to see and recall what transpired. *United States v. Chaney*, 30 C.M.R. 378 (C.M.A. 1961).

(c) That the false testimony provided was in respect to a material matter.

(4) Determination of whether the false testimony was with respect to a material matter is a question of fact to be determined by the fact-finder. *United States v. Gaudin*, 515 U.S. 506 (1995); *see Johnson v. United States*, 520 U.S. 461, 463-66 (1997).

(5) To constitute a "material matter", the matter need not be the main issue in the case. The test is whether the false statement has a natural tendency to influence, or be capable of influencing, the decision of the tribunal in making a determination required to be made. *United States v. McLean*, 10 C.M.R. 183 (A.B.R. 1953). Materiality must be judged by the facts and circumstances in the particular case. The color of an

accused's hair may be totally immaterial in one case, but decisively material in another. *Weinstock v. United States*, 231 F.2d 699 (D.C. Cir. 1956).

(a) False denial of prior convictions by a witness in response to cross-examination conducted to impeach him and attack his credibility constitutes perjury, as such false testimony relates to a material matter. *State v. Swisher*, 364 Mo. 157, 260 S.W.2d (1968).

(b) *United States v. Martin*, 23 C.M.R. 437 (A.B.R. 1956) (accused's testimony at a previous trial that he was authorized to wear certain decorations, which was not in fact the case, was a material matter for purposes of sustaining a charge of perjury).

(6) Even inadmissible evidence may be material and therefore the subject of a perjury charge. Where a court improperly admits evidence, such impropriety is not per se evidence of immateriality if the evidence goes to the jury. *See United States v. Whitlock*, 456 F.2d 1230 (10th Cir. 1972); *United States v. Parker*, 447 F.2d 826 (7th Cir. 1971).

5. Corroboration: Special Evidentiary Rules.

a) A unique characteristic of Article 131 is that it contains a quantitative norm as to what evidence must be presented to establish a crucial element of falsity. A mere showing of guilt beyond a reasonable doubt is not enough. Specifically:

(1) "Two witness rule." The falsity of accused's statement must be shown by the testimony of at least two witnesses or by the testimony of one witness which directly contradicts accused's statement plus other corroborating evidence. *See United States v. Olivero*, 39 M.J. 246 (C.M.A. 1994) (circumstantial evidence of marijuana use insufficient; must have at least one corroborated witness with direct proof of such use). *United States v. Tunstall*, 24 M.J. 235 (C.M.A. 1987) (where alleged false oath relates to two or more facts that one witness contradicts accused as to the one fact and another witness as to another fact, the two witnesses corroborate each other in the fact that accused swore falsely, and their testimony will authorize conviction); *United States v. Lowman*, 50 C.M.R. 749 (A.C.M.R. 1975) (accused's testimony contradicted by two witnesses); *United States v. Jordan*, 20 M.J. 977 (A.C.M.R. 1985) (two witnesses rule not applicable where falsity of accused's oath is directly proved by documentary testimony).

(2) Direct proof required. No conviction may be had for perjury, regardless of how many witnesses testify as to falsity and no matter how compelling their testimony may be, if such testimony is wholly circumstantial. *See Olivero*, 39 M.J. 246 (C.M.A. 1994).

b) Documentary evidence directly disproving the truth of accused's statement need not be corroborated if the document is an official record shown to have been well known to the accused at the time he took the oath or if the documentary evidence appears to have sprung from the accused himself -or had in any manner been recognized by him as containing the truth - before the allegedly perjured

statement was made. *See generally* Hall, *The Two-Witness Rule in Falsification Offenses*, Army Law., May 1989, at 11.

c) With the passage of Title IV of the Organized Crime Control Act of 1970 (18 U.S.C. § 1623), Congress eliminated application of the two witnesses rule in federal court and grand jury proceedings. In its stead was adopted a beyond a reasonable doubt standard. This statute, however, has not been made applicable to the military. *See United States v. Lowman*, 50 C.M.R. 749 (A.C.M.R. 1975).

d) Inconsistent Sworn Statements. Because of the requirements of the "two witness rule," contradictory sworn statements made by a witness cannot by themselves be the basis of a perjury prosecution under Article 131. For example, X testifies under oath that on 15 March he was in a certain bar with accused from 1900-2100. At the same or subsequent trial he again testifies under oath, but this time states that although he was in the bar from 1900-2100, he never saw the accused. Under military law, insufficient evidence exists to prosecute X for perjury.

6. Application of evidentiary rules.

a) *United States v. Downing*, 6 C.M.R. 568 (A.F.B.R. 1952). Mere circumstantial evidence showing nonpresence at a hospital by nonexistence of entry in hospital records held to be insufficient.

b) *United States v. McLean*, 10 C.M.R. 183 (A.B.R. 1953). Weighty direct and circumstantial evidence of drinking which accused denied found sufficient.

c) *United States v. Taylor*, 19 C.M.R. 71 (C.M.A. 1955). Directly contradictory testimony of prosecution witness corroborated by strong circumstantial evidence held sufficient.

d) *United States v. Walker*, 19 C.M.R. 284 (C.M.A. 1955). Proof by circumstantial evidence alone of falsity of accused's negative assertion of what he saw - something by its nature not susceptible of direct proof - was held to be sufficient. This exception was subsequently embodied in MCM, 1969, ¶ 210 (currently in MCM, pt. IV, ¶ 57c(2)(c)).

e) *United States v. Guerra*, 32 C.M.R. 463 (C.M.A. 1963). Contradictory testimony held not directly so, therefore insufficient.

f) *United States v. Martin*, 23 C.M.R. 437 (A.B.R. 1956). Documentary evidence directly disproving accused's assertion of holding various decorations insufficient where uncorroborated.

g) *United States v. Anders*, 23 C.M.R. 448 (A.B.R. 1956). Facts similar to those in *United States v. Martin, supra*. Documentary evidence properly corroborated by testimony negating claim of awards.

h) *United States v. Giles*, 58 M.J. 634 (N-M. Ct. Crim. App. 2003)(accused's testimony that she "did not believe she was purchasing LSD" was sufficiently contradicted by her prior confession to CID that she knew she was buying LSD, her own handwritten note stating that she was got "acid" and from the observations of an informant; totality of the evidence supports conviction for perjury) *rev'd on improper joinder grounds, remanded by*, 59 M.J. 374 (C.A.A.F. 2004).

7. *Res Judicata* as a Defense.

a) The availability of *res judicata* as a defense to an accused charged with perjury is recognized in military law.

b) This doctrine is raised when accused testifies at his trial and is acquitted, but the Government wants to retry him for presenting false testimony at that trial. Under these circumstances *res judicata* will bar a conviction for perjury. *United States v. Martin*, 24 C.M.R. 156 (C.M.A. 1957); *United States v. Hooten*, 30 C.M.R. 339 (C.M.A. 1961); *see generally* Milhizer, *Effective Prosecution Following Appellate Reversal: Putting Teeth Into the Second Bite of the Apple*, II Trial Counsel Forum No. 4 (Apr. 1982).

c) When an accused is acquitted based on statements made at his trial and then makes similar statements at the trial of another person, *res judicata* is not available as a bar to a perjury prosecution for his subsequent statements because the principle of *res judicata* applies only to issues of fact or law put in issue and finally determined between the same parties. The accused was not a party to the second trial. *United States v. Guerra*, 32 C.M.R. 463 (C.M.A. 1963); *see generally* Hahn, *Previous Acquittals, Res Judicata, and Other Crimes Evidence Under Military Rule of Evidence 404(b)*, Army Law., May 1983, at 1.

D. Obstructing Justice. MCM, pt. IV, ¶ 96; UCMJ art. 134.

1. Elements.

a) That the accused wrongfully did a certain act;

b) That the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal proceedings pending;

c) That the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice; and

d) That, under the circumstances, the conduct of the accused was to the prejudice of the good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

2. Scope. Obstructing justice under Article 134 is much broader than under the United States Code. *See United States v. Jones*, 20 M.J. 38 (C.M.A. 1985). It proscribes efforts to interfere with the administration of military justice throughout the investigation of a crime, not simply at pending judicial proceedings. The crime can be constituted where the accused had reason to believe that criminal proceedings were or would be pending. *United States v. Tedder*, 24 M.J. 176 (C.M.A. 1987); *United States v. Bailey*, 28 M.J. 1004 (A.C.M.R. 1989); *United States v. Chodkowski*, 11 M.J. 605 (A.F.C.M.R. 1981), *aff'd*, 14 M.J. 126 (C.M.A. 1982); *but cf. United States v. Kellough*, 19 M.J. 871 (A.F.C.M.R. 1985) (not obstruction to "plant" evidence where no proceeding pending; offense was a disorder under Article 134). Criminal proceedings are broadly defined to include nonjudicial punishment. MCM, pt. IV, ¶ 96c. An official act, inquiry, investigation, or other criminal proceeding with a view toward possible disposition in the military justice system is required. *United States v. Gray*, 28 M.J. 858 (A.C.M.R. 1989). MCM 1984, pt. IV 96F is amended by Change 5 by making wrongfulness a required element.

3. Applications.

a) Assault on witness who had testified at summary court-martial. *United States v. Long*, 6 C.M.R. 60 (C.M.A. 1952).

b) Intimidating witnesses who were to testify at a summary court-martial. *United States v. Rossi*, 13 C.M.R. 896(A.F.B.R. 1953).

c) Intimidating a witness who was to appear before an Article 32 investigating officer. *United States v. Daminger*, 31 C.M.R. 521 (A.F.B.R. 1961). *But see United States v. Chodkowski*, 11 M.J. 605 (A.F.C.M.R. 1981) (arguing that *Daminger* no longer accurately represents controlling law on obstruction issue and that such a charge does not require that charges had been preferred in the underlying case or investigation).

d) Attempt to influence and intimidate a witness to retract a statement made during course of an Article 15 hearing. *United States v. Delaney*, 44 C.M.R. 367 (A.C.M.R. 1971).

e) MP tried to conceal money which came into his possession in the course of official duty when the money was possible evidence pertaining to an alleged criminal offense by another person. *United States v. Favors*, 48 C.M.R. 873 (A.C.M.R. 1974).

f) Communications among co-conspirators not embraced by the conspiracy. *United States v. Williams*, 29 M.J. 41 (C.M.A. 1989); *see United States v. Dowlat*, 28 M.J. 958 (A.F.C.M.R. 1989).

g) Endeavoring to impede trial by soliciting a murder. *United States v. Thurmond*, 29 M.J. 709 (A.C.M.R. 1989).

h) Accused's threat to airman, which airman understood as an inducement to testify falsely if he were called as a witness at the accused's trial, constituted offense even if accused was not on notice that airman would be a witness. *United States v. Caudill*, 10 M.J. 787 (A.F.C.M.R. 1981); *United States v. Rosario*, 19 M.J. 698 (A.C.M.R. 1984).

i) Attempt to have witness falsely provide an alibi. *United States v. Gomez*, 15 M.J. 954 (A.C.M.R. 1983).

j) Accused's act of simultaneously soliciting false testimony from two potential witnesses constituted a single obstruction of justice. *United States v. Guerro*, 28 M.J. 223 (C.M.A. 1989).

k) Asking witnesses to withdraw statements. *United States v. Latimer*, 30 M.J. 554 (A.C.M.R. 1990).

l) Accused's statement "don't report me" did not constitute obstruction of justice. *United States v. Asfeld*, 30 M.J. 917 (A.C.M.R. 1990).

m) Seeking to have minor daughter's boyfriend influence daughter to change her testimony at a state court proceeding, in exchange for consenting to daughter's marriage to boyfriend. *United States v. Smith*, 32 M.J. 567 (A.C.M.R. 1991) *rev'd on other grounds* 39 M.J. 448 (C.M.A. 1994) (merely requesting a soldier to contact a witness in a state proceeding, without evidence that accused also asked him to convince the witness to change her testimony, is not sufficient to sustain conviction for obstruction of justice).

n) No obstruction of justice where accused's conduct consisted only of calling friends and begging them not to press charges. *United States v. Kirks*, 34 M.J. 646 (A.C.M.R. 1992).

o) Making false and misleading statement to investigators may constitute obstruction of justice. *United States v. Arriaga*, 49 M.J. 9 (1998).

p) A senior drill instructor's attempt to get two trainees to change their story regarding a sexual assault against one of the trainees was legally sufficient to sustain convictions for two specifications of obstruction of justice. The accused's statement, "I'll do anything if you don't tell," and its converse implication of more severe treatment if the trainee did not accede was inconsistent with the duties of a senior drill sergeant. Additionally, the accused knew his offense against the trainee had been reported and that the trainee was pursuing the matter. *United States v. Barner*, 56 M.J. 131 (2001).

q) An interested party who advises, with a corrupt motive, a witness to exercise a constitutional right may obstruct the administration of justice. *United States v. Reeves*, 61 M.J. 108 (2005) (accused, a tech school instructor, told a trainee not to speak to investigators and to seek counsel once the accused came under suspicion for several offenses).

4. Applies to state court proceedings. *United States v. Smith*, 32 M.J. 567 (A.C.M.R. 1991), *rev'd on other grounds*, 39 M.J. 448 (C.M.A. 1994).

5. Requisite intent not found unless accused aware that there is or possibly could be an investigation. *United States v. Athey*, 34 M.J. 44 (C.M.A. 1992).

6. It is not necessary that the potential evidence be within the control of authorities or already seized when destroyed by the accused in order to be considered obstruction of justice. *United States v. Lennette*, 41 M.J. 488 (1995).

7. An accused can be convicted of obstruction of justice, even if the court-martial acquits him of the offense for which he was under investigation. *United States v. Bailey*, 52 M.J. 786 (A.F. Ct. Crim. App. 1999), *aff'd*, 55 M.J. 38 (C.A.A.F. 2001).

8. Using the U.S. Code.

a) A more restrictive, and thus generally less desirable, way to charge this offense is under Article 134(3), UCMJ, as a violation of one of the below-listed sections of the U.S. Code:

(1) 18 U.S.C. § 1503 (1982) - Obstruction of proceedings before any federal court, commissioner, magistrate, or grand jury. *United States v. Aguilar*, 115 S. Ct. 2357 (1995) (adopting the "nexus" requirement - that the conduct in question had the natural and probable effect of interfering with the due administration of justice).

(2) 18 U.S.C. § 1505 (1982) - Obstruction of proceedings before departments, agencies and committees.

(3) 18 U.S.C. § 1510 (1982) - Obstruction of criminal investigations. *See generally United States v. Casteen*, 17 M.J. 580 (A.F.C.M.R. 1983) (not intended to deal with communications between accomplices) *reconsidered on other grounds*, 17 MJ 800 (1983), *rev'd. in part*, 24 MJ 62 (C.M.A. 1987). *But see United States v. Williams*, 29 M.J. 41 (C.M.A. 1989) (disapproving of *Casteen* and stating that communications to an accomplice will be subject to obstruction charge under either Article 134(1) or 134(2)).

(4) 18 U.S.C. § 1511 (1982) - Obstruction of state or local law enforcement.

b) *See* Annot., 18 A.L.R. Fed. 875 (1974).

c) If the offense is charged under the U.S. Code, the military judge must instruct on the elements set out in the statute and the Government must prove the same. *United States v. Canter*, 42 C.M.R. 753 (A.C.M.R. 1970); *see generally United States v. Ridgeway*, 13 M.J. 742 (A.C.M.R. 1982).

d) The MCM obviates the need for proceeding under some of these statutes as Article 134 provides the offense of "Wrongful Interference With An Adverse Administrative Proceeding." *See* MCM, pt. IV, para 96a.

E. Destruction, Removal, or Disposal of Property to Prevent Seizure. MCM, pt. IV, ¶ 103; UCMJ art. 134.

1. Elements.

a) That one or more persons authorized to make searches and seizures were seizing, about to seize, or endeavoring to seize certain property;

b) That the accused destroyed, removed, or otherwise disposed of that property with intent to prevent the seizure thereof;

c) That the accused then knew that persons(s) authorized to make searches were seizing, about to seize, or endeavoring to seize certain property; and

d) That, under the circumstances, the conduct of the accused was to the prejudice of the good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

2. The offense has no requirement that criminal proceedings be pending or that the accused intended to impede the administration of justice. *Cf. United States v. Ridgeway*, 13 M.J. 742 (A.C.M.R. 1982). The crime is constituted where the accused intended to prevent the seizure of certain property that the accused knew persons authorized to make seizures were endeavoring to seize.

3. Not a defense that the search or seizure was technically defective. MCM, pt. IV, ¶ 103c.

F. Misprision of a Serious Offense. MCM, pt. IV, ¶ 95; UCMJ art. 134.

1. Elements.

a) That a certain serious offense was committed by a certain person;

b) That the accused knew that the said person had committed the serious offense;

c) That, thereafter, the accused concealed the serious offense and failed to make it known to civilian or military authorities as soon as possible;

d) That the concealing was wrongful; and

e) That, under the circumstances, the conduct of the accused was to the prejudice of the good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

2. Taking affirmative steps to conceal the identity of the offender constitutes misprision; conviction of misprision of serious offense does not violate Fifth Amendment right against self-incrimination. *United States v. Sanchez*, 51 M.J. 165 (C.A.A.F. 1999) (accused took affirmative steps to conceal the identity of the offender).

3. *See supra*, ¶ II.D, ch. 1, for a discussion of differences between Misprision of a Serious Offense and Accessory After the Fact.

G. Lesser Included Offenses and Multiplicity. If properly pleaded, communicating a threat may be a lesser included offense of obstruction of justice. *United States v. Benavides*, 43 M.J. 723 (Army Ct. Crim. App. 1995) (relying on "pleading elements" analysis of *United States v. Weymouth*, 43 M.J. 329, 340 (1995)); *United States v. Craft*, 44 C.M.R. 664 (A.C.M.R. 1971). *But see United States v. Oatney*, 41 M.J. 619 (N-M. Ct. Crim. App. 1994) (relying on strict "statutory elements" analysis of *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993), the Navy-Marine Court held that communication of a threat and obstruction of justice are not multiplicious, even in a particular case where the threat factually must be proved in order to prove the obstruction of justice), *aff'd*, 45 M.J. 185 (C.A.A.F. 1996).

XLI."EVIL WORDS" OFFENSES.

A. Threat or Hoax Designed or Intended to Cause Panic or Public Fear. MCM, pt. IV, ¶ 109; UCMJ art. 134.

1. Expansion of Offense. In 2005, this offense was expanded from "bomb" threats or hoaxes to include threats and hoaxes of other types, including explosives, weapons of mass destruction, biological agents, chemical agents, and other hazardous material. See MCM, pt. IV, ¶ 109c; MCM, App. 23 ¶ 109.

2. Explanation. "Threat" and "hoax" offenses can be charged under either Article 134(1), UCMJ, as conduct prejudicial to good order and discipline or under Article 134(3), UCMJ, a non-capital federal crime violative of 18 U.S.C.

3. "Innocent Motive." Claim of joking motive is not a defense to "bomb hoax" charge, as the victim's concern, which satisfies the requirement for maliciousness, can be inferred. *United States v. Pugh*, 28 M.J. 71 (C.M.A. 1989); *see* TJAGSA Practice Note, *"I Was Only Joking" Not a Defense to "Bomb Hoax" Charge*, Army Law., Jul. 1989, at 39 (discusses *Pugh*).

B. Communicating A Threat. MCM, pt. IV, ¶ 110; UCMJ art. 134.

1. Elements.

a) That the accused communicated certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future;

b) That the communication was made known to that person or to a third person;

c) That the communication was wrongful; and

d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

2. Explanation. This offense consists of wrongfully communicating an avowed present determination or intent to injure the person, property, or reputation of another presently or in the future. It relates to a potential violent disturbance of public peace and tranquility. *United States v. Grembowic*, 17 M.J. 720 (N.M.C.M.R. 1983).

3. Pleading. *United States v. Wartsbaugh*, 45 C.M.R. 309 (C.M.A. 1972) (pleading sufficient because evidence of surrounding circumstances may disclose the threatening nature of the words).

4. Applications.

a) Avowed present intent or determination to injure.

(1) Accused's statement that "I'd kill [my first sergeant] with no problem," made to health care professional while seeking help for drug addiction and suicidal urges, was not a present determination or intent to kill the putative victim. *United States v. Cotton*, 40 M.J. 93 (C.M.A. 1994); *United States v. Wright*, 65 M.J. 703 (N-M. Ct. Crim. App. 2007) (statements to health care professional not communicating a threat).

(2) Ineffective disclaimer. *United States v. Johnson*, 45 C.M.R. 53 (C.M.A. 1972) ("I am not threatening you . . . but in two days you are going to be in a world of pain," constitutes a threat when considered within the totality of the circumstances).

(3) Conditional threat.

(a) The "impossible" variable. *United States v. Shropshire*, 43 C.M.R. 214 (C.M.A. 1971) (physical threat to guard by restrained prisoner not actionable as no reasonable possibility existed that threat would be carried out); *see also United States v. Gately*, 13 M.J. 757 (A.F.C.M.R. 1982) (upheld lesser included offense of provoking words).

(b) The "possible" variable. *United States v. Phillips*, 42 M.J. 127 (C.A.A.F. 1995) (accused's statement to airman to "keep her damn mouth shut and [she would] make it through basic training just fine" was not premised on an impossible condition, even if the victim was not inclined to report accused's misconduct); *United States v. Brown*, 65 M.J. 227 (2006) (accused could control the contingency, and the combination of words & circumstances could make a contingent threat immediate for purposes of Article 134); *United States v. Holiday*, 16 C.M.R. 28 (C.M.A. 1954) (unrestrained prisoner's threat to injure guard was actionable even though conditioned on guard's not pushing prisoner; the condition was one accused had no right to impose); *United States v. Bailey*, 52 M.J. 786 (A.F. Ct. Crim. App. 1999) (acts and words may express what accused can and will do in the future), *aff'd*, 55 M.J. 38 (C.A.A.F. 2001); *see United States v. Alford*, 32 M.J. 596 (A.C.M.R. 1991), *aff'd*, 34 M.J. 150 (C.M.A. 1992).

(4) Idle jest, banter, and hyperbole are not threatening words. *United States v. Gilluly*, 32 C.M.R. 458 (C.M.A. 1963). In appraising the legal sufficiency of the evidence to sustain a conviction of communicating a threat, the circumstances surrounding the uttering of the words and consideration of whether the words were stated in jest or seriousness are to be evaluated. *See United States v. Johnson*, 45 C.M.R. 53 (C.M.A. 1972) (Considered in the light of the circumstances of the situation the following was held to be an illegal threat, "I am not threatening you, but I am telling you that I am not personally going to do anything to you, but in two days you are going to be in a world of pain," adding a suggestion that the victim "damn well better sleep light").

(5) The words used by the accused are significant in that they may not evidence a technical threat but rather merely state an already completed act, *e.g.*, "I have just planted a bomb in the barracks." Such a statement may constitute a simple disorder under Article 134 or a false official statement under Article 107 if made to a person in an official capacity (*e.g.*, Charge of Quarters). To meet potential problems of proof, trial counsel should plead such offenses in the alternative. *See United States v. Gilluly*, 32 C.M.R. 458 (C.M.A. 1963).

(6) Lack of intent to actually carry out the threat is not a basis for rejecting a guilty plea. *United States v. Greig*, 44 M.J. 356 (C.A.A.F. 1996) (accused admitted making threats and wished that the individuals who heard the threats believed them).

(7) Consider language and surrounding circumstances to determine whether or not words express a present determination or intent to wrongfully injure. *United States v. Hall*, 52 M.J. 809 (N-M. Ct. Crim. App 1999).

b) Communication to the victim is unnecessary. *United States v. Gilluly*, 32 C.M.R. 458 (C.M.A. 1963).

c) No specific intent is required. The intent which establishes the offense is that expressed in the language of the declaration, not the intent locked in the mind of the declarant. This is not to say the declarant's actual intention has no significance as to his guilt or innocence. A statement may declare an intention to injure and thereby ostensibly establish this element of the offense, but the declarant's true intention, the understanding of the persons to whom the statement is communicated, and the surrounding circumstances may so belie or contradict the language of the declaration as to reveal it to be a mere jest or idle banter. *United States v. Humphrys*, 22 C.M.R. 96 (C.M.A. 1956).

d) A threat to reputation is sufficient. *United States v. Frayer*, 29 C.M.R. 416 (C.M.A. 1960); *see also United States v. Farkas*, 21 M.J. 458 (C.M.A. 1986) (threat to sell victim's diamond ring sufficient).

e) Threats not *directly* prejudicial to good order and discipline nor service discrediting do not constitute an offense. *United States v. Hill*, 48 C.M.R. 6, 7 (C.M.A. 1973) (lovers' quarrel).

f) Merger with an assault crime. *United States v. Metcalf*, 41 C.M.R. 574 (A.C.M.R. 1969) (threat after assault merges with assault for punishment purposes).

g) Threatening a potential witness is a separate offense from and may constitute obstruction of justice in violation of Article 134. *United States v. Oatney*, 41 M.J. 619 (N.M.C. Ct. Crim. App. 1994), *aff'd*, 45 M.J. 185 (C.A.A.F. 1996); *United States v. Rosario*, 19 M.J. 698 (A.C.M.R. 1984); *United States v. Baur*, 10 M.J. 789 (A.F.C.M.R. 1981).

C. Provoking Words or Gestures. UCMJ art. 117.

1. Elements.

a) That the accused wrongfully used words or gestures towards a certain person;

b) That the words or gestures used were provoking or reproachful; and

c) That the person toward whom the words or gestures were used was a person subject to the code.

2. Relationship to Communicating a Threat. This is a lesser included offense of communicating a threat.

3. *Mens Rea*. No specific intent is required. *United States v. Welsh*, 15 C.M.R. 573 (N.B.R. 1954).

4. Applications.

a) The provoking words must be used in the presence of the victim and must be words which a reasonable person would expect to induce a breach of the peace under the circumstances. MCM, pt. IV, ¶ 42(c).

(1) *United States v. Davis*, 37 M.J. 152 (C.M.A. 1993). Accused's statement to MP, "F___ you, Sergeant," and "F___ the MPs" was expected to induce a breach of the peace, even though the MP was not personally provoked and was trained to deal with such comments.

(2) *United States v. Thompson*, 46 C.M.R. 88 (C.M.A. 1972). Because of the physical circumstances, the offensive words were unlikely to cause a fight.

(3) *United States v. Shropshire*, 34 M.J. 757 (A.F.C.M.R. 1992). Insulting comments to policeman by handcuffed suspect under apprehension were insufficient to constitute provoking words as police are trained to overlook abuse.

(4) *United States v. Meo*, 57 M.J. 744 (C.A.A.F. 2002). Guilty plea improvident when accused told ensign "[T]his is bullshit, I'm going to explode and I don't know when or on who." Although statement was disrespectful, it did not rise to the level of "fighting words."

(5) *United States v. Ybarra*, 57 M.J. 807 (N-M. Ct. Crim. App. 2002) *pet. denied*, 58 M.J. 289 (C.A.A.F. 2003). Accused pled guilty to provoking speech for using racial slurs to an NCO who was trying to restrain him.

b) Not necessary that the accused know that the person towards whom the words or gestures are directed is a person subject to the UCMJ.

c) Merger with an assault crime. *United States v. Palms*, 47 C.M.R. 416 (A.C.M.R. 1973).

d) Separate offense from disrespect. *United States v. McHerrin*, 42 M.J. 672 (Army Ct. Crim. App. 1995).

D. Extortion. UCMJ art. 127.

1. Elements.

a) That the accused communicated a certain threat to another; and

b) That the acused intended to unlawfully obtain something of value, or any acquittance, advantage, or immunity.

2. Applications. *United States v. Brown*, 67 M.J. 147 (C.A.A.F. 2009). Accused threatened to release videotape depicting the victim's sexual acts unless she engaged in sexual intercourse with him. The specification alleged that "with intent unlawfully to obtain an advantage, to wit: sexual relations, [the accused] communicate[d] to [PFC RA] a threat to expose to other members of the military their past sexual relationship and to use his rank, position, and connections to discredit her and ruin her military career." The CAAF held that the specification in this case was legally sufficient. The specification described the "advantage" that he accused sought to receive: sexual relations with the victim. By seeking to have her engage in sexual relations with him, the accused intended to "obtain an advantage." The specification also described the threat the accused communicated in an effort to obtain the stated advantage: to expose their past sexual relationship in a manner that would harm the victim's military career.

E. Indecent Language. MCM, pt. IV, ¶ 89; UCMJ art. 134. *See supra* ¶ V.M., this chapter.

F. False Public Speech. Service member does not have unlimited freedom to make false official presentation to public forum, and giving false speech in public forum may constitute an offense under Article 134, Clause 2. *United States v. Stone*, 40 M.J. 420 (C.M.A. 1994).

G. Offensive Language.

1. *See supra* ¶ V.N., (obscenity), this chapter.

2. There is no generic "offensive language" offense under the UCMJ. *United States v. Herron*, 39 M.J. 860 (N.M.C.M.R. 1994) (uttering profanity in loud and angry manner in public setting was not "general disorder" and could not be prosecuted as such).

3. Any reasonable officer would have known that asking strangers of the opposite sex intimate questions about their sexual activities while using a false name, and a fictional publishing company as a cover was service discrediting conduct. *United States v. Sullivan*, 42 M.J. 360 (C.A.A.F. 1995).

XLII. DRUG OFFENSES.

A. Drug offenses fall into several categories under the UCMJ.

1. UCMJ art. 112a. Covers certain drugs listed in the statutory language of Art. 112a, substances listed under Schedules I through V of the Controlled Substances Act (21 U.S.C. § 812), and any other drugs that the President may see fit to prohibit in the military.

2. AR 600-85, the Army Substance Abuse Program (2 February 2009), para. 4-2m. This is a punitive provision that expands the list of drugs that Soldiers are prohibited from using. Offenses are punished under UCMJ art. 92(1).

3. There are numerous hazardous substances that are not expressly contained in any of the two categories described above. Such substances may be prohibited by operation of

other federal statutes, for example 21 U.S.C. § 813. In the absence of such a statute applicable to a particular hazardous substance, the use, possession, distribution, or manufacture or such substances may still be prohibited by other provisions of Title 21 of the U.S. Code. If this is the case, then such misconduct may be prosecuted under clause three of Article 134. *See, e.g., United States v. Reichenbach*, 29 M.J. 128 (C.M.A. 1989)

4. Finally, the abuse of substances not included in the categories described above may also violate clauses 1 and 2 of Article 134. *See generally United States v. Reichenbach*, 29 M.J. 128 (C.M.A. 1989); *see, e.g., United States v. Erickson*, 61 M.J. 230 (C.A.A.F. 2005) (wrongful inhalation of nitrous oxide that impaired thinking and could damage the brain); *United States v. Glover*, 50 M.J. 476 (C.A.A.F. 1999) (wrongful inhalation of aeresol "dust-off"). **NOTE:** After 2 Feb 09, the conduct in both *Erickson* and *Glover* of these cases would be covered under AR 600-85, para. 4-2m (4-2p after Rapid Action Revision on 2 Dec 09).

B. UCMJ art. 112a: The Statutory Framework.

1. Article 112a, UCMJ, provides in part: Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court-martial may direct.

2. Types of Controlled Substances Covered by Article 112a. Article 112a, UCMJ, is a statute of limited scope in that it only prescribes conduct relating to three specific categories of controlled substances; it does not purport to "ban every new drug mischief." *United States v. Tyhurst*, 28 M.J. 671, 675 (A.F.C.M.R.), *rev'd in part*, 29 M.J. 324 (C.M.A. 1989). Substances are "controlled" for purposes of this article (MCM, pt. IV, ¶ 37(a)(b)) if:

a) Congress listed them in the text of Article 112a.

b) The President listed them in the MCM for the purposes of Article 112a, UCMJ, or

c) They are listed in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. § 812).

3. Types of Conduct Prescribed by Article 112a, UCMJ. Article 112a prohibits an expansive array of conduct relating to controlled substances. The following types of conduct are expressly prohibited: Possession; Use; Manufacture; Distribution; Import/Export; Introduction; Possession, introduction, or manufacture with intent to distribute.

4. Time of war. When declared by Congress or in accordance with a factual determination by the President. R.C.M. 103(19); *United States v. Avarette*, 41 C.M.R. 363 (C.M.A. 1970); *United States v. Anderson*, 38 C.M.R. 386 (C.M.A. 1968).

5. Intent to distribute.

a) Intent to distribute may be inferred from circumstantial evidence. Examples of evidence which may tend to support an inference of intent to distribute are: possession of a quantity of substance in excess of that which one would be likely to have for personal use; market value of the substance; the manner in which the substance is packaged; and that the accused is not a user of the substance. On the other hand, evidence that the accused is addicted to or is a heavy user of the

substance may tend to negate an inference of intent to distribute. MCM, pt. IV, ¶ 37c(6).

b) Possession with intent to distribute does not require ownership. *United States v. Davis*, 562 F.2d 681 (D.C. Cir. 1977).

c) To convict for possession with intent to distribute, fact finder must be willing, where no evidence is presented of actual distribution, to find beyond a reasonable doubt that the accused would not have possessed so substantial a quantity of drugs if he merely intended to use them himself. *United States v. Morgan*, 581 F.2d 933 (D.C. Cir. 1978); see also *United States v. Turner*, 24 L.Ed.2d 610 (1970) (because accused's possession of 14.68 grams of a cocaine and sugar mixture of which 5% was cocaine might have been exclusively for his personal use, evidence was insufficient to support conviction for distribution).

d) Evidence of resale value of drug may support inference of intent to distribute. *United States v. Raminez-Rodriguez*, 552 F.2d 883 (9th Cir. 1977).

e) Circumstantial evidence of intent to distribute may require expert testimony as to dosage units, street value, and packaging. *See, e.g.*, *United States v. Blake*, 484 F.2d 50 (7th Cir.), *cert. denied*, 422 U.S. 919 (1979) (expert testimony that 14.3 grams of 17.3% pure heroin would make 420 "dime bags" having a St. Louis street value of $4,200); *United States v. Wilkerson*, 478 F.2d 813, 815 n. 3 (8th Cir. 1973) (49 pounds of marijuana worth $58,000 when first broken up and $71,500 if broken into joints); *United States v. Echols*, 477 F.2d 37 (8th Cir.), *cert. denied*, 414 U.S. 825 (1973) (199.73 grams of cocaine worth $200,000); *United States v. Hollman*, 541 F.2d 196 (8th Cir. 1976) (127 foil packets of heroin worth $20 each). *See generally United States v. Gould*, 13 M.J. 734 (A.C.M.R. 1982) (35 individually wrapped pieces of hashish).

f) A finding of addiction may support an inference that a large quantity of drugs were kept for personal use. *See United States v. Raminez-Rodriguez*, 552 F.2d 883 (9th Cir. 1977); *United States v. Kelly*, 527 F.2d 961 (9th Cir. 1976).

C. Use.

1. Elements.

a) Use of controlled substance.

b) Knowledge that the substance was used.

c) Knowledge of the contraband nature of the substance.

d) Use was wrongful, i.e., without legal justification or authorization.

2. Defined.

a) "[T]o inject, ingest, inhale, or otherwise introduce into the human body, any controlled substance." MCM, pt. IV, ¶ 37c(10).

b) Administration or physical assimilation of a controlled substance into one's body or system. *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986).

3. Pleadings.

a) Because it is often impossible to prove the exact date and location of drug use and because time and location are not of the essence of this offense, courts

allow some latitude in proving and pleading offenses of this sort. *United States v. Miller*, 34 M.J. 598 (A.C.M.R. 1992).

b) However, where a specification alleges wrongful acts on "divers occasions," the members of a panel must be instructed that any findings by exceptions and substitutions that remove the "divers occasions" language must clearly reflect the specific instance of conduct upon which their modified findings are based by referring to a relevant date or other facts in evidence that will clearly put accused and reviewing courts on notice of what conduct served as basis for the findings. *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003); *United States v. Seider*, 60 M.J. 36 (C.A.A.F. 2004); *United States v. Augspurger*, 61 M.J. 189 (2005) (citing the analysis in *Seider*).

c) The prosecution must nonetheless prove beyond a reasonable doubt that the accused used controlled substance during the period of time alleged in the specification. *United States v. Williams*, 37 M.J. 972 (A.C.M.R. 1993); *United States v. Lopez*, 37 M.J. 702 (A.C.M.R. 1993).

4. Inferences and Proof of Use.

a) Placebo effect. Expert testimony concerning herbal ecstasy and the effects described by the recipient in this case supported the factfinder's conclusion that this was MDMA rather than herbal ecstasy. In addition, a placebo effect was unlikely in this case because the recipient did not have any preconceived notion of what to expect. Finally, the government produced evidence that the participants used the term "ecstasy" rather than "herbal ecstasy" in referring to the drug. *United States v. Griggs*, 61 M.J. 402 (C.A.A.F. 2005).

b) Permissive inference of wrongfulness drawn from the positive result on urinalysis test is sufficient to support a finding of wrongful use of marijuana. *United States v Pabon*, 42 M.J. 404 (1995); *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987).

c) Laboratory results of urinalysis, coupled with expert testimony explaining the results, constituted sufficient evidence to establish beyond a reasonable doubt that the accused knowingly and wrongfully used marijuana. *United States v Bond*, 46 M.J. 86 (1997); *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986).

d) When the sole evidence of drug use is a positive laboratory test result, knowledge of the presence of the controlled substance may be inferred if the prosecution presents expert testimony explaining the underlying scientific methodology and the significance of the test result, so as to provide a rational basis for inferring that the substance was knowingly and wrongfully used. *United States v. Campbell*, 52 M.J. 386 (C.A.A.F. 2000) (clarifying, on reconsideration, its earlier holding that evidence, in this case, insufficient to permit inference of wrongfulness from concentration of LSD reported through use of GC/MS/MS test); *but see United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001) (positive urinalysis properly admitted under standards applicable to scientific evidence, when accompanied by interpretative expert testimony, provides legally sufficient basis to draw permissive inference of knowing, wrongful use of controlled substance); *but see United States v. Hunt*, 33 M.J. 345 (C.M.A. 1991) (result of urinalysis alone, with no expert testimony explaining the results, is insufficient to establish guilt).

e) Results of urinalysis alone, with no expert testimony explaining the results, are insufficient to establish guilt. *United States v. Hunt*, 33 M.J. 345 (C.M.A. 1991); *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987); *United States v. Brewer*, 61 M.J. 425 (C.A.A.F. 2005) (testimony from witnesses (who knew the accused throughout the charged period) that they had never seen him use drugs or observed him under the influence of drugs goes to the issue of knowing and wrongful use, and could have bolstered an innocent ingestion defense).

f) Manual provision that allows use of a permissive inference to prove wrongful use is constitutional. *United States v. Bassano*, 23 M.J. 661 (A.F.C.M.R. 1986).

g) Conviction for drug use affirmed where government introduced lab report and stipulation explaining the report. *United States v. Spann*, 24 M.J. 508 (A.F.C.M.R. 1987).

h) Hair analysis. Evidence was legally and factually sufficient to sustain conviction for unlawful use of cocaine; hair analysis revealed presence of cocaine in hair shafts, there was expert testimony that presence of cocaine in hair shafts was metabolically explained by ingestion, and that it did not occur as a natural phenomenon, accused's own witness conceded that there was cocaine in the hair sample tested, and chain of custody established that the sample was from the accused. *United States v. Bush*, 44 M.J. 646 (A.F. Ct. Crim. App. 1996), *aff'd*, 47 M.J. 305 (C.A.A.F. 1997).

5. Knowledge.

a) There is no express mention of a mens rea requirement in the text of Article 112a for the use, possession, or distribution of controlled substances; the article merely prohibits the "wrongful" use, possession, or distribution of various controlled substances. *See* UCMJ art. 112a. Likewise the MCM does not identify a mens rea in its description of the elements of these offenses. *See* MCM, pt. IV, ¶ 37b(2). However, the Court of Military Appeals (COMA) has long held that the absence of knowledge as to the presence of the substance in question or its contraband nature may give rise to a mistake or ignorance of fact defense to charges of use or possession of controlled substance. *E.g., United States v. Greenwood*, 19 C.M.R. 335 (C.M.A. 1955). Later, COMA explicitly held that court-martial panels must be instructed that an accused must knowingly possess or use a controlled substance to be criminally liable for such an act. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988).

b) There are two discrete types of knowledge that are relevant to the offenses in question: knowledge of the very presence of the substance, and knowledge of the physical composition of the substance. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988); *United States v. Williams*, 37 M.J. 972 (A.C.M.R. 1993); *United States v. Heitkamp*, 65 M.J. 861 (A. Ct. Crim. App. 2007).

(1) If an accused is unaware of the presence of a controlled substance in another, lawful substance, then the accused may have a defense of ignorance of fact. Such a circumstance may arise when a controlled substance is placed in a drink or other foodstuffs without the knowledge of the accused. The accused would lack the knowledge required for "use" of a controlled substance. *Mance*, 26 M.J. at 253-54 . However, the accused may not 'deliberately avoid" knowledge of the nature of the substance. *United States v. Brown*, 50 M.J. 262 (C.A.A.F. 1999)

(defendant must be aware of the high probability that the substance was of a contraband nature and deliberately contrive to avoid knowledge of the substance's nature).

(2) Alternatively, the accused may be aware of the presence of the substance but incorrectly believe that it is innocuous. This absence of knowledge as to the contraband nature of a substance may give rise to a mistake of fact defense. In this circumstance, the accused lacks the knowledge required to establish that the use was "wrongful." *Id.* at 254 .

(3) To be guilty of wrongful possession of a controlled substance, the accused need only know about the presence and the identity of the substance. *United States v. Heitkamp*, 65 M.J. 861 (A. Ct. Crim. App. 2007).

c) Intersection with mistake of law. *United States v. Heitkamp*, 65 M.J. 861 (A. Ct. Crim. App. 2007). Accused possessed methandienone, a Schedule III controlled substance, but thought it was legal to possess the steroid. To be guilty of wrongful possession of a controlled substance, the accused need only know about the presence and the identity of the substance. His knowledge of the unlawfulness of the contraband item is not a defense. "[I]f an accused knows the identity of a substance that he is possessing or using but does not know that such possession or use is illegal, his ignorance is immaterial . . . because ignorance of the law is no defense."

d) The presence of the controlled substance gives rise to a permissive inference that an accused possessed both types of knowledge required to establish wrongful possession or use. *Mance*, 26 M.J. at 254 .

e) Merely alleging in the pleading that a substance is listed on a federal schedule will not sustain a conviction for those substances not listed in Article 112a. *United States v. Bradley*, 68 M.J. 556 (ArmyCt.Crim.App. 2009)(setting aside conviction for possession of "3,4 methylenedioxymethamphetamine," commonly known as "ecstacy," where trial counsel failed to put on any evidence—such as a copy of the Controlled Substantces Act—and did not request the military judge to take judicial notice of the matter).

6. Applications.

a) Use of leftover prescription drugs for a different ailment than that for which they were prescribed does not necessarily constitute wrongful use as a matter of law. *United States v. Lancaster*, 36 M.J. 1115 (A.F.C.M.R. 1993).

b) One who knowingly ingests a controlled substance that he believes to be only cocaine, but actually contains cocaine laced with methamphetamine, may be found guilty of wrongful use of *both* substances; an accused need not know the exact pharmacological identity of the substance, but merely that it is contraband. *United States v. Stringfellow*, 32 M.J. 335 (C.M.A. 1991); *see United States v. Miles*, 31 M.J. 7 (C.M.A. 1990). *United States v. Alexander*, 32 M.J. 664 (A.C.M.R. 1991), *aff'd*, 34 M.J. 121 (C.M.A. 1992). In *United States v. Dillon*, 61 M.J. 221 (2005) (ecstasy and methamphetamine).

c) Accused not guilty of wrongful use of marijuana if he is a law enforcement official conducting legitimate law enforcement activities. *United States v. Flannigan*, 31 M.J. 240 (C.M.A. 1990); *see generally* TJAGSA Practice Note,

Lawfully Using Marijuana to Protect One's Cover, Army Law., Mar. 1991, at 47 (discusses *Flannigan*). This rule does not apply, however, to possession or use of drugs caused by addiction, incurred as a result of earlier drug use necessitated when supplier forced accused, a drug informant who was not acting with approval of law enforcement authorities, to use drugs to prove that he was not an informer, occurring after accused was no longer an informant and his use was not necessary to protect his life or his cover. *United States v. Wilson*, 44 M.J. 223 (C.A.A.F. 1996).

d) Prosecution may not argue that the defense of innocent ingestion of marijuana should be rejected by court members to discourage other soldiers from raising it. *United States v. Causey*, 37 M.J. 308 (C.M.A. 1993).

D. Possession.

1. Elements.

a) Possession of controlled substance.

b) Knowledge of possession.

c) Knowledge of contraband nature of substance.

d) Possession is wrongful, *i.e.*, without legal justification or authorization.

2. Possession Defined.

a) Possession means the exercise of control over something, including the power to preclude control by others. *United States v. Zubko*, 18 M.J. 378 (C.M.A. 1984); MCM, pt. IV, ¶ 37c(2).

b) More than one person may possess an item simultaneously.

c) Possession may be direct or constructive.

3. Constructive Possession.

a) An accused constructively possesses a contraband item when he is knowingly in a position or had the right to exercise dominion and control over an item, either directly or through others. *United States v. Traveler*, 20 M.J. 35 (C.M.A. 1985).

b) Mere association with one who is known to possess illegal drugs is not sufficient to convict on a theory of constructive possession. *United States v. Seger*, 25 M.J. 420 (C.M.A. 1988).

c) Mere presence on the premises where a controlled substance is found or proximity to a proscribed drug is insufficient to convict on a theory of constructive possession. *United States v. Wilson*, 7 M.J. 290 (C.M.A. 1979); *United States v. Corpening*, 38 M.J. 605 (A.C.M.R. 1993) (presence in automobile in which contraband found, without more, legally insufficient to sustain conviction).

4. Innocent Possession.

a) Accused's possession of drugs cannot be innocent if the accused neither destroys the drug immediately nor delivers them to the police. *United States v. Kunkle*, 23 M.J. 213 (C.M.A. 1987).

b) Innocent or "inadvertent" possession. The "inadvertent" possession defense requires that the drugs were planted or left in the accused's possession without his knowledge, coupled with certain subsequent actions taken with an intent to immediately destroy the contraband or deliver it to law enforcement agents. Returning contraband drugs to a prior possessor or owner will not entitle an accused to claim innocent possession unless the accused inadvertently comes into possession of contraband and reasonably believes that he would be exposing himself to immediate physical danger unless he returned it to the prior possessor. *United States v. Angone*, 57 M.J. 70 (C.A.A.F. 2002).

5. Deliberate Avoidance. MCM, pt. IV, ¶ 37c(11).

a) Deliberate avoidance may also be called "deliberate ignorance," or "conscious avoidance." This doctrine allows the fact finder to infer knowledge by the defendant of a particular fact if the defendant intentionally decides to avoid knowledge of that fact. *See generally United States v. Rodriguez*, 983 F.2d 455, 457 (2d Cir. 1993).

b) The rationale for the conscious avoidance doctrine is that a defendant's affirmative efforts to "'see no evil' and 'hear no evil' do not somehow magically invest him with the ability to 'do no evil.'" *United States v. Di Tommaso*, 817 F.2d 201, 218 n.26 (2d Cir. 1987).

c) *United States v. Brown*, 50 M.J. 262 (1999) (military judge erroneously gave deliberate avoidance (a.k.a. "ostrich") instruction when evidence did not reach "high plateau" required for the instruction); *see also United States v. Newman*, 14 M.J. 474 (C.M.A. 1983).

6. Attempted Possession. One who possesses a legal drug believing it to be an illegal drug is guilty of attempted possession. *United States v. Newak*, 15 M.J. 541 (A.F.C.M.R. 1982), *rev'd in part on other grounds*, 24 M.J. 238 (C.M.A. 1987). If the evidence is insufficient to identify the substance beyond a reasonable doubt, the accused may be guilty of attempted possession. *United States v. LaFontant*, 16 M.J. 236 (C.M.A. 1983).

7. Awareness of the presence of a controlled substance may be inferred from circumstantial evidence. MCM, pt. IV, ¶ 37c(2). *United States v. Mahan*, 1 M.J. 303 (C.M.A. 1976); *see generally* DA Pam 27-9, ¶ 7-3; Hug, *Presumptions and Inferences in Criminal Law*, 56 Mil. L. Rev. 81 (1972).

8. Applications.

a) Accused properly convicted of possession with intent to distribute when accused purchased 4.1 grams of marijuana, distributed 2.8 grams, but did not realize that 1.3 grams leaked out of the bag and remained in his pocket. *United States v. Gonzalez*, No. 20080111 (A. Ct. Crim. App. Jun. 26, 2009).

b) Accused in stockade is in "possession" of package of drugs mailed by him and returned to the stockade for inability to deliver. *United States v. Ronholt*, 42 C.M.R. 933 (N.C.M.R. 1970).

c) Possession is not present where accused tells another to hold marijuana while the accused decides whether to accept it in payment for a car. *United States v. Burns*, 4 M.J. 573 (A.C.M.R. 1978).

d) Mere speculation as to the identity of a substance by one non-expert witness is not legally sufficient evidence to prove possession of marijuana. *United States v. Nicholson*, 49 M.J. 478 (C.A.A.F. 1998).

e) Accused who comes into possession of drugs and who intended to return them to the original possessor is guilty of wrongful possession unless returning the drugs to the original possessor was motivated by fear for personal safety or to protect the identity/ safety of an undercover investigator. *United States v. Kunkle,* 23 M.J. 213 (C.M.A. 1987); MCM, pt. IV, ¶ 37 (analysis).

f) Possessing drugs for the purpose of giving them over to authorities is no offense. *United States v. Grover*, 27 C.M.R. 165 (C.M.A. 1958).

g) No "usable quantity" defense. *United States v. Birbeck*, 35 M.J. 519 (A.F.C.M.R. 1992) (small quantity of cocaine was found in bindle and entire amount consumed in testing; possession of a controlled substance is criminal without regard to amount possessed).

h) An accused who involuntarily comes into possession and intends to give it to authorities, but forgets to do so, has a legitimate defense. *United States v. Bartee*, 50 C.M.R. 51 (N.C.M.R. 1974).

i) An accused who acts on a commander's suggestion to buy drugs in order to further a drug investigation is in innocent possession. *United States v. Russell*, 2 M.J. 433 (A.C.M.R. 1955).

j) Possession is not "wrongful" where an enlisted pharmacy specialist, pursuant to his understanding of local practice, maintains an average stock of narcotic drugs in order to supply sudden pharmacy needs or fill an inventory shortfall. This is so even though the stock was in his possession outside the pharmacy and its existence was prohibited by regulations. The latter fact might justify prosecution for violation of the regulation. *United States v. West*, 34 C.M.R. 449 (C.M.A. 1964).

k) Specification charging accused with possession of marijuana with intent to distribute was sufficient despite not alleging element of wrongfulness. *United States v. Berner*, 32 M.J. 570 (A.C.M.R. 1991).

l) Possession is a lesser included offense of possession with intent to distribute. *United States v. Gould*, 13 M.J. 734 (A.C.M.R. 1982); *United States v. Burno*, 624 F.2d 95 (10th Cir. 1980).

E. Distribution.

1. MCM, pt. IV, ¶ 37c(3) states: "Distribute" means to deliver to the possession of another. "Deliver" means the actual, constructive, or attempted transfer of an item, whether or not there is an agency relationship.

2. Mens Rea.

a) Distribution is a general intent crime. *United States v. Brown*, 19 M.J. 63 (C.M.A. 1984).

b) The only mens rea necessary for wrongful distribution of controlled substances is the intent to perform the act of distribution. Distribution can occur even if the recipient is unaware of the presence of drugs. *United States v. Sorrell*, 23 M.J. 122 (C.M.A. 1986).

c) Knowledge of the presence and the character of the controlled substance is an essential requirement of wrongful distribution. *United States v. Crumley*, 31 M.J. 21 (C.M.A. 1990).

d) Distribution may continue, for purposes of establishing aider and abettor liability, after the actual transfer if the "criminal venture" contemplates the exchange of drugs for cash. *United States v. Speer*, 40 M.J. 230 (C.M.A. 1994).

3. Pleading. Wrongfulness is an essential element of distribution. Failure to allege wrongfulness may not be fatal if the specifications as a whole can be reasonably construed to embrace an allegation of the element of wrongfulness required for conviction. *United States v. Brecheen*, 27 M.J. 67 (C.M.A. 1988).

4. Applications.

a) Distribution can consist of passing drugs from one co-conspirator to another. *United States v. Tuero*, 26 M.J. 106 (C.M.A. 1988); *see United States v. Figueroa*, 28 M.J. 570 (N.M.C.M.R. 1989).

b) Distribution can consist of passing drugs back to the original supplier. *United States v. Herring*, 31 M.J. 637 (N.M.C.M.R. 1990); *see generally* TJAGSA Practice Note, *Distributing Drugs to the Drug Distributor*, Army Law., Mar. 1991, at 44 (discussing *Herring*).

c) Distribution includes the attempted transfer of drugs. *United States v. Omick*, 30 M.J. 1122 (N.M.C.M.R. 1989); *see generally* TJAGSA Practice Note, *Does Drug Distribution Require Physical Transfer*? Army Law., Nov. 1990, at 44 (discussing *Omick*).

d) The *Swiderski* exception.

(1) Sharing drugs is distribution. *United States v. Branch*, 483 F.2d 955 (9th Cir. 1973); *United States v. Ramirez*, 608 F.2d 1261 (9th Cir. 1979). However, when two individuals simultaneously and jointly acquire possession of a drug for their own use, intending to share it together, their only crime is joint possession. *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977).

(2) The *Swiderski* exception probably does not apply to the military. *See United States v. Manley*, 52 M.J. 748 (N-M. Ct. Crim. App. 2000); *United States v. Ratleff*, 34 M.J. 80 (C.M.A. 1992) (PFC Ratleff went to mess hall with PFC Jaundoo who had hidden hashish in a can; PFC Jaundoo carried the can back to a barracks room and then gave the can to PFC Ratleff who opened the can and gave the hashish back to PFC Jaundoo; PFC Ratleff's distribution conviction affirmed). *But see United States v. Hill*, 25 M.J. 411 (C.M.A. 1988) (dicta).

(3) Examples of cases where evidence did <u>not</u> raise the *Swiderski* exception. *United States v. Hill*, 25 M.J. 411 (C.M.A. 1988); *United States v. Viser*, 27 M.J. 562 (A.C.M.R. 1988); *United States v. Allen*, 22 M.J. 512 (A.C.M.R. 1986); *United States v. Tracey*, 33 M.J. 142 (C.M.A. 1991); *United States v. Lippoldt*, 34 M.J. 523 (A.F.C.M.R. 1991); *United States v. Espronceda*, 36 M.J. 535 (A.F.C.M.R. 1992).

e) An accused cannot aid and abet a distribution between two government agents, where accused's former "agent" became a government agent and sold to a person known by the accused to be a government agent and the accused did not ratify the sale or accept the proceeds. *United States v. Bretz*, 19 M.J. 224 (C.M.A. 1985); *United States v. Elliott*, 30 M.J. 1064 (A.C.M.R. 1990). *But cf. United States v. Dayton*, 29 M.J. 6 (C.M.A. 1989) (accused guilty of distribution

from source of one government agent to another government agent); *United States v. Lubitz*, 40 M.J. 165 (C.M.A. 1994) (accused not a "mere conduit" for drug distribution when he acted as buyer of cocaine with money supplie by government agent and subsequently transferred drugs to another covert government agent).

f) Evidence that the distribution was a sale for profit will normally be admissible on the merits. If not, it may be admissible for aggravation in sentencing in a guilty plea or in a contested case. *United States v. Vickers*, 13 M.J. 403 (C.M.A. 1982); *see United States v. Stokes*, 12 M.J. 229 (C.M.A. 1982).

g) Possession and Distribution. The elements of possession with intent to distribute are "necessarily included" within elements of distribution of a controlled substance, so accused cannot be found guilty of possession of marijuana with intent to distribute and distribution of the same marijuana on the same day. *United States v. Savage*, 50 M.J. 244 (C.A.A.F. 1999); see also *United States v. Scalarone*, 52 M.J. 539 (N-M. Ct. Crim. App. 1999).

5. Use of Firearms. Carrying a firearm during a drug trafficking crime is a violation of 18 U.S.C. § 924(g) and may be separately punished.

6. Use of a communication facility (*e.g*., telephone, fax, beeper) to facilitate a drug transaction is a violation of 21 U.S.C. § 843(b) and may be separately punished.

F. Manufacture.

1. MCM, pt. IV, ¶ 37c(4) states: "Manufacture" means the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis and includes any packaging or repackaging of such substance or labeling or relabeling of its container. The term "production" as used above includes the planting, cultivating, growing, or harvesting of a drug or other substance.

2. The definition is drawn from 21 U.S.C. § 802 (14) and (21).

3. Psilocybin mushrooms. Appellant planted spores from "magic mushroom" kit, but they failed to germinate. For the offense to be complete, the controlled substance must be present in the cultivated planting. Here, appellant is guilty only of an attempt to produce a controlled substance. Appellant ordered the "magic mushroom" kit, followed the instructions, and planted the spores with the specific intent of growing the contraband, acts that amounted to more than mere preparation. *United States v. Lee* , 61 M.J. 627 (C.G. Ct. Crim. App. 2005).

G. Introduction.

1. Introduction means to bring into or onto an installation, vessel, vehicle, or aircraft used by or under control of the Armed Forces. Installation is broadly defined and includes posts, camps, and stations. *See generally United States v. Jones*, 6 C.M.R. 80 (C.M.A. 1952) (Augsburg Autobahn Snack Bar a station).

2. An accused cannot be convicted of aiding and abetting introduction of marijuana by OSI agent where accused had already sold marijuana to agent off base and marijuana was

agent's sole property when agent brought it onto base. *United States v. Mercer*, 18 M.J. 644 (A.F.C.M.R. 1984).

3. Accused must have actual knowledge that he is entering an installation to be guilty of introduction. *United States v. Thomas*, 65 M.J. 132 (C.A.A.F. 2007).

H. Drug Paraphernalia.

1. Because possession of "drug paraphernalia" constitutes only a remote and indirect threat to good order and discipline, it cannot be charged under Article 134(1) as an offense which is directly and palpably prejudicial to good order and discipline. This offense therefore must be charged under Article 92 as the violation of a general order/regulation or under Article 134(3), assimilating a local state statute under 18 U.S.C. §13. *United States v. Caballero*, 49 C.M.R. 594 (C.M.A. 1975)). The AFCCA has interpreted *Caballero* to mean that when a punitive lawful general order or regulation proscribing the possession of drug paraphernalia exists, the offense must be charged under Art. 92(1), UCMJ, and not Art. 134. *See also* 2008 MCM, pt IV, ¶ 60c.(2)(b); *United States v. Borunda*, 67 M.J. 607 (A.F. Ct. Crim. App. 2009). In the absence of a lawful general order or regulation, the Government is at liberty to charge the possession of drug paraphernalia under either Art. 92(3) or Art. 134. *Borunda*, 67 M.J. at 607.

2. Most installations have promulgated local punitive regulations dealing with drug paraphernalia.

3. The DEA model statute has come under attack for being unconstitutionally vague and overbroad. *Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916 (6th Cir. 1980), *vacated and remanded*, 451 U.S. 1013 (1981). *See generally Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1981) (ordinance requiring a business to obtain a license if it sells any items "designed or marketed for use with illegal cannabis or drugs" upheld; DEA code as adopted in Ohio struck down).

4. Military regulations have been challenged for vagueness and overbreadth. *United States v. Sweney*, 48 C.M.R. 476 (A.C.M.R. 1974) (regulation upheld as being neither vague nor overbroad); *see also United States v. Cannon*, 13 M.J. 777 (A.C.M.R. 1982) (upholding regulation prohibiting possession of instruments or devices that might be used to administer or dispense prohibited drugs). *See generally United States v. Clarke*, 13 M.J. 566 (A.C.M.R. 1982); *United States v. Bradley*, 15 M.J. 843 (A.F.C.M.R. 1983); *United States v. Hester*, 17 M.J. 1094 (A.F.C.M.R. 1984).

5. To show violation of a regulation by possessing drug paraphernalia, the government need only prove that the accused exercised dominion and control over the paraphernalia. *United States v. McKnight*, 30 M.J. 205 (C.M.A. 1990). Prosecutors must also establish a nexus between drug use and an article that is not intrinsically drug-related. *United States v. Camacho*, 58 M.J. 624 (N-M. Ct. Crim. App. 2003) (a butane torch).

6. Applications.

a) Regulations will be closely scrutinized. Bindles, scales, zip-lock bags, and other materials associated with use or ingestion of drugs did not fall within regulatory prohibition of "drug abuse paraphernalia" of Navy Instruction. *United States v. Painter*, 39 M.J. 578 (N.M.C.M.R. 1993) (conviction set aside).

b) Written instructions for producing controlled substances could constitute "drug paraphernalia" within meaning of Air Force Regulation. *United States v. McDavid*, 37 M.J. 861 (A.F.C.M.R. 1993).

I. Multiplicity.

1. Simultaneous possession of different drugs constitutes only one offense for sentencing. *United States v. Hughes*, 1 M.J. 346 (C.M.A. 1976); *United States v. Griffen*, 8 M.J. 66 (C.M.A. 1979). Simultaneous use of two substances is not necessarily multiplicious for findings but may be unreasonable multiplication of charges. Unit*ed States v. Ray*, 51 M.J. 511 (N-M. Ct. Crim. App. 1999) *overruled on other grounds by United States v. Quiroz*, 53 M.J. 600 (N-M.C.C.A. 2000). Not multiplicious to charge two separate specifications for the simultaneous use of ecstacy and methamphetamine. *United States v. Dillon*, 61 M.J. 221 (2005). Simultaneous distribution of two different substances is not multiplicious but may constitute unreasonable multiplication of charges. *See United States v. Inthavong*, 48 M.J. 628 (Army Ct. Crim. App. 1998).

2. No distinction between marijuana and hashish. *United States v. Kelly*, 527 F.2d 961 (9th Cir. 1976); *United States v. Lee*, 1 M.J. 15 (C.M.A. 1975); *United States v. Nelson*, 47 C.M.R. 395 (A.C.M.R. 1973).

3. Sales at the same place between same parties but fifteen minutes apart were separately punishable. *United States v. Hernandez*, 16 M.J. 674 (A.C.M.R. 1983).

4. Possession of drugs from one cache at another time and place constitutes a separate offense warranting separate punishment. *United States v. Marbury*, 4 M.J. 823 (A.C.M.R. 1978).

5. Solicitation to sell and transfer of drugs are separately punishable when respective acts occurred at separate times (four hours apart) and at separate locations. *United States v. Irving*, 3 M.J. 6 (C.M.A. 1977).

6. Use was separately punishable from possession and sale where quantity used was not same as quantity possessed. *United States v. Smith*, 14 M.J. 430 (C.M.A. 1983); *see United States v. Nixon*, 29 M.J. 505 (A.C.M.R. 1989). But if quantity used and possessed is the same, possession charge is multiplicious for findings. *United States v. Bullington*, 18 M.J. 164 (C.M.A. 1984); *see United States v. Hogan*, 20 M.J. 221 (C.M.A. 1985). *See generally United States v. Cumber*, 30 M.J. 736 (A.F.C.M.R. 1990) (use and distribution of same drug not multiplicious for sentencing).

7. Attempted sale of a proscribed drug and possession of the same substance were so integrated as to merge as a single event subject only to a single punishment. *United States v. Smith*, 1 M.J. 260 (C.M.A. 1976); *see also United States v. Clarke*, 13 M.J. 566 (A.C.M.R. 1982).

8. Where charges of possession and transfer of heroin were based on accused's retention of some heroin after transferring a quantity of the drug to two persons who were to sell it on the open market as accused's agents, the two offenses were treated as single for purposes of punishment. *United States v. Irving*, 3 M.J. 6 (C.M.A. 1977).

9. Possession of one packet of drugs and simultaneous distribution of a separate packet of drugs was separately punishable. *United States v. Wilson*, 20 M.J. 3 (C.M.A. 1985) (summary disposition). Possession with intent to distribute 35 hits of LSD was separately punishable from the simultaneous distribution of 15 hits of LSD. *United States v. Coast*, 20 M.J. 3 (C.M.A. 1985) (possession of LSD with intent to distribute was multiplicious with distribution of LSD); *see also United States v. Kitts*, 23 M.J. 105 (C.M.A. 1986); *United States v. Muller*, 21 M.J. 205 (C.M.A. 1986); *United States v. Jennings*, 20 M.J. 223 (C.M.A. 1985). Sale and possession of a separate, cross-town cache were separately punishable. *United States v. Isaacs*, 19 M.J. 220 (C.M.A. 1985). Where the accused bought a large amount of marijuana to be sold in smaller quantities at a profit, where he made a final sale of approximately one eighth of it to a friend, and where the remainder

was retained for future sales or other disposition, different legal and societal norms were violated by the sale and possession, and separate punishments were proper. *United States v. Wessels*, 8 M.J. 747 (A.F.C.M.R. 1980); *accord United States v. Chisholm*, 10 M.J. 795 (A.F.C.M.R. 1981); *United States v. DeSoto*, 15 M.J. 645 (N.M.C.M.R. 1982); *United States v. Anglin*, 15 M.J. 1010 *United States v. Ansley*, 16 M.J. 584 (A.C.M.R. 1983); *United States v. Worden*, 17 M.J. 887 (A.F.C.M.R. 1984).

10. Possession and distribution of cocaine on divers occasions may be separate offenses under certain facts. *United States v. Bowers*, 20 M.J. 1003 (A.F.C.M.R. 1985) (considering guilty plea and facts before the court).

11. Distribution of a controlled substance necessarily includes possession with intent to distribute. *United States v. Savage*, 50 M.J. 244 (C.A.A.F. 1999); *United States v. Scalarone*, 52 M.J. 539 (N-M. Ct. Crim. App. 1999).

12. Introduction of drugs onto military installation and sale of portion on same day not multiplicious for sentencing. *United States v. Beardsley*, 13 M.J. 657 (N.M.C.M.R. 1982). Introduction and possession are, however, multiplicious. *United States v. Decker*, 19 M.J. 351 (C.M.A. 1985); *United States v. Roman-Luciano*, 13 M.J. 490 (C.M.A. 1982) (summary disposition); *United States v. Miles*, 15 M.J. 431 (C.M.A. 1983); *United States v. Hendrickson*, 16 M.J. 62 (C.M.A. 1983). But if the amount possessed is greater than the amount introduced, possession of the excess amount may not be multiplicious for any purpose if the excess amount is explained on the record. *United States v. Morrison*, 18 M.J. 108 (C.M.A. 1984) (summary disposition) (excess amount belonged to someone else); *cf. United States v. Hill*, 18 M.J. 459 (possession of excess amount dismissed where not explained on the record). Finally, introduction and possession with intent to distribute are not multiplicious. *United States v. Zupancic*, 18 M.J. 387 (C.M.A. 1984).

13. Introduction with intent to distribute and distribution are multiplicious for findings. *United States v. Wheatcraft*, 23 M.J. 687 (A.F.C.M.R. 1986); *contra United States v. Beesler*, 16 M.J. 988 (A.C.M.R. 1983).

14. Possession and distribution when time, place, and amount are the same are multiplicious for findings. *United States v. Zubko*, 18 M.J. 378 (C.M.A. 1984); *United States v. Brown*, 19 M.J. 63 (C.M.A. 1984).

15. Larceny of and possession of same drugs not multiplicious for sentencing. *United States v. Logan*, 13 M.J. 821 (A.C.M.R. 1982).

16. Possession and possession with intent to distribute are multiplicious for sentencing. The appropriate remedy is dismissal of the possession specification. *United States v. Forance*, 12 M.J. 312 (C.M.A. 1981) (summary disposition); *United States v. Conley*, 14 M.J. 229 (C.M.A. 1982) (summary disposition).

17. Possession of drugs and drug paraphernalia at the same time and place are multiplicious for sentencing. *United States v. Bell*, 16 M.J. 204 (C.M.A. 1983) (summary disposition).

18. Possession with intent to distribute and introduction are multiplicious. *United States v. Antonitis*, 29 M.J. 217 (C.M.A. 1989), *aff'd*, 32 M.J. 315 (C.M.A. 1991).

19. Distribution by injection and distribution of tablets of the same drug are multiplicious. *United States v. Gumbee*, 30 M.J. 736 (A.F.C.M.R. 1990).

20. Use and distribution based upon accused smoking a marijuana cigarette then passing it to a friend were not multiplicious for sentencing purposes. *United States v. Ticehurst*, 33 M.J. 965 (N.M.C.M.R. 1991).

21. For an example of prejudicial multiplicious pleading, see generally *United States v. Sturdivant*, 13 M.J. 323 (C.M.A. 1982) (charges dismissed where accused's phone conversation arguably setting up buy of his monthly marijuana ration led to 10 specifications being charged, a general court-martial conviction, and a sentence of dishonorable discharge, 3 years confinement and total forfeitures).

22. Simultaneous distribution not multiplicious. *United States v. Inthavong*, 48 M.J. 628 (C.A.A.F. 1998).

23. The offenses of introduction of a controlled substance, with the aggravating factor of intent to distribute, and distribution of the same controlled substance are not multiplicious. *United States v. Monday*, 52 M.J. 625 (Army Ct. Crim. App. 1999).

J. Special Rules of Evidence.

1. The laboratory report qualifies as a business record or public record exception to the hearsay rule and can be admitted into evidence once its authenticity is established. MRE 803(6) and (8); *United States v. Evans*, 45 C.M.R. 353 (C.M.A. 1972); *United States v. Miller*, 49 C.M.R. 380 (C.M.A. 1974); *United States v. Strangstalien*, 7 M.J. 225 (C.M.A. 1979); *United States v. Vietor*, 10 M.J. 69 (C.M.A. 1980).

2. The admission of a laboratory report into evidence as either a business or public record does not give accused an automatic right to the attendance of the person who performed the test. Rather, the accused must make a showing as to the necessity for producing the witness. *United States v. Vietor*, 10 M.J. 69 DA Form 4137 (the chain of custody form) is admissible as either a business record or public record exception to the hearsay rule. MRE 803(6) and (8). *Contra United States v. Nault*, 4 M.J. 318 (C.M.A. 1978); *United States v. Porter*, 7 M.J. 30 (C.M.A. 1979); *United States v. Neutze*, 7 M.J. 32 (C.M.A. 1979); *United States v. Oates*, 560 F.2d 45 (2nd Cir. 1977); *United States v. Helton*, 10 M.J. 820 *United States v. Scoles*, 33 C.M.R. 226 (C.M.A. 1963).

3. When dealing with fungible evidence such as drugs, military courts have traditionally required that an unbroken chain of custody be established to show that the drugs seized were in fact the drugs tested at the lab, and that they were not tampered with prior to testing. The Court of Military Appeals broadened this approach and declared that even fungible evidence may be introduced without showing an unbroken chain of custody so long as the government can establish that the substance was contained in a "readily identifiable" package and that the contents of that package were not altered in any significant way. *United States v. Parker*, 10 M.J. 415 (C.M.A. 1981); *United States v. Lewis*, 11 M.J. 188 (C.M.A. 1981); *United States v. Madela*, 12 M.J. 118 (C.M.A. 1981); *United States v. Ettelson*, 13 M.J. 348, 350-51 (C.M.A. 1982). *See generally United States v. Morsell*, 30 M.J. 808 *United States v. Hudson*, 20 M.J. 607 (A.C.M.R. 1985).

4. The chemical nature of a drug may be established without the aid of a laboratory report or expert witness but with the testimony of a lay witness familiar with the physical attributes of the drug. *United States v. Tyler*, 17 M.J. 381 (C.M.A. 1984) (lay witness qualified to testify what used was cocaine despite alcohol intoxication at time of use). Tests administered by investigators to determine lay witness' ability to identify drugs were relevant to ability to identify drugs at time of use. *Id.*; *United States v. Coen*, 46 C.M.R. 1201 (N.C.M.R. 1972) (accused's statement); *United States v. Torrence*, 3 M.J.

804 (C.G.C.M.R. 1977) (accomplice witness); *United States v. Watkins*, 5 M.J. 612 (A.C.M.R. 1978) (informer and CID agent); *United States v. Jenkins*, 5 M.J. 905 (A.C.M.R. 1978) (accused's admission is not enough to establish nature of drugs without corroborative evidence); *United States v. White*, 9 M.J. 168 (C.M.A. 1980) (accused's corroborated extrajudicial statement); *United States v. Morris*, 13 M.J. 666 (A.F.C.M.R. 1982) (transferee and witness); *United States v. Jessen*, 12 M.J. 122, 126 (C.M.A. 1981) ("simulated smoking" by undercover agent); *cf. United States v. Hickman*, 15 M.J. 674 (A.F.C.M.R. 1983) (witness merely calling the substance "marijuana" at trial insufficient); *but see United States v. LaFontant*, 16 M.J. 236 (C.M.A. 1983) (if evidence insufficient to identify substance beyond a reasonable doubt, accused may be guilty of an attempt).

5. The buyer in a drug sale case is an accomplice, and the defense is entitled to an accomplice instruction. *United States v. Hopewell*, 4 M.J. 806 (A.F.C.M.R. 1978); *United States v. Helton*, 10 M.J. 820 (A.F.C.M.R. 1981); *United States v. Scoles*, 33 C.M.R. 226 (C.M.A. 1963). No such instruction is required if buyer was Government informant. *United States v. Hand*, 8 M.J. 701 (A.F.C.M.R. 1980), *rev'd on other grounds*, 11 M.J. 321 (C.M.A. 1981); *United States v. Kelker*, 50 C.M.R. 410 (A.C.M.R. 1975).

K. Defenses.

1. The fact that the amount of controlled substance involved in any given offense is *de minimis* is no defense except as it may bear on the issues of the accused's knowledge. *United States v. Alvarez*, 27 C.M.R. 98 (C.M.A. 1958); *United States v. Nabors*, C.M.R. 101 (C.M.A. 1958); *see* MCM, pt. IV, ¶ 37c(7).

2. Knowledge, ignorance and mistake defenses.

a) Ignorance of the law (not knowing that the substance was illegal) is no defense. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988); *United States v. Greenwood*, 19 C.M.R. 335 (C.M.A. 1955); *United States v. Heitkamp*, 65 M.J. 861 (A. Ct. Crim. App. 2007) (accused stated that he did not know it was illegal to possess methandienone, a Schedule III controlled substance).

b) Ignorance of the physical presence of the substance is a legitimate defense ("I didn't know there was anything in the box . . . the locker . . . my pocket . . . the pipe."). *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988).

(1) Ignorance need not be reasonable, only honest. *United States v. Hansen*, 20 C.M.R. 298 (C.M.A. 1955).

(2) Knowledge that a container was present, without knowledge of the presence of the substance within, will not defeat the defense. *United States v. Avant*, 42 C.M.R. 692 (A.C.M.R. 1970).

(3) The accused's suspicion that a substance may be present is insufficient for guilt. *United States v. Whitehead*, 48 C.M.R. 344 (N.C.M.R. 1973); *United States v. Heicksen*, 40 C.M.R. 475 (A.B.R. 1969). *But see United States v. Valle-Valdez*, 554 F.2d 911 (9th Cir. 1977).

(4) Under some circumstances deliberate ignorance of a fact can create the same criminal liability as actual knowledge. *United States v. Newman*, 14 M.J. 474 (C.M.A. 1983). *See supra* ¶ IX.C.5., this chapter.

c) Ignorance or mistake as to "the physical composition or character" of the substance is a legitimate defense. ("I thought it was powdered sugar." "I didn't know what it was"). *United States v. Mance, supra*; *United States v. Greenwood*, 19 C.M.R. 335 (C.M.A. 1955); *United States v. Ashworth*, 47 C.M.R. 702 (A.F.C.M.R. 1973).

(1) The ignorance or mistake need not be reasonable. *United States v. Fleener*, 43 C.M.R. 974 (A.F.C.M.R. 1971).

(2) Knowledge of the name of the substance will not necessarily defeat the defense; to be guilty, the accused must know the "narcotic quality" of the substance. *United States v. Crawford*, 20 C.M.R. 233 (C.M.A. 1955); *United States v. Baylor*, 37 C.M.R. 122 (C.M.A. 1967) (Court approves instruction that accused "must know of the presence of the substance and its narcotic nature").

(3) The mistake must be one which, if true, would exonerate the accused. *United States v. Jefferson*, 13 M.J. 779 (A.C.M.R. 1982) (mistake not exonerating where accused accepted heroin thinking he was getting hashish); *see also United States v. Morales*, 577 F.2d 769, 776 (2nd Cir. 1978); *United States v. Jewell*, 532 F.2d 697, 698 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1978).

3. Defense of innocent ingestion does not require corroborative witnesses or direct evidence. *United States v. Lewis*, 51 M.J. 376 (C.A.A.F. 1999).

4. The defense of innocent possession does not apply in those cases where an accused exercises control over an item for the purpose of preventing its imminent seizure by law enforcement or other authorities, even if he intends to thereafter expeditiously destroy the item. *United States v. Angone*, 54 M.J. 945 (A. Ct. Crim. App. 2001), *aff'd*, 57 M.J. 70 (C.A.A.F. 2002); s*ee supra* ¶ IX.C.4, this chapter.

5. Regulatory immunity. Issue of whether accused was entitled to regulatory exemptions of Army Regulation 600-85 were waived if not raised at trial. *United States v. Gladdis*, 12 M.J. 1005 (A.C.M.R. 1982); *United States v. Mika*, 17 M.J. 812 (A.C.M.R. 1984).

Entrapment. *See infra* ch. 5, ¶ VII.

Chapter 6

"Special Defense" vs. "Other Defenses."

Special defenses, the military's equivalent to affirmative defenses, are those which deny, wholly or partially, criminal responsibility for the objective acts committed, but do not deny that those acts were committed by the accused. Other defenses, such as alibi and mistaken identity, deny commission of the culpable act or other elements of the crime. R.C.M. 916(a).

I. Procedure.

A. Raising a Defense.

1. The military judge must instruct upon all special defenses raised by the evidence. The test of whether a defense is raised is whether the record contains some evidence as to each element of the defense to which the trier of fact may attach credit if it so desires. *United States v. Ferguson*, 15 M.J. 12 (C.M.A. 1983); *United States v. Tan*, 43 C.M.R. 636 (A.C.M.R. 1971); *see also United States v. Jackson*, 12 M.J. 163 (C.M.A. 1982); *United States v. Jett*, 14 M.J. 941 (A.C.M.R. 1982). Generally, the reasonableness of the evidence is irrelevant to the military judge's determination to instruct. *United States v. Thomas*, 43 C.M.R. 89 (C.M.A. 1971); *United States v. Symister*, 19 M.J. 503 (A.F.C.M.R. 1984).

2. A defense may be raised by evidence presented by the defense, the Government, or the court-martial. R.C.M. 916(b) discussion; *United States v. Rose*, 28 M.J. 132 (C.M.A. 1989).

3. In deciding whether the defense is raised, the military judge is not to judge credibility or prejudge the evidence and preclude its introduction before the court members. *United States v. Tulin*, 14 M.J. 695 (N.M.C.M.R. 1982).

4. A defense is not raised, however, if it is wholly incredible or unworthy of belief. *United States v. Brown*, 19 C.M.R. 363 (C.M.A. 1955); *United States v. Franklin*, 4 M.J. 635 (A.F.C.M.R. 1977).

5. Appellate military courts are very generous in finding that a defense has been raised. *See, e.g.*, *United States v. Goins*, 37 C.M.R. 396 (C.M.A. 1967) (self-defense raised against charge of assault with intent to commit rape). Any doubt whether the evidence is sufficient to require an instruction should be resolved in favor of the accused. *United States v. Steinruck*, 11 M.J. 322 (C.M.A. 1981); *United States v. Jenkins*, 59 M.J. 893 (A. Ct. Crim. App. 2004).

6. In a bench trial, the impact of the raised defense is resolved by the military judge, *sub silentio*, in reaching a determination on the merits.

7. Burden of Proof. Except for the defense of lack of mental responsibility and the defense of mistake of fact as to age as described in pt. IV, ¶ 45c(2) in a prosecution of carnal knowledge, the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist. The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence, and has the burden of proving mistake of fact as to age in a carnal knowledge prosecution by a preponderance of the evidence. R.C.M. 916(b).

B. Advising the Accused. If in the course of a guilty plea trial, the accused's comments or any other evidence raises a defense, the military judge must explain the elements of the defense to the accused. *See generally* UCMJ art. 45(a). The accused's comments raising the defense need not be credible. *United States v. Lee*, 16 M.J. 278 (C.M.A. 1983). Subsequently, if the accused does not negate the defense or other evidence belies the accused's negation of the defense, the military

judge must withdraw the guilty plea, enter a plea of not guilty for the accused, and proceed to trial on the merits. *United States v. Jemmings*, 1 M.J. 414 (C.M.A. 1976).

C. Instructions.

1. In a members trial, the military judge must instruct the members, *sua sponte*, regarding all special defenses raised by the evidence. *United States v. Williams*, 21 M.J. 360 (C.M.A. 1986); *United States v. Sawyer*, 4 M.J. 64 (C.M.A. 1977); *United States v. Graves*, 1 M.J. 50 (C.M.A. 1975); R.C.M. 920(e)(3).

2. In instructing a military jury on a defense, the judge is under no obligation to summarize the evidence, but if he undertakes to do so, the summary must be fair and adequate. *United States v. Nickoson*, 35 C.M.R. 312 (C.M.A. 1965).

3. While the military judge must instruct upon every special defense in issue, there is no sua sponte duty to instruct upon every fact that may support a given defense. *United States v. Sanders*, 41 M.J. 485 (C.A.A.F. 1995) (holding no plain error to fail to mention victim's alleged invitation to assault).

D. Consistency of Defenses.

1. Generally, conflicting defenses may be raised and pursued at trial. R.C.M. 916(b) (discussion); *see also United States v. Viola*, 26 M.J. 822, 827-28 (A.C.M.R. 1988), *aff'd* 27 M.J. 456 (C.M.A. 1988); Nagle, *Inconsistent Defenses in Criminal Cases*, 92 Mil. L. Rev. 77 (1981). *See generally United States v. Garcia*, 1 M.J. 26 (C.M.A. 1975) (alibi and entrapment); *United States v. Walker*, 45 C.M.R. 150 (C.M.A. 1972) (lack of mental responsibility and self-defense); *United States v. Lincoln*, 38 C.M.R. 128 (C.M.A. 1967) (accident and self-defense); *United States v. Snyder*, 21 C.M.R. 14 (C.M.A. 1956) (heat of passion/voluntary manslaughter and self-defense); *United States v. Ravine*, 11 M.J. 325 (C.M.A. 1981) (entrapment and agency).

2. The defense of self-defense is eviscerated by the defendant's testimony that he did not inflict the injury, regardless of what other evidence might show. *United States v. Ducksworth*, 33 C.M.R. 47 (C.M.A. 1963); *United States v. Bellamy*, 47 C.M.R. 319 (A.C.M.R. 1973); *see also United States v. Crabtree*, 32 C.M.R. 652 (A.B.R. 1962) (both duress and denial may not be raised).

E. Burden of Proof.

1. Lack of mental responsibility. The accused has the burden of proving this defense by clear and convincing evidence. UCMJ Art. 50a(b); R.C.M. 916(b).

2. Mistake of fact as to age of victim of carnal knowledge. The accused has the burden of proving this defense by a preponderence of the evidence. The mistake must be both honest and reasonable. UCMJ Art. 120(d). *Cf. United States v. Strode*, 43 M.J. 29 (1995) (holding honest and reasonable mistake of fact as to age of victim of indecent acts with child may be a defense if acts would otherwise be lawful if victim was over age 16).

3. All other defenses. If a defense is raised, the prosecution then has the burden of proving beyond a reasonable doubt that the defense does not exist. R.C.M. 916(b); *United States v. Verdi*, 5 M.J. 330 (C.M.A. 1978).

II. Accident.

A. Defined. R.C.M. 916(f). To be excusable as an accident, the act resulting in death or injury must have been the result of doing a lawful act in a lawful manner, free of negligence and unaccompanied by any criminally careless or reckless conduct. *United States v. Rodriguez*, 31 M.J. 150 (C.M.A. 1990); *United States v. Moyler*, 47 C.M.R. 82, 85 (A.C.M.R. 1973). Accident is an unexpected act not due to negligence. It is not the unexpected consequence of a deliberate act. *United States v. Pemberton*, 36 C.M.R. 239 (C.M.A. 1966); R.C.M. 916(f). *See generally* TJAGSA Practice Note. *The Defense of Accident: More Limited Than You Might Think*, Army Law., Jan. 1989, at 45.

1. The lawful act. The unlawful nature of an accused's actions are apparent when performed in the course of committing a malum in se offense, *e.g.*, robbery. Such is not the case, however, when a malum prohibitum offense is involved. In *United States v. Sandoval*, 15 C.M.R. 61 (C.M.A. 1954), the accused was charged with killing a fellow soldier. He claimed that the death resulted from an accidentally inflicted gunshot wound. The government argued that accident was not available as a defense because the accused's possession of the murder weapon was a violation of local regulations. The Court of Military Appeals' decision implied that violation of the regulation made the accused's act per se illegal and thus precluded access to the accident defense. Eighteen years later in *United States v. Small*, 45 C.M.R. 700 (A.C.M.R. 1972), the Army Court of Military Review stated that an accident instruction could be denied only if the act, illegal as violative of a general regulation, was the proximate cause of the injury inflicted. *See also United States v. Tucker*, 38 C.M.R. 349 (C.M.A. 1968); *United States v. Taliau*, 7 M.J. 845 (A.C.M.R. 1979).

2. The unexpected act. If an act is specifically intended and directed at another, the fact that the ultimate consequence of the act is unintended or unforeseen does not raise the accident defense.

a) *United States v. McMonagle*, 38 M.J. 53 (C.M.A. 1993) (the defense of accident is not raised where accused engages a target in a combat zone that turns out to be a noncombatant; the death of a human being is neither unexpected nor unforeseen under these circumstances).

b) *United States v. Femmer*, 34 C.M.R. 138 (C.M.A. 1964) (no instruction on accident was required where the accused charged with aggravated assault admitted that the victim was injured by a razor blade in accused's hand which he used in a calculated effort to push the victim away from him. Because the injury resulted from an act intentionally directed at the victim, and the accused knew he held the razor blade when he carried out the act, accident of the kind that would absolve one of criminal liability was not involved).

c) Accident is not synonymous with unintended injury. A particular act may be directed at another without any intention to inflict injury, but if the natural and direct consequence of the act results in injury, the wrong is not excusable because of accident. *United States v. Pemberton*, 36 C.M.R. 239 (C.M.A. 1968) (accused's act of struggling with victim over a broken beer bottle was not directed at the victim but rather at wresting the bottle from the victim. Accident defense was therefore available although the judge in this case instructed improperly).

d) In military law, the defense of accident excuses a lawful act, in a lawful manner, which causes an unintentional and unexpected result. *United States v.*

Marbury, 50 M.J. 526 (A. Ct. Crim. App. 1999), *aff'd* 56 M.J. 12 (C.A.A.F. 2001) (defense of accident did not apply where the accused intentionally engaged in an offer type assault with a knife against a drunk and combative victim who was skilled in martial arts training).

3. Lawful manner. R.C.M. 916(f) discussion. The defense of accident is not available when the act which caused the death, injury, or event was a negligent act.

a) *United States v. Sandoval*, 15 C.M.R. 61 (C.M.A. 1954) (pushing door open with a loaded weapon does not constitute due care to allow accused to interpose accident defense to homicide).

b) *United States v. Redding*, 34 C.M.R. 22 (C.M.A. 1963) (in the course of playing "quick draw," accused shot a friend with a pistol. Even though the evidence established that the injury was unintentionally inflicted, no accident instruction was required because of the accused's culpable negligence).

c) *United States v. Moyler*, 47 C.M.R. 82 (A.C.M.R. 1973) (carrying a weapon within the base camp with a magazine inserted, a round chambered, the safety off, and the selector on automatic, constitutes negligence as a matter of law). *See also United States v. Rodriguez*, 8 M.J. 648 (A.F.C.M.R. 1979).

d) *United States v. Leach*, 22 M.J. 738 (N.M.C.M.R. 1986) (swinging a knife upwards in close quarters of victim was negligent, so the accident defense was not available).

e) *United States v. Davis*, 53 M.J. 202 (C.A.A.F. 2000) (where the accused admitted that he was negligent by failing to properly secure his infant daughter in her car seat, the military judge did not err by failing to instruct *sua sponte* on the affirmative defense of accident).

f) *United States v. Jenkins*, 59 M.J. 893 (A. Ct. Crim. App. 2004) (holding the military judge erred in refusing to give a requested accident instruction when there was evidence that the accused showed sufficient due care in firing a pistol).

g) *United States v. Ferguson*, 15 M.J. 12 (C.M.A. 1983) (waving a loaded shotgun without placing the safety in operation was a negligent act).

4. Negligent self-defense. Acting in self-defense can be the lawful act in a lawful manner for purposes of the accident defense. Negligent self-defense would deprive an accused of the accident defense. *See United States v. Lett*, 9 M.J. 602 (A.F.C.M.R. 1980) (using switchblade knife as passive deterrent was negligent self-defense); *United States v. Taliau*, 7 M.J. 845 (A.C.M.R. 1979) (unintentional injury to innocent third party excused where accused was engaging in lawful self-defense); *see also United States v. Jenkins*, 59 M.J. 893 (Army Ct. Crim. App. 2004) (accident and defense of another). Instructions: MJ should instruct on both doctrines where death of a victim is unintended and deadly force is not authorized. *See* DA PAM 27-9, Military Judges' Benchbook ¶¶ 5-2, 5-4; *United States v. Jones*, 3 M.J. 279 (C.M.A. 1977); *United States v. Perry*, 36 C.M.R. 377 (C.M.A. 1966).

B. Assault by Culpable Negligence and the Defense of Accident.

1. Unavailability of the defense of accident because of the accused's failure to act with due care does not establish assault under the theory of a culpably negligent act. *See United States v. Tucker*, 38 C.M.R. 349 (C.M.A. 1968).

2. When raised by evidence, "defense" of accident applies to all allegations of assault; if accused is successful in raising reasonable doubt as to any requisite *mens rea* element, result is acquittal. *United States v. Curry*, 38 M.J. 77 (C.M.A. 1993).

III. DEFECTIVE CAUSATION / INTERVENING CAUSE.

A. Defined. The accused is not criminally responsible for the loss/damage/injury if his or her act or omission was not a proximate cause.

1. Accused's act may be "proximate" even if it is not the sole or latest cause. *United States v. Moglia*, 3 M.J. 216 (C.M.A. 1977); *United States v. Taylor*, 44 M.J. 254 (C.A.A.F. 1996) (accused entitled to present evidence of negligent medical care given by paramedics to drowning victim even if eventual death did not result solely from such negligent medical care). *But see United States v. Reveles*, 41 M.J. 388 (C.A.A.F. 1995) (possibility that victim's death was caused by negligence of medical personnel subsequent to injury inflicted by accused was no defense because medical negligence did not loom so large that accused's act was not a substantial factor in victim's death).

2. The accused is not responsible unless his or her act plays a "major role" or "material role" in causing the loss/damage/injury. *United States v. Moglia*, 3 M.J. 216 (C.M.A. 1977) (manslaughter conviction affirmed where the accused's act of selling heroin played "major role" in overdose death of buyer); *United States v. Romero*, 1 M.J. 227 (C.M.A. 1975) (manslaughter conviction affirmed where the accused's act of assisting overdose victim in inserting syringe into vein played "material role" in victim's death).

3. In a crime of negligent omission, the accused is not criminally responsible unless his or her omission was a "substantial factor," among multiple causes, in producing the damage. *United States v. Day*, 23 C.M.R. 651 (N.B.R. 1957) (ship commander's failure to keep engines in readiness held proximate cause of ship grounding in gale).

4. *See generally* Benchbook ¶ 5-19.

B. Intervening Cause.

1. The accused is not criminally responsible for the crime if:

a) The injury or death resulted from an independent, intervening cause;

b) The accused did not participate in the intervening cause, and

c) The intervening cause was not foreseeable.

2. Intervening cause test from 26 Am. Jur. *Homicide*, § 50, cited with approval in *United States v. Houghten*, 32 C.M.R. 3 (C.M.A. 1962), states that: "If it appears that the act of the accused was not the proximate cause of the death for which he is being prosecuted, but that another cause intervened, with which he was in no way connected and but for which death would not have occurred, such supervening cause is a good defense to the crime of homicide."

3. Intervening cause must be "new and wholly independent" of the original act of the defendant. *United States v. Eddy*, 26 C.M.R. 718 (A.B.R. 1958) (to constitute an intervening cause to the offense of murder, medical maltreatment must be so grossly erroneous as to constitute a new and independent cause of death); *see also United States v. Gomez*, 15 M.J. 954 (A.C.M.R. 1983).

4. The intervening cause must not be foreseeable. *United States v. Varraso*, 21 M.J. 129 (C.M.A. 1985) (defense not raised where accused helped victim hang herself by

tying her hands behind her back and putting her head in the noose; any later acts by the victim to complete the hanging were foreseeable).

5. Intervening cause must intrude between the original wrongful act or omission and the injury and produce a result which would not otherwise have followed. *United States v. King*, 4 M.J. 785 (N.C.M.R. 1977), *aff'd*, 7 M.J. 207 (C.M.A. 1979). Defense offered evidence that the accused drove onto the shoulder of the road to avoid the oncoming victim and that, in attempting to negotiate the sunken shoulder to regain the road, the accused crossed over the center line and struck the victim's vehicle. The court noted that intervening cause would have been present had a third vehicle been involved or had the accused offered evidence that one of the wheels of his vehicle dropped off or that an earthslide forced him into the oncoming lane.

6. *Henderson v. Kibbe*, 431 U.S. 145 (1977) (abandoning intoxicated robbery victim on an abandoned rural road in a snowstorm established culpability for death of victim resulting from his being struck by a speeding truck).

7. *United States v. Riley*, 58 M.J. 305 (C.A.A.F. 2003). Airman gave birth to a baby girl in the latrine of hospital. The baby died from blunt force trauma and left in the trashcan of the latrine. Appellant argued that the doctors' failure to discover her pregnancy on three prior medical visits was an intervening cause in the baby's death. CAAF disagreed, concluding that, at best, the negligence was a contributing cause. The doctors did not intervene between the birth of the baby and the ultimate death. *See also United States v. Cooke*, 18 M.J. 152 (C.M.A. 1984).

IV. DURESS.

A. Defined. The defense of duress exists when the accused commits the offense because of a well-grounded apprehension of immediate death or serious bodily harm. R.C.M. 916(h); *see generally United States v. Rankins*, 34 M.J. 326 (C.M.A. 1992); *United States v. Montford*, 13 M.J. 829 (A.C.M.R. 1982).

1. Financial hardship, no matter how extreme, does not amount to duress under military law. *United States v. Alomarestrada*, 39 M.J. 1068 (A.C.M.R. 1994).

2. Duress is never a defense to homicide or to disobedience of valid military orders requiring performance of dangerous military duty. R.C.M. 916(h); *United States v. Talty*, 17 M.J. 1127 (N.M.C.M.R. 1984)(where sailor refused the order of his commander to enter the reactor chamber of a nuclear submarine to perform maintenance, based on his belief that radiation from the reactor could harm him); *United States v. Washington*, 57 M.J. 394 (C.A.A.F. 2002) (refusal to receive anthrax vaccination).

3. Reasonable opportunity to seek assistance negates a reasonable apprehension that another innocent person would immediately suffer death or serious bodily injury. *United States v. Vasquez*, 48 M.J. 426 (C.A.A.F. 1998).

4. What constitutes reasonable apprehension? Fear sufficient to cause a person of ordinary fortitude and courage to yield. *United States v. Logan*, 47 C.M.R. 1 (C.M.A. 1973) (reasonable fear did not exist where accused was in Korea and threats to harm his family in CONUS were made by local Korean nationals); *United States v. Olson*, 22 C.M.R. 250 (C.M.A. 1957) (prisoner-of-war who wrote anti-American articles while incarcerated was denied the duress instruction at his court-martial for aiding the enemy when the only evidence of coercion brought to bear on him consisted of veiled threats of future possible mistreatment); *United States v. Palus*, 13 M.J. 179 (C.M.A. 1982) (inadequate providency inquiry required reversal where accused in Germany stated he

feared for his family's safety when his wife was harassed in Las Vegas about his gambling debts). *See generally United States v. Ellerbee*, 30 M.J. 517 (A.F.C.M.R. 1990) (sufficient to raise duress); *United States v. Riofredo*, 30 M.J. 1251 (N.M.C.M.R. 1990) (evidence does not raise duress); TJAGSA Practice Note, *Duress and Absence Without Authority*, Army Law., Dec. 1990, at 34 (discusses *Riofredo*).

5. The military apparently does not recognize the rule that one who recklessly or intentionally placed himself in a situation in which it was reasonably foreseeable that he or she would be subjected to coercion is not entitled to the defense of duress. *United States v. Jemmings*, 50 C.M.R. 247 (A.C.M.R. 1975), *rev'd*, 1 M.J. 414 (C.M.A. 1976); *see also United States v. Vandemark*, 14 M.J. 690 (N.M.C.M.R. 1982).

6. The defense requires fear of immediate death or great bodily harm and no reasonable opportunity to avoid committing the harm. *See generally United States v. Barnes*, 12 M.J. 779 (A.C.M.R. 1981).

a) The accused must not only fear immediate death or great bodily harm but also have no reasonable opportunity to avoid committing the crime. R.C.M. 916(h). *See United States v. Banks*, 37 M.J. 700 (A.C.M.R. 1993) (defense of duress to charge of AWOL was not raised by accused's testimony that he failed to return from leave on time because of the serious illness of his mother); *United States v. Vasquez*, 48 M.J. 426 (C.A.A.F. 1998) (duress defense not raised in bigamy case where accused married Turkish woman three days after being caught with her and authorities threatened to put them in jail).

b) The old rule. *United States v. Fleming*, 23 C.M.R. 7 (C.M.A. 1957) (even though accused was subjected to great deprivation as POW, actions of captors did not constitute defense against charge of collaboration with the enemy because accused's resistance had not brought him to the "last ditch.").

c) The new rule. The immediacy element of the defense is designed to encourage individuals promptly to report threats rather than breaking the law themselves. *United States v. Jemmings*, 1 M.J. 414, 418 (C.M.A. 1976) (threat to inflict harm the next day held sufficient to activate defense where accused's company commander had previously refused to assist); *United States v. Campfield*, 17 M.J. 715 (N.M.C.M.R. 1983) *rev'd in part on other grounds (multiplicity)*, 20 M.J. 246 (C.M.A. 1985); *United States v. Biscoe*, 47 M.J. 398 (C.A.A.F. 1998) (sexual harassment did not constitute duress when victim conceded during providency that she did not fear for her life or the lives of her children when she went AWOL); *United States v. Vasquez*, 48 M.J. 426 (C.A.A.F. 1998) (in three days before threat to jail him and Turkish woman and his bigamous marriage, the accused could have sought legal assistance, sought assistance from the consulate, or sought help from his chain of command).

7. *United States v. Le*, 59 M.J. 859 (A. Ct. Crim. App. 2004). Appellant pled guilty to desertion. During his providence inquiry, appellant stated his primary reason for leaving was fear that his girlfriend's ex-boyfriend, a purported gang member, would kill or harm him. In response to the military judge's questions, appellant repeatedly said he did not fear "immediate" death or serious bodily injury, but he did not know when "they are going to come for me." The appeals court held that appellant's guilty plea was improvident because he raised the defense of duress, and the military judge failed to resolve the apparent inconsistency. Appellant's response that he did not fear immediate harm was merely a recitation of a conclusion of law. Duress has long been recognized as a defense to absence offenses; however, it only applies so long as the accused surrenders

at the earliest possible opportunity. Appellant's claim of duress could only apply while his reasonably grounded fear still existed. Once away from the source of the fear, the threat lost its coercive force.

8. *United States v. Barnes*, 60 M.J. 950 (N-M. Ct. Crim. App. 2005). Appellant pled guilty to a 52 month absence terminated by apprehension. Appellant claimed that he was beaten and threatened regularly and this contributed to his absence. HELD: The military judge erred when he granted a motion *in limine* to preclude the affirmative defense of duress, after ruling that the offense of desertion and the lesser included offense of unauthorized absence were not complete when appellant left the ship with the intent to remain away.

9. *See generally* Benchbook ¶ 5-5

B. Who Must Be Endangered. Any innocent person. R.C.M. 916(h); *see United States v. Barnes*, 12 M.J. 779 (A.C.M.R. 1981); *United States v. Pinkston*, 39 C.M.R. 261 (C.M.A. 1969) (threat against fiancée and illegitimate child can raise the defense of duress); *United States v. Jemmings*, 1 M.J. 414 (C.M.A. 1976) (threat against accused's children can raise the defense of duress).

C. Evidence. Accused's use of the duress defense creates an opportunity for the prosecution to introduce evidence of his other voluntary crimes in order to rebut the defense. *United States v. Hearst*, 563 F.2d 1331 (9th Cir. 1977); *see also* MRE 404(b).

D. The Nexus Requirement.

1. A nexus between the threat and the crime committed must exist. *United States v. Barnes*, 12 M.J. 779 (A.C.M.R. 1981) (duress was not available to an accused who robbed a taxi driver where the threat was only to force payment of a debt; the coercion must be to commit a criminal act); *see also United States v. Banks*, 37 M.J. 700 (A.C.M.R. 1993) (defense of duress to charge of AWOL was not raised by accused's testimony that he failed to return from leave on time because of the serious illness of his mother); *United States v. Biscoe*, 47 M.J. 398 (C.A.A.F. 1998) (allegation of sexual harassment alone, absent threat of death or serious bodily injury, did not raise duress as a defense to AWOL).

2. For requirements on instructions, see *United States v. Rankins*, 32 M.J. 971 (A.C.M.R. 1991), *aff'd*, 34 M.J. 326 (C.M.A. 1992).

E. The Military "Defense" of Necessity.

1. Duress Distinguished. Necessity is a defense of justification; it exculpates a nominally unlawful act to avoid a greater evil. Duress is a defense of excuse; it excuses a threatened or coerced actor. *See generally* Milhizer, *Necessity and the Military Justice System: A Proposed Special Defense*, 121 Mil. L. Rev. 95 (1988).

2. Duress and necessity are separate affirmative defenses, and the defense of necessity is not recognized in military law. *United States v. Banks*, 37 M.J. 700 (A.C.M.R. 1993). *But see United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999); *United States v. Olinger*, 50 M.J. 365 (1999) (common law defense of necessity, which may be broader than the defense of duress, may apply to the military).

3. Necessity has arguably been recognized and applied de facto to the offenses of AWOL and escape from confinement, but always under the name of duress.

a) *United States v. Blair*, 36 C.M.R. 413 (C.M.A. 1966) (error not to instruct on defense raised by accused's flight from cell to avoid beating by a brig guard).

b) *United States v. Pierce*, 42 C.M.R. 390 (A.C.M.R. 1970) ("duress" to escape from confinement not raised by defense offer of proof regarding stockade conditions, but lacking a showing of imminent danger).

c) *United States v. Guzman*, 3 M.J. 740 (N.C.M.R. 1977) (accused with injury that would have been aggravated by duty assignment had no defense of "duress" to crime of AWOL because performing duty would not have caused *immediate* death or serious bodily injury), *rev'd on other grounds (court-martial improperly convened)*, 4 M.J. 115 (C.M.A. 1977).

d) In an early case in which a sailor went AWOL because of death threats by a shipmate, the Navy Board of Review held that the defense of duress was not raised. Noting that the accused was never in danger of imminent harm and that the threatener had never demanded that the accused leave his ship, the board concluded that the accused had no right to leave a duty station in order to find a place of greater safety. *United States v. Wilson*, 30 C.M.R. 630 (N.B.R. 1960).

e) Escapees are not entitled to duress or necessity instructions unless they offer evidence of bona fide efforts to surrender or return to custody once the coercive force of the alleged duress/necessity had dissipated. *United States v. Bailey*, 444 U.S. 394 (1979); *accord United States v. Clark*, NCM 79-1948 (N.C.M.R. 30 May 1980) (unpub.).

f) *United States v. Roberts*, 14 M.J. 671 (N.M.C.M.R. 1982), *rev'd*, 15 M.J. 106 (C.M.A. 1983) (summary disposition) (duress available to female sailor who went AWOL to avoid shipboard initiation when complaints about harassment went unheeded); *see also United States v. Tulin*, 14 M.J. 695 (N.M.C.M.R. 1982) (informant felt Navy could no longer protect him); *United States v. Hullum*, 15 M.J. 261 (C.M.A. 1983) (racial harassment).

g) Note, *Medical Necessity as a Defense to Criminal Liability*, 46 Geo. Wash. L. Rev. 273 (1978).

4. Controlled Substances. No implied medical necessity exception to prohibitions established by the Controlled Substances Act. The necessity defense is especially controversial under a constitutional system in which federal crimes are defined by statute rather than common law. The defense of necessity cannot succeed when the legislature itself has made a determination of values. *United States v. Oakland Cannabis Buyer's Cooperative*, 121 S.Ct. 1711 (2001).

5. Duress and Necessity. *United States v. Washington*, 54 M.J. 936 (A.F. Ct. Crim. App. 2001), *aff'd*, 58 M.J. 129 (C.A.A.F. 2003). The accused conceded that he was not under an unlawful threat; therefore, the defense of duress was not available to him. The court further held that the defense of necessity was not available because the accused's refusal to be inoculated was a direct flouting of military authority and detracted from the ability of his unit to perform its mission. A military accused cannot justify his disobedience of a lawful order by asserting that his health would be jeopardized.

V. INABILITY / IMPOSSIBILITY—OBSTRUCTED COMPLIANCE.

A. Defined. Generally this defense pertains only to situations in which the accused has an affirmative duty to act and does not. The defense excuses a failure to act.

B. Physical (Health-Related) Obstructions to Compliance.

1. Physical impossibility. *See generally* Benchbook ¶ 5-9-1.

a) The accused's conduct is excused if physical conditions made it impossible to obey or involuntarily caused the accused to disobey. *See United States v. Williams*, 21 M.J. 360 (C.M.A. 1986).

b) When one's physical condition is such as actually to prevent compliance with orders or to cause the commission of an offense, the question is not one of reasonableness but whether the accused's illness was the proximate cause of the crime. The case is not one of balancing refusal and reason, but one of physical impossibility to maintain the strict standards required under military law. In such a situation, the accused is excused from the offense if its commission was directly caused by the physical condition and the question whether the accused acted reasonably does not enter into the matter. *United States v. Cooley*, 36 C.M.R. 180 (C.M.A. 1966). To apply a reasonableness standard in instructing the court is error. *United States v. Liggon*, 42 C.M.R. 614 (A.C.M.R. 1970).

c) Physical impossibility may exist as a result of illness/injury of the accused. *United States v. Cooley*, 36 C.M.R. 180 (C.M.A. 1966) (the defense applied to a charge of sleeping on guard where the accused suffered from narcolepsy resulting in uncontrollable sleeping spells.) The defense also exists when requirements placed on the accused are physically impossible of performance. *United States v. Borell*, 46 C.M.R. 1108 (A.F.C.M.R. 1973) (discusses the impossibility of obeying an order to report to the orderly room within a very short period of time).

d) *United States v. Roeseler*, 55 M.J. 286 (C.A.A.F. 2001) (because the impossibility of the fictitious victims being murdered was not a defense to either attempt or conspiracy, it was not a defense to the offense of attempted conspiracy).

e) *United States v. Lee*, 16 M.J. 278 (C.M.A. 1983) (collects cases on impossibility and AWOL).

2. Physical Inability. *See generally* Benchbook ¶ 5-9-2.

a) If the accused's noncompliance was reasonable under the circumstances, it is excused.

b) Unlike physical impossibility, inability to act is a matter of degree. To determine whether a soldier's failure to act because of a physical shortcoming constitutes a defense, one must ask whether the non-performance was reasonable in light of the injury, the task imposed, and the pressing nature of circumstances. *United States v. Cooley*, 36 C.M.R. 180 (C.M.A. 1966).

c) *United States v. Amie*, 22 C.M.R. 304 (C.M.A. 1957) (inability raised when accused testified that upon expiration of leave he was ill and, pursuant to medical advice, undertook to recuperate at home, thus resulting in late return to unit).

d) *United States v. Heims*, 12 C.M.R. 174 (C.M.A. 1953) (law officer erred by failing to instruct on the physical inability defense where evidence established that accused was unable to comply with order to tie sandbags because he was suffering from a hand injury).

e) *United States v. King*, 17 C.M.R. 3 (C.M.A. 1954) (inability defense raised where accused refused order to return to his battle position allegedly because he was suffering from frostbitten feet).

f) *United States v. Barnes*, 39 M.J. 230 (C.M.A. 1994) (defense of physical inability to return to unit is available only when accused's failure to return was not the result of his own willful and deliberate conduct; defense was raised by testimony that accused's failure to return was due to his abduction by third parties, the subsequent theft of his car, and his forty mile walk back to his home).

g) If a physical inability occurred through the accused's own fault or design, it is not a defense. *United States v. New*, 50 M.J. 729 (Army Ct. Crim. App. 1999) (military judge did not err by failing to instruct on inability where the accused claimed that after he willfully reported to the company formation in the wrong uniform, he was removed from the formation and unable to comply with the order to be in the follow-on battalion formation in the Macedonia deployment uniform), *aff'd*, 55 M.J. 95 (C.A.A.F. 2001).

h) Relationship to mental responsibility defense. Military judge need not instruct on both lack of mental responsibility and physical inability when physical symptoms are insignificant compared to mental distress and are part and parcel of mental condition. *United States v. Meeks*, 41 M.J. 150 (C.M.A. 1994)

3. Financial and Other Inability.

a) This defense is applicable if the accused can show the following:

(1) An extrinsic factor caused noncompliance;

(2) The accused had no control over the extrinsic factor;

(3) Noncompliance was not due to the fault or design of the accused after he had an obligation to obey; and

(4) The extrinsic factor could not be remedied by the accused's timely, legal efforts.

b) *See generally* Benchbook ¶ 5-10.

c) *United States v. Pinkston*, 21 C.M.R. 22 (C.M.A. 1966) (accused not guilty of disobeying order to procure new uniforms when, through no fault of his own, he was financially incapable of purchasing required uniforms).

d) *United States v. Smith*, 16 M.J. 694 (A.F.C.M.R. 1983). Financial inability is a defense to dishonorable failure to pay a debt. *But cf. United States v. Hilton*, 39 M.J. 97 (C.M.A. 1994) (financial inability not a defense to dishonorable failure to pay just debt where accused's financial straits resulted from her own financial scheming, had debts of only $50 each month and was receiving monthly pay of $724.20).

e) *United States v. Kuhn*, 28 C.M.R. 715 (C.G.C.M.R. 1959) (seaman who was granted leave to answer charges by civil authorities and who was detained in confinement after the expiration of his leave was not AWOL).

4. Physical Impossibility and Inability and Attempts. Generally physical impossibility and inability does not excuse an attempt. *United States v. Powell*, 24 M.J. 603 (A.F.C.M.R. 1987); *see supra*, chapter 1, section I.

VI. ENTRAPMENT: SUBJECTIVE and DUE PROCESS.

A. Subjective Entrapment: The General Rule.

1. In *United States v. Vanzandt*, 14 M.J. 332 (C.M.A. 1982) the court set out the two elements of subjective entrapment.

a) The suggestion to commit the crime originated in the government, *and*

b) The accused had no predisposition to commit the offense.

2. A question of fact for the finder of fact. *United States v. Jursnick*, 24 M.J. 504 (A.F.C.M.R. 1987).

3. *See generally* TJAGSA Practice Note, *The Evolving Entrapment Defense*, Army Law., Jan. 1989, at 40.

B. Predisposition to Commit the Crime.

1. The prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents. *Jacobson v. United States*, 503 U.S. 540 (1992); *United States v. Vanzandt*, 14 M.J. 332 (C.M.A. 1982).

2. An accused who readily accepts the government's first invitation to commit the offense has no defense of entrapment. *United States v. Suter*, 45 C.M.R. 284 (C.M.A. 1972); *United States v. Garcia*, 1 M.J. 26 (C.M.A. 1975); *United States v. Collins*, 17 M.J. 901 (A.C.M.R. 1984); *see United States v. Rollins*, 28 M.J. 803 (A.C.M.R. 1989); *see also United States v. Clark*, 28 M.J. 401 (C.M.A. 1989) (accused's hesitancy did not raise entrapment, as it was a result of fearing apprehension rather than a lack of predisposition); *United States v. St. Mary*, 33 M.J. 836 (A.C.M.R. 1991) (evidence supported finding predisposition where accused procured hashish and sold it to undercover agent within 24 hours of first request.).

3. The government's reasonable suspicion of the accused's criminal activity is immaterial. *United States v. Vanzandt*, 14 M.J. 332 (C.M.A. 1982); *United States v. Gonzalez-Dominicci*, 14 M.J. 426 (C.M.A. 1983); *United States v. Eason*, 21 M.J. 79 (C.M.A. 1985) (holding error to instruct trier of fact that entrapment negated if gov't agents reasonably believed that accused involved in criminal activity).

4. To show predisposition the government may introduce evidence of relevant, uncharged misconduct to establish predisposition. *United States v. Hunter*, 21 M.J. 240 (C.M.A. 1986); *See* MRE 405(b).

5. Some authority suggests that reputation and hearsay evidence may be admissible to show predisposition. *See, e.g.*, *United States v. Rocha*, 401 F.2d 529 (5th Cir. 1968); *United States v. Simon*, 488 F.2d 133 (5th Cir. 1973); *United States v. Woolfs*, 594 F.2d 77 (5th Cir. 1979). *But see United States v. Cunningham*, 529 F.2d 884 (6th Cir. 1976); *United States v. Whiting*, 295 F.2d 512 (1st Cir. 1961); *United States v. McClain*, 531 F.2d 431 (9th Cir. 1976). *See generally* Annot., 61 A.L.R. 3d 293, 314-18 (1975).

6. In a prosecution for possession of a large quantity of hashish for the purpose of trafficking, accused's prior possession and use of small quantities of hashish was held not to constitute "similar criminal conduct," and did not extinguish the defense of entrapment as to the large quantity. The accused would be found guilty, however, of possessing the lesser amount. *United States v. Fredrichs*, 49 C.M.R. 765 (A.C.M.R. 1974); *see also United States v. Jacobs*, 14 M.J. 999 (A.C.M.R. 1982). Prior possession or use of drugs does not necessarily establish a predisposition to sell or distribute drugs. *United States v.*

Venus, 15 M.J. 1095 (A.C.M.R. 1983); *United States v. Bailey*, 18 M.J. 749 (A.C.M.R. 1984), *aff'd*, 21 M.J. 244 (C.M.A. 1986).

7. Continuing Defense. A valid defense of entrapment to commit the first of a series of crimes is presumed to carry over into the later crimes. *United States v. Skrzek*, 47 C.M.R. 314 (A.C.M.R. 1973). Whether the presumption carries over to different kinds of drugs is a question of fact. *United States v. Jacobs*, 14 M.J. 999 (A.C.M.R. 1982). The taint can extend to a different type of crime as long as the acts come from the same inducement. *United States v. Bailey*, 18 M.J. 749 (A.C.M.R. 1984) (accused entrapped to distribute drugs could raise defense to larceny by trick arising from later distribution of counterfeit drugs), *aff'd*, 21 M.J. 244 (C.M.A. 1986).

8. Profit motive does not necessarily negate an entrapment defense. *United States v. Eckhoff*, 27 M.J. 142 (C.M.A. 1988); *United States v. Meyers*, 21 M.J. 1007 (A.C.M.R. 1986); *United States v. Cortes*, 29 M.J. 946 (A.C.M.R. 1990); *see* TJAGSA Practice Note, *Multiple Requests, Profit Motive, and Entrapment*, Army Law., Jun. 1990, at 48 (discusses *Cortes*).

9. Predisposition is a question of fact. A military judge may not find predisposition as a matter of law and refuse to instruct on entrapment. *United States v. Johnson*, 17 M.J. 1056 (A.F.C.M.R. 1983).

C. Government Conduct.

1. *United States v. Williams*, 61 M.J. 584 (N-M. Ct. Crim. App. 2005) (wanting to get to know two attractive females (undercover government agents) is insufficient to raise entrapment and reject an otherwise provident plea).

2. Profit motive does not necessarily negate entrapment. *Eckhoff*, *Cortes* and *Meyers*, all *supra*.

3. Multiple requests by a government agent alone may not raise entrapment. *United States v. Sermons*, 14 M.J. 350 (C.M.A. 1982).

4. The latitude given the government in "inducing" the criminal act is considerably greater in drug cases than it would be in other kinds of crimes. *United States v. Vanzandt*, 14 M.J. 332, 344 (C.M.A. 1982); *United States v. Cortes*, 29 M.J. 946 (A.C.M.R. 1990). *But cf. United States v. Lemaster*, 40 M.J. 178 (C.M.A. 1994)

D. Not Confession and Avoidance. In order for the defense of entrapment to be raised and established, the accused need not admit the crime; indeed, he may deny it. *United States v. Garcia*, 1 M.J. 26 (C.M.A. 1975); *United States v. Williams*, 4 M.J. 507, 509 n. 1 (A.C.M.R. 1977).

E. Due Process Entrapment. *See generally* Benchbook ¶ 5-6, note 4.

1. The due process defense is recognized under military law. *United States v. Vanzandt*, 14 M.J. 332 (C.M.A. 1982) (but outrageous government conduct in drug cases will be especially difficult to prove given the greater latitude given government agents in drug cases); *United States v. Simmons*, 14 M.J. 624 (A.F.C.M.R. 1982); *United States v. Harms*, 14 M.J. 677 (A.F.C.M.R. 1982); *United States v. Lemaster*, 40 M.J. 178 (C.M.A. 1994) (targeting an emotionally unstable female suspect, sexually and emotionally exploiting her, and planting drugs upon her in a reverse sting operation violates the fundamental norms of military due process and is the functional equivalent of entrapment), *amended by*, 42 M.J. 91 (C.M.A. 1995).

2. The due process defense is a question of law for the military judge. *United States v. Vanzandt*, 14 M.J. 332, 343 n. 11 (C.M.A. 1982).

3. Reverse sting operation does not deprive accused of due process. *United States v. Frazier*, 30 M.J. 1231 (A.C.M.R. 1990).

4. Police did not violate due process in soliciting the accused's involvement in drug transactions where they had no knowledge of his enrollment in a drug rehabilitation program. *United States v. Harris*, 41 M.J. 433 (C.A.A.F. 1995); *United States v. Bell*, 38 M.J. 358 (C.M.A. 1993); *United States. v. Cooper*, 33 M.J. 356 (C.M.A. 1991), *cert. denied*, 507 U.S. 985 (1993).

5. *United States v. St. Mary*, 33 M.J. 836 (A.C.M.R. 1991) (government conduct did not violate due process where accused provided drugs to undercover female agent in hopes of having a future sexual relationship as the agent did not offer dating or sexual favors as an inducement); *accord United States v. Fegurgur*, 43 M.J. 871 (Army Ct. Crim. App. 1996) (undercover CID agent who repeatedly asked accused to obtain marijuana for her, knowing that he wished to date her, was not so outrageous as to bar prosecution of accused under either due process clause or fundamental norms of military due process).

6. *United States v. Bell*, 38 M.J. 358 (C.M.A. 1993) (sufficient evidence existed to show accused's predisposition to commit two separate offenses of distribution of cocaine; however, due process entrapment defense was available for drug use offenses where government improperly induced accused, a recovering cocaine addict enrolled in Army rehabilitation program, into using cocaine).

7. Court members should be instructed only on subjective entrapment, and not the due process defense. *United States v. Dayton*, 29 M.J. 6 (C.M.A. 1989).

F. Entrapment does not apply if carried out by foreign law enforcement activities. *See United States v. Perl*, 584 F.2d 1316, 1321 n. 3 (4th Cir. 1978).

VII. SELF-DEFENSE.

A. "Preventive Self-Defense" in which no injury is inflicted. If no battery is committed, but the accused's acts constitute assault by offer, the accused may threaten the victim with any degree of force, provided only that the accused honestly and reasonably believes that the victim is about to commit a battery upon him. R.C.M. 916(e)(2). *United States v. Acosta-Vargas*, 32 C.M.R. 388 (C.M.A. 1962); *United States v. Johnson*, 25 C.M.R. 554 A.C.M.R. 1958); *United States v. Lett*, 9 M.J. 602 (A.F.C.M.R. 1980). *See generally* Benchbook ¶ 5-2-5.

B. Crimes in which an injury is inflicted upon the victim. Two separate standards of self-defense exist depending on the nature of the injury inflicted on the victim. *United States v. Thomas*, 11 M.J. 315 (C.M.A. 1981); *United States v. Sawyer*, 4 M.J. 64 (C.M.A. 1977); *United States v. Jackson*, 36 C.M.R. 101 (C.M.A. 1966).

1. R.C.M. 916(e)(1). Standard applied when homicide or aggravated assault is charged. The accused may justifiably inflict death or grievous bodily harm upon another if:

a) He apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted on him; and

b) He believed that the force he used was necessary to prevent death or grievous bodily harm.

c) *See United States v. Clayborne*, 7 M.J. 528 (A.C.M.R. 1979) (court set aside a conviction for unpremeditated murder because it "was not convinced beyond a reasonable doubt that the accused did not act in self-defense" in using a knife

against a victim who attacked the accused with only his hands when the accused knew 1) the victim was an experienced boxer, 2) with a reputation for fighting anyone, 3) who had defeated three men in a street fight, and 4) had choked and beaten a sleeping soldier once before). *But see United States v. Ratliff*, 49 C.M.R. 775 (A.C.M.R. 1975) (reaching opposite result in a knife scenario).

2. R.C.M. 916(e)(3). Standard applied when simple assault or battery is charged. The accused may justifiably inflict injury short of death or grievous bodily harm if:

a) He apprehended, upon reasonable grounds, that bodily harm was about to be inflicted on him, and

b) He believed that the force he used was necessary to avoid that harm, but that the force actually used was not reasonably likely to result in death or grievous bodily harm.

c) *See United States v. Jones*, 3 M.J. 279 (C.M.A. 1977) (one may respond to a simple fistic assault with similar force); *United States v. Perry*, 36 C.M.R. 377 (C.M.A. 1966).

3. Loss of Self-Defense by Aggressor / Mutual Combatant. A provoker, aggressor, or one who voluntarily engages in a mutual affray is not entitled to act in self defense unless he first withdraws in good faith and indicates his desire for peace. R.C.M. 916(e)(4). *United States v. Marbury*, 50 M.J. 526 (Army Ct. Crim. App. 1999) *aff'd* 56 M.J. 12 (C.A.A.F. 2001) (after the victim struck the accused in the face, the accused retreated from her room, unsuccessfully sought assistance from fellow NCOs, grabbed a knife, reentered her room, and then started a confrontation by threatening the victim with the knife). *United States v. Brown*, 33 C.M.R. 17 (C.M.A. 1963); *United States v. O'Neal*, 36 C.M.R. 189 (C.M.A. 1966); *United States v. Green*, 33 C.M.R. 77 (C.M.A. 1963).

4. Retreat / Withdrawal. The accused is not required to retreat when he is at a place where he has a right to be. The presence or absence of an opportunity to withdraw safely, however, may be a factor in deciding whether the accused had a reasonable belief that bodily harm was about to be inflicted upon him. R.C.M. 916(e)(4) (discussion); *United States v. Lincoln*, 38 C.M.R. 128 (C.M.A. 1967); *United States v. Smith*, 33 C.M.R. 3 (C.M.A. 1963); *United States v. Adams*, 18 C.M.R. 187 (C.M.A. 1955); *United States v. Jenkins*, 59 M.J. 893 (A. Ct. Crim. App. 2004) (holding when an aggressor, provoker, or mutual combatant who becomes unconscious and ceases resistance effectively withdraws, entitling another to exercise self-defense on his behalf).

5. Escalation. An accused who wrongfully engages in a simple assault and battery may have a right to use deadly force if the victim first uses deadly force upon the accused. *United States v. Cardwell*, 15 M.J. 124 (C.M.A. 1983); *United States v. Dearing*, 63 M.J. 478 (2006) (citing *Cardwell*); *United States v. Lewis*, 65 M.J. 85 (2007); *see United States v. Winston*, 27 M.J. 618 (A.C.M.R. 1988) (self-defense not raised where the accused aggressively participated in an escalating mutual affray);

6. Termination of Self-Defense. The right to self-defense ceases when the threat is removed. *United States v. Richey*, 20 M.J. 251 (C.M.A. 1985) (ejecting a tresspasser).

7. Voluntary Intoxication. The accused's voluntary intoxication cannot be considered in determining accused's perception of the potential threat which led him to believe that a battery was about to be inflicted, as this is measured objectively. *United States v. Judkins*, 34 C.M.R. 232 (C.M.A. 1964).

8. Requirement to Raise. Self-defense need not be raised by the accused's testimony, even if he testifies. *United States v. Rose*, 28 M.J. 132 (C.M.A. 1989); *see* TJAGSA Practice Note, *Self-Defense Need Not Be Raised by the Accused's Testimony*, Army Law., Aug. 1989, at 40 (discusses *Rose*). *See United States v. Reid*, 32 M.J. 146 (C.M.A. 1991).

9. The "Egg-Shell" Victim. R.C.M. 916(e)(3) (discussion). If an accused is lawfully acting in self-defense and using less force than is likely to cause death or grievous bodily harm, the death of the victim does not deprive the accused of the defense, if:

a) The accused's use of force was not disproportionate, and

b) The death was unintended, and

c) The death was not a reasonably foreseeable consequence. *United States v. Jones*, 3 M.J. 279 (C.M.A. 1977); *United States v. Perry*, 36 C.M.R. 377 (C.M.A. 1966).

d) *See generally* Benchbook ¶ 5-2-4.

VIII. DEFENSE OF ANOTHER.

A. Traditional View Adopted by Military. R.C.M. 916(e)(5). One who acts in defense of another has no greater right than the party defended. *United States v. Regalado*, 33 C.M.R. 12 (C.M.A. 1963); *United States v. Hernandez*, 19 C.M.R. 822 (A.F.B.R. 1955); *United States v. Cole*, 54 M.J. 572 (A. Ct. Crim. App. 2000) (where the victim did not attack or make an offer of violence to the accused's wife, he was not entitled to use deadly force in defense of his family), *aff'd*, 55 M.J. 466 (C.A.A.F. 2001). *See generally* Benchbook ¶ 5-3.

B. "Enlightened View" Rejected. Accused who honestly and reasonably believes he is justified in defending another does not escape criminal liability if the "defended party" is not entitled to the defense of self-defense. *United States v. Lanier*, 50 M.J. 772 (A. Ct. Crim. App. 1999), *aff'd* 53 M.J. 220 (C.A.A.F. 2000) (accused may not use more force than the person defended was lawfully entitled to use under the circumstances. This "alter ego" status imposes significant limitations on the availability and application of the defense of defense of another); *United States v. Tanksley*, 7 M.J. 573 (A.C.M.R. 1979), *aff'd*, 10 M.J. 180 (C.M.A. 1980); *United States v. Styron*, 21 C.M.R. 579 (C.G.B.R. 1956). *But see* LaFave & Scott, Criminal Law § 54 at 397-399 (1972). *See generally* Byler, *Defense of Another, Guilt Without Fault?*, Army Law., June 1980.

C. Accident & Defense of Another. *United States v. Jenkins*, 59 M.J. 893 (A. Ct. Crim. App. 2004). Appellant and friends traveled to another unit's barracks area to solve a dispute with another group. Appellant carried with him a loaded handgun, which he gave to a friend to hold. A fight erupted between two members of the factions. A member of the opposing faction had beaten appellant's colleague unconscious and continued to beat him. Appellant retrieved his pistol and fired three shots; the third shot struck another soldier and caused the loss of his kidney. At trial, defense counsel requested instructions on accident, defense of another, and withdrawal as reviving the right to self-defense. The Military Judge (MJ) instructed the panel only on defense of another, and the panel convicted appellant of conspiracy to assault and intentional infliction of grievous bodily harm. The appellate court held that the MJ erred in refusing to give the requested instructions. When appellant's friend became unconscious during the fight, he effectively withdrew from the mutual affray, giving appellant the right to defend him. Further, there was evidence in the record that appellant showed due care in firing his pistol to prevent further injury to his friend. Finally, the panel's finding of guilt for intentional assault did not render the errors harmless.

IX. INTOXICATION.

A. Voluntary Intoxication. R.C.M. 916(l)(2). *See generally* Milhizer, *Voluntary Intoxication as a Criminal Defense Under Military Law*, 127 Mil. L. Rev. 131 (1990).

1. Voluntary intoxication is a legitimate defense against an element of premeditation, specific intent, knowledge, or willfulness in any crime---except the element of specific intent in the crime of unpremeditated murder. R.C.M. 916(l)(2); MCM, pt. IV, ¶ 43c(2)(c); *United States v. Morgan*, 37 M.J. 407 (C.M.A. 1993) (voluntary intoxication no defense to unpremeditated murder; re-affirming the rule in face of lower courts calling the rule into question); *United States v. Ferguson*, 38 C.M.R. 239 (C.M.A. 1968). To constitute a valid defense, voluntary intoxication need not deprive the accused of his mental capacities nor substantially deprive him of his mental capacities. Rather, it need only be of such a degree as to create a reasonable doubt that he premeditated or entertained the required intent, knowledge, or willfulness. *See generally United States v. Gerston*, 15 M.J. 990 (N.M.C.M.R. 1983); *United States v. Ledbetter*, 32 M.J. 272 (C.M.A. 1991); *United States v. Cameron*, 37 M.J. 1042 (A.C.M.R. 1993) (defense to willful disobedience to a lawful order).

2. Voluntary intoxication is not a defense to crimes involving only a general intent. *United States v. Brosius*, 37 M.J. 652 (A.C.M.R. 1993) (voluntary intoxication no defense to general intent crime of communicating a threat), *aff'd*, 39 M.J. 378 (C.M.A. 1994); *United States v. Reitz*, 47 C.M.R. 608 (N.C.M.R. 1973) (voluntary intoxication no defense to drug sale, transfer, possession).

3. Where there is some evidence of excessive drinking and impairment of accused's faculties, military judge must *sua sponte* instruct on the defense of voluntary intoxication. *United States v. Yandle*, 34 M.J. 890 (N.M.C.M.R. 1992). If no evidence of excessive drinking or impairment, military judge is not required to instruct. *United States v. Watford*, 32 M.J. 176 (C.M.A. 1991).

4. Limitations on voluntary intoxication defense are constitutional. *Montana v. Egelhoff*, 116 S. Ct. 2013 (1996) (Montana's statutory ban on voluntary intoxication evidence in general intent crimes is consistent with state interests in deterring crime, holding one responsible for consequences of his actions, and excluding misleading evidence, and does not violate the due process clause).

5. *See generally* Benchbook ¶ 5-12 and 5-2-6, Note 4.

B. Involuntary Intoxication.

1. In issue when:

a) Intoxicant is introduced into accused's body either without her knowledge or by force; or

b) Accused is "pathologically intoxicated," i.e., grossly intoxicated in light of amount of intoxicant consumed and accused not aware of susceptibility; or

c) Long-term use of alcohol causes severe mental disease.

2. An accused is involuntarily intoxicated when he exercises no independent judgment in taking the intoxicant--as, for example, when he has been made drunk by fraudulent contrivances of others, by accident, or by error of his physician. If the accused's intoxication was involuntary and his capacity for control over his conduct was affected thereby and resulted in the criminal act charged, he should be acquitted. *United States v. Travels*, 44 M.J. 654 (A.F. Ct. Crim. App. 1996) (involuntary intoxication exists when

accused is intoxicated through force, fraud, or trickery or actual ignorance of intoxicating nature of the substance consumed); *but see United States v. Ward*, 14 M.J. 950 (A.C.M.R. 1982) (holding intoxication not "involuntary" where accused knew substance was marijuana but was unaware it was laced with PCP).

3. An accused who voluntarily takes the first drink, knowing from past experience that the natural and reasonably foreseeable consequences of that act will be a violent intoxicating reaction cannot claim that his condition was "involuntary" so as to interpose an affirmative defense. *United States v. Schumacher*, 11 M.J. 612 (A.C.M.R. 1981). *See generally* Kaczynski, "*I Did What?" The Defense of Involuntary Intoxication*, Army Law., Apr. 1983, at 1.

Compulsion to drink that merely results from alcoholism that has not risen to the level of a severe mental disease or defect is considered "voluntary intoxication" and will not generally excuse crimes committed while intoxicated. Involuntary intoxication rises to level of affirmative defense only if it amounts to legal insanity, and is not available if accused is aware of his reduced tolerance for alcohol but chooses to consume it anyway. *United States v. Hensler*, 44 M.J. 184 (C.A.A.F. 1996).

X. MISTAKEN BELIEF OR IGNORANCE.

A. Degrees of Mistake or Ignorance of Fact.

1. An honest (subjective) mistake of fact or ignorance is generally a defense to crimes requiring premeditation, specific intent, knowledge, or willfulness. For example, an accused's honest belief that he had permission to take certain property would excuse the crime of larceny or wrongful appropriation. R.C.M. 916(j). *United States v. McDonald* 57 M.J. 18 (2002) (accused entitled to mistake of fact instruction as to buying stolen retail merchandise); *United States v. Binegar*, 55 M.J. 1 (C.A.A.F. 2001) (honest mistake of fact a defense to larceny); *United States v. Turner*, 27 M.J. 217 (C.M.A. 1988) (honest mistake a defense to larceny); *see* TJAGSA Practice Note, *Recent Applications of the Mistake of Fact Defense*, Army Law., Feb. 1989, at 66 (discusses *Turner*); *United States v. Hill*, 32 C.M.R. 158 (C.M.A. 1962) (honest belief owner gave permission to use car a good defense to wrongful appropriation); *see also United States v. Jett*, 14 M.J. 941 (A.C.M.R. 1982). Similarly, an honest mistake can be a defense to presenting a false claim, *United States v. Graves*, 23 M.J. 374 (C.M.A. 1987); *United States v. Ward*, 16 M.J. 341 (C.M.A. 1983), and false official statement. *United States v. Oglivie*, 29 M.J. 1069 (A.C.M.R. 1990). *See generally* Benchbook ¶ 5-11-1.

a) *United States v. Gillenwater*, 43 M.J. 10 (C.A.A.F. 1995) (mistake of fact defense raised in prosecution for wrongful appropriation of government tools where accused's former supervisor testified that he gave accused permission to take things home for government use & accused worked on several government projects at home); *United States v. Gunter*, 42 M.J. 292 (C.A.A.F. 1995) (discussing possible defenses of self-help and honest claim of right).

b) *United States v. McDivitt*, 41 M.J. 442 (C.A.A.F. 1995) (mistake of fact defense is not raised by evidence where accused signed official documents falsely asserting that he had supported dependents for prior two years in order to obtain higher allowances after being advised by finance clerk that he was entitled to allowances at higher rate until divorced).

2. An honest and reasonable (objective) mistake. A defense to general intent crimes—crimes lacking an element of premeditation, specific intent, knowledge or willfulness. R.C.M. 916(j). *United States v. Brown*, 22 M.J. 448 (C.M.A. 1986); *United States v.*

Carr, 18 M.J. 297 (C.M.A. 1984) (rape); *United States v. Davis*, 27 M.J. 543 (A.C.M.R. 1988) (rape); *United States v. Graham*, 3 M.J. 962 (N.C.M.R. 1977) (accused's honest and reasonable mistaken belief he had permission to be gone held a legitimate defense to AWOL); *United States v. Jenkins*, 47 C.M.R. 120 (C.M.A. 1973) (accused's honest and reasonable belief he had a "permanent profile" held a legitimate defense to disobedience of a general regulation requiring shaving); *United States v. Oglivie*, 29 M.J. 1069 (A.C.M.R. 1990) (an honest and reasonable mistake is required for a defense to the general intent crime of bigamy); *United States v. Barnard*, 32 M.J. 530 (A.F.C.M.R. 1990) (an honest and reasonable mistake is required for a defense to general intent crime of dishonorable failure to maintain sufficient funds); *United States v. McMonagle*, 38 M.J. 53 (C.M.A. 1993) (mistake of fact can rebut state of mind required for depraved-heart murder and can negate element of unlawfulness and thus, killing was justified if accused honestly and reasonably thought that he was shooting at a combatant); *United States v. New*, 50 M.J. 729 (A. Ct. Crim. App. 1999), *aff'd* 55 M.J. 97 (C.A.A.F. 2001) (a mistake about the lawfulness of an order to wear UN accouterments must be both honest and reasonable); *See generally* Benchbook ¶ 5-11-2.

3. Honest mistake. Negates an element of premeditation, specific intent, willfulness, or actual knowledge. *United States v. Binegar*, 55 M.J. 1 (C.A.A.F. 2001) (larceny).

4. Certain offenses such as bad checks and dishonorable failure to pay debts require a special degree of prudence and the mistake and ignorance standards must be adjusted accordingly. For example, in UCMJ art. 134 check offenses the accused's ignorance or mistake to be exonerating must not have been the result of bad faith or gross indifference. *United States v. Barnard*, 32 M.J. 530 (A.F.C.M.R. 1990). *See generally* Benchbook ¶ 5-11-3.

5. Some offenses, like carnal knowledge, have strict liability elements. *See* Milhizer, *Mistake of Fact and Carnal Knowledge*, Army Law., Oct. 1990, at 4. Deliberate ignorance can create criminal liability. *United States v. Dougal*, 32 M.J. 863 (N.M.C.M.R. 1991).

B. Result of Mistaken Belief. To be a successful defense, the mistaken belief must be one which would, if true, exonerate the accused. *United States v. Vega*, 29 M.J. 892 (A.F.C.M.R. 1989) (no defense where the accused believed he possessed marijuana rather than cocaine); *United States v. Fell*, 33 M.J. 628 (A.C.M.R. 1991) (against a charge of robbery, the accused's honest belief that the money was his is a legitimate defense to robbery of the money, though not a shield against conviction for assault on the victim); *United States v. Anderson*, 46 C.M.R. 1073 (A.F.C.M.R. 1973) (accused charged with LSD offense has no defense because he believed the substance to be mescaline); *United States v. Calley*, 46 C.M.R. 1131, 1179 (A.C.M.R. 1973) (no defense to homicide that accused believed victims were detained PWs rather than noncombatants); *United States v. Jefferson*, 13 M.J. 779 (A.C.M.R. 1982) (mistake not exonerating where accused accepted heroin thinking it was hashish); *United States v. Myles*, 31 M.J. 7 (C.M.A. 1990) (mistake as to type of controlled substance is not exculpatory); *see* TJAGSA Practice Note, *Mistake of Drug is Not Exculpatory*, Army Law., Dec. 1990, at 36 (discusses *Myles*). *See generally United States v. Mance*, 26 M.J. 244 (C.M.A. 1988); *United States v. Heitkamp*, 65 M.J. 861 (A. Ct. Crim. App. 2007).

C. Mistake or Ignorance and Drug Offenses. *See supra* ¶ IX.K.2, ch. 4.

D. Mistake of Fact and Sex Offenses.

1. Consent and Mistake of Fact as to Consent (for offenses involving the new Article 120, effective 1 October 2007). Article 120 provides that consent and mistake of fact as

to consent are affirmative defenses for Rape, Aggravated Sexual Assault, Aggravated Sexual Contact, and Abusive Sexual Contact. *See* UCMJ art. 120(r) & (t)(14). *See supra* Ch.4, ¶ V.B.8.

2. Mistake of Fact as to Consent (for offenses occurring prior to 1 October 2007). An honest and reasonable mistake of fact as to consent is a defense in rape cases. *United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988) (mistake of fact not available in conspiracy to commit rape absent evidence that all co-conspirators had a mistaken belief that the victim consented); *United States v. Baran*, 22 M.J. 265 (C.M.A. 1986); *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984); *United States v. Davis*, 27 M.J. 543 (A.C.M.R. 1988); *see* TJAGSA Practice Note, *Recent Applications of the Mistake of Fact Defense*, Army Law., Feb. 1989, at 66 (discusses *Davis*); *see also United States v. Daniels*, 28 M.J. 743 (A.F.C.M.R. 1989) (discusses sufficiency of evidence to raise the defense).

a) Mistake of fact as to victim's consent to sexual intercourse cannot be predicated upon negligence of accused; mistake must be honest and reasonable to negate a general intent or knowledge. *United States v. True*, 41 M.J. 424 (1995).

b) Mistake of fact as to whether the victim consented to intercourse is a different defense than actual consent by the victim. When the evidence raises only an issue as to actual consent, the military judge has no sua sponte duty to instruct on mistake. *United States v. Willis*, 41 M.J. 435 (1995). *Cf. United States v. Brown*, 43 M.J. 187 (1995) (observing "[i]n every case where consent is a defense to a charge of rape, the military judge would be well advised to either give the mistake instruction or discuss on the record with counsel the applicability of the defense").

c) Applications.

(1) *United States v. Hibbard*, 58 M.J. 71 (C.A.A.F. 2003). Evidence cited by the defense in light of the totality of the circumstances, including the manner that the issue was litigated at trial, was insufficient to reasonably raise the issue of whether the accused had a reasonable belief that the victim consented to sexual intercourse.

(2) *United States v. Yarborough*, 39 M.J. 563 (A.C.M.R. 1994). Mistake of fact as to consent in a prosecution for rape is not reasonable where the 13-year-old victim is a virgin who was too intoxicated to consent or resist even if she was aware of the intercourse, notwithstanding her response of "yeah" when the accused asked her if she "wanted to do it."

(3) *United States v. Valentin-Nieves*, 57 M.J. 691 (N-M. Ct. Crim. App. 2002). Victim's alleged statement that she had told another witness she would not mind having sex with accused did not establish mistake of fact where, a few days later, accused had taken the very intoxicated victim into a bathroom and had sexual intercourse with victim, who at the time was "too weak to hold [her]self up let alone hold someone else away."

(4) *United States v. Barboza*, 39 M.J. 596 (A.C.M.R. 1994). There could be no honest or reasonable mistake of fact as to consent to

intercourse and sodomy where the accused and victim had only slight acquaintance as classmates, no dating relationship, victim stated she did not want sex and asked accused to leave her room, accused forced her head to his penis to accomplish fellatio and threatened to kill her if she told anyone about the incident.

(5) *United States v. Campbell*, 55 M.J. 591 (C.G. Ct. Crim. App. 2001). The evidence established the affirmative defense of mistake of fact as to consent. The victim's failure to take action to stop the accused from touching her ribs and across her front after consenting to his giving her a back rub was sufficient to confirm in the mind of a reasonable person that she was consenting to his actions. His departure from the back rub to front side caress ultimately led to the touching of her breasts.

(6) *United States v. Parker*, 54 M.J. 700 (A. Ct. Crim. App. 2000), *rev'd on other grounds*, 59 M.J. 195 (C.A.A.F. 2003). The government did not disprove accused's defense that he mistakenly believed that the victim consented to the intercourse and sodomy. The victim admitted that she and the accused engaged in a consensual relationship for several months before the first alleged rape, and she sent mixed signals to the accused about their relationship. The relationship included consensual sexual acts, which were similar to the acts she claimed were nonconsensual.

(7) *United States v. Black*, 42 M.J. 505 (A. Ct. Crim. App. 1995) (evidence that victim of sex offenses may have engaged in oral sex with another individual prior to assault by accused was not relevant to show that accused was mistaken as to consent of victim to engage in such acts with accused). *Cf. United States v. Greaves*, 40 M.J. 432 (C.M.A. 1994)(excluding evidence of accused's projected beliefs of victim's sexual relations with others); *United States v. Traylor*, 40 M.J. 248 (C.M.A. 1994) (holding mistake of fact as to consent to intercourse not reasonable when based upon belief by accused that victim "would consent to intercourse with anyone").

(8) *United States v. Peterson*, 47 M.J. 231 (C.A.A.F. 1997) (holding consent element is a general intent element, even though indecent assault requires specific intent to gratify lust); *United States v. Johnson*, 25 M.J. 691 (A.C.M.R. 1987).

(9) Even though indecent assault is a specific intent crime, a mistake of fact as to the victim's consent must be both honest and reasonable as the defense goes to the *victim's* intent and not the accused's intent. *United States v. Johnson*, 25 M.J. 691 (A.C.M.R. 1987); *United States v. McFarlin*, 19 M.J. 790 (A.C.M.R. 1985). Compare this with assault with intent to commit rape, a specific intent crime, where a mistake of fact as to victim's consent need only be honest. *United States v. Langley*, 33 M.J. 278 (C.M.A. 1991); *see also United States v. Apilado*, 34 M.J. 773 (A.C.M.R. 1992).

(10) *United States v. Gaines*, 61 M.J. 689 (N-M. Ct. Crim. App. 2005). Appellant went into a dark room and touched the legs and pelvic area of the woman sleeping there, believing she was someone else. HELD: Mistake of fact was raised in this case, especially as to the issue of consent. Had the victim consented to the touching, there would be no assault. If appellant had an honest and reasonable belief that the victim consented to the touching, he would have a complete defense.

3. Mistake of Fact as to Age, Indecent Acts. *United States v. Zachary*, 63 M.J. 438 (C.A.A.F. 2006) (holding that it is a defense to indecent acts with a child that, at the time of the act, the accused held an honest and reasonable belief that the person with whom the accused committed the indecent act was at least sixteen years of age). *United States v. Strode*, 43 M.J. 29 (1995) (mistake of fact may be a defense if the accused had an honest and reasonable belief as to the age of the victim and the acts would otherwise be lawful were the victim 16 or older).

4. Mistake of Fact as to Age, Carnal Knowledge. The accused carries the burden to prove mistake of fact as to age by a preponderance of the evidence in a carnal knowledge case. R.C.M. 916(b).

5. Mistake of Fact as to Age, Sodomy. "There is no mistake of fact defense available with regard to the child's age in the Article 125, UCMJ, offense of sodomy with a child under the age of sixteen." *United States v. Wilson*, 66 M.J. 39 (C.A.A.F. 2008).

6. Accused not required to take stand to raise defense of mistake of fact. *United States v. Sellers*, 33 M.J. 364 (C.M.A. 1991).

E. Mistake of Law.

1. Ordinarily, mistake of law is not a defense. R.C.M. 916(l). *United States v. Bishop*, 2 M.J. 741 (A.F.C.M.R. 1977) (accused's belief that under state law he could carry a concealed weapon not a defense to carrying a concealed weapon on base in violation of Article 134, UCMJ); *United States v. Ivey*, 53 M.J. 685 (A. Ct. Crim. App. 2000) (accused argued that he did not know what was meant by "actual buyer" on ATF Form 4473 when purchasing firearms for friends), *aff'd*, 55 M.J. 251 (C.A.A.F. 2001); *United States v. Heitkamp*, 65 M.J. 861 (A. Ct. Crim. App. 2007) (accused believed it was lawful to possess methandienone; "[I]f an accused knows the identity of a substance that he is possessing or using but does not know that such possession or use is illegal, his ignorance is immaterial . . . because ignorance of the law is no defense.").

2. Under some circumstances, however, a mistake of law may negate a criminal intent or a state of mind necessary for an offense. R.C.M. 916(l)(1) discussion.

a) A mistake as to a separate, nonpenal law may exonerate. *See United States v. Sicley*, 20 C.M.R. 118 (C.M.A. 1955) (honest mistake of fact as to claim of right under property law negates criminal intent in larceny); *United States v. Ward*, 16 M.J. 341 (C.M.A. 1983) (honest mistake defense to presenting a false claim).

b) Reliance on decisions and pronouncements of authorized public officials and agencies may be a defense. *See United States v. Maynulet*, 68 M.J. 374 (C.A.A.F. 2010) (claimed reliance on JAG Law of War deployment briefing not not raise a defense to "mercy killing" where accused could not show any pronouncement in the briefing that condoned the practice).

c) Reliance on representing counsel's advice would not be a defense. R.C.M. 916(l)(1) (discussion); R. Perkins and M. Boyce, Criminal Law 1041, 1043 (3rd

ed. 1982). *Cf. United States v. Lawton*, 19 M.J. 886 (A.C.M.R. 1985) (behavior after obtaining lawyer's opinion that married at common law, *inter alia*, sufficient to raise mistake defense).

3. When an attorney advises an accused to act in manner that the accused knows is criminal, the accused should not escape responsibility on the basis of the attorney's bad advice. Thus, advice of counsel would not afford accused any protection for misconduct which is self-evidently criminal, such as injuring someone, violating a lawful regulation, or taking someone else's property without consent. *United States v. Sorbera*, 43 M.J. 818 (A.F. Ct. Crim. App. 1996).

F. Special Evidentiary Rule. MRE 404(b) allows the prosecution to present evidence of uncharged crimes, wrongs, or acts committed by the accused in order to show the absence of a mistake. This is particularly important because such extrinsic evidence may be admitted even though the accused does not testify on his own behalf. *See United States v. Beechum*, 582 F.2d 898 (5th cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979). Before such evidence will be admitted, however, it must be tested against the criteria of MRE 403. *See United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989).

XI. JUSTIFICATION.

A. Protection of Property.

1. Use of non-deadly force. Reasonable, non-deadly force may be used to protect personal property from trespass or theft. *United States v. Regalado*, 33 C.M.R. 12 (C.M.A. 1963) (one lawfully in charge of premises may use reasonable force to eject another, if the other has refused an oral request to leave and a reasonable time to depart has been allowed); *United States v. Hines*, 21 C.M.R. 201 (C.M.A. 1956) (with regard to on-post quarters, commander on military business is not a trespasser subject to accused's right to eject); *United States v. Gordon*, 33 C.M.R. 489 (A.B.R. 1963) (the necessity to use force in defense of personal property need not be real, but only reasonably apparent); *United States v. Wilson*, 7 M.J. 997 (A.C.M.R. 1979) (accused had no right to resist execution of a search warrant, even though warrant subsequently held to be invalid); *United States v. Adams*, 18 C.M.R. 187 (C.M.A. 1955) (generally a military person's place of abode is the place where he bunks and keeps his private possessions. His home is the particular place where the necessities of the service force him to live. This may be a barracks, a tent, or even a fox hole. Whatever the name of his place of abode, it is his sanctuary from unlawful intrusion and he is entitled to stand his ground against a trespasser, to the same extent that a civilian is entitled to stand fast in his civilian home); *see also United States v. Lincoln*, 38 C.M.R. 128 (C.M.A. 1967). *See generally* Peck, *The Use of Force to Protect Government Property*, 26 Mil. L. Rev. 81 (1964); Benchbook ¶ 5-7.

2. Use of deadly force. Deadly force may be employed to protect property only if (1) the crime is of a forceful, serious or aggravated nature, and (2) the accused honestly believes use of deadly force is necessary to prevent loss of the property. *United States v. Lee*, 13 C.M.R. 57 (C.M.A. 1953).

3. Reasonable force. While it is well established that a service member has a legal right to eject a trespasser from her military bedroom and a legal right to protect her personal property, the soldier has no legal right to do so unreasonably. *United States v. Marbury*, 56 M.J. 12 (C.A.A.F. 2001) (accused's immediate return to her bedroom brandishing a knife for the purpose of ejecting her assailant was excessive or unreasonable force and hence unlawful conduct).

B. Prevention of Crime.

1. Under military law a private person may use force essential to prevent commission of a felony in his presence, although the degree of force should not exceed that demanded by the circumstances. *United States v. Hamilton*, 27 C.M.R. 204 (C.M.A. 1959). *See generally* Peck, *The Use of Force to Protect Government Property*, 26 Mil. L. Rev. 81 (1964). While felony is not defined in the 2008 Manual for Courts-Martial, 18 U.S.C. § 1 (1) (1982) defines it as any offense punishable by death or imprisonment for a term exceeding one year.

2. Use of deadly force. *United States v. Person*, 7 C.M.R. 298 (A.B.R. 1953) (soldier on combat patrol justified in killing unknown attacker of another patrol member where (1) victim was committing a felony in the accused's presence, and (2) the accused attempted to inflict less than deadly force).

C. Performance of Duty.

1. A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful. R.C.M. 916(c).

2. Justification is raised only if the accused was performing a legal duty at the time of the offense. *United States v. Rockwood*, 52 M.J. 98, 112 (1999) (holding that neither international law nor television speech by the President imposed on accused a duty to inspect Haitian penitentiary for possible human rights violations); *United States v. McMonagle*, 38 M.J. 53 (C.M.A. 1993) (killing civilian may be justified by a mistake of fact as to victim's identity, although not the facts of this case).

3. *United States v. Little*, 43 M.J. 88 (C.A.A.F. 1995) (accused's statements in providence inquiry about his authorization for possession of a work knife were substantially inconsistent with guilty plea for unauthorized possession of a dangerous weapon on naval vessel).

4. *United States v. Reap*, 43 M.J. 61 (C.A.A.F. 1995) (naval custom whereby goods are bartered or traded from department to department in order to avoid delays, red tape, and technicalities incident to acquisition through regular supply channels, is not a defense to wrongful disposition of government property unless it rises to the level of a claim of authority or honest and reasonable mistaken belief of authority).

5. *United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999) (accused's interpretation of the President's command intent did not create a legal duty to inspect penitentiary in Haiti and accused could not base a special defense of justification on that ground. The commander, not the subordinate assesses competing concerns and develops command mission priorities).

D. Obedience to Orders.

1. Orders of military superiors are inferred to be legal. MCM, pt. IV, ¶ 14c(2)(a); *United States v. Cherry*, 22 M.J. 284 (C.M.A. 1986).

2. The accused is entitled to the defense where he committed the act pursuant to an order which (a) appeared legal and which (b) the accused did not know to be illegal. R.C.M. 916(d); *United States v. Calley*, 46 C.M.R. 1131, 1183 (A.C.M.R. 1973).

a) Accused's actual knowledge of illegality required. *United States v. Whatley*, 20 C.M.R. 614 (A.F.B.R. 1955) (where superior ordered accused to violate a general regulation, the defense of obedience to orders will prevail unless the evidence shows not only that the accused had actual knowledge that the order

was contrary to the regulation but, also, that he could not have reasonably believed that the superior's order may have been valid).

b) Defense unavailable if man of ordinary sense and understanding would know the order to be unlawful. *United States v. Griffen*, 39 C.M.R. 586 (A.B.R. 1968) (no error to refuse request for instruction on defense where accused shot PW pursuant to a superior's order); *see United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973) (instruction on obedience to orders given).

3. The processing of a conscientious objector application does not afford an accused a defense against his obligation to deploy, even if the orders to do so violate service regulations concerning conscientious objections. *United States v. Johnson*, 45 M.J. 88 (C.A.A.F. 1996).

4. Obedience to orders given by an individual who is acting outside the scope of his authority does not trigger the Obedience to Lawful Orders defense—only the Obedience to Orders defense. *United States v. Smith*, 68 M.J. 316 (C.A.A.F. 2010) (military working dog (MWD) handler, who complied with cell-block NCOIC's instructions to incorporate MWD into the interrogation of an Iraqi detainee, was not entitled to Obedience to Lawful Orders defense where task force (CJTF-7) commanding general had withheld authority to order MWD use during detainee interrogations).

5. *See generally* Benchbook ¶ 5-8.

E. The Right to Resist Restraint.

1. Illegal confinement. "Escape" is from lawful confinement only; if the confinement itself was illegal, then no escape. MCM, pt. IV, ¶ 19c(1)(e); *United States v. Gray*, 20 C.M.R. 331 (C.M.A. 1956) (no crime to escape from confinement where accused's incarceration was contrary to orders of a superior commander).

2. Illegal apprehension/arrest. An individual is not guilty of having resisted apprehension (UCMJ art. 95) if that apprehension was illegal. *United States v. Clark*, 37 C.M.R. 621 (A.B.R. 1967) (accused physically detained by private citizen for satisfaction of a debt may, under the standards of self-defense, forcefully resist and seek to escape); *United States v. Rozier*, 1 M.J. 469 (C.M.A. 1976) (by forcibly detaining accused immediately following his illegal apprehension, NCOs involved acted beyond scope of their offices); *United States v. Lewis*, 7 M.J. 348 (C.M.A. 1979) (accused cannot assert illegality of apprehension as defense to assault charge when apprehending official acted within the scope of his office); *United States v. Noble*, 2 M.J. 672 (A.F.C.M.R. 1976) (accused may resist apprehension if he has no "reason to believe" the person apprehending him is empowered to do so); *United States v. Braloski*, 50 C.M.R. 310 (A.C.M.R. 1975) (resisting apprehension by a German policeman is not an offense cognizable under UCMJ art. 95, but must be charged under UCMJ art. 134).

F. Parental Discipline.

1. The law has clearly recognized the right of a parent to discipline a minor child by means of moderate punishment. *United States v. Scofield*, 33 M.J. 857 (A.C.M.R. 1991). *See generally* Benchbook ¶ 5-16.

2. The use of force by parents or guardians is justifiable if:

a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and

b) the force is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation. *United States v. Brown*, 26 M.J. 148 (C.M.A. 1988).

3. A parent who spanks a child with a leather belt using reasonable force and thereby unintentionally leaves welts or bruises nevertheless acts lawfully so long as the parent acted with a bona fide parental purpose. *United States v. Scofield*, 33 M.J. 857 (A.C.M.R. 1991). *But see United States v. Staton*, 68 M.J. 569, (A.F.Ct.Crim.App. 2009) (service court looked at size and strength of accused versus that of the child and the objects used in the punsishments to determine that the government had carried its burden in proving the force to be unreasonable.)

4. One acting in the capacity of parent is justified in spanking a child, but the disciplining must be done in good faith for correction of the child motivated by educational purpose and not for some malevolent motive. *United States v. Proctor*, 34 M.J. 549 (A.F.C.M.R. 1991), *aff'd*, 37 M.J. 330 (C.M.A. 1993); *United States v. Ward*, 39 M.J. 1085 (A.C.M.R. 1994) (not a license to abuse the child).

5. Applications.

a) Tying stepson's hands and legs and placing a plastic bag over his head went beyond use of reasonable or moderate force allowed in parental discipline. *United States v. Gowadia*, 34 M.J. 714 (A.C.M.R. 1992).

b) Accused who admitted striking his child out of frustration and as means of punishment and who made no claim that he honestly believed that force used was not such as would cause extreme pain, disfigurement, or serious bodily injury was not entitled to instruction on parental discipline defense. *United States v. Gooden*, 37 M.J. 1055 (N.M.C.M.R. 1993).

c) Evidence of one closed-fist punch, without evidence of actual physical harm, was legally sufficient to overcome the affirmative defense of parental discipline where the punch was hard enough to knock down the accused's 13-year old son. *United States v. Rivera*, 54 M.J. 489 (C.A.A.F 2001).

d) *See also United States v. Robertson*, 36 M.J. 190 (C.M.A. 1992); *United States v. Ziots*, 36 M.J. 1007 (A.C.M.R. 1993).

XII. ALIBI.

A. Not an Affirmative Defense. R.C.M. 916(a) discussion.

B. Notice Required. R.C.M. 701(b)(2). Exclusion of alibi evidence because of lack of notice is a drastic remedy to be employed only after considering the disadvantage to opposing counsel and the reason for failing to provide notice. *United States v. Townsend*, 23 M.J. 848 (A.F.C.M.R. 1987). Military judge abused his discretion when he excluded defense testimony because R.C.M. 701(b)(1) notice requirements were not met. *United States v. Preuss*, 34 M.J. 688 (N.M.C.M.R. 1991).

C. Raised by Evidence. Alibi raised when some evidence shows that the accused was elsewhere at the time of the commission of a crime.

D. Instructions.

1. Military judge is under no *sua sponte* obligation to instruct on this theory of defense. R.C.M. 920(e)(3); *United States v. Boyd*, 17 M.J. 562 (A.F.C.M.R. 1983); *United States*

v. Bigger, 8 C.M.R. 97 (C.M.A. 1953); *United States v. Wright*, 48 C.M.R. 295, 297 (A.F.C.M.R. 1974).

2. When defense is raised by the evidence and accused requests an instruction, failure to instruct is error. *United States v. Moore*, 35 C.M.R. 317 (C.M.A. 1965); *United States v. Jones*, 7 M.J. 441 (C.M.A. 1979).

E. Sufficiency.

1. If alibi raises a reasonable doubt as to guilt, the accused is entitled to an acquittal. *United States v. Stafford*, 22 M.J. 825 (N.M.C.M.R. 1986) (finding error to require defense to prove alibi beyond a reasonable doubt).

2. Rebuttal not required. *United States v. Rath*, 27 M.J. 600 (A.C.M.R. 1988) (holding alibi defense can be rejected by the trier of fact even absent rebuttal by government).

XIII. VOLUNTARY ABANDONMENT.

A. Special defense to a charge of attempted commission of a crime. M.C.M., pt. IV, ¶4c(4); *United States v. Byrd*, 24 M.J. 286 (C.M.A. 1987).

1. Not available as a defense to an attempt crime where the acts committed have caused substantial harm to the victim. *United States v. Smauley*, 42 M.J. 449 (C.A.A.F. 1995); *United States v. Thornsbury*, 59 M.J. 767 (A. Ct. Crim. App. 2004).

2. Available for a consummated attempt only when the accused has a genuine change of heart that causes her to renounce the criminal enterprise. *United States v. Schoof*, 37 M.J. 96 (C.M.A. 1993); *United States v. Walther*, 30 M.J. 829 (N.M.C.M.R. 1990).

B. Not raised when:

1. Not raised as a defense to attempted breaking restriction where the accused abandoned his efforts because of a fear of being detected or apprehended. *United States v. Miller*, 30 M.J. 999 (N.M.C.M.R. 1990).

2. Not raised as a defense where the accused merely postpones his criminal enterprise until a more advantageous time or transfers his criminal effort to another objective or victim, or where his criminal purpose is frustrated by external forces beyond his control. *United States v. Rios*, 33 M.J. 436 (C.M.A. 1991).

XIV. MISCELLANEOUS DEFENSES.

A. Amnesia.

1. General. Inability to recall past events or the facts of one's identity is loosely described as amnesia. An accused who suffers from amnesia at the time of the trial is at a disadvantage. Failure to recall a past event may prevent the accused from disclaiming the possession of a particular intent, the existence of which is essential for conviction of the offenses charged. Similarly, inability to recall identity can prevent the accused from obtaining evidence of good character from friends and family. Amnesia, however, is, by itself, generally "a relatively neutral circumstance in its bearing on criminal responsibility." *United States v. Olvera*, 15 C.M.R. 134 (C.M.A. 1954). *See generally United States v. Boultinghouse*, 29 C.M.R. 537 (C.M.A. 1960); *United States v. Buran*, 23 M.J. 736 (A.F.C.M.R. 1986); *United States v. Barreto*, 57 M.J. 127 (C.A.A.F. 2002).

2. When Amnesia May be a Defense.

a) Military offenses requiring knowledge of accused's status as a service person.

(1) Inability to recall identity might include loss of awareness of being a member of the armed forces; in that situation, amnesia might be a defense to a charge of failing to obey an order given before the onset of the condition, as it would show the existence of a mental state which would serve to negate criminal responsibility. *United States v. Olvera, supra* ¶ XIV.A.

(2) An accused cannot be convicted of AWOL if he was temporarily without knowledge that he was in the military during the period of his alleged absence. *United States v. Wiseman*, 30 C.M.R. 724 (N.B.R. 1961).

b) Drug/alcohol induced amnesia.

(1) Lack of memory or amnesia resulting from drugs or alcohol has never constituted a complete defense. *United States v. Luebs*, 43 C.M.R. 315 (C.M.A. 1971); *United States v. Butler*, 43 C.M.R. 87 (C.M.A. 1971); *United States v. Day*, 33 C.M.R. 398 (C.M.A. 1963).

(2) Drug/alcohol induced amnesia in and of itself does not constitute a mental disease or defect which will excuse criminal conduct under the defense of lack of mental responsibility. *United States v. Olvera, supra* at ¶ XIV.A.; *United States v. Lopez-Malave*, 15 C.M.R. 341 (C.M.A. 1954).

(3) Under earlier law, in order to require an insanity instruction, the evidence must show that accused's alcoholism constitutes a mental disease or defect so as to impair substantially his capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. *United States v. Brown*, 50 C.M.R. 374 (N.C.M.R. 1975); *United States v. Marriott*, 15 C.M.R. 390 (C.M.A. 1954).

(4) With the passage of UCMJ art. 50a, the standard for lack of mental responsibility is now complete impairment. For a complete discussion of Article 50a, see Chapter 6, *infra*.

3. Amnesia as Affecting Accused's Competency to Stand Trial.

a) The virtually unanimous weight of authority is that an accused is not incompetent to stand trial simply because he is suffering from amnesia. *Thomas v. State*, 301 S.W.2d 358 (Tenn. 1957); *Commonwealth v. Hubbard*, 371 Mass. 160 (1976).

b) The appropriate test when amnesia is found is whether an accused can receive, or has received, a fair trial. The test, as stated in *Dusky v. United States*, 362 U.S. 402 (1960), is "whether [the accused] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him."

c) The problem when the accused suffers from amnesia is not his ability to consult with his attorney but rather his inability to recall events during a crucial period.

d) Where the amnesia appears to be temporary, an appropriate solution might be to defer trial for a reasonable period to see if the accused's memory improves.

e) *Commonwealth v. Lombardi*, 393 N.E.2d 346 (Mass. 1979). Where the amnesia is apparently permanent, the fairness of proceeding to trial must be assessed on the basis of the particular circumstances of the case. A variety of factors may be significant in determining whether the trial shall proceed, to include:

(1) the nature of the crime,

(2) the extent to which the prosecution makes a full disclosure of its case and circumstances known to it,

(3) the degree to which the evidence establishes the accused's guilt,

(4) the likelihood that an alibi or some defense could be established but for the amnesia,

(5) the extent and effect of the accused's amnesia.

f) A pretrial determination of whether the accused's amnesia will deny him a fair trial is not always possible. In such a case, the trial judge may make a determination of fairness after trial with appropriate findings of fact and rulings concerning the relevant criteria.

4. Guilty Pleas. An accused who fails to recall the factual basis of the offenses but is satisfied from the evidence that he is guilty may plead guilty. *United States v. Luebs*, 43 C.M.R. 315 (C.M.A. 1971); *United States v. Butler*, 43 C.M.R. 87 (C.M.A. 1971).

B. Automatism / Unconsciousness.

1. Seizures attendant to epilepsy may render the accused unable to form the *mens rea* required for assault. *United States v. Rooks*, 29 M.J. 291 (C.M.A. 1989). *See generally* TJAGSA Practice Note, *Epileptic Seizures and Criminal Mens Rea*, Army Law., Feb. 1990, at 65 (discusses *Rooks*).

2. Evidence was sufficient to convict accused of offenses of willfully disobeying and assaulting an NCO, notwithstanding accused's contention that he lacked required *mens rea* due to automatic and uncontrollable behavior brought on by claustrophobia. *United States v. Campos*, 37 M.J. 894 (A.C.M.R. 1993), *aff'd*, 42 M.J. 253 (C.A.A.F. 1995).

3. *United States v. Axelson*, 65 M.J. 501 (A. Ct. Crim. App. 2007). The ACCA concluded that the accused's plea to aggravated assault was knowing and no additional instructions on defenses were required because aggravated assault is a general intent crime to which partial mental responsibility is not a defense. Further, automatism is not a defense under R.C.M. 916 or other caselaw, and there was no evidence of automatism raised either in the providence inquiry or on the merits.

4. For an interesting survey of the law in this area, see Michael J. Davidson & Steve Walters, *United States v. Berri: The Automatism Defense Rears Its Ugly Little Head*, Army Law., Oct. 1993, at 17.

C. Due Process Fair Warning. The touchstone of the fair warning requirement is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that defendant's conduct was criminal. *United States v. Lanier*, 117 S.Ct. 1219 (1997).

D. Selective Prosecution**.** Accused was not subjected to selective or vindictive prosecution in regard to handling or adultery allegations, though charges were not preferred against two others

alleged to have committed adultery, where charges were preferred against accused only after he violated a "no-contact" order. *United States v. Argo*, 46 M.J. 454 (C.A.A.F. 1997).

E. Jury Nullification. Because there is no right to jury nullification, military judge did not err either in declining to give a nullification instruction or in declining to otherwise instruct the members that they had the power to nullify his instructions on matters of law. *United States v. Hardy*, 46 M.J. 67 (C.A.A.F. 1997). *See generally* Lieutenant Colonel Donna M. Wright & Lieutenant Colonel (Ret.) Lawrence M. Cuculic, *Annual Review of Developments in Instructions – 1997*, Army Law., Jul. 1998, at 39, 48 (discussing *Hardy*).

F. Religious Convictions. *United States v. Webster*, 65 M.J. 936 (A. Ct. Crim. App. 2008). The accused pled guilty to missing movement to Iraq by design and disobeying orders from two superior commissioned officers to deliver his bags for deployment. The accused had converted to Islam in 1994 and had doubts about whether he should participate in a war against Muslims. After consulting Islamic scholars on the Internet, the accused determined that the consensus was that Muslims are not permitted to participate in the war in Iraq. By participating as a combatant, the accused believed that he would be placed "in an unfavorable position on the Day of Judgment." The accused filed a conscientious objector packet prior to the deployment, but withdrew it. He filed another conscientious objector packet on the same day that he missed movement. During the guilty plea inquiry, the military judge ruled that his religious beliefs would not provide a defense to disobeying orders. The ACCA first held that the accused's guilty plea was knowing, voluntary, and provident. First, the accused confirmed that the defense of duress did not apply to him. Second, there is no authority for the proposition that conscientious objector status provides a defense for missing movement or violating lawful orders. Third, under AR 600-43, conscientious objector requests made after an individual has entered active duty will not be favorably considered when the objection is to a certain war, which was the case here. Finally, it is irrelevant that the offenses involving missing movement and failure to obey orders were based on religious motives where such motives and beliefs did not rise to the level of a duress defense and did not constitute any other defense. The court then held that the First Amendment does not require anything more to accommodate the accused's free exercise of religion than was offered here, and the accused's rights were not violated. The ACCA first identified the applicable standard for analyzing alleged government infringement on the free exercise of religion. Under the Religious Freedom Restoration Act of 1993, the state must have a "compelling state interest" before it can burden the free exercise of religion. Additionally, courts are enjoined to apply judicial deference when strictly scrutinizing the military's burden on the free exercise of religion. *See Goldman v. Weinberger*, 475 U.S. 503 (1986). Applying these two standards, the ACCA concluded that the government had a compelling interest in requiring soldiers to deploy with their units. The government furthered this compelling interest using the least restrictive means. The Army offers soldiers an opportunity to apply for conscientious objector status, and in this case, his command offered the accused the opportunity to deploy in a non-combat role. In applying the duly required judicial deference, the ACCA concluded that the Army furthered its compelling interest in the least restrictive manner possible. The accused "had no legal right or privilege under the First Amendment to refuse obedience to the orders, and the orders were not given for an illegal purpose." (citing *United States v. Barry*, 36 C.M.R. 829, 831 (C.G.B.R. 1966) (internal brackets omitted).

XV. STATUTE OF LIMITATIONS

A. While not an affirmative or special defense, the statute of limitations operates like a defense in that it time-bars prosecutions. *See* UCMJ art. 43 (2008); R.C.M. 907(2)(B) and discussion.

B. The standard statute of limitations is five years. *See* UCMJ art. 43(a). Statute of limitations is tolled when the summary court-martial convening authority receives the sworn charges. *See* UCMJ art. 43(b)(1).

C. Offenses without a statute of limitations. UCMJ art. 43(a).

1. The following offenses may be tried at any time without limitation:

a) Absence without leave.

b) Missing movement in a time of war.

c) Murder.

d) Rape and rape of a child.

e) Any offense punishable by death.

2. Applications.

a) *Willenbring v. Neurauter*, 48 M.J. 152 (C.A.A.F. 1998) (statute of limitations under Article 43 does not bar trial for rape, as any offense "punishable by death" may be tried at any time without limitation, even if it is referred as a noncapital case), *aff'd*, 57 M.J. 321 (C.A.A.F. 2002).

b) *United States v. Thompson*, 59 M.J. 432 (C.A.A.F. 2004). Appellant was charged with raping his stepdaughter on divers occasions within a specified four-year period. Evidence at trial showed a pattern of sexual abuse occurring over an eleven-year period at several duty stations. Over defense objection, the MJ instructed the members on carnal knowledge and indecent acts as LIOs. The members found appellant guilty of indecent acts or liberties. The MJ amended the charge sheet, deleting the time period during which the indecent acts would be barred by the statute of limitations, and asked the members whether the change did "violence" to their verdict. The president indicated that if the amended specification included a portion of the period at Fort Irwin, then that was satisfactory to the panel. The CAAF held that before instructing the members on any LIOs barred by the statute of limitations, the MJ failed to obtain a required waiver from the appellant. Because appellant did not waive the statute, the instructions erroneously included a time-barred period. The MJ was not authorized to modify the unambiguous findings of the panel, after announcement of the verdict, to reflect the non-time barred period.

D. Child Abuse Offenses. UCMJ art. 43(b)(2)(B) defines "child abuse offense."

1. Prior to 24 November 2003, the statute of limitations for child abuse offenses was 5 years.

2. Effective 24 November 2003, the statute of limitations for child abuse offenses was amended so that an accused could be tried as long as sworn charges were received by the SCMCA before the victim reached the age of 25.

3. Effective 6 January 2006, the the statute of limitations for child abuse offenses was amended once again, and an accused may now be tried for a child abuse offense as long as sworn charges are received by the SCMCA during the life of the child, or within 5 years of the offense, whichever is longer.

4. The applicable statute of limitations is the one effective at the time of the commission of the offense. *See United States v. Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008).

5. *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000) (statute of limitations codified at 18 U.S.C. § 3283, which permits prosecution for offenses involving sexual or physical abuse of children under the age of 18 until the child reaches the age of 25, does not apply to courts-martial as UCMJ Article 43 provides the applicable statute of limitations for courts-martial).

E. Effect of Amendments to Art. 43.

1. An amendment to the statute of limitations may not revive and extend a statute of limitations that had run prior to the amendment. *Stogner v. California*, 539 U.S. 607 (2003) (holding that reviving time-barred offenses violated the Ex Post Facto Clause).

2. An amendment to the statute of limitations may extend a statute of limitations that had not run prior to the amendment ONLY when Congress evinces an intent to do so. *United States v. Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008) (holding an amendment to Article 43 that increased the statute of limitations for certain "child abuse" offenses did not extend existing limitations periods that had not run at the time of the amendment; the Article 43 amendment and its legislative history were silent as to retrospective application).

F. Extended Statute of Limitations for Certain Crimes in a Time of War. UCMJ art. 43.

1. Article 43(a). Covers AWOL and missing movement in a time of war. May be tried and punished at any time without limitation.

a) Time of War for purposes of Art. 43(a) is a de facto determination. *See Broussard v. Patton* 466 F.2d 816 (9th Cir. 1972) ("time of war refers to *de facto* war and does not require a formal Congressional declaration").

b) Korean Conflict. *United States v. Ayers* 15 C.M.R. 220 (C.M.R. 1954) (Korean Conflict is time of war for purposes of Article 43(a)); *United States v. Shell*, 23 C.M.R. 110 (C.M.R. 1957) (Armistice on July 27, 1953 terminated hostilities).

c) Vietnam Conflict. *United States v. Anderson*, 38 C.M.R. 386 (C.M.R. 1968) (As of the Gulf of Tonkin Resolution on Aug. 10, 1964, the Vietnam Conflict is time of war for purposes of Article 43(a)); *United States v. Michaud*, 48 C.M.R. 379 (N.C.M.R. 1973) (Vietnam Conflict is time of war for purposes of Article 43(a)); *United States v. Reyes*, 48 C.M.R. 832 (A.C.M.R. 1974) (the Vietnam "time of war" terminated on 27 January 1973).

2. Article 43(f). Covers crimes against the United States or any agency thereof involving frauds, real or personal property, and contracting. Art. 43(f)(1–3).

a) Statute of limitations is suspended during the time of war and for three years after the termination of hostilities. Art. 43(f).

b) "Time of War."

(1) *United States v. Swain*, 27 C.M.R. 111 (C.M.A. 1958) (Korean Conflict constituted a time of war for purposes of Article 43(f)).

(2) There is no military caselaw addressing whether OIF or OEF constitute a "time of war" for purposes of Art. 43(f). For arguments that OIF and OEF should be considered a time of war for Art. 43, see Lieutenant Commander Joseph Romero, *Of War and Punishment: "Time of War" in Military Jurisprudence and a Call for Congress to Define its Meaning*, 51 Naval L. Rev. 1 (2005).

(3) One federal district court has concluded that both OIF and OEF were, at one point, a time of war, invoking the federal analogue to Article 43(f), 18 U.S.C. § 3287. *See United States v. Prosperi*, 2008 U.S. Dist. LEXIS 66470 (Dist. Mass. Aug. 29, 2008).

XVI. Former Jeopardy (Art. 44, UCMJ)

A. No person may, without his consent, be tried a second time for the same offense. Article 44(a); U.S. Const. amend V.

B. When Jeopardy Attaches.

1. A proceeding which, after introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused, is a trial. Article 44(c).

2. In the military, jeopardy does not attach until an accused is put to trial before the trier of the facts. *See United States v. Ragard*, 56 M.J. 852, 855 (A. Ct. Crim. App. 2003).

a) In a military judge alone case, jeopardy attaches after an accused has been indicted and arraigned, has pleaded and the court has begun to hear evidence. *See United States v. McClain*, 65 M.J. 894 (A. Ct. Crim. App. 2008) (citing *McCarthy v. Zerbst*, 85 F.2d 640, 642 (10th Cir. 1936)).

b) In a panel case, this occurs when the members are empaneled and sworn. *United States v. McClain*, 65 M.J. 894 (A. Ct. Crim. App. 2008) (citing *Serfass v. United States*, 420 U.S. 377, 390-91, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975)).

3. Withdrawal of charges after arraignment but before presentation of evidence does not constitute former jeopardy, and denial of a motion to dismiss charges at a subsequent trial is proper. *United States v. Wells*, 26 C.M.R. 289 (C.M.A. 1958).

4. Double jeopardy does not attach when charges are dismissed for violating the statute of limitations. Thus, the government is not barred from prosecuting the accused on a charge sheet that had properly been received by the summary court-martial convening authority within the period of the statute, following dismissal of charges for the same offense (but on a different charge sheet) that was not received within the period of the statute. However, if evidence was introduced in the first proceeding, the first is considered a trial and jeopardy attaches. *United States v. Jackson*, 20 M.J. 83 (C.M.A. 1985).

C. When Former Jeopardy Bars a Second Trial.

1. A determination that jeopardy attaches does not end the analysis. Double jeopardy bars retrial only when the military judge or the panel has made a determination by regarding guilt or innocence. *See United States v. McClain*, 65 M.J. 894 (A. Ct. Crim. App. 2008); *United States v. Germono*, 16 M.J. 987, 988 (A.C.M.R. 1988).

2. An accused is "acquitted" only when a ruling of the judge actually resolves some or all of the factual elements of the offense charged in the accused's favor, even if some or all of that resolution may be incorrect. *See United States v. McClain*, 65 M.J. 894 (A. Ct. Crim. App. 2008) (citing *United States v. Hunt*, 24 M.J. 725, 728 (A.C.M.R. 1987) and *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977)).

3. Retrial for offenses was not barred when the military judge granted a defense motion to dismiss on speedy trial grounds after hearing evidence in the first trial, but before entering findings. *United States v. McClain*, 65 M.J. 894 (A. Ct. Crim. App. 2008).

D. Same Offense.

1. Once tried for a lesser offense, accused cannot be tried for a major offense that differs from the lesser offense in degree only. Trial for AWOL bars subsequent trial for desertion. *United States v. Hayes*, 14 C.M.R. 445 (N.B.R. 1953).

2. "The protection against double jeopardy does not rest upon a surface comparison of the allegations of the charges; it also involves consideration of whether there is a substantial relationship between the wrongdoing asserted in the one charge and the misconduct alleged in the other." *United States v. Lynch*, 47 C.M.R. 498, 500 (C.M.A. 1973) (doctrine of former jeopardy precluded another trial for unauthorized absence from different unit and shorter time period). *But see United States v. Robinson*, 21 C.M.R. 380 (A.B.R. 1956) (permitting, after conviction for an AWOL and after disapproval of findings and sentence by the convening authority, trial for AWOL for the same period but from a different unit than was previously charged); *United States v. Hutzler*, 5 C.M.R. 661, 664 n.3 (A.B.R. 1951).

3. Nonjudicial punishment previously imposed under Article 15 for a *minor* offense and punishment imposed under Article 15 for a *minor* disciplinary infraction may be interposed as a bar to trial for the same minor offense or infraction. R.C.M. 907(b)(2)(D)(iv).

a) "Minor" normally does not include offenses for which the maximum punishment at a general court-martial could be dishonorable discharge or confinement for more than one year. MCM, pt. V, ¶ 1.e.

If an accused has previously received punishment under Article 15 for other than a minor offense, the service member may be tried subsequently by court-martial; however, the prior punishment under Article 15 must be considered in determining the amount of punishment to be adjudged at trial if the accused is found guilty at the court-martial. *United States v. Jackson*, 20 M.J. 83 (C.M.A. 1985); *see* UCMJ art. 15(f); R.C.M. 1001(c)(1)(B); *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989) (accused must be given complete credit for any and all nonjudicial punishment suffered—day-for-day, dollar-for-dollar, and stripe-for-stripe).

Mental Responsibility

XVII. **Introduction.**

A. **Mental Responsibility**. Refers to the criminal culpability of the accused based on his mental state at the time of the offense and includes the complete defense commonly known as the "insanity defense" and the more limited defense of "partial mental responsibility."

B. **Competency to Stand Trial**. Refers to the present ability of the accused to stand trial. An accused may not be tried unless mentally competent. *Godinez v. Moran*, 509 U.S 389, 396 (1993). To try a mentally incompetent accused is a violation of due process. *Medina v. California*, 505 U.S. 437, 453 (1992).

C. **Sanity Boards**. Provision under Rule for Courts-Martial (RCM) 706 governing the process inquiring into the mental capacity or mental responsibility of an accused.

XVIII. **References.**

A. Manual for Courts-Martial, United States (2008 ed.).

B. TM 8-240, Military Mental Health Law (29 Sept. 1992).

C. Major Timothy P. Hayes, Jr., *Post-Traumatic Stress Disorder on Trial*, 190-191 Mil L. Rev. 67 (2007).

D. Major Jeremy Ball, *Solving the Mystery of Insanity Law: Zealous Representation of Mentally Ill Servicmembers*, Army Law., Dec. 2005, at 1.

E. Captain Charles Trant, *The American Military Insanity Defense: A Moral, Philosophical, and Legal Dilemma*, 99 Mil. L. Rev. 1 (1983).

F. Major Rita Caroll, *Insanity Defense Reform*, 114 Mil. L. Rev. 183 (1986).

G. Lieutenant Colonel Donna M. Wright, *"Though this be madness, yet there is some method in it": A Practitioners Guide to Mental Responsibility and Competency to Stand Trial*, Army Law., Sep. 1997, at 18.

H. Major Jeff Bovarnick and Captain Jackie Thompson, *Trying to Remain Sane Trying an Insanity Case: United States v. Captain Thomas S. Payne*, Army Law., June 2002 at 13.

XIX.**MENTAL RESPONSIBILITY.**

A. **The Old Standard**. Court of Military Appeals adopted the ALI test for insanity in *United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977). "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." *Frederick*, 3 M.J. at 234.

B. **The Current Standard**. Codified in Article 50a, UCMJ.

1. Definition. It is an **affirmative defense** in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense. RCM 916(k)(1). Article 50a was modeled on 18 U.S.C. § 17.

2. Taken from Insanity Defense Reform Act, Pub. L. No. 98-473, § 402(a), 98 Stat. 2057 (1984).

C. Significant aspects of the current standard.

1. Threshold Requirements.

a) **Severe mental disease or defect**. The affirmative defense requires a "severe" mental disease or defect. *United States v. Martin*, 56 M.J. 97, 103 (C.A.A.F. 2001).

(1) The MCM defines "severe mental disease or defect" negatively. A severe mental disease or defect "*does not* include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects." RCM 706(c)(2)(A) (emphasis added).

(2) However, case law indicates that a nonpsychotic disorder may constitute a severe mental disease or defect. *See United States v. Benedict*, 27 M.J. 253 (C.M.A. 1988) (discussing pedophilia).

(3) Compare with Benchbook Instruction 6-4: "[A] severe mental disease or defect does not, in the legal sense, include an abnormality manifested only by repeated criminal or otherwise antisocial conduct or by nonpsychotic behavior disorders and personality disorders."

(4) **Ultimate Opinion Testimony**. In 1986, the President rescinded adoption of Fed. R. Evid. 704(b), which prohibits expert testimony offering an opinion on the issue of a defendant's mental state or condition where such constituted an element or defense to a charged offense. Ultimate opinion testimony is admissible. *See, e.g., United States v. Combs*, 39 M.J. 288 (C.M.A. 1994). Testimony as to the ultimate opinion (diagnosis of severe mental disease or defect) does not, however, always equate to lack of mental responsibility. *United States. v. Jones*, 46 M.J. 535 (N-M. Ct. Crim. App. 1997), *rev'd on other grounds*, 50 M.J. 46 (C.A.A.F. 1998) (summary disposition), *on remand*, 1999 WL 356311 (N-M. Ct. Crim. App. May 7, 1999) (unpublished).

b) As a result of severe mental disease or defect, accused unable to appreciate nature and quality *or* wrongfulness of the act. *Martin*, 56 M.J. at 103.

D. Procedure.

1. The defense must give notice of the defense of lack of mental responsibility before the beginning of trial on the merits. RCM 701(b)(2). Reciprocal discovery may apply. RCM 701(b)(3) and (4).

2. Burden and standard of proof.

a) **Burden on the accused by clear and convincing evidence**. *Martin*, 56 M.J. at 103. A career Army Judge Advocate convicted, *inter alia*, of 29 specifications of larceny, alleged at trial and on appeal that he was not mentally responsible for his criminal misconduct because he suffered from bipolar disorder. Though the defense presented over 20 expert and lay witnesses (the accused did not testify), none of these witnesses described unusual or bizarre behavior on the dates of the alleged offenses.

b) The constitutionality of shifting the burden. *See United States v. Martin*, 48 M.J. 820, 825 n.9 (A. Ct. Crim. App. 1998); *United States v. Freeman*, 804 F.2d 1574 (11th Cir. 1986), citing *Leland v. Oregon*, 343 U.S. 790 (1952).

3. **Instructions on mental responsibility**. The military judge has a *sua sponte* duty to instruct upon mental responsibility during final instructions if the defense is raised by the evidence. RCM 920(e)(3). Chapter 6, DA PAM 27-9. The defense can get a preliminary instruction (6-3) when some evidence has been adduced which tends to show insanity of accused. The MJ is not required to instruct the panel regarding the consequences to the accused of a not guilty only by reason of lack of mental responsibility verdict. *See Shannon v. United States*, 512 U.S. 573 (1994).

4. Bifurcated voting procedures. RCM 921(c)(4). *See also* DA PAM 27-9, 6-4 and 6-7 (procedural instructions on findings). Because of their complexity, the voting instructions should be given in writing.

a) First vote on whether accused is guilty.

b) If accused found guilty, the second vote is on mental responsibility.

5. RCM 1102A. Not guilty only by reason of lack of mental responsibility. Within 40 days of verdict, court-martial must conduct a hearing. UCMJ art. 76b. RCM 1102A sets out the procedural guidelines for the hearing.

a) Before the hearing, the judge or convening authority shall order a psychiatric or psychological examination of the accused, with the resulting psychiatric or psychological report transmitted to the military judge for use in the post-trial hearing. RCM 1102A(b). *See also* 18 U.S.C. § 4243 (post-trial psychiatric examination).

b) The convening authority *shall* commit the accused to a suitable facility until person is eligible for release IAW UCMJ, art. 76b(b). UCMJ, art. 76b(b)(1).

c) Accused must prove that his release would not create a substantial risk of bodily injury or serious damage to property of another due to a mental disease or defect. If he fails to meet that burden, the GCMCA may commit the accused to the Attorney General, who turns the person over to a state or monitors the person until his release would not create a substantial risk of bodily injury or serious damage to another's property.

(1) If the accused is found not guilty by reason of lack of mental responsibility for an offense involving bodily injury to another or serious damage to property of another, or substantial risk of such property or injury, the standard is clear and convincing evidence.

(2) Any other offense, standard is preponderance of the evidence.

d) **Right to Counsel**. RCM 1102A(c)(1) provides that an accused shall be represented by counsel.

6. Discovery of Evidence Post-Trial indicating Lack of Mental Responsibility. *See United States v. Harris*, 61 M.J. 391 *(*C.A.A.F. *2005). Good discussion of issues surrounding discovery, post-trial, of evidence of lack of mental responsibility.*

XX. PARTIAL MENTAL RESPONSIBILITY.

A. **The Old (pre-2004 Amendment) Manual Standard**. A mental condition not amounting to a general lack of mental responsibility under subsection RCM 916(k)(1) is not a defense, *nor is evidence of such a mental condition admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense*. RCM 916(k)(2). The old standard tried to prohibit a partial mental responsibility defense.

1. The CMA rejected the old RCM 916(k)(2) because it doubted the rule's constitutionality and found that the legislative history of the federal model lacked any Congressional intent to preclude defendants from attacking *mens rea* with contrary evidence.

2. Psychiatric testimony or evidence that serves to negate a specific intent is admissible. *Ellis v. Jacob*, 26 M.J. 90 (C.M.A. 1988); *see United States v. Berri*, 33 M.J. 337 (C.M.A. 1991); *United States v. Mansfield*, 38 M.J. 415, 419 n.5 (C.M.A. 1993); *see also United States v. Cameron*, 907 F.2d 1051 (11th Cir. 1990); *United States v. Pohlot*, 827 F.2d 889 (3d Cir. 1987); *United States v. Gold*, 661 F. Supp. 1127 (D.D.C. 1987); *United States v. Frisbee*, 623 F. Supp. 1217 (N.D. Cal. 1985).

B. **The Current (post-2004 Amendment) Manual Standard**. A mental condition not amounting to a lack of mental responsibility (i.e., a finding of not guilty only by reason of lack of mental responsibility) is not an affirmative defense, but may be admissible to determine whether the accused entertained the state of mind necessary to prove an element of the offense. In other words, partial mental responsibility is not an affirmative defense, but it is a deficiency of the government proof of a necessary element (e.g., specific intent).

1. Instruction on Partial Mental Responsibility. DA PAM 27-9, instruction 6-5. The affirmative defense of insanity and the defense of partial mental responsibility are separate defenses, but the panel members may consider the same evidence with respect to both defenses. With regard to partial mental responsibility, the burden never shifts from the government to prove, beyond a reasonable doubt, that the accused entertained the mental state necessary for the charged offense.

2. However, not all psychiatric evidence is now admissible. The evidence still must be relevant and permitted by UCMJ art. 50a.

a) General intent crime. The psychiatric evidence must still rise to the level of a "severe mental disease or defect." The insanity defense cannot be resurrected under another guise. UCMJ art. 50a.

b) Specific intent crime. The psychiatric evidence must be relevant to the *mens rea* element.

XXI. INTOXICATION.

A. **Voluntary Intoxication**. RCM 916(l)(2). Voluntary intoxication from alcohol or drugs may negate the elements of premeditation, specific intent, knowledge, or willfulness. Voluntary intoxication, by itself, will not reduce unpremeditated murder to a lesser offense. *United States v. Morgan*, 37 M.J. 407 (C.M.A. 1993). Voluntary intoxication not amounting to legal insanity is not a defense to general intent crimes.

B. **Involuntary Intoxication**. Generally, involuntary intoxication is a defense to a general or specific intent crime. *See United States v. Hensler*, 44 M.J. 184 (C.A.A.F. 1996). *But see United States v. Ward*, 14 M.J. 950 (A.C.M.R. 1982) (involuntary intoxication not available when accused knowingly used marijuana, but did not know it also contained PCP).

C. *See generally* Major Eugene Milhizer, *Weapons Systems Warranties: Voluntary Intoxication as a Defense Under Military Law*, 127 Mil. L. Rev. 131 (1990).

XXII. COMPETENCY TO STAND TRIAL.

A. **Current Standard**. "No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them [sic]

or to conduct or cooperate intelligently in the defense of the case." RCM 909(a). *See also* 18 U.S.C. § 4241(d). The accused is presumed to have capacity to stand trial. RCM 909(b).

B. **Old Standard**. "No person may be brought to trial by court-martial unless that person possesses **sufficient mental capacity** to understand the nature of the proceedings against that person and to conduct or cooperate intelligently in the defense of the case." MCM, RCM 909 (1984).

C. Differences between the standards.

1. Mental disease or defect required (need not be "severe").

2. "Unable to understand" vs. "sufficient mental capacity."

D. Cases.

1. The real issue is whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has rational as well as factual understanding of the proceeding against him. It is not enough that he is oriented to time and place and has some recollection of events. *United States v. Proctor*, 37 M.J. 330, 336 (C.M.A. 1993) (quoting *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam)).

2. "The question is whether the accused is possessed of sufficient mental power, and has such understanding of his situation, such coherency of ideas, control of his mental facilities, and the requisite power of memory, as will enable him to testify in his own behalf, if he so desires, and otherwise to properly and intelligently aid his counsel in making a rational defense." *United States v. Lee*, 22 M.J. 767, 769 (A.F.C.M.R. 1986).

3. *United States v. Schlarb*, 46 M.J. 708 (N-M. Ct. Crim. App. 1997). The accused did not establish a lack of mental capacity to stand trial where she testified clearly and at length on four occasions, showing a clear understanding of the proceedings.

4. *Indiana v. Edwards*, 554 U.S. 164 (2008). The Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. Therefore, a defendant who is mentally competent to stand trial may still be denied the right to represent themselves, depending on the vagaries of the mental disease or illness.

E. **Compared to Amnesia**.

1. Amnesia is not equivalent to a lack of capacity. "An inability to remember about the crime itself does not necessarily make a person incompetent to stand trial." *Lee*, 22 M.J. at 769; s*ee also United States v. Barreto*, 57 M.J. 127 (C.A.A.F. 2002). The ability of an accused to function is absolutely critical to the fairness of a criminal trial. In deciding whether an accused can function, a military judge can apply factors set out in *Wilson v. United States*, 391 F.2d 460 (D.C. Cir. 1968): (1) the extent to which the amnesia affects the accused's ability to consult and assist his lawyer; (2) the extent to which the amnesia affects the accused's ability to testify on his own behalf; (3) the extent to which the evidence could be extrinsically reconstructed, in view of the accused's amnesia; (4) the extent to which the Government assisted the accused and defense counsel in reconstruction; (5) the strength of the Government case; and, (6) any other facts and circumstances that would indicate whether the accused had a fair trial.

2. *United States v. Axelson*, 65 M.J. 501 (A. Ct. Crim. App. 2007). A failure to recall facts pertaining to an offense does not preclude an accused from pleading guilty so long

as, after assessing the Government's evidence against him, he is convicted of his own guilt.

F. Procedure. UCMJ art. 76b and RCM 909.

1. **Interlocutory question of fact.** After referral, military judge *may* conduct an incompetence determination hearing either *sua sponte* or on request of either party. RCM 909(d).

2. Defense has the burden of proof by a preponderance of the evidence.

3. Military judge *shall* conduct the hearing if sanity board completed IAW RCM 706 before or after referral concluded the accused is not competent.

4. Military judge determines whether the accused is competent to stand trial. *United States v. Proctor*, 37 M.J. 330 (C.M.A. 1993); *Short v. Chambers*, 33 M.J. 49 (C.M.A. 1991).

5. Once a sanity board is requested, the military judge must consider the sanity board report before ruling on the accused's capacity to stand trial. *United States v. Collins*, 41 M.J. 610 (A. Ct. Crim. App. 1994).

G. **Hospitalization of the accused.** An accused who is found incompetent to stand trial shall be hospitalized by the Attorney General for a reasonable period of time, not to exceed 4 months, to determine whether his condition will improve in foreseeable future, and for an additional reasonable period of time. The additional period of time ends when: the mental condition improves so that trial may proceed, or, charges are dismissed.

1. Upon a finding of incompetence, if the convening authority agrees, there is no discretion regarding commitment. *United States. v. Salahuddin*, 54 M.J. 918 (A.F. Ct. Crim. App. 2001); *see also* RCM 909(e)(3) and 18 U.S.C. § 4241(d).

2. The four-month time period may be extended. To justify extended commitment, the Government must prove by clear and convincing evidence that "a substantial probability exists that the continued administration of antipsychotic medication will result in a defendant attaining the capacity to permit the trial to proceed in the foreseeable future." *United States v. Weston*, 260 F. Supp. 2d 147, 154 (D.D.C. 2003) (approving a year-long extension from the case below in (3)(a)).

3. Involuntary Medication.

a) *United States v. Weston*, 255 F.3d 873 (D.C. Cir. 2001). Defendant indicted for the murders and attempted murder of federal law enforcement officers. A court-appointed forensic psychiatrist diagnosed defendant with paranoid schizophrenia, the severity of which rendered him incompetent to stand trial. Because he refused treatment with antipsychotic medication, he was simply placed in solitary confinement under constant supervision. The government sought a court order authorizing the involuntary administration of medication to render him competent to stand trial. The Circuit Court held that there was no basis to believe that defendant's worsening condition rendered him more dangerous, given his near-total incapacitation. However, the court affirmed the District Court's decision that the government's interest in administering antipsychotic drugs overrode his liberty interest and that restoring his competence in this way did not violate his right to a fair trial.

b) *Sell v. United States*, 539 U.S. 166 (2003). Defendant was charged with fraud. A federal magistrate found him incompetent to stand trial and ordered his

hospitalization to determine whether he would attain capacity to allow his trial to proceed. Sell refused to take antipsychotic drugs. The magistrate found involuntary medication appropriate because Sell was a danger to himself and others, that medication was the only way to render him less dangerous, that any serious side effects could be ameliorated, that the benefits to him outweighed the risks, and that the drugs were substantially likely to return Sell to competence. The District Court, although determining that the Magistrate's conclusion regarding Sell's dangerousness was clearly erroneous, nonetheless affirmed the decision because it found that the medication was the only viable hope of rendering Sell competent and was necessary to serve the government's interest in adjudicating his guilt or innocence. The Circuit Court affirmed, finding that the government had an essential interest in bringing Sell to trial, that treatment was medically appropriate, and that the medical evidence indicated a reasonably probability that Sell would fairly be able to participate in his defense. The Supreme Court vacated and remanded the case. Determining that forced medication solely for trial competency purposes may be rare, the Court held that the Constitution permits involuntary medication to render a mentally ill defendant competent to stand trial on serious criminal charges if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the trial's fairness, and, taking account of less intrusive alternatives, is necessary to significantly further important governmental trial-related interests.

c) *United States v. Bush*, 585 F.3d 806 (4th Cir. 2009). The court finds that the government must establish all of the *Sell* factors by clear and convincing evidence. The court also held that even where a defendant has been in an institution longer than the maximum punishment for the underlying offense, the government still has an important interest in bringing the defendant to trial. Certain consequences that convictions bring (such as firearms restrictions) are important governmental interests justifying continued prosecution and potential involuntary medication.

4. **Recovery.** If the accused has recovered and is competent to stand trial, the director of the facility notifies the GCMCA and sends a copy of the notice to accused's counsel. GCMCA must take prompt custody of the accused if the accused is still in a military status. The director of the facility may retain custody of the person for not more than 30 days after transmitting the required notifications.

a) **No Recovery**. If person does not improve (18 U.S.C. § 4246). If the director of the facility where the accused is confined certifies that the accused is presently suffering from a mental disease or defect and his release would create a substantial risk of bodily injury to another person or serious damage to property, the director notifies the GCMCA. The district court then conducts further hearings.

H. **Waiver**. *Moore v. Campbell*, 344 F.3d. 1313 (11th Cir. 2003). The Eleventh Circuit Court of Appeals looked at whether a defendant in a capital case can forfeit his right to competency – a case of first impression. Moore attempted suicide during his capital murder trial. After treatment at a hospital and subsequent examination by a psychiatrist, Moore appeared at trial, which resumed on 31 August. From 27 August until the evening of 1 September, Moore had refused anything to eat or drink, resulting in dehydration. The state court found Moore was competent to stand trial and that he took a "calculated and concerted effort to disrupt his murder trial." The state court also found Moore's asserted incompetence similar to a defendant whose behavior results in exclusion from a trial. Reviewing the state court proceedings during a federal *habeas*

petition, the Court of Appeals determined that the "state court's determination that a capital defendant in Alabama can forfeit his right to be competent – that is mentally present – at trial" was not contrary to or an unreasonable application of clearly established Supreme Court precedent, if only because the issue has not been yet decided by the Supreme Court.

I. **Post-trial**. The convening authority may not approve a sentence while the accused lacks the mental capacity to cooperate and understand post-trial proceedings. RCM 1107(b)(5). Likewise, an appellate authority may not affirm the findings when the accused lacks the ability to understand and cooperate in appellate proceedings. RCM 1203(c)(5). *See Thompson v. United States*, 60 M.J. 880 (N-M. Ct. Crim. App. 2005) (holding that appellant demonstrated lack of mental capacity to assist in appeal; appeal stayed).

XXIII. THE SANITY BOARD.

A. Sanity Board Request.

1. Who can request? Any commander, investigating officer, trial counsel, defense counsel, military judge, or member. R.C.M. 706(a).

a) Request goes to CA (before referral) and MJ (after referral).

b) A sanity board should be granted if request is not frivolous and is made in good faith. *United States v. Nix*, 36 C.M.R. 76, 80-81 (C.M.A. 1965); *United States v. Kish*, 20 M.J. 652 (A.C.M.R. 1985).

c) It may be prudent for trial counsel to join in the motion. *See United States v. James*, 47 M.J. 641 (A. Ct. Crim. App. 1997) (finding that a mental status evaluation was not an adequate substitute for a sanity board).

2. Failure to direct a sanity inquiry.

a) Though ultimate result may be "favorable" to the government, failure to timely direct a sanity board can result in lengthy appellate review. *United States v. Breese*, 47 M.J. 5 (C.A.A.F. 1997).

b) "**A low threshold is nonetheless a threshold which the proponent must cross**." *United States v. Pattin*, 50 M.J. 637, 639 (A. Ct. Crim. App. 1999) (finding that the military judge's refusal to order a sanity board was not error where it appeared the motion for a sanity board was merely a frivolous attempt to get a trial delay).

3. Sanity Board Order asks the following questions:

a) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect?

b) What is the clinical psychiatric diagnosis?

c) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his conduct?

d) Does the accused have sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense?

4. Composition of the sanity board.

a) One or more persons.

b) Physician or clinical psychologist.

c) At least one psychiatrist or clinical psychologist.

d) A provisional license may be enough to qualify a psychologist as a clinical psychologist. *United States v. Boasmond*, 48 M.J. 912 (N-M. Ct. Crim. App. 1998).

5. Conflict of interest. *United States v. Best*, 61 M.J. 376 (C.A.A.F. 2005). Two members of the accused's RCM 706 sanity board had a preexisting psychotherapist-patient relationship with the accused. In a case of first impression, the Army court stated that an actual conflict of interest would exist when prior participation that materially limits his or her ability to objectively participate in and evaluate the subject of an RCM 706 sanity board. The CAAF declined to adopt a presumptive rule that there would be an actual conflict of interest if a mental health provider, who has established a psychotherapist-patient relationship with an accused, also serves as a member in an RCM 706 sanity board. In this case, the CAAF held there was no evidence suggesting that the two members' participation would be materially limited by their prior relationship.

6. The accused's right to a speedy trial is not violated when the government delays the case for a time reasonably necessary to complete a thorough mental evaluation. *United States v. Colon-Angueira*, 16 M.J. 20 (C.M.A. 1983) (fifty-one days reasonable); *United States v. Carpenter*, 37 M.J. 291 (C.M.A. 1993) (the government's negligence or bad faith can be considered in determining whether the sanity board was completed within a reasonable time); *United States v. Pettaway*, 24 M.J. 589 (N.M.C.M.R. 1987) (thirty-six days was reasonable time for a second sanity board); *United States. v. Arab*, 55 M.J. 508 (A. Ct. Crim. App. 2001) (140 days was not unreasonable, where the record reflected due diligence by the government).

7. Results of board - limited distribution.

a) Defense counsel gets full report.

b) Trial counsel initially only gets answers to the above questions.

B. The Sanity Inquiry.

1. Compelled Examination. RCM 706.

a) Article 31, UCMJ, not applicable.

b) Failure to cooperate in an examination can result in the exclusion of defense expert evidence.

2. Privilege Concerning Mental Examination of an Accused. MRE 302.

a) The general rule: Anything the accused says (and any derivative evidence) to the sanity board is privileged and cannot be used against him.

b) This privilege may be claimed by the accused notwithstanding the fact that the accused may have been warned of the rights provided by MRE 305.

c) Waiver. There is no privilege under this rule when the accused first introduces into evidence such statements or derivative evidence. Privilege applies only to examinations ordered under RCM 706. *See United States v. Toledo*, 25 M.J. 270 (C.M.A. 1987), *aff'd on reconsid.*, 26 M.J. 104 (C.M.A. 1988).

3. Derivative Evidence. In *United States v. Clark*, 62 M.J. 195 (C.A.A.F. 2005), the accused was charged, *inter alia*, with breaking restriction. Dr. Petersen treated the accused for almost a month after his command referred him to mental health. She

concluded that the accused suffered a manic episode during the charged time period. Prior to trial, the defense requested a sanity board. Dr. Marrero was the lone member of the board, and he agreed with Dr. Petersen's diagnosis, but concluded that the accused was mentally responsible. At trial, Dr. Petersen, testifying for the defense, opined that there was a "high likelihood" that the accused suffered from a severe mental disease or defect during the relevant time period and that, as a result of that severe mental disease or defect, would have had a difficult time appreciating the nature and quality or wrongfulness of his conduct. During her testimony, Dr. Petersen acknowledged that she reviewed the sanity board report. The trial counsel renewed his motion to obtain a copy of the report (the MJ earlier denied the same request), which was granted. The CAAF held that it was error to release the statements of accused to Dr. Marrero as the derivative evidence provisions of MRE 302 had not been triggered. As a nonconstitutional error, the government would have to demonstrate that the error did not have a substantial influence on the findings. Given that the government relied heavily upon the testimony of Dr. Marrero, the court was left to conclude that the insanity defense may have succeeded had the military judge not erred in releasing the appellant's privileged statements to the government.

C. Are there substitutes for a sanity board?

1. Yes. "The point is that we do not believe that the drafters selected the sanity board format because they had determined that no other procedure was capable of detecting mental disorders or determining an accused person's mental capacity or responsibility. That being the case, *we believe we should look to the substance of the evaluation performed on the accused rather than on its form*." *United States v. Jancarek*, 22 M.J. 600, 603 (A.C.M.R. 1986) (emphasis added).

2. *But see United States v. Mackie*, 65 M.J. 762 (A.F. Ct. Crim App. 2007), *aff'd*, 66 M.J. 198 (C.A.A.F. 2008) (finding that the mental health evaluation performed by a staff psychologist as a result of a pretrial suicide gesture was not an adequate substitute because of her inexperience in performing sanity boards); *United States v. James*, 47 M.J. 641 (A. Ct. Crim. App. 1997) (finding that mental status evaluation done by a mental health counselor was not an adequate substitute); *United States v. English*, 47 M.J. 215 (C.A.A.F. 1997) (finding that an examination by doctors for purposes of treatment of the accused was not an adequate substitute because the examination did not address the judicial standards for mental capacity or responsibility).

XXIV. **TRIAL CONSIDERATIONS.**

A. In addition to a sanity board, an accused is entitled to access to a qualified psychiatrist or psychologist for the purpose of presenting an insanity defense if he establishes that his sanity will be a "significant factor" at the trial. *United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986); *see Ake v. Oklahoma*, 470 U.S. 68 (1985). Significant factor defined:

1. Mere assertion of insanity by accused or counsel is insufficient. *Volson v. Blackburn*, 794 F.2d 173 (5th Cir. 1986).

2. A "clear showing" by the accused that sanity is in issue and a "close" question that might be decided either way is required. *Cartwright v. Maynard*, 802 F.2d 1203 (10th Cir. 1986).

3. Expert must be made part of the "defense team" under MRE 502 to be covered by the attorney-client privilege. *United States v. Toledo*, 25 M.J. 270 (C.M.A. 1987), *aff'd on reconsid*., 26 M.J. 104 (C.M.A. 1988). *United States v. Mansfield*, 38 M.J. 415 (C.M.A.

1993). A physician, psychotherapist who assists the defense in preparation of a defense may fall within the scope of the attorney-client privilege.

B. *United States v. Collins*, 60 M.J. 261 (C.A.A.F. 2004). The MJ must act when issues of mental responsibility and capacity arise during trial. In this case, the lone member of a sanity board testified in a manner apparently inconsistent with his conclusion in the report that the accused was mentally responsible for his actions. During trial, COL Richmond testified that the accused's actions were consistent with his delusional disorder and that the accused did *not* understand the nature and quality or wrongfulness of his conduct. The MJ did not order further inquiry under RCM 706 and the CAAF held that he should have.

C. **Defense use of statements of the accused to an RCM 706 Board.** *United States v. Schap*, 49 M.J. 317 (C.A.A.F. 1998). The judge did not err when he sustained trial counsel's objection and prevented former sanity board psychiatrist from testifying for defense at trial as to accused's statements and emotions at the time of the offense. The defense was attempting to smuggle the accused's statements in without subjecting him to cross-examination.

D. Once defense offers **expert** testimony of accused's mental condition, a prosecution expert may testify as to the reasons for the expert's conclusions concerning accused's mental state (may not extend to accused's statements unless the accused first introduces his own statement or derivative evidence). MRE 302.

E. **Disclosure of full sanity board report.** *United States v. Cole*, 54 M.J. 572 (A. Ct. Crim. App. 2000), *aff'd*, 55 M.J. 466 (C.A.A.F. 2001) (summary disposition). At trial, the Government moved to compel defense disclosure of entire report under MRE 302(c) because defense was requesting two experts to testify about accused's belief that his actions were necessary to protect his family (as opposed to lack of mental responsibility). The military judge's decision to defer ruling on the government motion, because it was unclear in advance of the testimony whether the experts would testify on the issue of mental responsibility and not just on the second prong of defense of another, was not an abuse of discretion.

1. *United States v. Savage*, 67 M.J. 656 (A. Ct. Crim. App. 2009). The appellant claimed that he was asleep when he stabbed his victim due to a disorder called parasomnia. An RCM 706 inquiry concluded that the appellant was competent to stand trial, that there was a reasonable possibility that the appellant suffered from "parasomnia, or somnambulism that produced an automatism or sleep-related behavior at the time of the assault," and that the appellant may not have been unable to appreciate the wrongfulness of his conduct. The defense provided the government with notice of intent to rely on the defense of lack of mental responsibility. Approximately six weeks later, the defense e-mailed the full RCM 706 report to the trial counsel without an order from the military judge. Six weeks after that, the appellant hired civilian counsel and excused the counsel who e-mailed the report. Eventually the civilian counsel notified the government that the defense would not pursue the defense of lack of mental responsibility, and instead would rely upon partial mental responsibility to negate *mens rea*. Some of those statements were eventually used in cross-examination of the appellant's expert. The ACCA held that MRE 302(c) was violated, but the error was harmless. The defense case-in-chief involved statements from an expert that revealed specific statements made by the appellant captured in the RCM 706 inquiry. The defense could have avoided the government using any portion of the report by not calling experts who authored the report. *See United States v. Clark*, 62 M.J. 195 (C.A.A.F. 2005).

F. Although the rule seems to condition the use of expert testimony by the prosecution on prior use of **experts** by the defense, the Court of Military Appeals rejected such an interpretation,

finding that lay testimony can permit the government to use its experts. *United States v. Bledsoe*, 26 M.J. 97 (C.M.A. 1988); *see also United States v. Matthews*, 14 M.J. 656 (A.C.M.R. 1982).

G. The sanity board report is not admissible under hearsay rules. *United States v. Benedict*, 27 M.J. 253 (C.M.A. 1988).

H. **Sentencing Considerations**. Extenuation and Mitigation. Evidence of the accused's mental condition can be used on sentencing but with caution. *See United States v. Bono*, 26 M.J. 240 (C.M.A. 1988).

I. Guilty Pleas and Sanity Issues.

1. *United States v. Harris*, 61 M.J. 391 (C.A.A.F. 2005). After acceptance of the accused's pleas and announcement of sentence, but before the convening authority took action, the accused was diagnosed with bipolar disorder. At a post-trial Article 39(a) session, the military judge listened to expert testimony from mental health experts who disagreed as to whether the accused suffered from any mental illness. The accused did not testify at this hearing. In his findings of fact and conclusions of law, the military judge stated that the accused "suffered from a bipolar disorder that would equate to a severe mental disease or defect," but that he appreciated the wrongfulness of his actions and was subsequently competent to stand trial. The CAAF disagreed, the majority saying that they did not see how an accused can make an informed plea without knowledge that he suffers from a severe mental disease or defect at the time of the offense. The court also stated that it was not possible for a military judge to conduct the necessary *Care* inquiry without exploring with the accused the impact of any mental health issues on those pleas.

2. *United States v. Shaw*, 64 M.J. 460 (C.A.A.F. 2007). The accused pled guilty to offenses during a guilty plea and findings were entered. During the accused's unsworn statement, he said that prior to the charged offenses he was assaulted by a man wielding a lead pipe and suffered severe injuries to his head and brain. The accused also said that he spent almost a month in the hospital and that he was diagnosed with bipolar syndrome. The CAAF determined that the military judge did not err when he failed to inquire into the accused mental condition because his statements were unsupported by other evidence entered into the record or his behavior during his providence inquiry or unsworn statement. <u>A military judge is only required to inquire into circumstances or statements that raise a possible defense, not circumstances or statements that raise the "mere possibility" of defense.</u> NOTE: the majority opinion recommend that a prudent military judge conduct an inquiry when a significant mental health condition is raised during the plea inquiry; s*ee also United States v. Falcon*, 65 M.J. 386 (C.A.A.F. 2008) (noting that "[the accused] has provided no authority that a diagnosis of pathological gambling can constitute a defense of lack of mental responsibility."); *United States v. Glenn*, 66 M.J. 64 (C.A.A.F. 2008) (stating that the accused's expert mitigation evidence that he suffered from a mood disorder and his unsworn and unsubstantiated statements that he suffered from bipolar disorder did not raise a substantial basis in law for questioning his guilty plea).

3. *United States v. Handy*, 48 M.J. 590, 593 (A.F. Ct. Crim. App. 1998). During a guilty plea, "[w]hen evidence of an accused's mental health rears its head, the judge should question defense counsel on whether he or she has explored the mental responsibility angle of the case, including whether evidence exists to negate an intent or knowledge element of the offense. The judge should ask the accused if defense counsel has discussed that issue and how it may apply to the particular case. The judge should

accept the guilty plea only if the mental issues are resolved for the record and the accused disclaims any potential mental 'defense,' full or partial."

4. *United States v. Estes*, 62 M.J. 544 (A. Ct. Crim. App. 2005). Appellant argued that remarks made during his unsworn, indicating a hyper-religiosity, should have triggered further inquiry from the Military Judge regarding his lack of mental responsibility and competency. Appellant further argued that the inquiry, together with evidence of appellant's cannabis addiction, would have demonstrated significant issues of lack of mental responsibility. The Army court, in a carefully reasoned opinion, held appellant failed to show that a different verdict might reasonably have resulted if the trier of fact had evidence of a lack of mental responsibility that was not available for consideration at trial.

5. *United States v. McGuire*, 63 M.J. 678 (A. Ct. Crim. App. 2006). Appellant's providence inquiry referenced psychiatric treatment and he otherwise acting strangely during his colloquy with the military judge. A previous mental evaluation pursuant to RCM 706 determined that the accused possessed the requisite mental capacity to stand trial and that he did not lack the necessary mental responsibility at the time of the offense. The Army court determined that the military judge was not required sua sponte to order further evaluation of the appellant. With regard to the providence of the appellant's plea, the court, citing to *Estes*, reaffirmed that not every reference to psychiatric treatment or problems, no matter how vague or oblique, is sufficient to create a substantial basis for questioning a guilty plea.

6. *United States v. Riddle*, 67 M.J. 335 (C.A.A.F. 2009). In a stipulation of fact, the parties agreed that the appellant had a chronic alcohol and marijuana dependence, as well as a bipolar and borderline personality disorder. The military judge was aware of these conditions. The judge knew that before her absence, she was receiving mental health treatment at an "off-post installation that specializes in mental issues, mental and behavioral issues." The judge also knew that she arrived at the trial from the facility and would return there after trial. During the trial, the military judge asked the appellant if she was feeling OK when she referred to "getting the fishes high" by throwing a marijuana cigarette into a lake. The military judge also asked the appellant a series of questions regarding her mental health and competency at trial. A report of mental health status evaluation was admitted into evidence on sentencing, stating that appellant had attempted suicide twice, but was mentally responsible. Finally, the military judge noted before sentencing that he observed the appellant at trial, and that she was alert, articulate, and cognizant. The CAAF held that her guilty plea was not improvident. A military judge can presume, in the absence of contrary circumstances, that the accused is sane. *See United States v. Shaw*, 64 M.J. 460 (C.A.A.F. 2007). If the appellant's statement or facts in the record indicate a mental disease or defect, the military judge must determine if that information raises a conflict with the plea or merely a possibility of conflict with the plea. The former requires further inquiry, the latter does not. The CAAF finds that the facts of this case merely raised the possibility of conflict with the plea and the military judge was not required to inquire further. Moreover, the military judge appropriately inquired into her status, and captured his observations in the record.

Like other affirmative defenses, lack of mental responsibility is subject to the rule of waiver. *United States v. Boasmond*, 48 M.J. 912 (N-M. Ct. Crim. App. 1998).

Chapter 7

Chapter 7
Substance to Form

I. Overview. This chapter focuses on how the theoretical issues of military criminal law become tangible concerns with which practitioners must contend regularly. The chapter first discusses the charging decision: the point at which concepts and theory become reality via a charge sheet (hence the chapter title "substance to form"). The chapter then addresses those issues that must be considered at the time of charging because they generally flow directly from the charging decision – pleadings, multiplicity, unreasonable multiplication of charges, lesser included offenses, instructions, and findings.

II. The Charging Decision

A. One Method for Making the Charging Decision.

1. Prosecutorial Discretion. Even in the absence of any formal limitations, it is important to remember that there is no ethical or legal obligation to plead *all* possible charges that the evidence might support. *Compare* ABA Standards, Standard 3-3.9(b) (listing factors properly considered in exercise of prosecutorial discretion) *with* R.C.M. 306(b) discussion (listing factors to be considered by commanders in making an initial disposition of offenses).

2. How To Make the Charging Decision: A Method.

a) Review all the evidence.

b) Develop a theory of the case.

c) List possible charging options.

d) Conduct elements/proof analysis of each charge.

e) Consider ethical and legal limitations.

f) Consider prudential/tactical factors.

(1) Theory of the case.

(2) Nature and degree of harm.

(3) Panel's perception and sense of fairness.

(4) Exigencies of proof and intentional multiplicity.

(5) Use of "mega-specs".

(6) Preservation of LIOs.

(7) Maximum punishments.

(8) Uncharged misconduct / MRE 404(b) issues.

(9) Cooperation of accused.

(10) Improper motives of witnesses or victims.

(11) Reluctance of victim to testify.

g) Draft the Charges. Consider these basic principles:

(1) Charge the most serious offense consistent with the evidence. *See United States v. Foster*, 40 M.J. 140, 144 n. 4 (C.M.A. 1994) ("[T]here is prosecutorial discretion to charge the accused for the offense(s) which most accurately describe the misconduct and most appropriately punish the transgression(s).").

(2) Err on the side of liberal charging and be prepared to withdraw as the case develops. *See* R.C.M. 401(c) and R.C.M. 604 concerning withdrawal of charges and specifications.

(3) If charging conspiracy, ensure that it is important/necessary for your theory of the case.

B. Ethical and Legal Limitations.

1. Ethical Limitations.

a) Charges must be warranted by the evidence.

(1) Army Reg. 27-26, Rule 3.8(a), provides that a trial counsel shall "recommend to the convening authority that any charge or specification not warranted by the evidence be withdrawn."

(2) ABA Standards, Standard 3-3.9(a), provides that "a prosecutor should not . . . cause to be instituted, or permit the continued pendency of criminal charges" in two circumstances:

(a) When the prosecutor knows that the charges are not supported by probable cause, or

(b) In the absence of sufficient admissible evidence to support a conviction.

b) A supervising prosecutor cannot compel a subordinate to prosecute an offense about which the supervisor has a reasonable doubt as to the guilt of the accused. ABA Standards, Standard 3-3.9(c). *Cf.* R.C.M. 307(a) discussion.

c) Charges should not be unreasonably multiplied.

(1) Nature of Charges. What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person. R.C.M. 307(c)(4). *Cf.* ABA Standards, Standard 3-3.9(f) (A prosecutor should not "seek charges greater in number or degree . . . than are necessary to fairly reflect the gravity of the offense").

(2) Prosecutorial Motive. A prosecutor should not "pile on" charges to "unduly leverage an accused to forego his or her right to trial." ABA Standards, Standard 3-3.9 commentary.

2. Constitutional Limitations.

a) A prosecutor cannot *selectively* prosecute an individual because of "race, religion, or other arbitrary classification." *Wayte v. United States*, 470 U.S. 598 (1985). Accused must show more than a mere possibility. *United States v. Hagen*, 25 M.J. 78 (C.M.A. 1987).

b) A prosecutor cannot *vindictively* prosecute to penalize an individual's exercise of constitutional or statutory rights. *Blackledge v. Perry*, 417 U.S. 21 (1974).

C. The Defense Response to the Charging Decision.

1. Motions to dismiss.

a) Failure to state an offense. R.C.M. 907(b)(1)(B).

b) Statute of limitations. R.C.M. 907(b)(2)(B).

c) Defective or misleading specifications. R.C.M. 907(b)(3)(A).

d) Unreasonable multiplication of charges. R.C.M. 907(b)(3)(B).

2. Motions for appropriate relief.

a) Determination of multiplicity. R.C.M. 906(b)(12).

b) Bill of particulars. R.C.M. 906(b)(6).

c) Sever duplicitous specifications. R.C.M. 906(b)(5).

d) Sever offenses. R.C.M. 906(b)(10).

e) Vindictive or selective prosecution. Fifth Amendment; *United States v. Hagen*, 25 M.J. 78 (C.M.A. 1987).

III. Pleadings Generally

A. Introduction.

1. Military pleadings follow the format of charge and specification. R.C.M. 307(c)(1).

2. Charge: The article of the UCMJ or law of war which the accused is alleged to have violated. R.C.M. 307(c)(2).

3. Specification: plain, concise, and definite statement of the essential facts constituting the offense charged. R.C.M. 307(c)(3).

B. Charges and Specifications.

1. Charges. Generally R.C.M. 307(c)(2).

a) A single charge is not numbered ("The Charge:").

b) If more than one charge, use Roman numerals ("Charge I:" "Charge II:").

c) Additional charges follow the same format and may be added until arraignment.

d) Error in, or omission of, the designation of the charge shall not be a ground for dismissal of a charge or reversal of a conviction unless the error prejudicially misleads the accused. R.C.M. 307(d); *see United States v. Bluitt*, 50 C.M.R. 675 (A.C.M.R. 1975).

2. Specifications. R.C.M. 307(c)(3) and discussion.

a) Numbering.

(1) A single specification is not numbered ("The Specification:").

(2) Multiple specifications use Arabic numbers ("Specification 1:" "Specification 2:").

b) Drafting the Language.

(1) Model specifications may be found in either:

(a) MCM, part IV; or,

(b) Dep't of Army, Pam. 27-9, *Military Judges' Benchbook*, Chapter 3 (15 Sep 2002). Note: Be sure to check for approved interim updates found on the Trial Judiciary page on JAGCNET.

(2) Legally Sufficient Specifications. *See infra* Chapter 7, Appendix A; *see also* R.C.M. 907(b)(1)(B), and R.C.M. 307(c)(3).

(3) Describe the accused.

(a) Name and rank.

(b) Armed force.

(c) Social security number of accused should not be stated in specification.

(4) Place of offense. "At or near . . ."

(5) Date and time of offense. "On or about . . . "

c) Novel Specifications.

(1) Counsel are unlikely to have novel specifications for most offenses. However, counsel may have to draft novel specifications for general disorders or service-discrediting conduct that are charged as violations of UCMJ art. 134, or for many forms of conduct unbecoming that are charged as violations of UCMJ art. 133.

(2) Designing a novel specification. *See United States v. Sell*, 11 C.M.R. 202 (C.M.A 1953).

(a) Identify and expressly plead the elements of the offense.

(i) Consult civilian case law or pattern jury instructions for the elements of crimes and offenses not capital integrated from federal law or assimilated from state law.

(ii) Conduct prejudicial to good order and discipline and service discrediting conduct not specifically listed as crimes by the President are more problematic.

(iii) The MCM provides that there are only two elements to such offenses: act or omission by accused, and a prejudicial or discrediting effect. MCM, pt. IV, para. 60.b.

(iv) Words of Criminality. If the act alleged is not *inherently* criminal, but is made an offense only by operation of custom, statute, or regulation, the specification must include words of criminality appropriate to the facts of the case, e.g., "without authority," "wrongfully," or "unlawfully." *See* R.C.M. 307(c)(3) discussion.

(b) Describe the offense with sufficient specificity to inform the accused of the conduct charged, to enable the accused to prepare a defense, and to protect the accused from subsequent reprosecution for the same offense. Notice pleading nevertheless remains the rule.

(c) Allege in the specification only those facts that make the accused's conduct a crime.

(d) Evidence supporting the allegation should ordinarily not be included in the specification.

C. General Rules of Pleading

1. Principals. All principals are charged as if they were the perpetrator. R.C.M. 307(c)(3) discussion at (H)(i). For a thorough discussion of principals, see UCMJ art. 77; MCM, pt. IV, ¶ 1; and Chapter 1 of the Crimes and Defenses Deskbook. The theory of liability does not need to be specified. *See United States v. Vidal*, 23 M.J. 319 (C.M.A. 1987)

2. Duplicity.

a) General. Duplicity is the practice of charging two or more offenses in one specification. Distinguish this from multiplicity, which is the practice of charging one offense in two or more separate charges or specifications.

b) Rule. Each specification shall state only one offense. R.C.M. 307(c)(4). If an accused is found guilty of a duplicitous specification, his maximum punishment is that for a single specification of the offense. Exception: "mega-specs;" see below.

c) Remedy. The sole remedy for duplicity is severance into separate specifications. R.C.M. 906(b)(5). *United States v. Hiatt*, 27 M.J. 818 (A.C.M.R. 1988) (conspiracy specification that alleged both conspiracy to commit larceny and to receive stolen property was duplicitous, but failure at trial to move to sever or strike constituted waiver). As a practical matter, severance is rarely requested, because it exposes the accused to multiple punishments.

d) Applications.

(1) "Mega-specs." The CAAF has held that the maximum punishment for some duplicitous specifications may be calculated as if each offense alleged in a duplicitous specification had been charged separately.

(a) Bad checks. *United States v. Mincey*, 42 M.J. 376 (C.A.A.F. 1995) (holding that maximum punishment in a bad-check case is calculated by the number and amount of checks as if they had been charged separately, regardless of whether Government joined multiple offenses in one specification).

(b) Check forgery. *United States v. Dawkins*, 51 M.J. 601 (A. Ct. Crim. App. 1999) (extending the *Mincey* rule to check forgery).

(2) Larceny.

(a) See pleading principles for value *infra* at Part II.C.4.

(b) *United States v. Rupert*, 25 M.J. 531 (A.C.M.R. 1987) (accused charged under one specification for larceny of different items "on divers occasions" over a 17-month period having a combined value of over $100). To be convicted of larceny over $100 either:

(i) One item must have that value, or

(ii) Several items taken at the same time and place must have that aggregate value.

Note: With the 2002 MCM Amendments, the threshold for increased punishment was raised to $500.

3. Matters in aggravation (*i.e.*, punishment enhancers).

a) Must be alleged and proven beyond a reasonable doubt. R.C.M. 307(c)(3).

b) Examples.

(1) Over 30 grams of marijuana. MCM, pt. IV, ¶ 37e(1).

(2) Value over $500; military property. MCM, pt. IV, ¶ 46e(1).

(3) Use of a firearm. MCM, pt. IV, ¶ 47e(1).

(4) Age of the victim. MCM, pt. IV, ¶ 54e(7).

4. Value.

a) Pleading value. ("of a value greater than . . .," "of a value not less than . . .," "of some value").

b) Proving value. Value is a question of fact to be determined by all of the evidence admitted. MCM, pt. IV, ¶46c(1)(g).

(1) Government property. Listed in official publications.

(2) Other property. Legitimate market value.

(3) *United States v. Trisler*, 25 M.J. 611 (A.C.M.R. 1987) (hearsay testimony admissible to show value of stereo equalizer and two speakers absent defense objection).

c) Value in larceny cases.

(1) Multiple items taken at substantially the same time and place are a single larceny, even if the items belonged to more than one victim. In such cases, a single specification is used to allege theft of all items, and the values of the items are combined to determine the maximum punishment. *See* MCM, pt. IV, ¶47c(1)(h)(ii). The specification should state the value of each item followed by a statement of the aggregate value. R.C.M. 307(c)(3) discussion at (H)(iv).

(2) Cannot combine or aggregate values of items stolen from different places or on different dates.

(3) To be convicted of larceny over $500 either:

(a) One item must have that value (over $500.00), or

(b) Several items taken at the same time and place must have that aggregate value. *See* MCM, pt. IV, ¶47c(1)(h)(ii).

5. Joinder of offenses.

a) All offenses against an accused *may* be referred to the same court-martial for trial. R.C.M. 601(e)(2).

b) The military judge may sever offenses "only to prevent manifest injustice." R.C.M. 906(b)(10); *United States v. Duncan*, 53 M.J. 494 (C.A.A.F. 2000); *see also United States v. Simpson*, 56 M.J. 462 (C.A.A.F. 2002).

c) Joinder of perjury charges resulting from accused's testimony at previous trial. *United States v. Giles*, 59 M.J. 374 (C.A.A.F. 2004) (holding the military judge abused his discretion by failing to sever the perjury charge from the of attempted use and distribution charges at retrial; the instructions given were insufficient to prevent a manifest injustice).

d) After arraignment, charges cannot be added without the consent of the accused. R.C.M. 601(e)(2).

D. Amendments. R.C.M. 603.

1. Types of changes. R.C.M. 603(a).

a) Major change. Adds a party, offense, or substantial matter not fairly included in those previously preferred, or which is likely to mislead the accused.

b) Minor changes. All other changes.

2. Making minor changes.

a) Before arraignment. Any person forwarding, acting upon, or prosecuting the charges can make minor changes before arraignment. R.C.M. 603(b).

b) After arraignment. After arraignment, the military judge may, upon motion, permit minor changes any time before findings. R.C.M. 603(c).

3. Making Major Changes.

a) Changes other than minor changes may **never** be made over the objection of the accused *unless* the charge or specification is preferred anew. R.C.M. 603(d).

b) Applications.

(1) Conspiracy. *United States v. Moreno*, 46 M.J. 216 (C.A.A.F. 1997) (holding that accused's ability to prepare a defense was not prejudiced by a change to conspiracy specification the day before trial despite major change).

(2) Matters in aggravation. *United States v. Smith*, 49 M.J. 269 (C.A.A.F. 1998) (holding that amendment to larceny specification adding "military property" was a major change, but error was not prejudicial).

(3) Disobedience. *United States v. Longmire*, 39 M.J. 536 (A.C.M.R. 1994) (change to person issuing order and document used to issue order was major change).

(4) General Article. *United States v. Sullivan*, 42 M.J. 360 (C.A.A.F. 1995) (change from clause three to clause two offense on day of trial was a minor change).

E. Variance. R.C.M. 918(a)(1)

1. A variance between pleadings and proof exists when evidence at trial establishes the commission of a criminal offense by the accused, but the proof does not conform strictly with the offense alleged in the charge. *United States v. Allen*, 50 M.J. 84, 86 (C.A.A.F. 1999).

2. Findings by exceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it. R.C.M. 918(a)(1).

3. The specification and the findings may differ, provided the accused is not prejudiced. *United States v. Collier*, 14 M.J. 377 (C.M.A. 1983).

4. Test for prejudice. *United States v. Lee*, 1 M.J. 15 (C.M.A. 1975); *United States v. Wray*, 17 M.J. 375 (C.M.A. 1984).

a) The variance misled the accused to the extent that he was unable to adequately prepare for trial; or

b) The variance puts accused at risk of another prosecution for the same offense; or

c) The variance changes the nature or identity of the offense and the accused has been denied the opportunity to defend against the charge.

5. Applications.

a) Substantially different offense. *United States v. Lovett*, 59 M.J. 230 (C.A.A.F. 2004) (holding variance was fatal when finding of guilt for solicitation to obstruct justice was substantially different from the charged solicitation to murder).

b) Different date. *United States v. Parker*, 59 M.J. 195 (C.A.A.F. 2003) (holding two-year variance in date of rape fatal); *United States v. Wray*, 17 M.J. 375 (C.M.A. 1984) (holding variance in date of larceny fatal). *But see United States v. Hunt*, 37 M.J. 344 (C.M.A. 1993) *cert. denied*, 114 S. Ct. 1052 (1993) (holding three-week variance in date of rape not fatal).

c) Different victim. *United States v. Marshall*, 67 M.J. 418 (C.A.A.F. 2009) (holding variance fatal in an Art. 95 prosecution when specification alleged that the accused escaped from the custody of "CPT Kreitman" and military judge entered findings by exceptions and substitutions convicting the accused of escaping the custody of "SSG Fleming").

d) Different injury. *United States v. Dailey*, 37 M.J. 1078 (N.M.C.M.R. 1993) (holding variance not fatal).

e) Different unit. *United States v. Atkinson*, 39 M.J. 462 (C.M.A. 1994) (holding variance in alleging unit of assignment rather than temporary place of duty not fatal).

f) Violation of different paragraph of general order. *United States v. Teffeau*, 58 M.J. 62 (C.A.A.F. 2003) (holding variance fatal where accused was charged with violating a lawful general order by providing alcohol to a recruit but convicted of violating of a different paragraph of the same order by engaging in a personal relationship with the recruit).

g) Statute of limitations—divers occasions. *United States v. Rollins*, 61 M.J. 338 (C.A.A.F. 2005). Appellant was charged with numerous offenses including attempted rape on divers occasions, and indecent acts on divers occasions. The panel found appellant not guilty of attempted rape, but guilty of indecent assault on divers occasions, and guilty of the divers occasions indecent act specification. Both of these specifications included periods which would later be time-barred by the holding in *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000). The convening authority modified the findings to include only the dates not affected by the statute of limitations. HELD: The military judge erred by not providing the panel with instructions that focused their attention on the period not barred by

the statute of limitations. The convening authority's action did not cure this prejudice and the affected findings were set aside. *See also United States v. Thompson*, 59 M.J. 432 (C.A.A.F. 2004).

6. Continuing course of conduct "on divers occasions."

a) On findings, when the phrase "on divers occasions" is removed from a specification, the effect is that the accused has been found guilty of misconduct on a single occasion and not guilty of the remaining occasions. *See United States v. Trew*, 68 M.J. 364 (C.A.A.F. 2010); *United States v. Augsberger*, 62 M.J. 189 (C.A.A.F. 2005).

b) Where the findings do not disclose the single occasion on which the conviction is based, appellate courts cannot conduct a factual sufficiency review or affirm findings because it cannot determine which occasion the servicemember was acquitted of. *See United States v. Trew*, 68 M.J. 364 (C.A.A.F. 2010); *United States v. Augsberger*, 62 M.J. 189 (C.A.A.F. 2005).

c) "Both trial practitioners and military judges need to be aware of the potential for ambiguous findings . . . and take appropriate steps through instruction and pre-announcement review of findings to ensure no ambiguity occurs." *United States v. Trew*, 68 M.J. 364 (C.A.A.F. 2010).

d) While a Court of Criminal Appeals may not review the record to determine which incident *most likely* formed the basis for the conviction, the court "may review the record to determine if there was *only a single possible incident* that met 'all the details of the specification' for which the [accused] was convicted. *United States v. Trew*, 68 M.J. 364 (C.A.A.F. 2010); *United States v. Ross*, 68 M.J. 415 (C.A.A.F. 2010). However, Government may prevail on appeal if legal sufficiency review reveals only one occasion that is legally sufficient. "Under those circumstances, . . . the verdict would be unambiguous." *See United States v. Ross*, 68 M.J. 415 (C.A.A.F. 2010).

e) Applications. *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003) (holding variance fatal where specification alleged wrongful drug use on "divers occasions" and findings by exceptions and substitutions removed the "divers occasions" language; the substituted language must clearly reflect the specific instance of conduct upon which the modified findings are based); s*ee also United States v. Trew*, 68 M.J. 364 (C.A.A.F. 2010) (accused charged with indecent acts upon a child on divers occasions, military judge convicted of assault consummated by battery on one occasion without clarification, ambiguous findings); *United States v. Ross*, 68 M.J. 415 (C.A.A.F. 2010) (charged with possession of child pornography on divers occasions, military judge excepted words "on divers occasions" without additional comment," ambiguous findings); *United States v. Wilson*, 67 M.J. 423 (C.A.A.F. 2009) (error for military judge to fail to identify the specific instance of conduct forming the basis for the conviction); *United States v. Seider*, 60 M.J. 36 (C.A.A.F. 2004) (fatal variance); *United States v. Augspurger*, 61 M.J. 189 (C.A.A.F. 2005) (fatal variance); and *United States v. Scheurer*, 62 M.J. 100 (C.A.A.F. 2005) (partially affirmed and partially set aside).

IV. Multiplicity

A. Practitioners should note that there have been substantial changes proposed to the Manual for Courts-Martial discussing and attempting to clarify multiplicity and unreasonable multiplication of charges (for findings and sentencing). This is a result of *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012). As of January 2013, the Executive Order reflecting these changes is awaiting Presidential signature, and the 2013 edition should reflect these substantial revisions.

B. Defined: "[T]he practice of charging the commission of a single offense in several counts." *Black's Law Dictionary* 1016 (6th ed. 1990).

C. The doctrine of Multiplicity rests on a Constitutional Basis.

1. "No person shall . . . be subject, for the same offense, to be twice put in jeopardy of life and limb." U.S. Const. amend. V.

2. This prohibition extends to multiple punishments for the same offense at a single criminal trial. *Ohio v. Johnson*, 467 U.S. 493 (1984); *Ball v. United States*, 470 U.S. 856 (1985).

D. The Fundamental Rule. *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993).

1. An accused may not be convicted of multiple offenses arising out of a single criminal transaction unless there is a clear expression of legislative intent to the contrary.

2. Legislative intent to allow multiple convictions for offenses arising out of a single criminal transaction may be inferred if each offense requires proof of a fact that the other does not. The determination that each offense requires proof of a unique fact is made by comparing the elements of the offenses. *See United States v. Dillon*, 61 M.J. 221 (C.A.A.F. 2005) (holding that separate specifications for different controlled substances used at the same time not multiplicious; Congress clearly intended separate specifications for each controlled substance and this complies with the statutory elements test under *Teters*.).

3. "[T]hose elements required to be alleged in the specification, along with the statutory elements, constitute the elements of the offense for the purpose of the elements test." *United States v. Weymouth*, 43 M.J. 329, 340 (C.A.A.F. 1995).

4. The inference of legislative intent to allow separate convictions may be overcome if there are indications of contrary legislative intent. *See, e.g.*, UCMJ art. 120(b) (prior to 1 Oct. 2007) (2008 MCM, App. 27) (limiting carnal knowledge to "circumstances not amounting to rape").

5. Offenses found to be "separate" under this analysis may be considered separate for all purposes, including sentencing. *United States v. Morrison*, 41 M.J. 482 (1995).

6. Charges reflecting both an offense and a lesser included offense are impermissibly multiplicious. *United States v. Hudson*, 59 M.J. 357 (C.A.A.F. 2004); *United States v. Savage*, 50 M.J. 244 (C.A.A.F. 1999).

E. Multiplicity does not apply to sentencing. If an offense is multiplicious for sentencing, then it is necessarily multiplicious for findings. *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012) (eliminating the doctrine of multiplicity for sentencing, but affirming the application of unreasonable multiplication of charges for sentencing).

F. Multiplicity and Waiver.

1. Absent plain error, an unconditional guilty plea waives a multiplicity claim. *United States v. Lloyd*, 46 M.J. 19 (C.A.A.F. 1997). However, if two specifications are facially

duplicative, i.e., "factually the same," then they are multiplicious, and it is plain error not to dismiss one of them. *United States v. Hudson*, 59 M.J. 357 (C.A.A.F. 2004) (holding, under the facts, that breaking restriction and AWOL are not factually the same, so the military judge did not commit plain error by not dismissing the AWOL charge as a lesser included offense).

2. Failing to object to charges as multiplicious waives the issue absent plain error. *See United States v. Britton*, 47 M.J. 195 (C.A.A.F. 1997); *United States v. Savage*, 50 M.J. 244 (C.A.A.F. 1999).

G. Suggested References for Multiplicity. Articles that may assist in understanding these principles include: Captain Gary E. Felicetti, *Surviving the Multiplicity/LIO Family Vortex*, Army L., Feb. 2011, 46; Major Christopher S. Morgan, *Multiplicity: Reconciling the Manual for Courts-Martial*, 63 A. F. L. Rev. 23 (2009); Lieutenant Colonel Michael Breslin & Lieutenant Colonel LeEllen Coacher, *Multiplicity and Unreasonable Multiplication of Charges: A Guide to the Perplexed*, 45 A. F. L. Rev. 99 (1998); Major William T. Barto, *Alexander the Great, the Gordian Knot, and the Problem of Multiplicity in the Military Justice System*, 152 Mil. L. Rev. 1 (1996).

V. Unreasonable Multiplication of Charges (UMC)

A. Practitioners should note that there have been substantial changes proposed to the Manual for Courts-Martial discussing and attempting to clarify multiplicity and unreasonable multiplication of charges (for findings and sentencing). This is a result of *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012). As of January 2013, the Executive Order reflecting these changes is awaiting Presidential signature, and the 2013 edition should reflect these substantial revisions.

B. General. Even if offenses are <u>not</u> multiplicious, courts may apply the doctrine of unreasonable multiplication of charges (UMC).

1. "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4); *see also* R.C.M. 1003(c)(1)(C). *Cf.* R.C.M. 906(b)(12).

2. Military judges must ensure that prosecutors do not needlessly "pile on" charges against a military accused. *United States v. Foster*, 40 M.J. 140, 144 n.4 (C.M.A. 1994).

C. The Doctrine. *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001).

1. Multiplicity and UMC are founded on distinct legal principles. The prohibition against multiplicity complies with the constitutional and statutory restrictions against double jeopardy. The prohibition against UMC addresses features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion. After considering these factors, if the court finds the "piling on" of charges to be unreasonable, it will fashion an appropriate remedy on a case by case basis.

2. In *Quiroz*, the CAAF endorsed the N-MCCA's non-exclusive list of factors to consider in weighing a claim of UMC: 1) Did accused object at trial? 2) Is each charge and specification aimed at a distinctly separate act? 3) Does the number of charges misrepresent or exaggerate accused's criminality? 4) Is there any evidence of prosecutorial overreaching in drafting? 5) Does number of charges and specifications unreasonably increase accused's punitive exposure?

D. Trial Judges may dismiss unreasonably multiplied charges on findings. *United States v. Roderick*, 62 M.J. 425 (C.A.A.F. 2006).

E. Service courts may consider UMC claims waived or forfeited if not raised at trial. *United States v. Butcher*, 56 M.J. 87 (C.A.A.F. 2001).

F. On appeal, service courts may may disapprove findings, even if they are correct in law and fact, in order to remedy what it finds to be an unreasonable multiplication of charges. *United States v. Bond*, 69 M.J. 701 (C.G. Ct. Crim. App. 2010).

G. Unreasonable multiplication of charges can occur across multiple prosecutions. *See United States v. Raynor*, 66 M.J. 693 (A.F. Ct. Crim. App. 2008) (after the AFCCA ordered a rehearing on two charges, the government added charges for indecent liberties, sodomy, assault, and enticing minors to engage in sexually explicit conduct under 18 U.S.C. § 2251, which arose from the same conduct at issue at the first trial; held: not an unreasonable multiplication of charges).

H. Applications.

1. Although CAAF eliminated the doctrine of multiplicity for sentencing, courts may still apply the the unreasonable multiplication of charges test during sentencing. *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012).

2. *United States v. Mazer*, 58 M.J. 691 (N-M. Ct. Crim. App. 2003). A commissioned officer exchanged sexually suggestive and explicit e-mail and "chat" messages with a 14-year-old girl. Four specifications of an Article 133 charge was not UMC, because they did not reflect the same act or transaction. Each specification identified a discrete and unique communication.

3. *United States v. Esposito*, 57 M.J. 608 (C.G. Ct. Crim. App. 2002) Appellant made a false statement about the source of injuries sustained in a fight and asked a fellow crewmember to do the same. Charging appellant with false official statement and obstructing justice by making the same false statement was UMC. Also, charging appellant with soliciting a false official statement and obstructing justice by that same solicitation was UMC.

VI. Instructions Generally

A. Three essential presumptions underlie the use of instructions at trial:

1. The panel or jury hears and listens to the instructions. *United States v. Smith*, 25 C.M.R. 86 (C.M.A. 1958).

2. The panel or jury understands the instructions. *United States v. Quintanilla*, 56 M.J. 37, 83 (C.A.A.F. 2001).

3. The panel or jury follows the instructions. *Quintanilla*, 56 M.J. at 83.

B. Instructions should be written in plain language that is easy for lay people to understand. *See* Carolyn G. Robbins, *Jury Instructions: Plainer is Better*, Trial, Apr. 1996, at 32.

C. Instructions should be carefully tailored to the specific facts in each case. *United States v. Harrison*, 41 C.M.R. 179 (C.M.A. 1970).

D. Instructions must provide meaningful legal principles for the courts-martial's consideration. *United States v. Dearing*, 63 M.J. 478, 483 (C.A.A.F. 2006).

E. Instructions must be given orally on the record in the presence of all parties and members. Written copies of the instructions or, unless a party objects, portions of them may also be given to the members for their use during deliberation. R.C.M. 920(d).

F. Further readings.

1. Colonel R. Peter Masterton, "Instructions: A Primer for Counsel" Army Law., Oct. 2007, at 85.

2. The Army Trial Judiciary publishes an annual update on instructions in The Army Lawyer. *See, e.g.*, Colonel Timothy Grammel and Lieutenant Colonel Kwasi L. Hawks, Annual Review of Developments in Instructions, Army Law., Feb. 2010, at 52.

VII. Counsel's role in drafting instructions

A. "Although judges have the responsibility for giving proper instructions, counsel may request specific instructions, and, indeed, subject to ethical considerations, competent counsel should always seek to do so unless the applicable standard instruction is at least as favorable as any reasonable proposed instruction would be." 22 Francis A. Gilligan & Fredric I. Lederer, Court-Martial Practice § 31.00 (3d ed. 2006).

B. At the close of the evidence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. R.C.M. 920(c).

C. A military judge is required to give requested instructions "as may be necessary and which are properly requested by a party." RCM 920(e)(7); *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993). Requested instructions are necessary when:

1. The issue is reasonably raised;

   a) A matter is "in issue" when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they chose. R.C.M. 920(e) discussion; *United States v. Terry*, 64 M.J. 295, 299 (C.A.A.F. 2007).

   b) Whether an issue is raised is a matter for the judge to decide; the judge should not permit the court members to decide if the issue was raised. *United States v. Jones*, 7 M.J. 441 (C.M.A. 1979).

2. The issue is not adequately covered elsewhere in anticipated instructions; and

   a) *See United States v. Briggs*, 42 M.J. 367 (C.A.A.F. 1995); *United States v. Carruthers*, 64 M.J. 340 (C.A.A.F. 2007); *see also* R.C.M. 920(c) discussion (the military judge is not required to give the specific instruction requested by the counsel as long as the issue is adequately covered in the instructions).

3. The proposed instruction accurately states the law concerning facts in the case.

D. When counsel draft instructions or request instructions that are not required, the standard of review on appeal is abuse of discretion. *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993); *United States v. Acosta-Zapata*, 65 M.J. 811 (A. Ct. Crim. App. 2007).

1. However, if the instruction is otherwise required, the fact that the defense submitted a proposed but erroneous instruction does not excuse the military judge from his duty to instruct correctly. *United States v. Dearing*, 63 M.J. 478 (C.A.A.F. 2006). In those cases, use the standard of review for required instructions. See section IVC below.

2. Waiver of error (R.C.M. 920(f)) does not really apply. Here, the defense counsel is active.

VIII. Procedural Instructions

A. The military judge may make such preliminary instructions as may be appropriate. R.C.M. 913(a).

1. These instructions are generally found in Chapter 2 of U.S. Dep't of Army, Pam 27-9, Military Judges' Benchbook (1 Jan. 2010) [hereinafter Benchbook].

B. Mixed plea cases.

1. 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. R.C.M. 913(a).

2. Exceptions to this rule include when the accused requests otherwise, and when the accused's plea was to lesser-included-offense and the prosecution intends to prove the greater offense. *See* R.C.M. 913(a) discussion.

C. Required instructions. Art. 51(c), R.C.M. 920(e)(5) and (6).

1. The accused is presumed innocent.

2. If there is reasonable doubt, the accused must be acquitted.

3. If there is a lesser included offense and there is reasonable doubt as to the greater offense, the finding must be to an offense to where there is not reasonable doubt.

4. The burden of proof is on the government (except for certain defenses).

5. Instructions on deliberations and voting.

IX. Elements of the Offenses

A. Instructions on findings shall be given before or after arguments by counsel, or at both times. R.C.M. 920(b).

1. Chapter 3 of the Benchbook contains the instructions on the elements of the offense.

2. The timing is within the sole discretion of the military judge. R.C.M. 920(b) discussion.

B. Required instructions. Art. 51(c), R.C.M. 920(e)(1) and (2).

1. Charged offenses. A description of the elements of each offense charged (unless the accused pled guilty to that offense).

2. Lesser included offenses. A description of the elements of each lesser included offense, unless trial on the lesser included offenses is barred by the statute of limitations.

a) The military judge has a *sua sponte* duty to instruct on all lesser-included-offenses reasonably raised by the evidence. *United States v. Davis*, 53 M.J. 202 (C.A.A.F. 2000); *United States v Griffin*, 50 M.J. 480 (C.A.A.F. 1999); *United States v. Wells*, 52 M.J. 126 (C.A.A.F. 1999).

b) Whether an issue is raised is a matter for the judge to decide; the judge should not permit the court members to decide if the issue was raised. *United States v. Jones*, 7 M.J. 441 (C.M.A. 1979).

c) A matter is "in issue" when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they chose. R.C.M. 920(e) discussion. *See United States v. Hibbard*, 58 M.J. 2003 (C.A.A.F. 2003) (contains a thorough analysis of this problem done in the context of a defense instruction).

d) Any doubt about whether the evidence is sufficient to raise the need to instruct on a lesser included offense must be resolved in favor of the accused. *United States v. Gillenwater*, 43 M.J. 10 (C.A.A.F. 1995); *United States v. Rodwell*, 20 M.J. 264 (C.M.A. 1985). *But see United States v. Vasquez*, 48 M.J. 426 (C.A.A.F. 1998) (the court appears to weigh the evidence on one aspect of the defense of duress).

e) The defense may affirmatively waive instruction on lesser included offenses. *United States v. Strachan*, 35 M.J. 362 (C.M.A. 1992).

f) However, the defense does not have an "all or nothing" option. If the prosecution (or the military judge) wants the instruction on the lesser included offense, the military judge can read that instruction.

(1) Either party may request a lesser included offense instruction. *United States v. Miergrimando*, 66 M.J.34 (C.A.A.F. 2008).

(2) The military judge can instruct on a lesser included offense even over defense objection. *United States v. Emmons*, 31 M.J. 108 (C.M.A. 1990)(the prosecution should not be denied of a conviction of the lesser included offense if the prosecution has met its burden on that lesser offense). *See also United States v. Toy*, 60 M.J. 598 (N-M. Ct. Crim. App. 2004); *United States v. Miergrimando*, 66 M.J.34 (C.A.A.F. 2008) (no error when military judge gave lesser included offense instruction and defense planned to use an "all or nothing" strategy, and military judge gave the defense an option to continue the case to remedy defense's mistaken strategy).

g) Lesser included offenses include attempts. *United States v. Brown*, 63 M.J. 735 (A. Ct. Crim. App. 2006) (error not to instruct on attempted murder when the evidence showed that the victim may have already been dead when shot).

h) The military judge may instruct on lesser included offenses in order of severity of punishment or severity of the elements of the offenses. *United States v. Emmons*, 31 M.J. 108 (C.M.A. 1990).

i) A service court may, after disapproving a conviction for an offense due to an error, approve a conviction for the lesser included offense whose instruction was not considered, and instructed upon at the trial and in fact had been waived by both parties. The court's authority comes from Article 66(c), UCMJ which allows the court to consider the entire record. *United States v. Upham*, 66 M.J. 83 (C.A.A.F. 2008).

j) Where some LIOs may be time-barred by the statute of limitations, the military judge has an affirmative duty to personally discuss the issue with the accused, and if not waived by the accused, to modify the instructions to include only the period of time for those LIOs that are not time-barred by the statute of limitations. *United States v. Thompson*, 59 M.J. 432 (C.A.A.F. 2004).

C. Standard of review for required instructions.

1. "The propriety of the instructions given by a military judge is reviewed *de novo*." *United States v. Quintanilla*, 56 M.J. 37, 83 (C.A.A.F. 2001); *United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006).

2. Erroneous instructions and lack of proper instructions are reviewed for prejudice. Art. 59(a).

a) When the erroneous instruction is of a constitutional dimension (undermines the fundamental trial structure), the test for prejudice is harmless beyond a reasonable doubt. *United States v. Cowan*, 42 M.J. 475 (C.A.A.F. 1995).

(1) If the military judge omits an element *entirely*, the error is *per se* prejudicial. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988).

(2) However, if the judge adequately identifies the element but gives an *erroneous* instruction on it, that error *may* be tested for prejudice, with the prejudice test being determined by whether the error was of a constitutional dimension or not. *Mance*, 26 M.J. 244; *United States v. Cowan*, 42 M.J. 475 (C.A.A.F. 1995).

b) When the erroneous instruction is not of a constitutional dimension, the test for prejudice is harmless error. *United States v. Cowan*, 42 M.J. 475 (C.A.A.F. 1995).

c) Effect of failure to object to erroneous instructions or to request certain instructions.

(1) R.C.M. 920(f) states that failure to object to an instruction or to the omission before the members close to deliberate constitutes waiver of the objection in the absence of plain error.

(2) However, in *United States v. Taylor*, 26 M.J. 127, 128 (C.M.A. 1988), the court restricted that language to only those instructions that relate to R.C.M. 920(e)(7) ("such other" instructions). The court held that this rule does not apply to required instructions, such as those on elements, defenses, and due process principles. *See also United States v. Wolford*, 62 M.J. 418 (C.A.A.F. 2006); *United States v. Smith*, 50 M.J. 451 (C.A.A.F. 1999) (failure to object to erroneous instructions given by the military judge does not waive appellate review of the instructions given; affirmative waiver on the record is required).

(3) Failure to object does not result in plain error analysis; rather, the test for error is *de novo* and the test for prejudice is determined by whether the error was of a constitutional dimension or not. *United States v. Cowan*, 42 M.J. 475 (C.A.A.F. 1995).

(4) However, failure to give an amplifying instruction on the element (fully defining "wrongfulness," for example) is tested for plain error if the defense counsel does not request that instruction or fails to object to an incorrect amplifying instruction. *United States v. Glover*, 50 M.J 476 (C.A.A.F. 1999); *United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003); *United States v. Brewer*, 61 M.J. 425 (C.A.A.F. 2005).

X. Instructions on Defenses

A. Instructions on findings shall be given before or after arguments by counsel, or at both times. R.C.M. 920(b).

1. Chapter 5 of the Benchbook contains the instructions on special and other defenses. Chapter 6 contains the instructions for lack of mental responsibility and partial mental responsibility.

2. The timing is within the sole discretion of the military judge. R.C.M. 920(b) discussion.

B. Required instructions. Art. 51(c), R.C.M. 920(e)(3).

1. A description of any special defense under R.C.M. 916 in issue.

a) Special defenses are those defenses that, while not denying that the accused committed the acts charged, seek to deny criminal responsibility for those acts. R.C.M. 916(a).

b) Alibi and good character are not special defenses; rather, they are failure of proof offenses. R.C.M. 916(a) discussion.

c) Partial mental responsibility (Instruction 6-5) and evidence that negates *mens rea* (Instruction 5-17) are failure of proof defenses but the military judge has a sua sponte duty to instruct on them. The partial mental responsibility instruction is only read if the evidence has raised a lack of mental responsibility defense *and* there is evidence that tends to negate *mens rea*. Note that both instructions will be read. If the evidence has not raised the lack of mental responsibility defense, use Instruction 5-17.

d) Voluntary intoxication is considered a special defense for purposes of requiring an instruction. *United States v. Hearn*, 66 M.J. 770 (A. Ct. Crim. App. 2008). The court found that some evidence of *severe* intoxication is required to trigger an instruction. The court developed a three-prong test to determine whether a voluntary intoxication is required:

(1) The crime charged includes a mental state;

(2) There is evidence of impairment do to the ingestion of alcohol or drugs;

(3) There is evidence that the impairment affected the defendant's ability to form the required intent or mental state.

e) The description must adequately cover the concepts of the defense so that the panel can fairly consider the defense theory. *United States v. Dearing*, 63 M.J. 478, 483 (C.A.A.F. 2006).

2. The military judge has a *sua sponte* duty to instruct on special defenses reasonably raised by the evidence.

a) Whether an issue is raised is a matter for the judge to decide; the judge should not permit the court members to decide if the issue was raised. *United States v. Jones*, 7 M.J. 441 (C.M.A. 1979).

b) The test for whether a special defense is reasonably raised is whether the record contains some evidence to which the court members may attach credit if they so desire. *United States v. Davis*, 53 M.J. 202 (C.A.A.F. 2000); *United States v. Hibbard*, 58 M.J. 2003 (C.A.A.F. 2003) (applying thorough analysis to this problem, using a totality of the circumstances approach, when finding that an instruction was not required).

c) In determining whether to give a requested instruction on a defense, the judge may *not* weigh the credibility of the defense evidence. *United States v. Brooks*, 25 M.J. 175 (C.M.A. 1987).

d) The military judge also has the sua sponte duty to read the instruction on the defense of lack of mental responsibility if some evidence has raised the defense. Benchbook para. 6-4. Preliminary instructions may be read when the evidence is introduced so that the panel can put the evidence in context. Benchbook para. 6-3.

3. Defense counsel may affirmatively waive an affirmative defense instruction. *United States v. Gutierrez*, 64 M.J. 374 (C.A.A.F. 2007).

C. Failure of proof defenses.

1. The military judge ordinarily has no *sua sponte* duty to instruct on defenses which deny the accused's commission of the acts charged. *United States v. Stafford*, 22 M.J. 825 (N.M.C.M.R. 1986).

2. Alibi and good character are not special defenses; rather, they are "failure of proof" defenses. R.C.M. 916(a) discussion.

a) The Benchbook contains an instruction on alibi (Benchbook, para. 5-13). *See also United States v. Jones*, 7 M.J. 441 (C.M.A. 1979) (instruction that defense of alibi "may or may not" have been raised was improper; military judge must determine if defense has been raised and instruct accordingly).

b) The Benchbook also contains direction to the military judge on good character defenses. *See* Benchbook, para. 5-14.

c) The Benchbook contains instructions on other "failure of proof" defenses. *See* Benchbook, para. 5-17.

3. For a discussion of voluntary intoxication as a failure of proof defense, *see United States v. Hensler*, 44 M.J. 184, 187 (C.A.A.F. 1996); *United States v. Hearn*, 66 M.J. 770 (A. Ct. Crim. App. 2008) (voluntary intoxication is a required instruction).

D. Standard of review.

1. The analysis for the standard of review is the same as that for instructions on the elements of the offense. *United States v. Dearing*, 63 M.J. 478 (C.A.A.F. 2006). *See generally*, *United States v. Gillenwater*, 43 M.J. 10 (C.A.A.F. 1995); *United States v. Davis*, 53 M.J. 202 (C.A.A.F. 2000).

2. For that analysis, go to section IV.C, above.

3. Failure of proof defenses fall under R.C.M. 920(e)(7) so are subject to the waiver rules of R.C.M. 920(f).

XI. Evidentiary instructions

A. Duty to provide instructions.

1. The military judge ordinarily has no *sua sponte* duty to give these instructions. (Exceptions to this rule are found below).

2. However, when the evidence relates to a central issue at trial, in some cases it may be plain error for the military judge *not* to give a sua sponte evidentiary instruction. *See United States v. Kasper*, 58 M.J. 314 (C.A.A.F. 2003) (when the government introduced "human lie detector" testimony through an OSI agent, it was plain error for the judge not

to give a *sua sponte* curative instruction, even though defense counsel did not request one, because the testimony involved a central issue at trial -- the appellant's credibility).

3. Evidentiary instructions are found in chapter 7 of the Benchbook.

B. Summarizing the evidence. R.C.M. 920(e) discussion.

1. The military judge may summarize and comment upon evidence. However, the military judge should:

a) Present an accurate, fair, and dispassionate statement of what the evidence shows;

b) Not depart from an impartial role;

c) Not assume as true the existence or nonexistence of a fact in issue when the evidence is conflicting or disputed, or when there is no evidence to support the matter;

d) Make clear that the members must exercise independent judgment as to the facts.

2. *See generally United States v. Figura*, 44 M.J. 308 (C.A.A.F. 1996).

C. Standard of review.

1. The military judge's ruling to issue or not issue an instruction that is not required is tested for abuse of discretion. *United States v. Thompson*, 31 M.J. 125 (C.M.A. 1990); *United States v. Forbes*, 61 M.J. 354 (C.A.A.F. 2005).

2. Failure to object to an erroneous instruction or to request an omitted (non-mandatory) instruction constitutes waiver. R.C.M. 920(f). This triggers plain error analysis, *United States v. Kasper*, 58 M.J. 314 (C.A.A.F. 2003).

3. The test for prejudice depends on whether the error was of constitutional dimension. *See generally United States v. Forbes*, 61 M.J. 354 (C.A.A.F. 2005).

D. Judicial notice. Benchbook, para. 7-6.

1. The military judge *shall* give an instruction whenever he or she takes judicial notice of any matter. *See* Mil. R. Evid. 201 and 201A.

E. Credibility of witnesses. Benchbook, para. 7-7.

1. This instruction should be given upon request or when appropriate and *must* be given when the credibility of a principal witness or witness for the prosecution has been assailed by the defense.

F. Failure to testify. Benchbook, para. 7-12.

1. General rule. When the accused does not testify at trial, defense counsel may request that the members of the court be instructed to disregard that fact and not to draw any adverse inference from it. Defense counsel may request that the members not be so instructed. Defense counsel's election shall be binding upon the military judge except that the military judge may give the instruction when the instruction is necessary in the interests of justice. Mil. R. Evid. 301(g).

2. In *United States v. Forbes*, 61 M.J. 354 (C.A.A.F. 2005), the court adopted the following analysis. The military judge is bound by the defense election unless the judge performs a balancing test that weighs the defense concerns against the case-specific interests of justice. This is the same balancing test that is found in M.R.E. 403.

Something more than just a generalized fear that the panel will hold it against the accused must be present. If the military judge follows that analysis, she will be granted abuse of discretion on review. If she does not, the test will be de novo. If there is error, then the test for prejudice is: a presumption of prejudice, where the burden shifts to the government to prove by a preponderance of the evidence that no prejudice exists.

3. If the members ask a question that implicates the accused's silence, the military judge has an affirmative duty to give the instruction. *United States v. Jackson*, 6 M.J. 116 (C.M.A. 1979).

G. Uncharged misconduct. Benchbook, para. 7-13.

1. The military judge is required to instruct on the limited use of uncharged misconduct "upon request." Mil. R. Evid. 105.

2. Instruction may be required even absent defense request. *United States v. Barrow*, 42 M.J. 655 (A.F. Ct. Crim. App. 1995) (despite defense request not to give limiting instruction regarding uncharged misconduct, one was required because "[n]o evidence can so fester in the minds of court members").

3. Timing of instruction. *United States v. Levitt*, 35 M.J. 114 (C.M.A. 1992). Instruction should be given immediately following introduction of evidence and repeated before deliberations.

H. Spill-over effect of charged misconduct. Benchbook, para. 7-17.

1. This instruction should be given, and might be required, whenever unrelated but similar offenses are tried at the same time. *See United States v. Myers*, 51 M.J. 570 (N-M. Ct. Crim. App. 1999) (failure to give requested spill-over instruction was of constitutional dimension).

I. Cross-racial identification (as it relates to Benchbook para. 7-7-2, eyewitness identification).

1. This instruction should be given if cross-racial identification is in issue. The mere fact that an eyewitness and the accused are of different races does not require instruction – cross-racial identification must be a "primary issue" in the case. *United States v. Thompson*, 31 M.J. 125 (C.M.A. 1990).

J. Variance. Benchbook, paras. 7-15 and 7-16.

1. This instruction should be given if the evidence indicates that the offense occurred but the time, place, amount, etc. is different than that charged.

a) *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003). The appellant was tried for wrongful use of ecstasy on "divers occasions." The government presented evidence of six uses, and after being instructed on variance, the panel found him guilty of use on "one occasion." The court reversed, holding that where a specification alleges wrongful acts on "divers occasions," any findings by exceptions and substitutions that remove the "divers occasions" language must specify the particular instances of conduct upon which the findings are based.

b) *See also United States v. Seider*, 60 M.J. 36 (C.A.A.F. 2004) (citing *Walters* and holding that the lower court could not conduct an Art. 66 review when the members excepted the words "divers occasions" from their findings and did not indicate which of the two instances the accused was guilty); *United States v. Augspurger* 61 M.J. 189 (C.A.A.F. 2005).

2. However, a factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of those means beyond a reasonable doubt. *United States v. Brown*, 65 M.J. 356 (C.A.A.F. 2007); *United States v. Hardy*, 46 M.J. 67, 73 (C.A.A.F. 1997).

XII. Sentencing Instructions

A. Instructions on sentencing *shall* be given after arguments by counsel on sentencing and before the members close to deliberate. The military judge may, upon request of the members, any party, or *sua sponte*, give additional instructions at a later time. Instructions must be given orally, but may, in addition, be in writing. R.C.M. 1005(b) and (d).

1. Chapter 2 of the Benchbook contains the sentencing instructions.

B. Required Instructions. R.C.M. 1005(e).

1. Maximum punishment.

a) Military judge must instruct on the correct maximum punishment, but not how the amount was reached (unitary sentencing). *United States v. Purdy*, 42 M.J. 666 (A. Ct. Crim. App. 1996). *See also United States v. Reyes*, 63 M.J. 265 (2006) (reversing where the military judge incorrectly instructed that a dishonorable discharge was available).

b) Punishments other than the maximum. The military judge has no *sua sponte* duty to instruct on other punishments. Instruction on the maximum punishment plus a proper sentence worksheet is sufficient. *United States v. Brandolini*, 13 M.J. 163 (C.M.A. 1982).

2. A statement of the effect any sentence announced that includes a punitive discharge and confinement, or confinement in excess of six months, will have on the accused's entitlement to pay and allowances.

3. Procedures for deliberations and voting.

a) Failure to give instruction that members are to begin voting with the lightest proposed sentence is not plain error. *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986). However, in capital cases, this is error. *United States v. Thomas*, 46 M.J. 311 (C.A.A.F. 1997); *United States v. Simoy*, 50 M.J. 1 (C.A.A.F. 1999).

b) Collecting and counting votes.

(1) *United States v. Truitt*, 32 M.J. 1010 (A.C.M.R. 1991). Failure to instruct that junior member collects and counts the votes and the president shall check the count was harmless in the absence of evidence that the panel actually voted incorrectly.

(2) *But see United States v. Harris*, 30 M.J. 1150 (A.C.M.R. 1990). Failure to give instructions that voting was to be by secret written ballot and that the junior member was to collect and count the ballots was error. The court declined to presume that the correct procedures were followed and reversed.

4. The members are solely responsible for selecting the sentence and they cannot rely upon mitigating action by the convening authority.

5. Members must consider all matters in extenuation, mitigation and aggravation. R.C.M. 1005(e)(5). If the accused states irrelevant matters in her unsworn statement, the military judge may give a *Friedmann* instruction (based on *United States v. Friedmann*,

53 M.J. 800 (A. F. Ct. Crim. App. 2000)); *see also United States v. Barrier*, 61 M.J. 482 (C.A.A.F. 2005).

C. Requested instructions.

1. After presentation of matters relating to sentence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. R.C.M. 1005(c).

2. The analysis is the same as described in section II above. *United States v. Simmons*, 48 M.J. 193 (C.A.A.F. 1998).

3. Often, defense requests relate to identifying certain things as being mitigating.

a) *United States v. Simmons*, 48 M.J. 193 (C.A.A.F. 1998). When there is a dispute as to whether the mitigator exists, the preferable method is for the judge to modify a requested instruction to say that the members can consider the matter in mitigation if they decided the mitigator exists.

b) *United States v. Perry*, 48 M.J. 197 (C.A.A.F. 1998). Accused convicted of forcible sodomy and other offenses. Defense wanted an instruction in sentencing about the fact that the accused dismissal may cause the accused to pay back his education. The judge refused to give the instruction, claiming that it was collateral and there were too many factors to know for certain whether the money would be taken back. CAAF agreed.

c) *United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F. 2001) (holding that military judges are required to instruct on the impact of a punitive discharge on retirement benefits, "if there is an evidentiary predicate for the instruction and it is requested").

D. Standard of review.

1. Failure to object to an instruction or omission of instruction constitutes waiver of the objection in the absence of plain error. R.C.M. 1005(f); *United States v. Reyes*, 63 M.J. 265 (C.A.A.F. 2006).

2. The test for prejudice is whether the error materially prejudiced a substantial right. The question is whether the panel might have been substantially swayed by the error during the sentencing process. *United States v. Reyes*, 63 M.J. 265 (C.A.A.F. 2006).

XIII. Instruction Drills

A. Read through the Archie fact pattern or your current fact pattern. Skim through the Crimes and Defenses chapters of this Deskbook and identify the legal issues in your case. Go to Appendix I of the Benchbook. Now identify which instructions you would want the military judge to read to the panel members. After you have identified the instructions you would want read, identify what instructions you would have to draft to adequately cover a point of law that you discovered in the Crimes and Defense chapters that is not covered in the Benchbook.

B. Once you have done that, construct an argument using an argument worksheet based on an instruction you have identified (or want to write).

XIV. General Findings in the Military – RCM 918(a)

A. Guilty;

B. Not Guilty;

C. Guilty by Exceptions (with or without substitutions);

D. Guilty of Lesser Included Offense (LIO).

1. RCM 918(a)(1) permits a plea of "not guilty to an offense as charged, but guilty of a named lesser included offense." What constitutes a "named lesser included offense" and whether this rule can be reliably applied is questionable in light of *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010).

2. When plea to an LIO is entered, defense counsel should provide a written revised specification. Revised specification should be an appellate exhibit.

E. Not Guilty Only by Reason of Lack of Mental Responsibility.

XV. What May / May Not Be Considered in Reaching Findings? RCM 918(c).

A. Matters properly before the court (*e.g.*, testimony of witnesses, real and documentary evidence). Does not include documents provided *ex parte* to the military judge. *But see United States v. McCarthy*, 37 M.J. 595 (A.F.C.M.R. 1993) (finding no prejudice when military "finds" missing performance evaluation report during deliberations and "adds" it to the record without explaining where he got it).

B. Specialized knowledge – *i.e.*, gained by member from source outside court-martial – may not be considered.

1. *United States v. Davis*, 19 M.J. 689 (A.C.M.R. 1984). Improper for court member to visit the crime scene to determine quality of lighting. Convening authority should have ordered an evidentiary hearing to determine whether the accused was prejudiced.

2. *United States v. Johnson*, 23 M.J. 327 (C.M.A. 1987). During deliberations, demonstration by member with martial arts expertise did not constitute extraneous prejudicial information where the demonstration was merely an examination and evaluation of evidence already produced.

C. Member may not communicate with witnesses.

1. *United States v. Elmore*, 33 M.J. 387 (C.M.A. 1991). Blood expert witness had dinner with the members. Extensive *voir dire* established the lack of taint.

2. *United States v. White*, 36 M.J. 284 (C.M.A. 1993). Although any contact between witnesses and members gives rise to perceptions of unfairness, it is not automatically disqualifying. In this case the *voir dire* disclosed in full the innocuous nature of the contact.

D. Members may not seek information that is not available in open court. *United States v. Knight*, 41 M.J. 867 (Army Ct. Crim. App. 1995). Three members repeatedly quizzed bailiff/driver about matters presented in court out of presence of members, and sought his medical opinion – he was also an EMT – about bruising, which was a key issue in sexual assault prosecution.

E. Split Plea. Unless the defense requests (or offenses stand in greater – LIO relationship), panel members may not consider, and should not be told, that the accused earlier plead guilty to some offenses. *United States v. Kaiser*, 58 M.J. 146 (2003).

F. Use of providence inquiry statements in mixed plea cases.

1. Admissions in a plea of guilty to one offense cannot be used as evidence to support a finding of guilty of an essential element of a separate and different offense, but the elements established by the guilty plea inquiry and stipulation of fact may be considered in trial on contested charges, if the pled to charge is LIO of the contested charge. *United States v. Abdullah*, 37 M.J. 692 (A.C.M.R. 1993) (relying on *United States v. Caszatt*, 29 C.M.R. 521, 522 (1960)). *See also United States v. Rivera*, 23 M.J. 89, 95 (C.M.A. 1986) (guilty plea to one offense can only be considered on findings when the plea is to a lesser included offense of the same specification as to which the plea is being offered into evidence).

2. Plea of guilty may be used to establish common facts and elements of a greater offense within the same specification, but may not be used as proof of a separate offense. The elements of a LIO established by guilty plea (but not the accused's admissions made in support of that plea) can be used to establish common elements of the greater offense. *United States v. Ramelb*, 44 M.J. 625 (Army Ct. Crim. App. 1996).

3. Admissions concerning the elements of the LIO made during providence inquiry can be considered insofar as the admissions relate to common elements of the greater offense, but it was error for the military judge to consider the accused's admissions that pertained to different elements of the greater offense. *United States v. Grijalva*, 55 M.J. 223 (2001).

G. Matters taken into the deliberation room may be considered. **RCM 921(b)**.

1. Notes of the court members.

2. Exhibits admitted into evidence.

3. Stipulations of fact are taken into the deliberation room so long as the military judge sufficiently ensures that the accused understood the effect of the stipulation of fact entered into with the Government. See *United States v. Resch*, 65 M.J. 233 (C.A.A.F. 2007).

4. Testimonial substitutes (depositions, stipulations of expected testimony) do not go into the deliberation room. *See United States v. Austin*, 35 M.J. 271 (C.M.A. 1992) (finding that a verbatim transcript of alleged victim's testimony at pretrial investigation was not an "exhibit" that members could take into the deliberation room).

H. Fact finder may not consider submitted Chapter 10. *United States v. Balagna*, 33 M.J. 54 (C.M.A. 1991). Character witness acknowledged (upon prodding in open court by MJ) that he could not vouch for accused because had seen a "report." When asked by the MJ what that report was, the witness responded "a request for Chapter 10." Court finds no "extraordinary circumstances" requiring the declaration of a mistrial since the "adverse impact can be neutralized by other means." *Id.* at 57. The MJ twice instructed the members that the evidence was inadmissible and prior to findings advised the

members that it was to be "completely disregarded." *See also United States v. Vasquez*, 54 M.J. 303 (C.A.A.F. 2001).

I. Findings worksheet is used to assist members in putting findings in order. *See* Appendix 10, Manual for Courts-Martial, Forms of Findings.

XVI. Deliberations and Voting on Findings. RCM 921.

A. Basic rules and procedures.

1. Deliberations. **RCM 921(a) and (b)**.

2. Only members present. RCM 921(a).

3. No superiority in rank used to influence other members. RCM 921(a).

4. May request reopening of court to have record read back or for introduction of additional evidence. RCM 921(b).

5. Voting. **RCM 921(c)**.

6. By secret written ballot, with all members voting.

7. Guilty only if at least 2/3 vote for guilty.

8. Fewer than 2/3 vote for guilty, then finding of not guilty results.

9. Special procedure to find accused not guilty by reason of lack of mental responsibility.

10. Procedure. **RCM 921(c)(6)**.

B. Straw polls.

1. *United States v. Fitzgerald*, 44 M.J. 434 (1996). Two specifications each alleged multiple discrete acts of sodomy and indecent acts. As to discrete acts alleged in specifications, MJ suggested straw vote on specification as charged, then treating individual discrete acts separately as lesser included offenses. Instructions likely inured to benefit of accused, and brought no objection from counsel. Court found waiver by defense, no plain error, and affirmed findings and sentence.

2. *United States v. Lawson*, 16 M.J. 38 (C.M.A. 1983). Straw polls, *i.e.*, informal non-binding votes, are not specifically prohibited, but are discouraged. Cannot be used directly or indirectly to allow superiority of rank to influence opinion.

XVIII. Instructions on Findings. RCM 920.

A. *United States v. Hardy*, 46 M.J. 67 (1997). MJ cannot direct panel to accept findings of fact, or to return verdict of guilty. In non-capital case, panel returns only general verdict. In answering panel question regarding required finding, MJ refused trial counsel request to instruct that proof beyond reasonable doubt as to all elements meant panel must find accused guilty.

B. *United States v. Gibson*, 58 M.J. 1 (2003). MJ erred by failing to give defense requested accomplice instruction. Three prong test to determine if failure to give requested instruction is reversible error: (1) was requested instruction accurate; (2) was requested instruction substantially covered by the instructions given; and (3) if not substantially covered, was the instruction on such a vital point that it (failure to give) deprived the accused of a defense or seriously impaired its effective presentation. If one through three are met, the burden of persuasion shifts to the Government to show that the error was harmless, that is, failure to give the instruction did not have a "substantial influence on the findings." If it had a substantial influence or the court is left in "grave doubt" as to the validity of the findings, reversible error has occurred.

C. *United States v. Hibbard*, 58 M.J. 71 (2003). MJ did not err by failing to give mistake of fact instruction in rape case where defense theory throughout trial, to include cross examination of victim, was that no intercourse occurred.

D. *United States v. Lewis*, 65 M.J. 85 (2007). MJ erred by giving an incomplete instruction regarding self-defense by failing to instruct the members that a mutual combatant could regain the right to self-defense when the conflict is escalated or, is unable to withdraw in good faith. "When the instructional error raises constitutional implications, the error is tested for prejudice using a "harmless beyond a reasonable doubt" standard." *US v Lewis*, 65 M.J. 85, __ (2007) citing *United States v. Wolford*, 62 M.J. 418, 420 (2006).

XIX. Announcement of Findings. RCM 922.

A. *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 technical violation of RCM 922(a) occurred, MJ commended for using post-trial session to remedy oversight.

B. *United States v. Perkins*, 56 M.J. 825 (Army Ct. Crim. App. 2002). 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. Court

notes that a proceeding in revision under RCM 1102 would have been an appropriate course of action had the MJ or SJA caught the mistake.

XX. Reconsideration of Findings. UCMJ art. 52, RCM 924.

A. Members may reconsider any finding before such finding is announced in open session. RCM 924(a).

1. *United States v. Thomas*, 39 M.J. 626 (N.M.C.M.R. 1993), *rev'd in part* 46 M.J. 311 (1997). (CAAF affirmed the findings and reversed the sentence due to a sentencing instruction error). Accepted practice is to instruct prior to deliberation on findings that if any member desires to reconsider a finding, the MJ should be notified so that reconsideration instructions may be given in open court. Instruction on reconsideration is required **only** if a court member indicates desire to reconsider.

2. *United States v. Jones*, 31 M.J. 908 (A.F.C.M.R. 1990). Appellate court orders rehearing on sentence. Can the second panel reconsider findings? HELD: No. RCM 924(a) states "Members may reconsider any finding reached by them." Also, the appellate court had already affirmed the findings of guilty. Once affirmed, "they are no longer subject to reconsideration."

B. Judge alone. MJ may reconsider guilty finding any time before announcement of sentence. RCM 924(c).

XXI. Defective Findings.

A. Concerns: Sufficient basis for court to base its judgment and protect against double prosecution.

1. Divers occasions.

a) *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003). Appellant charged with drug use on divers occasions. The evidence put on by the government alleged six separate periods. The panel returned a finding by exceptions and substitutions (excepting the words "divers occasions" and substituting the words "one occasion"), but did not specify the time frame. The CAAF held that the findings were ambiguous, setting aside the findings and sentence. The court noted that where a specification alleges acts on divers occasions, the members must be instructed that any findings by exceptions and substitutions must reflect the specific instance of conduct on which the modified findings are made.

2. *United States v. Wilson*, 67 M.J. 423 (C.A.A.F. 2009). Appellant charged with rape of a child on divers occasion. The testimony of the victim, and a sworn statement of the appellant admitted at trial, indicated that there were two possible occasions when a rape may have occurred. The military judge found the appellant guilty, excepting the words "on divers occasions," but did not indicate which occasion was the basis for the single rape conviction. The CAAF held that a court of criminal appeals did even have the authority to review the cases because the findings where ambiguous – the appeals court would not know which occasion the appellant was guilty of. The CAAF dismissed the rape charge with prejudice. The CAAF identified two methods to prevent such a drastic remedy in future cases. First, when "on divers occasions" is excepted out, the substituted findings must clearly identify which conduct served as a basis for the findings. Second, in a judge alone trial, a clear statement from the military judge on the record explaining which conduct formed the basis for the conviction.

3. *United States v. Trew*, 68 M.J. 364 (C.A.A.F. 2010). Appellant charged with indecent acts on diverse occasions. Military judge finds him guilty of LIO of assault consummated by battery on a child under sixteen and excepts the words "divers occasions." Trial counsel asks military judge to clarify if the guilty finding was for "divers occasions as charged or is that just for—for one event or—will you clarify that further for us? The military judge replied "[i]t is on the one occasion." NMCCA found the findings "were not ambiguous when placed it in the context of the entire record." CAAF reversed the NMCCA, stating that NMCCA's "distinction between 'evaluat[ing] evidence' and 'consider[ing] the record as a whole to clarify the meaning and intent of the "military judge's words' appears to be a distinction without a difference." CAAF finds findings "ambiguous" and unreviewable, and dismissed the charges with prejudice.

4. *United States v. Ross*, 68 M.J. 415 (C.A.A.F. 2010). Appellant found guilty by military judge alone of possession of child pornography, excepting the words "on divers occasions." CAAF holds findings are ambiguous and dismisses charge with prejudice. Even though possession of child pornography is a continuing offense and the words "on divers occasions" may be "surplusage," on these facts they were not because the images were on three different media. Because the images could have been on more than one form of storage media, charging "on divers occasions" was appropriate, and excepting that language without identifying which media the child pornography was on created an ambiguous finding.

5. *United States v. Saxman*, 69 M.J. 540 (N. M. Ct. Crim. App. 2010). Appellant charged with possession of twenty-two child pornography videos on a computer. Appellant was convicted by officer members by exceptions and substitutions of possessing only four of the charged twenty-two videos. The announced finding did not specify which four videos formed the basis of the guilty finding. NMCCA applies the *Walters* and *Wilson* logic to these facts and dismisses charge with prejudice. Members' finding meant the appellant was not guilty of possessing eighteen of the twenty-two videos. Without knowing exactly which eighteen videos were not child pornography, the findings are ambiguous.

B. Variance.

1. *United States v. Teffeau*, 58 M.J. 62 (2003). Modification of a lawful general order charge from "wrongfully providing alcohol to [JK]" to "wrongfully [ ] engaging in and seeking [ ] a nonprofessional, personal relationship with [JK], a person enrolled in the Delayed-Entry Program" held to be a material variance; finding of guilty to the Charge and Specification set aside. Variance cannot change the nature of the offense or increase the seriousness of the offense or its maximum punishment.

2. *United States v. Pryor*, 57 M.J. 821 (N-M. Ct. Crim. App. 2003). MJ erred by not entering guilty findings by exceptions and substitutions when the evidence in the stipulation of fact and the accused's providence inquiry narrowed the period of the accused's criminality. By simply entering findings of guilty to the specifications as written, the appellant was prejudiced by a court-martial record that "indicates a pattern of criminal conduct occurring over a greater period of time than actually took place." The court provided relief by modifying the findings and reassessing the sentence based on the modified findings.

C. Bill of particulars.

1. *United States v. Harman*, 66 M.J. 710 (Army Ct. Crim. App. 2008). MJ erred by accepting a verdict from the panel that specifically incorporated the bill of particulars. ACCA amended the specification and charge to implement the panel's clear intent.

D. Announcement of findings.

1. *United States v. Mantilla*, 36 M.J. 621 (A.C.M.R. 1992). After findings of guilty have been announced, MJ may seek clarification any time before adjournment, and error in announcement of findings may be corrected by new announcement before final adjournment of court-martial. Such correction is not reconsideration; accused, however, should be given opportunity to present additional matters on sentencing.

2. *United States v. Perez*, 40 M.J. 373 (C.M.A. 1994). President's disclosure of members' unanimous vote that overt act alleged in support of conspiracy specification had not been proven, during discussion of proposed findings as reflected on findings worksheet, was not announcement of finding of not guilty and had no legal effect. MJ had authority to direct reconsideration of the inconsistent verdict. Alternatively, MJ could have advised members that findings amounted to a finding of not guilty and advised them of their option to reconsider.

XXII. Impeachment of Findings. RCM 923.

A. Strong policy against the impeachment of verdicts.

1. Promotes finality in court-martial proceedings.
2. Encourages members to fully and freely deliberate.

B. General rule: Deliberative privilege – court deliberations are privileged (MRE 509).

C. Exceptions: Court members' testimony and affidavits cannot be used after the court-martial to impeach the verdict except in <u>three</u> limited situations. RCM 923; MRE 606. *See United States v. Loving*, 41 M.J. 213 (C.M.A. 1994).

1. Outside influence (*e.g.*, bribery, jury tampering).

2. Extraneous prejudicial information.

3. *United States v. Witherspoon*, 16 M.J. 252 (C.M.A. 1983). Improper court member visit to crime scene.

4. *United States v. Almeida*, 19 M.J. 874 (A.F.C.M.R. 1985). No prejudice where court member talked to witness about Thai cooking during a recess in the trial.

5. *United States v. Elmore*, 33 M.J. 387 (C.M.A. 1991). Blood expert witness had dinner with the members. Extensive *voir dire* established the lack of taint.

6. Unlawful command influence.

7. *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.

8. *United States v. Accordino*, 20 M.J. 102 (C.M.A. 1985). President of court can express opinions in strong terms and call for a vote when discussion is complete or further debate is pointless. It is improper, however, for the president to use superiority of rank to coerce a subordinate to vote in a particular manner.

9. Possible voting irregularity not enough. *United States v. Brooks*, 42 M.J. 384 (1995). Deliberative privilege precludes MJ from entering a finding of not guilty when he concludes that members may have come to guilty finding as a result of improperly computing their votes.

10. *United States v. Hardy*, 46 M.J. 67 (1997). "[T]he protection of the deliberative process outweigh[s] the consequences of an occasional disregard of the law by a court-martial panel." *Id*. at 74.

D. Discovery of impeachable information.

1. Polling of court members is prohibited. RCM 922(e). May not impeach findings with post-trial member questionnaires. *See United States v. Heimer*, 34 M.J. 541 (A.F.C.M.R. 1991). MRE 606 establishes the only three permissible circumstances to impeach a verdict. Post-trial questionnaires improperly "sought to impeach each panel member's subjective interpretation of the evidence – the precise material the rule seeks to protect." *Id*. at 546.

2. *United States v. Ovando-Moran*, 48 M.J. 300 (1998). Gathering information to impeach a verdict is not a proper basis for post-trial interviews by counsel of panel members. Information in counsel's post-trial affidavit that members improperly considered testimony and were impacted by military judge's comments during trial fell outside bounds of MRE 606(b) to impeach findings of court-martial.

3. Additional cases involving impeachment: *United States v. Hance*, 10 M.J. 622 (A.C.M.R. 1980*); United States v. Higdon*, 2 M.J. 445 (A.C.M.R. 1975); *United States v. Harris*, 32 C.M.R. 878 (A.F.B.R. 1962).

E. Evidence introduced at sentencing for the sole purpose of impeaching the findings is inadmissible. *See infra United States v. Johnson*, 62 M.J. 31 (2005).

XXIII. Special Findings

A. Purpose. In a trial by court-martial composed of military judge alone, the military judge shall make special findings upon request by any party. Special findings may be requested only as to matters of fact reasonably in issue as to an offense and need be made only as to offenses of which the accused was found guilty. RCM 918(b).

1. "Special findings enable the appellate court to determine the legal significance attributed to particular facts by the military judge, and to determine whether the judge correctly applied any presumption of law, or used appropriate findings." *United States v. Hussey*, 1 M.J. 804 (A.F.C.M.R. 1976).

a) "Special findings serve many of the same functions as do jury instructions in trials before a court of members." Captain Lee D. Schinasi, *Special Findings: Their Use at Trial and On Appeal*, 87 Mil. L. Rev.73, 74 (Winter, 1980). "Special findings are to a bench trial as instructions are to a trial before members. Such procedure is designed to preserve for appeal questions of law. It is the remedy designed to rectify misconceptions regarding: the significance of a particular fact; the application of any presumption; or the appropriate legal standard." *Id.* at 105 (quoting *United States v. Falin*, 43 C.M.R. 702 (A.C.M.R. 1971)).

2. "Viewed together, special findings can make a record for appellant, or protect it for the government." *Schinasi* at 121.

3. Analogues (Specifically Mandated Occasions for Special Findings)

4. RCM 905(d) - Motions: "Where factual issues are involved in determining a motion, the military judge shall state the essential findings on the record."

5. MRE 304(d)(4) - Confessions and Admissions: "Where factual issues are involved in ruling upon such motion or objection, the military judge shall state essential findings of fact on the record."

6. MRE 311(d)(4) - Evidence Obtained From Unlawful Searches and Seizures: "Where factual issues are involved in ruling upon such motion or objection, the military judge shall state essential findings of facts on the record."

7. MRE 312(f) - Eyewitness Identification: "Where factual issues are involved in ruling upon such motion or objection, the military judge shall state his or her essential findings of fact on the record."

B. Trial Procedures

1. Who may request special findings:

a) Any party to the proceeding. RCM 918(b). Whenever the government and the defendant in a criminal case waive a jury, they are entitled to not just a verdict one way or the other, but to the reasons behind it." *Schinasi* at 86 (citing *United States v. Clark*, 123 F.Supp.608 (S.D. Cal 1954)).

2. The military judge acting sua sponte. *Schinasi* at 81 (discussing *United States v. Figueroa*, 377 F.Supp. 645 (S.D.N.Y. 1970)).

3. What the party may request: Any party can request special findings on any facts reasonably related to an important issue, but may make only one set of requests per case. RCM 918(b).

4. When to make such a request: At any time before general findings are announced. RCM 918(b).

5. How to make the request: There is no specified format, and the rule allows for either verbal or written requests. However, the military judge has the authority to require any request be specific and in writing. RCM 918(b).

6. What issues merit special findings:

7. "Not only findings on elements of the offense, but also on all factual questions reasonably in issue prior to findings as well as controverted issues of fact which are deemed relevant to the sentencing decision," including jurisdictional issues. *Schinasi* at 107 (citing *United States v. Falin*, 43 C.M.R. 702, 703 (A.C.M.R. 1971)). Also, the judge must ensure they are made whenever another rule requires “essential findings of fact.”

8. Issues which are irrelevant, immaterial, or so remote as to have no effect on the trial's outcome do not merit special findings. *Schinasi* at 107-108 (discussing *United States v. Burke*, 4 M.J. 530 (N.C.M.R. 1977)). Special findings are also not required when counsel desires to know what evidence was considered unimportant by the trial judge. *Schinasi* at 91 (citing *United States v. Peterson*, 338 F.2d 595 (7th Cir. 1964)).

9. How the military judge must issue special findings: Verbally on the record or in writing. RCM 918(b).

10. When the military judge must enter findings: During or after the court-martial, but in any event before authentication of the record, as they must be included with the record of trial. RCM 918(b); RCM 1103(b)(3)(A)(iv).

C. Use by Defense Counsel

1. When creatively designed, special findings requests can ensure that the trial judge fully understands the defense position. *Schinasi* at 121. "Virtually all trial judges agree that special findings help clarify those determinations..." *Schinasi* at 88 (citing *United States v. Johnson*, 496 F.2d 1131 (5th Cir. 1974)).

2. If there is any inkling that the judge is laboring under any misapprehension of law or fact..." special findings may reveal that misapprehension, so the defense counsel can either resolve the issue at trial, or preserve it for appeal. *Schinasi* at 88. Convictions will be reversed for example, if "inconsistent special and general findings are returned." *Schinasi* at 95, citing *United States v. Maybury*, 274 F.2d 899 (2nd Cir. 1960).

3. When the judge takes a contrary position to that requested by the defense, special findings flush-out the operative conclusions the judge has relied upon. "Findings of fact in non-jury criminal cases primarily aid the defendant in preserving questions for appeal, and aid the appellate court in delineating the factual bases on which the trial court's decisions rested." *United States v Livingston*, 459 F.2d 797, 798 (3rd. Cir.1972) (en banc).

D. Use by trial counsel

1. Prosecutors can "protect the record from appellate intervention by requiring the trial judge to clearly establish the factual and legal predicate upon which conviction will be based." *Schinasi* at 102. Special findings can also "show that the judge decided the case correctly after all." *Schinasi* at 73.

2. To "ensure that conflicting and often confusing evidence is thoroughly evaluated by the trial court, and that the law is properly applied to the facts, protecting the record from inconsistent appellant review." *Schinasi* at 88. This may be particularly important in light of Article 66(c), which allows the military appellate courts the unique ability, unlike civilian appellate courts, to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact..." *Id.*

a) "Special findings provide a concise format for establishing what evidence was considered by the bench, and, more important, what legal theory was employed to support the ultimate decision. Used in this fashion, special findings prohibit an appellate court from 'discovering' variant interpretations or irregularities in the record which could be used to justify reversing conviction." *Schinasi* at 122.

E. *Sua sponte* use by court

1. The military judge must make all “essential findings of fact,” even if not requested. *See* MRE 304(d)(4), MRE 311(d)(4), MRE 321(f).

2. "Special findings justify themselves not only in averting an unjust act, but also in highlighting to the public, and the particular accused involved, that no injustice occurred." *Schinasi* at 80. "The existence of a rationale may not make the hurt pleasant, or even just. But the absence, or refusal, of reason is a hallmark of injustice." *Schinasi* at 80.

F. Standard of Review

1. Virtually every military court" which has addressed the issue "recognizes that it [918(b)] is based upon [Federal] Rule [of Criminal Procedure] 23(c), and attempts, as best it can, to adopt the federal practice." *Schinasi* at 102.

2. Specific findings on an ultimate issue of guilt or innocence are subject to the same appellate review as a general finding of guilt, while other special findings are reviewed for clear error. *United States v. Jones*, 2009 WL 1508418, (A.F. Ct. Crim. App) (unpublished).

3. "The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the appellant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F.2001); *United States v. Turner*, 25 M.J. 324 (C.M.A.1987); *United States v. Jones*, 2009 WL 1508418 at 3.

4. "The test for factual sufficiency is whether, after weighing the evidence in the record of trial and allowing for the fact that we did not personally see and hear the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. We review legal and factual sufficiency de novo. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)." *United States v. Jones*, 2009 WL 1508418 at 3.

G. Remedy for defective special findings

1. If the trial judge's mistake in rendering special findings is merely procedural, most appellate courts will return the case for compliance with statutory requirements. *Schinasi* at 117.

"Where a trial judge's special findings disclose that he has misperceived, ignored, or confused the law or the facts, reversal will be the result." *Schinasi* at 118 (examining *United States v. People*, 45 C.M.R. 872 (N.C.M.R. 1971); *Haywood v. United States*, 393 F.2d 780 (5th Cir. 1968). *See also United States v. McMurrin*, 69 M.J. 591 (N.M. Ct. Crim. App. 2010) (setting aside findings when military judge’s special findings omitted a critical element of the offense).

Chapter 8

I. References

A. UCMJ art. 15.

B. Manual for Courts-Martial, United States pt. V (2012) [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 only 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. 3-19*b*(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 Solder 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**. AR 27-10, para. 3-6b.

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? It 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	GRADE	SSN	UNIT & LOCATION	MONTHLY BASE PAY
Doe, John	SPC	000-00-0000	D. Co., 1-5 INF, Ft. Wainwright, AK	2,094.00

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 authourity, 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)*. I 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	SIGNATURE	DATE
Jane Doe, CPT, IN, D. Co., 1-5 INF		20101215

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. [JD] I do not demand trial by court-martial and in the Article 15 proceedings:

(1) I request the hearing be: [JD] Open [ ] Closed

(2) A person to speak in my behalf: [ ] Is requested [JD] Is not requested

(3) Matters in defense, extenuation, and/or mitigation:

[JD] Are not presented [ ] Are attached [ ] Will be presented in person

NAME AND GRADE OF SERVICE MEMBER	SIGNATURE	DATE
John Doe, SPC		20101117

4a. In a *(n)* [JD] Open [ ] Closed hearing, having considered all matters presented, I hereby make the following finding:

[JD] Guilty of All Specifications. [ ] Guilty of Some Specifications *(line out Not Guilty Specifications)*. [ ] Not Guilty of All 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 [JD] 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	SIGNATURE	DATE
Jane Doe, CPT, IN, D. Co., 1-5 INF		20101117

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	SIGNATURE	DATE
John Doe, SPC		20101117

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:

[JD] 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)* [X] Oral reprimand or admonition

The punishment(s) of reduction to Private First Class (E3) *(was / were)*

suspended, to be automatically remitted if not vacated before 20101215 *(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:

[JD] 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	Jane Doe	20101115

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

a. [JD] 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	John Doe	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.

DA FORM 2627-1, OCT 2011 PREVIOUS EDITIONS ARE OBSOLETE. Page 1 of 3 APD LF v1.00ES

SAMPLE

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	GRADE	SSN	UNIT & LOCATION
John Doe	SPC	000-00-0000	D Co., 1-5 INF, Fort Wainwright, AK

TYPE OF SUPPLEMENTAL ACTION *(OTHER THAN SUPERIOR AUTHORITY ACTING ON APPEAL) (CHECK APPROPRIATE BOX)*

☐ SUSPENSION *(Complete Item 1 below)* ☐ MITIGATION *(Complete Item 2 below)* ☐ REMISSION *(Complete Item 3 below)*

☐ SETTING ASIDE *(Complete Item 4 below)* ☒ VACATION OF SUSPENSION *(Complete Item 5 below)*

1. SUSPENSION

The punishment(s) of: _____

imposed on the above service member on _____ (date of punishment) _____ is / are

suspended and will automatically be remitted if not vacated before _____ (date).

2. MITIGATION

The punishment(s) of: _____

imposed on the above service member on _____ (date of punishment) _____ is / are mitigated to _____

3. REMISSION

The punishment(s) of: _____

imposed on the above service member on _____ (date of punishment) _____ is / are remitted.

4. SETTING ASIDE

The punishment(s) of: _____

imposed on the above service member on _____ (date of punishment) _____ is / are set aside on the basis of _____

All rights, privileges, and property affected are hereby restored.

5. VACATION OF SUSPENSION

a. The suspension of the punishment(s) of: reduction to the grade of E-3

imposed on the above service member on 20101117 (date of punishment) _____ is / are hereby vacated. The unexecuted portion(s) of the punishment(s) will be duly executed (date of punishment).

b. Vacation is based on the following offense(s): 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.

c. The service member was (was / was not) given an opportunity to rebut *(see para. 3-25, AR 27-10).*

d. The service member was (was / was not) present at the vacation proceeding *(see para. 3-25, AR 27-10).*

6. THE ORIGINAL DA FORM 2627 WAS FILED AS FOLLOWS:

☐ Performance section of the OMPF ☐ Restricted section of the OMPF. ☒ NA as soldier was an E-4 or below at start of proceedings

7. BY MY ORDER:

☒ AS THE OFFICER WHO IMPOSED THE PUNISHMENT ☐ AS THE SUCCESSOR IN COMMAND TO THE IMPOSING OFFICER ☐ AS THE SUPERIOR AUTHORITY

NAME, RANK, AND ORGANIZATION OF COMMANDER	SIGNATURE	DATE
Jane Doe, CPT, D Co., 1-5 INF		20101208

DA FORM 2627-2, OCT 2011 PREVIOUS EDITIONS ARE OBSOLETE. APD LF v1.00

SAMPLE

Chapter 9

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 <u>mandatory</u> 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 not 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 that 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 place 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

Chapter 10

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 voco 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 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) <u>and</u> 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

* 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).

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. Wieczorek*, 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)

6. *United States v. Brehm* 11-4755 Decided 10 August 2012, 4th Cir.

a) On Thanksgiving Day 2010, Sean Brehm (a South African), who was a contractor working for a U.S. company on Kandahar Airfield, Afghanistan (KAF), stabbed another contractor in the arm and stomach causing serious injuries. Brehm was taken into custody by Military Police. As part of his "Foreign Service Agreement" Brehm acknowledged and accepted that he may be subject to U.S. federal civilian criminal jurisdiction under MEJA (Military Extraterritorial Jurisdiction Act – passed in 2000 MEJA allow for the prosecution of civilians accompanying American troops overseas), by virtue of the fact that he was accompanying the U.S. Armed Forces outside the United States. As a result of the stabbing a grand jury indictment ensued whereby Brehm was charged with two counts of assault (one with a dangerous weapon, and one resulting in serious bodily injury).

Brehm pleaded guilty in Federal District Court in the Eastern District of Virginia to assault resulting in serious bodily injury. In exchange he was allowed to challenge, through appeal, the jurisdictional basis of the indictment. On appeal Brehm argued: 1) The indictment's reliance on MEJA was misplaced, in that the statute cannot be applied to him in a manner consistent with the Constitution, and 2) there lacked a sufficient nexus between himself and the United States to support the exercise of criminal jurisdiction. The court rejected Brehm's arguments and affirmed the district court conviction.

Concerning his first argument, Brehm did not challenge the constitutionality of MEJA and agreed that "under some circumstances Congress might have the authority to criminalize acts of foreign nationals." But argued that neither he nor the victim are American citizens, and that during the stabbing he was not acting in furtherance of his job duties, which of course was with an American company. The court reverted to the Constitution, specifically the power of Congress to "raise and support Armies." Such power entitles it to "make all Laws necessary and proper" to adequately support the armed forces. The court also pointed out that it is not unusual for foreign nationals to be tried in American Courts for criminal conduct that occurs within U.S. borders. However, MEJA contemplates the very conduct for which Brehm was charged: criminal "conduct outside the United States." Thus, the court concluded that the status of Brehm and his victim as foreign nationals is irrelevant, and that "rarely, we think, would a private employer include vicious attacks on third parties within an employee's job description."

To support his second argument, Brehm noted that until he came to Virginia as an accused he had never set foot in the United States, thus he lacked a sufficient nexus between himself and the United States to allow for the application of MEJA. For this, the court states that Brehm's very presence on KAF would not have been possible without a DOD Letter of Authorization entitling him to DOD support while living on KAF. Thus, while KAF is not "technically territory of the United States" the court found it a "suitable proxy for due process purposes" whereby "the imposition of American criminal law there is not arbitrary." Further, the court stated that since Afghanistan had "disclaimed any interest in prosecuting criminal conduct at KAF by those situated similarly to Brehm, due process is not offended by the United States stepping into the jurisdictional void." Finally, the court did not find any unfairness in prosecuting Brehm, in that "fair

warning does not require that the defendants understand that they could be subject to criminal prosecution in the United States so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere." Brehm should have reasonably understood that his conduct of stabbing a fellow contractor was criminal in nature.

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 <u>declared war or a contingency operation</u>, 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.)

In July of 2012 CAAF released its decision which was based on review two issues where Ali renewed his earlier arguments: 1) he does not fall within the provisions of 2(a)(10) and 2) exercising jurisdiction over him violated his Fifth and Sixth Amendment rights.

CAAF ruled that the court-martial had jurisdiction over Ali under the provisions of Article 2(a)(10), and that the application of 2(a)(10) to Ali did not violate the Constitution ***"under the circumstances of this case."***

The last six words of the above sentence seem to indicate that this result may be quite narrow and limited to the facts of this particular case. First, looking to the issue of jurisdiction under 2(a)(10), the *Ali* opinion reminds us that there are three prerequisites that must be met for courts-martial jurisdiction to vest: 1) jurisdiction over the offense, 2) jurisdiction over the accused, and 3) a properly convened and composed court-martial.

The court stated that Ali does not contest the finding that Operation Iraqi Freedom was a contingency operation. Ali's argument centered on the second prong of the jurisdiction test where he argued that the terms "accompanying" and "serving with" are not defined in the MCM, Art. 2, or case law; thus ambiguous. Ali urged the court to look to the Military Extraterritorial Jurisdiction Act (MEJA) and the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA), as both MEJA and the NATO SOFA define those terms and exclude host country nationals from their jurisdiction. However, the court noted that the phrase "persons serving with or accompanying an armed force" was addressed in *U.S. v. Burney, 6 C.M.A. 776*. "The test is whether the accused has moved with a military operation and whether his presence with the armed force was not merely incidental, but directly connected with, or dependent upon, the activities of the armed force or its personnel."

Additionally, the court pointed out that an accused may be considered to be accompanying or serving with an armed force even though he is not directly employed by that armed force or the Government, "but instead works for a contractor engaged on a military project." Thus the court looked to the facts to determine if Ali was "serving with" or "accompanying the force." What those facts revealed was that Ali was "virtually indistinguishable from the troops serving in 1st Squad and he faced the same daily routines and threats as they did." Ali was fully embedded with his unit, he wore a "U.S. Army Tape" and unit patch on his uniform, as well as body armor and a helmet. He lived in a combat outpost, and received mission orders from the squad leader, to whom, for operational purposes, he also reported. As such, Ali was both serving with and accompanying the force in the field. Additionally, the court found that in the least, Ali continued to accompany the force while awaiting trial thereby satisfying the second prong of the three part jurisdiction test.

Turning to the Constitutional claims made by Ali, the court summed up the issue by saying that "Ali must show that he was entitled to Fifth and Sixth Amendment protections and that, under the facts of the this case, these protections were violated when he was subjected to military jurisdiction." The bottom line here is that since Ali, a noncitizen, lacked, and never developed, "substantial connections" with the United States, and no precedent exists that mandates conferring upon him Fifth and Sixth Amendment rights. The court further stated that "whatever rights Appellant had were met through the court-martial process."

VII. MENTAL RESPONSIBILITY - INTRODUCTION.

A. **Mental Responsibility**. Refers to the criminal culpability of the accused based on his mental state at the time of the offense and includes the complete defense commonly known as the "insanity defense" and the more limited defense of "partial mental responsibility."

B. **Competency to Stand Trial**. Refers to the present ability of the accused to stand trial. An accused may not be tried unless mentally competent. *Godinez v. Moran*, 509 U.S 389, 396 (1993). To try a mentally incompetent accused is a violation of due process. *Medina v. California*, 505 U.S. 437, 453 (1992).

C. **Sanity Boards**. Provision under Rule for Courts-Martial (RCM) 706 governing the process inquiring into the mental capacity or mental responsibility of an accused.

VIII. REFERENCES.

A. Manual for Courts-Martial, United States (2012 ed.).

B. TM 8-240, Military Mental Health Law (29 Sept. 1992).

C. Major Timothy P. Hayes, Jr., *Post-Traumatic Stress Disorder on Trial*, 190-191 Mil L. Rev. 67 (2007).

D. Major Jeremy Ball, *Solving the Mystery of Insanity Law: Zealous Representation of Mentally Ill Servicmembers*, Army Law., Dec. 2005, at 1.

E. Captain Charles Trant, *The American Military Insanity Defense: A Moral, Philosophical, and Legal Dilemma*, 99 Mil. L. Rev. 1 (1983).

F. Major Rita Caroll, *Insanity Defense Reform*, 114 Mil. L. Rev. 183 (1986).

G. Lieutenant Colonel Donna M. Wright, *"Though this be madness, yet there is some method in it": A Practitioners Guide to Mental Responsibility and Competency to Stand Trial*, Army Law., Sep. 1997, at 18.

H. Major Jeff Bovarnick and Captain Jackie Thompson, *Trying to Remain Sane Trying an Insanity Case: United States v. Captain Thomas S. Payne*, Army Law., June 2002 at 13.

IX. MENTAL RESPONSIBILITY.

A. **The Old Standard**. Court of Military Appeals adopted the ALI test for insanity in *United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977). "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." *Frederick*, 3 M.J. at 234.

B. **The Current Standard**. Codified in Article 50a, UCMJ.

1. Definition. It is an **affirmative defense** in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense. RCM 916(k)(1). Article 50a was modeled on 18 U.S.C. § 17.

2. Taken from Insanity Defense Reform Act, Pub. L. No. 98-473, § 402(a), 98 Stat. 2057 (1984).

C. Significant aspects of the current standard.

1. Threshold Requirements.

a) **Severe mental disease or defect**. The affirmative defense requires a "severe" mental disease or defect. *United States v. Martin*, 56 M.J. 97, 103 (C.A.A.F. 2001).

(1) The MCM defines "severe mental disease or defect" negatively. A severe mental disease or defect "*does not* include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects." RCM 706(c)(2)(A) (emphasis added).

(2) However, case law indicates that a nonpsychotic disorder may constitute a severe mental disease or defect. *See United States v. Benedict*, 27 M.J. 253 (C.M.A. 1988) (discussing pedophilia).

(3) Compare with Benchbook Instruction 6-4: "[A] severe mental disease or defect does not, in the legal sense, include an abnormality manifested only by repeated criminal or otherwise antisocial conduct or by nonpsychotic behavior disorders and personality disorders."

(4) **Ultimate Opinion Testimony**. In 1986, the President rescinded adoption of Fed. R. Evid. 704(b), which prohibits expert testimony offering an opinion on the issue of a defendant's mental state or condition where such constituted an element or defense to a charged offense. Ultimate opinion testimony is admissible. *See, e.g., United States v. Combs*, 39 M.J. 288 (C.M.A. 1994). Testimony as to the ultimate opinion (diagnosis of severe mental disease or defect) does not, however, always equate to lack of mental responsibility. *United States. v. Jones*, 46 M.J. 535 (N-M. Ct. Crim. App. 1997), *rev'd on other grounds*, 50 M.J. 46 (C.A.A.F. 1998) (summary disposition), *on remand*, 1999 WL 356311 (N-M. Ct. Crim. App. May 7, 1999) (unpublished).

b) As a result of severe mental disease or defect, accused unable to appreciate nature and quality *or* wrongfulness of the act. *Martin*, 56 M.J. at 103.

D. Procedure.

1. The defense must give notice of the defense of lack of mental responsibility before the beginning of trial on the merits. RCM 701(b)(2). Reciprocal discovery may apply. RCM 701(b)(3) and (4).

2. Burden and standard of proof.

a) **Burden on the accused by clear and convincing evidence**. *Martin*, 56 M.J. at 103. A career Army Judge Advocate convicted, *inter alia*, of 29 specifications of larceny, alleged at trial and on appeal that he was not mentally responsible for his criminal misconduct because he suffered from bipolar disorder. Though the defense presented over 20 expert and lay witnesses (the accused did not testify), none of these witnesses described unusual or bizarre behavior on the dates of the alleged offenses.

b) The constitutionality of shifting the burden. *See United States v. Martin*, 48 M.J. 820, 825 n.9 (A. Ct. Crim. App. 1998); *United States v. Freeman*, 804 F.2d 1574 (11th Cir. 1986), citing *Leland v. Oregon*, 343 U.S. 790 (1952).

3. **Instructions on mental responsibility**. The military judge has a *sua sponte* duty to instruct upon mental responsibility during final instructions if the defense is raised by the evidence. RCM 920(e)(3). Chapter 6, DA PAM 27-9. The defense can get a preliminary instruction (6-3) when some evidence has been adduced which tends to show insanity of accused. The MJ is not required to instruct the panel regarding the consequences to the accused of a not guilty only by reason of lack of mental responsibility verdict. *See Shannon v. United States*, 512 U.S. 573 (1994).

4. Bifurcated voting procedures. RCM 921(c)(4). *See also* DA PAM 27-9, 6-4 and 6-7 (procedural instructions on findings). Because of their complexity, the voting instructions should be given in writing.

a) First vote on whether accused is guilty.

b) If accused found guilty, the second vote is on mental responsibility.

5. RCM 1102A. Not guilty only by reason of lack of mental responsibility. Within 40 days of verdict, court-martial must conduct a hearing. UCMJ art. 76b. RCM 1102A sets out the procedural guidelines for the hearing.

a) Before the hearing, the judge or convening authority shall order a psychiatric or psychological examination of the accused, with the resulting psychiatric or psychological report transmitted to the military judge for use in the post-trial hearing. RCM 1102A(b). *See also* 18 U.S.C. § 4243 (post-trial psychiatric examination).

b) The convening authority *shall* commit the accused to a suitable facility until person is eligible for release IAW UCMJ, art. 76b(b). UCMJ, art. 76b(b)(1).

c) Accused must prove that his release would not create a substantial risk of bodily injury or serious damage to property of another due to a mental disease or defect. If he fails to meet that burden, the GCMCA may commit the accused to the Attorney General, who turns the person over to a state or monitors the person until his release would not create a substantial risk of bodily injury or serious damage to another's property.

(1) If the accused is found not guilty by reason of lack of mental responsibility for an offense involving bodily injury to another or serious damage to property of another, or substantial risk of such property or injury, the standard is clear and convincing evidence.

(2) Any other offense, standard is preponderance of the evidence.

d) **Right to Counsel**. RCM 1102A(c)(1) provides that an accused shall be represented by counsel.

6. Discovery of Evidence Post-Trial indicating Lack of Mental Responsibility. *See United States v. Harris,* 61 M.J. 391 *(*C.A.A.F. *2005). Good discussion of issues surrounding discovery, post-trial, of evidence of lack of mental responsibility.*

X. PARTIAL MENTAL RESPONSIBILITY.

A. **The Old (pre-2004 Amendment) Manual Standard**. A mental condition not amounting to a general lack of mental responsibility under subsection RCM 916(k)(1) is not a defense, *nor is evidence of such a mental condition admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense*. RCM 916(k)(2). The old standard tried to prohibit a partial mental responsibility defense.

1. The CMA rejected the old RCM 916(k)(2) because it doubted the rule's constitutionality and found that the legislative history of the federal model lacked any Congressional intent to preclude defendants from attacking *mens rea* with contrary evidence.

2. Psychiatric testimony or evidence that serves to negate a specific intent is admissible. *Ellis v. Jacob*, 26 M.J. 90 (C.M.A. 1988); *see United States v. Berri*, 33 M.J. 337 (C.M.A. 1991); *United States v. Mansfield*, 38 M.J. 415, 419 n.5 (C.M.A. 1993); *see also United States v. Cameron*, 907 F.2d 1051 (11th Cir. 1990); *United States v. Pohlot*, 827 F.2d 889 (3d Cir. 1987); *United States v. Gold*, 661 F. Supp. 1127 (D.D.C. 1987); *United States v. Frisbee*, 623 F. Supp. 1217 (N.D. Cal. 1985).

B. **The Current (post-2004 Amendment) Manual Standard**. A mental condition not amounting to a lack of mental responsibility (i.e., a finding of not guilty only by reason of lack of mental responsibility) is not an affirmative defense, but may be admissible to determine whether the accused entertained the state of mind necessary to prove an element of the offense. In other words, partial mental responsibility is not an affirmative defense, but it is a deficiency of the government proof of a necessary element (e.g., specific intent).

1. Instruction on Partial Mental Responsibility. DA PAM 27-9, instruction 6-5. The affirmative defense of insanity and the defense of partial mental responsibility are separate defenses, but the panel members may consider the same evidence with respect to both defenses. With regard to partial mental responsibility, the burden never shifts from the government to prove, beyond a reasonable doubt, that the accused entertained the mental state necessary for the charged offense.

2. However, not all psychiatric evidence is now admissible. The evidence still must be relevant and permitted by UCMJ art. 50a.

a) General intent crime. The psychiatric evidence must still rise to the level of a "severe mental disease or defect." The insanity defense cannot be resurrected under another guise. UCMJ art. 50a.

b) Specific intent crime. The psychiatric evidence must be relevant to the *mens rea* element.

XI. INTOXICATION.

A. **Voluntary Intoxication**. RCM 916(l)(2). Voluntary intoxication from alcohol or drugs may negate the elements of premeditation, specific intent, knowledge, or willfulness. Voluntary intoxication, by itself, will not reduce unpremeditated murder to a lesser offense. *United States v. Morgan*, 37 M.J. 407 (C.M.A. 1993). Voluntary intoxication not amounting to legal insanity is not a defense to general intent crimes.

B. **Involuntary Intoxication**. Generally, involuntary intoxication is a defense to a general or specific intent crime. *See United States v. Hensler*, 44 M.J. 184 (C.A.A.F. 1996). *But see United States v. Ward*, 14 M.J. 950 (A.C.M.R. 1982) (involuntary intoxication not available when accused knowingly used marijuana, but did not know it also contained PCP).

C. *See generally* Major Eugene Milhizer, *Weapons Systems Warranties: Voluntary Intoxication as a Defense Under Military Law*, 127 Mil. L. Rev. 131 (1990).

XII. COMPETENCY TO STAND TRIAL.

A. **Current Standard**. "No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them [sic]

or to conduct or cooperate intelligently in the defense of the case." RCM 909(a). *See also* 18 U.S.C. § 4241(d). The accused is presumed to have capacity to stand trial. RCM 909(b).

B. **Old Standard**. "No person may be brought to trial by court-martial unless that person possesses **sufficient mental capacity** to understand the nature of the proceedings against that person and to conduct or cooperate intelligently in the defense of the case." MCM, RCM 909 (1984).

C. Differences between the standards.

1. Mental disease or defect required (need not be "severe").

2. "Unable to understand" vs. "sufficient mental capacity."

D. Cases.

1. The real issue is whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has rational as well as factual understanding of the proceeding against him. It is not enough that he is oriented to time and place and has some recollection of events. *United States v. Proctor*, 37 M.J. 330, 336 (C.M.A. 1993) (quoting *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam)).

2. "The question is whether the accused is possessed of sufficient mental power, and has such understanding of his situation, such coherency of ideas, control of his mental facilities, and the requisite power of memory, as will enable him to testify in his own behalf, if he so desires, and otherwise to properly and intelligently aid his counsel in making a rational defense." *United States v. Lee*, 22 M.J. 767, 769 (A.F.C.M.R. 1986).

3. *United States v. Schlarb*, 46 M.J. 708 (N-M. Ct. Crim. App. 1997). The accused did not establish a lack of mental capacity to stand trial where she testified clearly and at length on four occasions, showing a clear understanding of the proceedings.

4. *Indiana v. Edwards*, 554 U.S. 164 (2008). The Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. Therefore, a defendant who is mentally competent to stand trial may still be denied the right to represent themselves, depending on the vagaries of the mental disease or illness.

E. **Compared to Amnesia**.

1. Amnesia is not equivalent to a lack of capacity. "An inability to remember about the crime itself does not necessarily make a person incompetent to stand trial." *Lee*, 22 M.J. at 769; s*ee also United States v. Barreto*, 57 M.J. 127 (C.A.A.F. 2002). The ability of an accused to function is absolutely critical to the fairness of a criminal trial. In deciding whether an accused can function, a military judge can apply factors set out in *Wilson v. United States*, 391 F.2d 460 (D.C. Cir. 1968): (1) the extent to which the amnesia affects the accused's ability to consult and assist his lawyer; (2) the extent to which the amnesia affects the accused's ability to testify on his own behalf; (3) the extent to which the evidence could be extrinsically reconstructed, in view of the accused's amnesia; (4) the extent to which the Government assisted the accused and defense counsel in reconstruction; (5) the strength of the Government case; and, (6) any other facts and circumstances that would indicate whether the accused had a fair trial.

2. *United States v. Axelson*, 65 M.J. 501 (A. Ct. Crim. App. 2007). A failure to recall facts pertaining to an offense does not preclude an accused from pleading guilty so long

as, after assessing the Government's evidence against him, he is convicted of his own guilt.

F. Procedure. UCMJ art. 76b and RCM 909.

1. **Interlocutory question of fact.** After referral, military judge *may* conduct an incompetence determination hearing either *sua sponte* or on request of either party. RCM 909(d).

2. Defense has the burden of proof by a preponderance of the evidence.

3. Military judge *shall* conduct the hearing if sanity board completed IAW RCM 706 before or after referral concluded the accused is not competent.

4. Military judge determines whether the accused is competent to stand trial. *United States v. Proctor*, 37 M.J. 330 (C.M.A. 1993); *Short v. Chambers*, 33 M.J. 49 (C.M.A. 1991).

5. Once a sanity board is requested, the military judge must consider the sanity board report before ruling on the accused's capacity to stand trial. *United States v. Collins*, 41 M.J. 610 (A. Ct. Crim. App. 1994).

G. **Hospitalization of the accused.** An accused who is found incompetent to stand trial shall be hospitalized by the Attorney General for a reasonable period of time, not to exceed 4 months, to determine whether his condition will improve in foreseeable future, and for an additional reasonable period of time. The additional period of time ends when: the mental condition improves so that trial may proceed, or, charges are dismissed.

1. Upon a finding of incompetence, if the convening authority agrees, there is no discretion regarding commitment. *United States. v. Salahuddin*, 54 M.J. 918 (A.F. Ct. Crim. App. 2001); *see also* RCM 909(e)(3) and 18 U.S.C. § 4241(d).

2. The four-month time period may be extended. To justify extended commitment, the Government must prove by clear and convincing evidence that "a substantial probability exists that the continued administration of antipsychotic medication will result in a defendant attaining the capacity to permit the trial to proceed in the foreseeable future." *United States v. Weston*, 260 F. Supp. 2d 147, 154 (D.D.C. 2003) (approving a year-long extension from the case below in (3)(a)).

3. Involuntary Medication.

a) *United States v. Weston*, 255 F.3d 873 (D.C. Cir. 2001). Defendant indicted for the murders and attempted murder of federal law enforcement officers. A court-appointed forensic psychiatrist diagnosed defendant with paranoid schizophrenia, the severity of which rendered him incompetent to stand trial. Because he refused treatment with antipsychotic medication, he was simply placed in solitary confinement under constant supervision. The government sought a court order authorizing the involuntary administration of medication to render him competent to stand trial. The Circuit Court held that there was no basis to believe that defendant's worsening condition rendered him more dangerous, given his near-total incapacitation. However, the court affirmed the District Court's decision that the government's interest in administering antipsychotic drugs overrode his liberty interest and that restoring his competence in this way did not violate his right to a fair trial.

b) *Sell v. United States*, 539 U.S. 166 (2003). Defendant was charged with fraud. A federal magistrate found him incompetent to stand trial and ordered his

hospitalization to determine whether he would attain capacity to allow his trial to proceed. Sell refused to take antipsychotic drugs. The magistrate found involuntary medication appropriate because Sell was a danger to himself and others, that medication was the only way to render him less dangerous, that any serious side effects could be ameliorated, that the benefits to him outweighed the risks, and that the drugs were substantially likely to return Sell to competence. The District Court, although determining that the Magistrate's conclusion regarding Sell's dangerousness was clearly erroneous, nonetheless affirmed the decision because it found that the medication was the only viable hope of rendering Sell competent and was necessary to serve the government's interest in adjudicating his guilt or innocence. The Circuit Court affirmed, finding that the government had an essential interest in bringing Sell to trial, that treatment was medically appropriate, and that the medical evidence indicated a reasonably probability that Sell would fairly be able to participate in his defense. The Supreme Court vacated and remanded the case. Determining that forced medication solely for trial competency purposes may be rare, the Court held that the Constitution permits involuntary medication to render a mentally ill defendant competent to stand trial on serious criminal charges if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the trial's fairness, and, taking account of less intrusive alternatives, is necessary to significantly further important governmental trial-related interests.

c) *United States v. Bush*, 585 F.3d 806 (4th Cir. 2009). The court finds that the government must establish all of the *Sell* factors by clear and convincing evidence. The court also held that even where a defendant has been in an institution longer than the maximum punishment for the underlying offense, the government still has an important interest in bringing the defendant to trial. Certain consequences that convictions bring (such as firearms restrictions) are important governmental interests justifying continued prosecution and potential involuntary medication.

4. **Recovery.** If the accused has recovered and is competent to stand trial, the director of the facility notifies the GCMCA and sends a copy of the notice to accused's counsel. GCMCA must take prompt custody of the accused if the accused is still in a military status. The director of the facility may retain custody of the person for not more than 30 days after transmitting the required notifications.

a) **No Recovery**. If person does not improve (18 U.S.C. § 4246). If the director of the facility where the accused is confined certifies that the accused is presently suffering from a mental disease or defect and his release would create a substantial risk of bodily injury to another person or serious damage to property, the director notifies the GCMCA. The district court then conducts further hearings.

H. **Waiver**. *Moore v. Campbell*, 344 F.3d. 1313 (11th Cir. 2003). The Eleventh Circuit Court of Appeals looked at whether a defendant in a capital case can forfeit his right to competency – a case of first impression. Moore attempted suicide during his capital murder trial. After treatment at a hospital and subsequent examination by a psychiatrist, Moore appeared at trial, which resumed on 31 August. From 27 August until the evening of 1 September, Moore had refused anything to eat or drink, resulting in dehydration. The state court found Moore was competent to stand trial and that he took a "calculated and concerted effort to disrupt his murder trial." The state court also found Moore's asserted incompetence similar to a defendant whose behavior results in exclusion from a trial. Reviewing the state court proceedings during a federal *habeas*

petition, the Court of Appeals determined that the "state court's determination that a capital defendant in Alabama can forfeit his right to be competent – that is mentally present – at trial" was not contrary to or an unreasonable application of clearly established Supreme Court precedent, if only because the issue has not been yet decided by the Supreme Court.

I. **Post-trial**. The convening authority may not approve a sentence while the accused lacks the mental capacity to cooperate and understand post-trial proceedings. RCM 1107(b)(5). Likewise, an appellate authority may not affirm the findings when the accused lacks the ability to understand and cooperate in appellate proceedings. RCM 1203(c)(5). *See Thompson v. United States*, 60 M.J. 880 (N-M. Ct. Crim. App. 2005) (holding that appellant demonstrated lack of mental capacity to assist in appeal; appeal stayed).

XIII. THE SANITY BOARD.

A. Sanity Board Request.

1. Who can request? Any commander, investigating officer, trial counsel, defense counsel, military judge, or member. R.C.M. 706(a).

a) Request goes to CA (before referral) and MJ (after referral).

b) A sanity board should be granted if request is not frivolous and is made in good faith. *United States v. Nix*, 36 C.M.R. 76, 80-81 (C.M.A. 1965); *United States v. Kish*, 20 M.J. 652 (A.C.M.R. 1985).

c) It may be prudent for trial counsel to join in the motion. *See United States v. James*, 47 M.J. 641 (A. Ct. Crim. App. 1997) (finding that a mental status evaluation was not an adequate substitute for a sanity board).

2. Failure to direct a sanity inquiry.

a) Though ultimate result may be "favorable" to the government, failure to timely direct a sanity board can result in lengthy appellate review. *United States v. Breese*, 47 M.J. 5 (C.A.A.F. 1997).

b) "**A low threshold is nonetheless a threshold which the proponent must cross**." *United States v. Pattin*, 50 M.J. 637, 639 (A. Ct. Crim. App. 1999) (finding that the military judge's refusal to order a sanity board was not error where it appeared the motion for a sanity board was merely a frivolous attempt to get a trial delay).

3. Sanity Board Order asks the following questions:

a) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect?

b) What is the clinical psychiatric diagnosis?

c) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his conduct?

d) Does the accused have sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense?

4. Composition of the sanity board.

a) One or more persons.

b) Physician or clinical psychologist.

c) At least one psychiatrist or clinical psychologist.

d) A provisional license may be enough to qualify a psychologist as a clinical psychologist. *United States v. Boasmond*, 48 M.J. 912 (N-M. Ct. Crim. App. 1998).

5. Conflict of interest. *United States v. Best*, 61 M.J. 376 (C.A.A.F. 2005). Two members of the accused's RCM 706 sanity board had a preexisting psychotherapist-patient relationship with the accused. In a case of first impression, the Army court stated that an actual conflict of interest would exist when prior participation that materially limits his or her ability to objectively participate in and evaluate the subject of an RCM 706 sanity board. The CAAF declined to adopt a presumptive rule that there would be an actual conflict of interest if a mental health provider, who has established a psychotherapist-patient relationship with an accused, also serves as a member in an RCM 706 sanity board. In this case, the CAAF held there was no evidence suggesting that the two members' participation would be materially limited by their prior relationship.

6. The accused's right to a speedy trial is not violated when the government delays the case for a time reasonably necessary to complete a thorough mental evaluation. *United States v. Colon-Angueira*, 16 M.J. 20 (C.M.A. 1983) (fifty-one days reasonable); *United States v. Carpenter*, 37 M.J. 291 (C.M.A. 1993) (the government's negligence or bad faith can be considered in determining whether the sanity board was completed within a reasonable time); *United States v. Pettaway*, 24 M.J. 589 (N.M.C.M.R. 1987) (thirty-six days was reasonable time for a second sanity board); *United States. v. Arab*, 55 M.J. 508 (A. Ct. Crim. App. 2001) (140 days was not unreasonable, where the record reflected due diligence by the government).

7. Results of board - limited distribution.

a) Defense counsel gets full report.

b) Trial counsel initially only gets answers to the above questions.

B. The Sanity Inquiry.

1. Compelled Examination. RCM 706.

a) Article 31, UCMJ, not applicable.

b) Failure to cooperate in an examination can result in the exclusion of defense expert evidence.

2. Privilege Concerning Mental Examination of an Accused. MRE 302.

a) The general rule: Anything the accused says (and any derivative evidence) to the sanity board is privileged and cannot be used against him.

b) This privilege may be claimed by the accused notwithstanding the fact that the accused may have been warned of the rights provided by MRE 305.

c) Waiver. There is no privilege under this rule when the accused first introduces into evidence such statements or derivative evidence. Privilege applies only to examinations ordered under RCM 706. *See United States v. Toledo*, 25 M.J. 270 (C.M.A. 1987), *aff'd on reconsid.*, 26 M.J. 104 (C.M.A. 1988).

3. Derivative Evidence. In *United States v. Clark*, 62 M.J. 195 (C.A.A.F. 2005), the accused was charged, *inter alia*, with breaking restriction. Dr. Petersen treated the accused for almost a month after his command referred him to mental health. She

concluded that the accused suffered a manic episode during the charged time period. Prior to trial, the defense requested a sanity board. Dr. Marrero was the lone member of the board, and he agreed with Dr. Petersen's diagnosis, but concluded that the accused was mentally responsible. At trial, Dr. Petersen, testifying for the defense, opined that there was a "high likelihood" that the accused suffered from a severe mental disease or defect during the relevant time period and that, as a result of that severe mental disease or defect, would have had a difficult time appreciating the nature and quality or wrongfulness of his conduct. During her testimony, Dr. Petersen acknowledged that she reviewed the sanity board report. The trial counsel renewed his motion to obtain a copy of the report (the MJ earlier denied the same request), which was granted. The CAAF held that it was error to release the statements of accused to Dr. Marrero as the derivative evidence provisions of MRE 302 had not been triggered. As a nonconstitutional error, the government would have to demonstrate that the error did not have a substantial influence on the findings. Given that the government relied heavily upon the testimony of Dr. Marrero, the court was left to conclude that the insanity defense may have succeeded had the military judge not erred in releasing the appellant's privileged statements to the government.

C. Are there substitutes for a sanity board?

1. Yes. "The point is that we do not believe that the drafters selected the sanity board format because they had determined that no other procedure was capable of detecting mental disorders or determining an accused person's mental capacity or responsibility. That being the case, *we believe we should look to the substance of the evaluation performed on the accused rather than on its form*." *United States v. Jancarek*, 22 M.J. 600, 603 (A.C.M.R. 1986) (emphasis added).

2. *But see United States v. Mackie*, 65 M.J. 762 (A.F. Ct. Crim App. 2007), *aff'd*, 66 M.J. 198 (C.A.A.F. 2008) (finding that the mental health evaluation performed by a staff psychologist as a result of a pretrial suicide gesture was not an adequate substitute because of her inexperience in performing sanity boards); *United States v. James*, 47 M.J. 641 (A. Ct. Crim. App. 1997) (finding that mental status evaluation done by a mental health counselor was not an adequate substitute); *United States v. English*, 47 M.J. 215 (C.A.A.F. 1997) (finding that an examination by doctors for purposes of treatment of the accused was not an adequate substitute because the examination did not address the judicial standards for mental capacity or responsibility).

XIV. TRIAL CONSIDERATIONS.

A. In addition to a sanity board, an accused is entitled to access to a qualified psychiatrist or psychologist for the purpose of presenting an insanity defense if he establishes that his sanity will be a "significant factor" at the trial. *United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986); *see Ake v. Oklahoma*, 470 U.S. 68 (1985). Significant factor defined:

1. Mere assertion of insanity by accused or counsel is insufficient. *Volson v. Blackburn*, 794 F.2d 173 (5th Cir. 1986).

2. A "clear showing" by the accused that sanity is in issue and a "close" question that might be decided either way is required. *Cartwright v. Maynard*, 802 F.2d 1203 (10th Cir. 1986).

3. Expert must be made part of the "defense team" under MRE 502 to be covered by the attorney-client privilege. *United States v. Toledo*, 25 M.J. 270 (C.M.A. 1987), *aff'd on reconsid*., 26 M.J. 104 (C.M.A. 1988). *United States v. Mansfield*, 38 M.J. 415 (C.M.A.

1993). A physician, psychotherapist who assists the defense in preparation of a defense may fall within the scope of the attorney-client privilege.

B. *United States v. Collins*, 60 M.J. 261 (C.A.A.F. 2004). The MJ must act when issues of mental responsibility and capacity arise during trial. In this case, the lone member of a sanity board testified in a manner apparently inconsistent with his conclusion in the report that the accused was mentally responsible for his actions. During trial, COL Richmond testified that the accused's actions were consistent with his delusional disorder and that the accused did *not* understand the nature and quality or wrongfulness of his conduct. The MJ did not order further inquiry under RCM 706 and the CAAF held that he should have.

C. **Defense use of statements of the accused to an RCM 706 Board.** *United States v. Schap*, 49 M.J. 317 (C.A.A.F. 1998). The judge did not err when he sustained trial counsel's objection and prevented former sanity board psychiatrist from testifying for defense at trial as to accused's statements and emotions at the time of the offense. The defense was attempting to smuggle the accused's statements in without subjecting him to cross-examination.

D. Once defense offers **expert** testimony of accused's mental condition, a prosecution expert may testify as to the reasons for the expert's conclusions concerning accused's mental state (may not extend to accused's statements unless the accused first introduces his own statement or derivative evidence). MRE 302.

E. **Disclosure of full sanity board report.** *United States v. Cole*, 54 M.J. 572 (A. Ct. Crim. App. 2000), *aff'd*, 55 M.J. 466 (C.A.A.F. 2001) (summary disposition). At trial, the Government moved to compel defense disclosure of entire report under MRE 302(c) because defense was requesting two experts to testify about accused's belief that his actions were necessary to protect his family (as opposed to lack of mental responsibility). The military judge's decision to defer ruling on the government motion, because it was unclear in advance of the testimony whether the experts would testify on the issue of mental responsibility and not just on the second prong of defense of another, was not an abuse of discretion.

1. *United States v. Savage*, 67 M.J. 656 (A. Ct. Crim. App. 2009). The appellant claimed that he was asleep when he stabbed his victim due to a disorder called parasomnia. An RCM 706 inquiry concluded that the appellant was competent to stand trial, that there was a reasonable possibility that the appellant suffered from "parasomnia, or somnambulism that produced an automatism or sleep-related behavior at the time of the assault," and that the appellant may not have been unable to appreciate the wrongfulness of his conduct. The defense provided the government with notice of intent to rely on the defense of lack of mental responsibility. Approximately six weeks later, the defense e-mailed the full RCM 706 report to the trial counsel without an order from the military judge. Six weeks after that, the appellant hired civilian counsel and excused the counsel who e-mailed the report. Eventually the civilian counsel notified the government that the defense would not pursue the defense of lack of mental responsibility, and instead would rely upon partial mental responsibility to negate *mens rea*. Some of those statements were eventually used in cross-examination of the appellant's expert. The ACCA held that MRE 302(c) was violated, but the error was harmless. The defense case-in-chief involved statements from an expert that revealed specific statements made by the appellant captured in the RCM 706 inquiry. The defense could have avoided the government using any portion of the report by not calling experts who authored the report. *See United States v. Clark*, 62 M.J. 195 (C.A.A.F. 2005).

F. Although the rule seems to condition the use of expert testimony by the prosecution on prior use of **experts** by the defense, the Court of Military Appeals rejected such an interpretation,

finding that lay testimony can permit the government to use its experts. *United States v. Bledsoe*, 26 M.J. 97 (C.M.A. 1988); *see also United States v. Matthews*, 14 M.J. 656 (A.C.M.R. 1982).

G. The sanity board report is not admissible under hearsay rules. *United States v. Benedict*, 27 M.J. 253 (C.M.A. 1988).

H. **Sentencing Considerations**. Extenuation and Mitigation. Evidence of the accused's mental condition can be used on sentencing but with caution. *See United States v. Bono*, 26 M.J. 240 (C.M.A. 1988).

I. Guilty Pleas and Sanity Issues.

1. *United States v. Harris*, 61 M.J. 391 (C.A.A.F. 2005). After acceptance of the accused's pleas and announcement of sentence, but before the convening authority took action, the accused was diagnosed with bipolar disorder. At a post-trial Article 39(a) session, the military judge listened to expert testimony from mental health experts who disagreed as to whether the accused suffered from any mental illness. The accused did not testify at this hearing. In his findings of fact and conclusions of law, the military judge stated that the accused "suffered from a bipolar disorder that would equate to a severe mental disease or defect," but that he appreciated the wrongfulness of his actions and was subsequently competent to stand trial. The CAAF disagreed, the majority saying that they did not see how an accused can make an informed plea without knowledge that he suffers from a severe mental disease or defect at the time of the offense. The court also stated that it was not possible for a military judge to conduct the necessary *Care* inquiry without exploring with the accused the impact of any mental health issues on those pleas.

2. *United States v. Shaw*, 64 M.J. 460 (C.A.A.F. 2007). The accused pled guilty to offenses during a guilty plea and findings were entered. During the accused's unsworn statement, he said that prior to the charged offenses he was assaulted by a man wielding a lead pipe and suffered severe injuries to his head and brain. The accused also said that he spent almost a month in the hospital and that he was diagnosed with bipolar syndrome. The CAAF determined that the military judge did not err when he failed to inquire into the accused mental condition because his statements were unsupported by other evidence entered into the record or his behavior during his providence inquiry or unsworn statement. <u>A military judge is only required to inquire into circumstances or statements that raise a possible defense, not circumstances or statements that raise the "mere possibility" of defense.</u> NOTE: the majority opinion recommend that a prudent military judge conduct an inquiry when a significant mental health condition is raised during the plea inquiry; s*ee also United States v. Falcon*, 65 M.J. 386 (C.A.A.F. 2008) (noting that "[the accused] has provided no authority that a diagnosis of pathological gambling can constitute a defense of lack of mental responsibility."); *United States v. Glenn*, 66 M.J. 64 (C.A.A.F. 2008) (stating that the accused's expert mitigation evidence that he suffered from a mood disorder and his unsworn and unsubstantiated statements that he suffered from bipolar disorder did not raise a substantial basis in law for questioning his guilty plea).

3. *United States v. Handy*, 48 M.J. 590, 593 (A.F. Ct. Crim. App. 1998). During a guilty plea, "[w]hen evidence of an accused's mental health rears its head, the judge should question defense counsel on whether he or she has explored the mental responsibility angle of the case, including whether evidence exists to negate an intent or knowledge element of the offense. The judge should ask the accused if defense counsel has discussed that issue and how it may apply to the particular case. The judge should

accept the guilty plea only if the mental issues are resolved for the record and the accused disclaims any potential mental 'defense,' full or partial."

4. *United States v. Estes*, 62 M.J. 544 (A. Ct. Crim. App. 2005). Appellant argued that remarks made during his unsworn, indicating a hyper-religiosity, should have triggered further inquiry from the Military Judge regarding his lack of mental responsibility and competency. Appellant further argued that the inquiry, together with evidence of appellant's cannabis addiction, would have demonstrated significant issues of lack of mental responsibility. The Army court, in a carefully reasoned opinion, held appellant failed to show that a different verdict might reasonably have resulted if the trier of fact had evidence of a lack of mental responsibility that was not available for consideration at trial.

5. *United States v. McGuire*, 63 M.J. 678 (A. Ct. Crim. App. 2006). Appellant's providence inquiry referenced psychiatric treatment and he otherwise acting strangely during his colloquy with the military judge. A previous mental evaluation pursuant to RCM 706 determined that the accused possessed the requisite mental capacity to stand trial and that he did not lack the necessary mental responsibility at the time of the offense. The Army court determined that the military judge was not required sua sponte to order further evaluation of the appellant. With regard to the providence of the appellant's plea, the court, citing to *Estes*, reaffirmed that not every reference to psychiatric treatment or problems, no matter how vague or oblique, is sufficient to create a substantial basis for questioning a guilty plea.

6. *United States v. Riddle*, 67 M.J. 335 (C.A.A.F. 2009). In a stipulation of fact, the parties agreed that the appellant had a chronic alcohol and marijuana dependence, as well as a bipolar and borderline personality disorder. The military judge was aware of these conditions. The judge knew that before her absence, she was receiving mental health treatment at an "off-post installation that specializes in mental issues, mental and behavioral issues." The judge also knew that she arrived at the trial from the facility and would return there after trial. During the trial, the military judge asked the appellant if she was feeling OK when she referred to "getting the fishes high" by throwing a marijuana cigarette into a lake. The military judge also asked the appellant a series of questions regarding her mental health and competency at trial. A report of mental health status evaluation was admitted into evidence on sentencing, stating that appellant had attempted suicide twice, but was mentally responsible. Finally, the military judge noted before sentencing that he observed the appellant at trial, and that she was alert, articulate, and cognizant. The CAAF held that her guilty plea was not improvident. A military judge can presume, in the absence of contrary circumstances, that the accused is sane. *See United States v. Shaw*, 64 M.J. 460 (C.A.A.F. 2007). If the appellant's statement or facts in the record indicate a mental disease or defect, the military judge must determine if that information raises a conflict with the plea or merely a possibility of conflict with the plea. The former requires further inquiry, the latter does not. The CAAF finds that the facts of this case merely raised the possibility of conflict with the plea and the military judge was not required to inquire further. Moreover, the military judge appropriately inquired into her status, and captured his observations in the record.

Like other affirmative defenses, lack of mental responsibility is subject to the rule of waiver. *United States v. Boasmond*, 48 M.J. 912 (N-M. Ct. Crim. App. 1998).

Chapter 11

I. 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-preferred 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 abstentia*, 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 repreferral 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 reinstitution 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-preferral 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.

Chapter 12

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, **<u>and</u>**

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).

b. *United States v. Williams*, 29 M.J. 570 (A.F.C.M.R. 1989), *petition denied*, 30 M.J. 106 (C.M.A. 1990). "[T]here is no specified format for the contents [of the reviewing officer's memorandum] other than it must state the reviewing officer's conclusions and the factual findings on which they are based." Failure to precisely state the reasons for continued pretrial confinement is not an abuse of discretion requiring additional credit.

6. Reviewing officer shall, after notice to parties, reconsider the decision to approve continued confinement, upon request based upon any significant information not previously considered. R.C.M. 305(i)(2)(E).

H. Review by Military Judge. R.C.M. 305(j).

1. Once charges are referred, military judge may review propriety of confinement on motion for appropriate relief.

2. Military judge may order release only if:

a. Reviewing officer's decision was abuse of discretion and no information presented to military judge justifying confinement; **or**

b. Information not presented to reviewing officer establishes that prisoner should be released; **or**

c. There has been no initial review and the military judge determines that the requirements for confinement have not been met.

3. The military judge can order day-for-day administrative credit for any pretrial confinement served as a result of failure to comply with subsection (f), (h), (i) or (j) of R.C.M. 305. The MJ may order additional credit for any pretrial confinement that involves the abuse of discretion or unusually harsh circumstances. When simultaneous noncompliance with multiple provisions occurs, only day-for-day credit will be applied. In other words, a pretrial confinee is not entitled to extra additional days of credit when multiple provisions of R.C.M. 305 are violated on one day or over the same period. *United States v. Plowman*, 53 M.J. 511, 514 (N.M. Ct. Crim. App. 2000). See also, *United states v. Huey*, 57 M.J. 504 (N-M. Ct. Crim. App. 2002), for the proposition that once the case is referred, the military judge has the authority to review the propriety of pretrial confinement regardless of whether the IRO has conducted his review.

I. Who May Direct Release. R.C.M. 305(g).

1. Any commander of the prisoner.

United States v. Shelton, 27 M.J. 540 (A.C.M.R. 1988). The following commanders may review pretrial confinement and direct the accused's release: the accused's unit commander, the confinement facility commander, the commander of the unit to which the accused is attached while serving confinement, or the commander of the installation on which the confinement facility is located.

2. Officer appointed to review confinement (military magistrate).

3. The detailed military judge, once charges have been referred.

J. Reconfinement After Release. R.C.M. 305(1).

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. All*en, 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.

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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 **<u>would</u>** 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 <u>pretrial confinement</u> (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 trail, but even if not waived, it was not analogous to the "shaming ritual" in *Cruz.*

5. Other examples.

a. "Incorrective" 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).

Chapter 13

ARTICLE 13

Chapter Is Currently Under Construction

Chapter 14

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

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[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).

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).

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

[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).

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).

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,

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[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.

(b) Did the person questioned perceive the inquiry as involving more than a casual conversation?

(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 proceeded 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.

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[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).

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[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).

(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.

(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

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

(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."

(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]

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[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.

[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.

(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.

[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.

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[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.

h. *United States v. Meeks*, 41 M.J. 150 (C.M.A. 1994). Accused was not a suspect at the time his commander met with him in attempt to persuade him to deploy, even though commander knew sergeant had missed a mobility meeting and had a hunch that accused might ultimately choose not to deploy. At time of meeting, commander thought there might be legitimate reason for accused's missing the meeting, and until the accused informed his commander that he would not deploy, no offense had been committed.

i. *United States v. Schlamer*, 47 M.J. 670 (N-M. Ct. Crim. App. 1997). Before unwarned questioning, NCIS agents were informed that the accused was seen in the area where a murder occurred. The NMCCA held that the accused was one of hundreds of individuals who the investigators believed might have helpful information and was, therefore, not a suspect requiring Article 31(b) warnings.

j. *United States v. Miller*, 48 M.J. 49 (C.A.A.F. 1998). After receiving a report about a gang robbery, an MP stopped the accused to ascertain his identity and whereabouts during the evening. The accused answered the questions without being warned of his rights under *Miranda* or Article 31. Even though the accused matched the general description of one of the assailants, the CAAF found that the investigation had not sufficiently narrowed to make the accused a suspect and, therefore, Article 31(b) was not triggered. *See also United States v. Henry*, 44 C.M.R. 152 (C.M.A. 1971).

k. *United States v. Muirhead*, 51 M.J. 94 (C.A.A.F. 1999). The accused was a suspect, and investigators were required to advise him of his rights under Article 31(b) when they questioned him during a permissive search of his residence. Prior to the search, a physician had told investigators that he suspected child abuse based on his examination of the victim.

l. *United States v. Duncan*, 48 M.J. 797 (N-M. Ct. Crim. App. 1998). Asking the accused questions about alleged misconduct his roommate committed was not an interrogation, since the accused was not yet a suspect.

5. The "Public Safety" exception for Article 31 warnings?

a. *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990). "Whether a [public safety] exception to Article 31 exists for military superiors acting in a command disciplinary function when questioning a suspect who is not in custody is an issue beyond the facts of this case." However, the court considered the "unquestionable urgency of the threat and the immediacy of the crew chief's response" in deciding that there was a "legitimate operational nature of his questions" that obviated the need for Article 31 warnings.

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)	*Miranda* (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?	Custodial – Would a reasonable person in the subject's position feel that they were under arrest or significant restraint? Interrogation – 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 *Blockburger* 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: *Miranda* 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 reinitiate 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).

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[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.

(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 peremptory 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.

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[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).

[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).

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.

(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.

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[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.

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[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

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[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).

to 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

Article 31(d) provides:

> 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).

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.

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 it's 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 though 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).

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[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.

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.

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. Khamsouk*, 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 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).

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[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), 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).

"[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.

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]

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.

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[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."

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

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.

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[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 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.

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."

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.

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[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).

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.

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.

[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).

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).

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[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.

j. *United States v. Baldwin*, 54 M.J. 464 (C.A.A.F. 2001). In the confession, the appellant stated that his wife had walked in on him while he was assaulting his daughter (although she did not see anything) and that he immediately sought professional help through the chaplain and a therapist. In finding adequate corroboration, the court relied on the following facts: the appellant's wife saw the appellant in their daughter's room on the night he confessed to sexually assaulting her; the appellant gave his wife "a strange look that she had never seen before;" the appellant left the bedroom and went in the living room where he began crying and talking about his own history of being sexually abused; and, two days after being caught, the appellant went to the chaplain and then to a therapist. It was not necessary to provide independent evidence of all the elements of the offense. The court also emphasized that the government only had to establish an inference of truth as to the essential facts by a preponderance of the evidence.

7. Defense Evidence on Voluntariness.

a. *Crane v. Kentucky*, 476 U.S. 683 (1986). Due process and Sixth Amendment concerns require that the accused be permitted to challenge the reliability of a statement before the fact-finder, even though the judge may have found the statement "voluntary."

b. *United States v. Miller*, 31 M.J. 247 (C.M.A. 1990). Mil. R. Evid. 304(e) adopts the orthodox rule for determining the voluntariness of confessions. The judge alone determines the admissibility of confessions and that ruling is final. Although the members must consider the confession in determining guilt or innocence, the accused is free to argue the confession was involuntary in order to reduce the weight the members give it. Judge must hold a hearing and make findings as to voluntariness only if the defense raises the issue by a motion to suppress or a timely objection at trial. The Constitution does not require a voluntariness hearing unless use of the confession is challenged.

8. Joint trials: redaction of confessions.

Gray v. Maryland, 523 U.S. 185 (1998). A co-defendant's confession that substituted either a blank space or the word "deleted" in place of the accused's name was inadmissible in a joint trial. As redacted, the Court held that the jury would clearly infer the confession refers to the accused. The Court opined that there were other acceptable ways to redact the accused's name from the confession. *See also Bruton v. United States*, 391 U.S. 123 (1968); Mil. R. Evid. 306.

XIII. IMMUNITY

A grant of immunity overcomes the privilege against self-incrimination by removing the consequences of a criminal penalty. If a servicemember is given immunity, the government can compel him to make a statement, but cannot use that compelled statement against him in trial. The statement can, however, be used if the servicemember commits perjury, false statement, or false swearing. Only the General Court-Martial Convening Authority (GCMCA) can grant immunity. There are circumstances in which immunity may be implied (*de facto* immunity), even though the GCMCA did not grant immunity.

A. Types of immunity.

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.

d. *United States v. Richter*, 51 M.J. 213 (C.A.A.F. 1999). The accused was one of many actors in a larceny scheme. Prior to trial, the defense asked the convening authority to grant immunity to a defense witness. The convening authority denied the defense request, but granted immunity to five prosecution witnesses. The CAAF held that the military judge did not abuse his discretion when he denied the defense motion to abate the court-martial. The court relied on the three-prong test under RCM 704(e) in reaching its decision. Specifically, the court stated that the three prongs must be read in the conjunctive. Since the defense witness was a prosecution target, the second prong of the rule was not met.

2. Order to testify/grant of immunity.

a. RCM 704(d).

b. AR 27-10, Military Justice, Chapter 2 (Investigation and Prosecution of Crimes With Concurrent Jurisdiction).

D. Notice to the accused.

1. Mil. R. Evid. 301(c)(2). Written grant shall be served on accused prior to arraignment or within a reasonable time before witness testifies.

2. Remedy: continuance, prohibit or strike testimony, or other order as required.

3. *United States v. Tuscan*, 67 M.J. 592 (C.G. Ct. Crim. App. 2009). Trial counsel notified defense of government witness immunized testimony the morning of trial. Witness did not testify until after lunch on the second day of trial. Defense did not ask for a continuance. The CGCCA held that this was a reasonable time before the witness testified and therefore the testimony was properly allowed. However, the CGCCA expresses concern that the government was potentially "hiding the ball." *Id*. at 595.

E. Scope of the immunity.

1. Prosecution after testimonial immunity.

a. Independent evidence.

(1) Government must show that evidence used to prosecute accused is completely independent of immunized testimony. Tips to avoid problems: (1) screen all immunized data from the trial team; (2) catalogue or seal all data to provide a paper trail; and, (3) personnel who had access to the immunized testimony should have no contact with the prosecution team. *See United States v. England*, 30 M.J. 1030 (A.F.C.M.R. 1990), *aff'd*, 33 M.J. 37 (C.M.A. 1991).

(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

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[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

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

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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 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); s*ee 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).

Chapter 15

RIGHT TO COUNSEL AND IAC

Chapter Is Currently Under Construction

Chapter 16

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 in 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 a 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 *Hiibel 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 "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. Rodriquez*, 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); s*ee 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.

VIII. 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

IX. 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.

Chapter 17

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. Behenna*, 71 M.J. 228 (C.A.A.F 2012); *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 nevo* 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 them 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 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 and 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 product 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, *and* 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, *and* 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
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,

			regardless 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.

Chapter 18

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.

Action contemplated	**If statutorily disqualified -**	**If personally disqualified -**
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. **The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2012 amended Article 47, UCMJ, to allow for subpoenas duces tecum to be issued for Article 32 Investigations**. Subpoena duces tecum is also called "subpoena for production of evidence." This portion of the statute became effective 1 January 2012.

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 in 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*
PRESERVATION AND ADMISSION OF 32 TESTIMONY	o Article 32 testimony may be admissible as substantive evidence at courts-martial (once the foundational elements for each provision are satisfied): • M.R.E. 801(d)(1) (prior inconsistent statement); • M.R.E. 804(b)(1) (former testimony); • M.R.E. 807 (residual hearsay).
PARTICIPANTS	o 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. *See United States v. Wojciechowski*, 19 M.J. 577 (N.M.C.M.R. 1984); *McKinney v. Jarvis*, 46 M.J. 870 (A. Ct. Crim. App. 1997); *see also United States v. Dinges*, 49 M.J. 232 (1998). The investigating officer must be "neutral and detached," and must avoid *ex parte* 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.
PRODUCTION OF WITNESSES	o 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. *United States v. Marrie*, 43 M.J. 35 (1995); *United States v. Burfitt*, 43 M.J. 815 (A.F. Ct. Crim. App. 1996).
PROCEDURE FOR CONDUCTING THE INVESTIGATION	o 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. *United States v. Thompson*, 46 M.J. 472 (1997). o M.R.E. application: Only the rules on privileges, Rape Shield, and self-incrimination apply at the Article 32 investigation. RCM 405(i). o 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. *See generally ABC, Inc. v.*

	Powell, 47 M.J. 363 (C.A.A.F. 1997); RCM 405(h)(3).
Treatment of Defects and Remedy	o Objections to the investigation must be made "promptly upon discovery" or are waived, absent good cause. RCM 405(h)(2) and 405(k). o 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). o 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). o 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). o 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). o The remedy to correct a defect is normally a continuance to correct the defect. RCM 906(b)(3), Discussion.

Chapter 19

I. Introduction

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) then 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, be sure to review 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.

Chapter 20

I. Introduction

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

. . . .

(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

. . . .

(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.

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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.

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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.

[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).

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 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. ACCA 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. 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"

[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."

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, ⅔ pay forfeitures for 4 months, reduction to E-1, and bad-conduct discharge. The adjudged sentence was confinement for 2 months, ⅔ 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*
Permissible Pleas	• 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 *nolo contendre* or plead guilty to a capital offense when there is a possibility of finally receiving a death sentence.
The Effect of a Guilty Plea	• 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, *inter alia*, multiplicity motions that are not facially duplicative, unlawful command influence, and ineffective assistance of counsel.
Mechanics of *Care* Inquiry	• 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 *Care* Inquiry. • The *Care* 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 *Benchbook*, 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 *Benchbook* 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.
Use of the Providence Inquiry; Mixed Plea Case Procedure	• 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

(RCM 913)	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.
Military Judge and PTAs	• 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.
Permissible and Impermissible Terms of PTAs	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 *sub rosa* agreements. Permissible terms include waiver of a members trial, promises of restitution, reasonable probation, and waiver of accusatory stage unlawful command influence. *US v. Weasler* has spurred the introduction of novel terms that require a high degree of scrutiny.

Chapter 21

Chapter 21
Court-Martial Personnel

I. Introduction

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 SPCMCAs 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 <u>may</u> 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.

Action contemplated	**If *statutorily* disqualified -**	**If *personally* disqualified -**
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. Fenwrick*, 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 XOs 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 WOs); *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. Fenwrick*, 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 (⅓) 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 NMCMR.

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 withdraw 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 waving 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

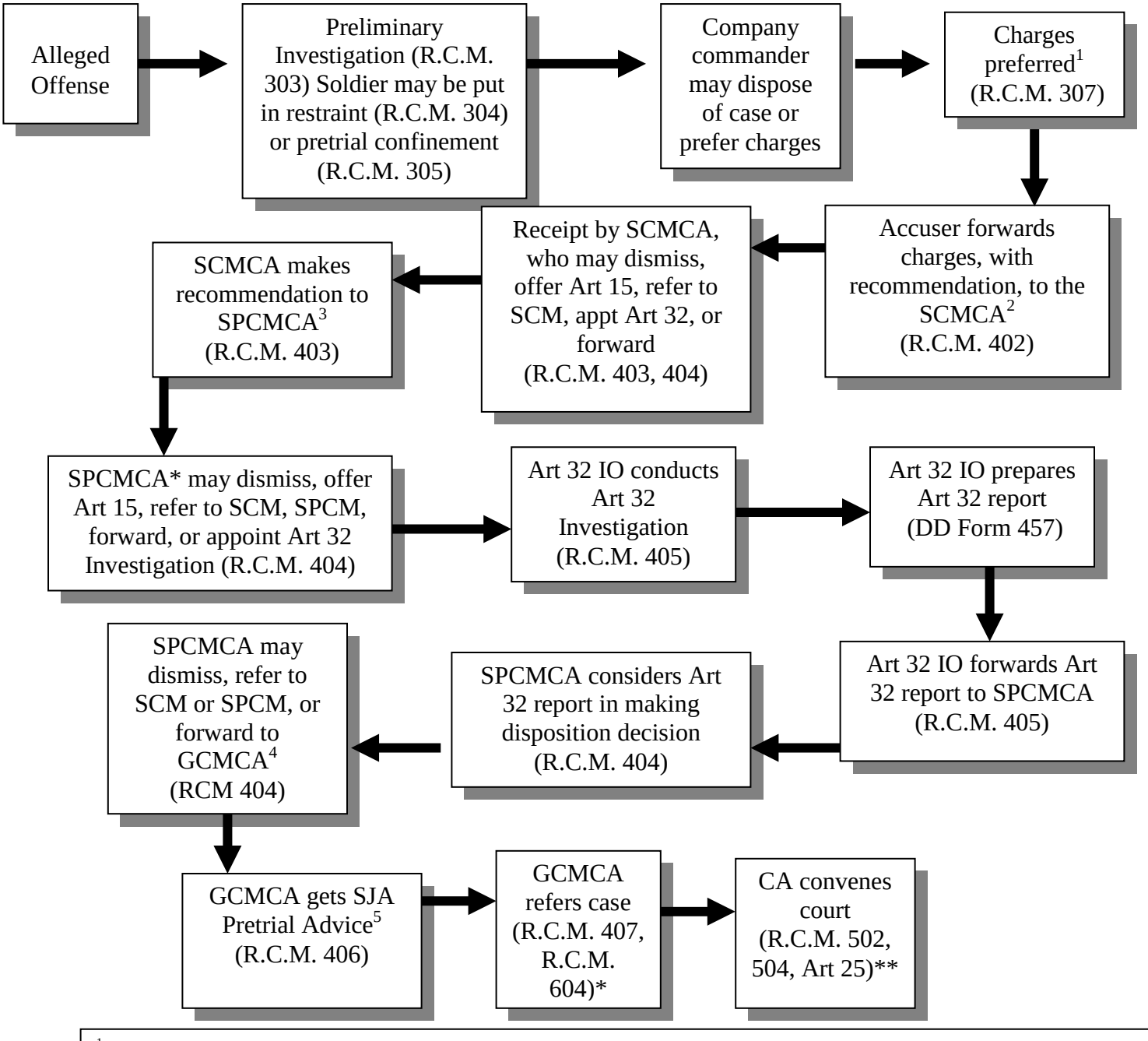
IX. APPENDIX – COURT-MARTIAL PerSoNneL SUMMARY

MAJOR POINT	*SUMMARY*
The Convening Authority	• 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.
Accused's Rights: Counsel Qualifications and Pro Se Representation	• 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.
Court Members	• 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 US v. Bartlett*, 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.
The Military Judge	• 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.
Trial By Judge Alone or by a panel of ⅓ enlisted members	• 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 *might* 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.
Trial In Absentia ▸ **Presence** ▸ ▸ ▸	• Trial in absentia is only possible after an effective arraignment. *The MJ must ensure that the accused is given an opportunity to have the charges read, and then call upon the accused to plead.* 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 *physically* 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)



[1]Usually 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)).
[2]Summary Court-Martial Convening Authority
[3]Special Court-Martial Convening Authority
[4]General Court-Martial Convening Authority
[5]The SJA will normally "bundle" the subordinate commanders' recommendations with his Pretrial Advice.
*GCMCAs and SPCMCAs 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, appt Art 32, forward with rec. for GCM (must note disqualification). If personally disqualified (e.g., personal interest in case), may not appt 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."

Chapter 22

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. See Chapter 17, *Discovery and Expert Assistants*

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." 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. 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.

V. Appointment and Production of Expert Witnesses

A. Expert Witnesses. (For discussion of expert assistants, see Chapter 17.)

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 and 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).

VI. 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 product 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.

Chapter 23

I. Introduction

A. This chapter covers two major topics. The first half of the chapter covers the ethical and legal rules that apply when an attorney conducts a witness interview. The second part of the chapter provides resources and guidance on the "how" – techniques for witness interviews. This chapter is focused on the interviewing of witnesses that are NOT an attorney's client.

II. Ethics of Interviewing Witnesses

A. "In one sense, the term 'legal ethics' refers narrowly to the system of professional regulations governing the conduct of lawyers. In a broader sense, however, legal ethics is simply a special case of ethics in general, as ethics is understood in the central traditions of philosophy and religion. From this broader perspective, legal ethics cuts more deeply than legal regulation: it concerns the fundamentals of our moral lives as lawyers." Deborah L. Rhode & David Luban, *Legal Ethics* 3 (1992) (quoted under "Legal Ethics" in Black's Law Dictionary 976 (9th ed. 2004)).

B. Ethical considerations regarding investigations and interviewing appear in four general categories.

1. Investigatory responsibilities.
2. Dealing with access issues such that the rights of witnesses and defendants are respected.
3. Techniques used to investigate and/or prepare witnesses for their testimony.
4. Disclosure obligations which may arise from interviews.

C. Sources of Rules and Guidelines

1. Army Regulations. *See, e.g.* AR 27-10, Military Justice; AR 27-26, Rules of Professional Conduct for Lawyers.
2. ABA Standards for Criminal Justice. The standards are intended to be used as a guide to professional conduct and performance. According to AR 27-10, para. 5-8c, "Judges, counsel, and court-martial clerical support personnel will comply with the American Bar Association Standards for Criminal Justice (current edition) to the extent they are not inconsistent with the UCMJ, MCM, directives, regulations . . .or other rules governing the provision of legal services in the Army." The Standards have discussion sections that deal with many of the thorny issues counsel run into when investigating their cases.
3. Case Law. *See, e.g.*, *Geders v. United States*, 425 U.S. 80, 90 n.3 (1976) ("An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it.").
4. Ethical rules from your bar of licensure.

III. Investigatory Responsibilities

A. A trial counsel ordinarily relies on military police, CID, and command personnel for investigation of alleged criminal acts, but the trial counsel has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with

by others, although this typically will mean requesting one of the above entities to renew or reopen their investigation. *See* ABA Standards for Criminal Justice: Prosecution Function 3-3.1(a).

B. Throughout the course of the investigation, as new information emerges, the trial counsel should reevaluate:

1. Judgments or beliefs as to the culpability or status of persons or entities identified as "witnesses," "victims," "subjects" and "targets," and recognize that the status of such persons may change; and

2. The veracity of witnesses and confidential informants and assess the accuracy and completeness of the information that each provides.

3. *See* ABA Standards for Criminal Justice: Prosecutorial Investigations 1.4(a).

C. Upon request and if known, the trial counsel should inform a person or the person's counsel, whether the person is considered to be a target, subject, witness or victim, including whether their status has changed, unless doing so would compromise a continuing investigation. *See* ABA Standards for Criminal Justice: Prosecutorial Investigations 1.4(b).

D. Defense counsel should conduct a prompt investigation of the circumstances of the case. *See* ABA Standards for Criminal Justice: Defense Function 4-4.1(a). The investigation should include the interview of witnesses. *Id.,* Comment.

E. Whether you are a trial counsel conducting an official investigation or a defense counsel investigating the facts surrounding a case, "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." AR 27-26, Rule 4.4.

1. Notwithstanding this obligation to avoid needless harm, "an Army lawyer may communicate a correct statement of facts that includes the possibility of criminal action if a civil obligation is not fulfilled." AR 27-26, Rule 4.4, Comment.

IV. Access Issues

A. R.C.M. 701(e) provides that "[e]ach 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."

B. On the other hand, "a potential witness at a criminal trial cannot normally be required to submit to a pretrial interview for either side." *United States v. Alston*, 33 M.J. 370, 373 (C.M.A. 1991).

C. Therefore, an issue arises when counsel, after the witness inquires or *sua sponte*, advises the witness about agreeing to an interview with opposing counsel. Army Rule 3.4 makes clear that a "lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party unless (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information." AR 27-26, Rule 3.4 (f); *see also* ABA Standard 11-6.3; 3-3.1(d); ABA Model R. Prof. Conduct 3.4.

1. Generally speaking, it is appropriate to inform a witness that it is their choice whether to speak with an opposing counsel or investigator. *See* ABA Standards for Criminal Justice: Prosecution Function 3-3.1, Comment.

2. However, counsel should scrupulously avoid attempting to subtly encourage witnesses not to agree to speak with the other party. In fact, it is a good practice to advise a witness that their failure to speak to the other side can be fertile ground for cross-examination. Counsel could also tell the witness that if they do not agree to meet with the other party, the witness might be ordered to give a deposition under R.C.M. 703.

3. Nonetheless, during the investigatory phase before charges are preferred, trial counsel may ask potential witnesses not to disclose information, and in doing so, trial counsel may explain to them the adverse consequences that might result from disclosure (such as compromising the investigation or endangering others). However, absent a law or court order to the contrary, trial counsel should not imply or state that it is unlawful for potential witnesses to disclose information related to or discovered during an investigation. Barring exceptional circumstances, those witnesses should be advised that they may agree to be interviewed by defense counsel after the preferral of charges. *See* ABA Standards for Criminal Justice: Prosecutorial Investigations 1.4 (d).

4. When the government is interviewing potentially exculpatory witnesses, counsel should not threaten criminal prosecution of perjury to prevent a witness from testifying. *United States v. Edmond*, 63 M.J. 343 (C.A.A.F. 2006) (a trial counsel threatened a civilian witness (former Soldier) with prosecution by the SAUSA if he testified and then counsel had the SAUSA reiterate the threat of prosecution).

5. It is also "proper to caution a witness concerning the need to exercise care in subscribing to a statement prepared by another person." ABA Standards for Criminal Justice: Prosecution Function 3-3.1, Comment.

D. Asking Potential Witnesses Not to Volunteer Information

1. AR 27-26 Rule 3.4 forbids a lawyer from requesting an individual to not voluntarily provide information unless it is the client; or a relative, employee, or agent of the client and that person's interest will not be adversely affected by their silence.

2. AR 27-26 Rule 4.3 dictates that a lawyer should not give any advice to an unrepresented person other than to obtain counsel, impliedly authorizing an attorney to recommend to an unrepresented witness the attorney is interviewing that the witness seek counsel.

E. Overlay of Victim Witness Program

1. AR 27-10 establishes policy, designates responsibility, and provides guidance for the assistance and treatment of those persons who are victims of crime and those persons who may be witnesses in criminal justice proceedings. This regulation contains provisions which impact access to witnesses. AR 27-10, ch. 18.

2. "Within the guidelines of R.C.M. 701(e), and at the request of the victim or other witness, a VWL [Victim Witness Liaison] or designee may act as an intermediary between a witness and representatives of the government and the defense for the purpose of arranging interviews in preparation for trial. The VWL's role . . . is to ensure that witnesses are treated with courtesy and respect and that interference with their lives and privacy is kept to a minimum. This paragraph is not intended to prevent the defense or the government from

contacting potential witnesses not previously identified or who have not requested a VWL to act as an intermediary." AR 27-10, para. 18-19(d).

3. The regulation requires that the VWL, trial counsel or other government representative inform victims and witnesses of the services available to them which includes the intermediation described in para. 18-19(d). AR 27-10, para. 18-9.

4. Despite the fact that some victim/witness services, such as this intermediation, may limit access to witnesses, "Neither a lawyer acting as a victim/witness liaison nor another person appointed by a lawyer to be a victim/witness liaison unlawfully obstructs another party's access to evidence or to material having potential exculpatory value by performing victim/witness liaison duties in accordance with Army regulation. For example, a victim/witness liaison, *upon the request of a victim or witness*, may require trial counsel and defense counsel to coordinate with the victim/witness liaison for interviews of a victim of or a witness to the crime which forms the basis of a court-martial." AR 27-26, Rule 3.4, Comment.

5. 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 (like a victim/witness liaison) 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).

6. Many of the requirements in the Army's Victim Witness Program mirror the ethical guidelines promulgated by the ABA. *See* ABA Standards for Criminal Justice: Prosecutorial Investigations 1.4(c) ("The prosecutor should know the law of the jurisdiction regarding the rights of victim and witnesses and should respect those rights.").

   a) Trial Counsel or VWL will provide notification of status and significant events of case. AR 27-10, para. 18-14; *See also* ABA Standards for Criminal Justice: Prosecution Function 3-3.2 (c),(e) and (g).

   b) When appropriate, trial counsel or VWL shall consult with victims of crime concerning: (1) Decisions not to prefer charges, (2) Decisions concerning pretrial restraint of the alleged offender, (3) Pretrial dismissal of charges, and (4) Negotiations of pretrial agreements and their potential terms. AR 27-10, para. 18-15; *See also* ABA Standards for Criminal Justice: Prosecution Function 3-3-3.2(h).

   c) Trial counsel of VWL will immediately notify the SJA whenever a victim or witness expresses genuine concern for his or her safety. AR 27-10, para. 18-19(b); *See also* ABA Standards for Criminal Justice: Prosecution Function 3-3.2(d).

7. If defense counsel finds a government witness uncooperative, particularly the victim, it may be ineffective assistance of counsel to passively wait until they take the stand to first question them. *United States v. Thorton*, NMCCA 200800729 (2009). Thorton's defense counsel requested the victim and her mother testify at the Article 32 hearing, but both refused. While their statements to NCIS were included with the Article 32 record, both refused to speak to the

DC prior to trial. The DC never requested a deposition of either witness under R.C.M. 702(c)(3)(A), which articulates several "exceptional circumstances" under which a counsel can depose a witness, including "unavailability of an essential witness at an Article 32 hearing." Further, the trial defense counsel failed to formally request an opportunity to interview either witness prior to or following the direct examination by the Government. Additionally, DC failed to file a 412 motion that would have provided the DC an opportunity to explore the nature of the relationships, including on MySpace, since the witnesses refused to talk to him about prior to trial. The appellate court found this ultimately led to the DC failing to present an effective theory of the case to the military judge.

8. The trial judge may prohibit communication between a lawyer and a witness during recesses of that witness' testimony at trial. *See Perry v. Leeke*, 488 U.S. 272 (1989). However, such a prohibition on communication between a defense counsel and his client may not last over an overnight recess. *See Geders v. United States*, 425 U.S. 80 (1976).

V. Specific Circumstances and Issues

A. Article 31(b) Rights

1. In a circumstance where Article 31(b) would require an advice of rights, trial counsel must remember to advise them of their rights. Article 31(b); *See also* ABA Standards for Criminal Justice: Prosecution Function 3-3.2(b); LTC H.L. Williams, *To Read or Not To Read*, ARMY LAW., Sep. 1996 (discussing whether defense counsel has an obligation if interviewee is suspected of crime); ABA Standards for Criminal Justice: Defense Function 4-4.3(c) (guidance that defense counsel has no independent duty to advise of right to non-incrimination).

2. Once charges have been brought against an individual such that they are an "accused," Army Rule 3.8(c) directs that trial counsel shall "not seek to obtain from an unrepresented accused a waiver of important pretrial rights."

3. One ethical issue can arise regarding "improperly" advising a witness of their rights. For instance, if the defense indicates that it intends to call an alibi witness who would inculpate himself while exculpating the defendant, advising the witness of his rights could be seen as a method to rob the defendant of exculpatory evidence. The ABA Standards indicate that "a prosecutor should not so advise a witness for the purpose of influencing the witness in favor of or against testifying." ABA Standards for Criminal Justice: Prosecution Function 3-3.2(b). The best practice would be to approach the military judge and obtain a ruling before taking such a witness' statement.

4. Relatedly, trial counsel should not interfere with, threaten, or seek to punish persons seeking counsel in connection with an investigation. *See* ABA Standards for Criminal Justice: Prosecutorial Investigations 1.4(h).

B. Truthfulness

1. Counsel must ensure that they conduct their interviews consistent with their ethical duties regarding truthfulness.

a) "In the course of representing a client, a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary

to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." AR 27-26, Rule 4.1.

b) While Rule 4.1 makes a failure to disclose an ethical violation in very limited circumstances, one other such exception exists. When "dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonable should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." AR 27-26, Rule 4.3.

2. Having victims present during court-martial proceedings can have a powerful impact. As such, trial counsel may encourage victims to be present even if their testimony is complete or is otherwise not necessary. Nonetheless, trial counsel should not "require victims and witnesses to attend judicial proceedings unless their testimony is essential to the prosecution or is required by law." ABA Standards for Criminal Justice: Prosecution Function 3-3.2(f).

3. Counsel should not imply the existence of legal authority to interview an individual or compel the attendance of a witness if counsel does not have such authority. ABA Standards for Criminal Justice: Prosecution Function 3-3.2(e); *See United States v. Villa-Chaparro*, 115 F.3d 797 (10th Cir. 1997) (U.S. Attorney's Office improperly used Rule 17 subpoenas to bring witness in for pre-trial interviews).

C. Confidentiality

Defense counsel in particular must remember not to violate their duty of confidentiality to their client when interviewing witnesses. *See* AR 27-26, Rule 1.6. For example, counsel may want to reveal the client's account of an event to a witness to assist in the interview. Such a disclosure may be exempt from confidentiality as "impliedly authorized in order to carry out the representation." However, the better practice is to discuss the possibility of such disclosures with the client and obtain the client's consent beforehand.

D. Presence of Third Parties

1. When interviewing or preparing witnesses, it is best practice to be accompanied by another person. That person can, if necessary, serve as a witness to the witness' statements during the interview if impeachment is later necessary. Without the third person's presence, an attorney should be prepared to forgo impeachment of that witness based upon the interview. *See* AR 27-26, Rule 3.7 (Barring rare exceptions, a "lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness."); *see also* ABA Standards for Criminal Justice: Prosecution Function 3-3.1(g); ABA Standards for Criminal Justice: Defense Function 4-4.3(e). The ability to impeach a witness on the basis of statements at the interview can also be addressed by requesting the witness sign a statement of material facts after the interview is complete. *See* ABA Standards for Criminal Justice: Prosecution Function 3-3.1, Comment; ABA Standards for Criminal Justice: Prosecution Function 4-4.3, Comment.

2. Counsel should consider themselves responsible for the actions of any third party who is conducting the interview with them. If the lawyer is aware of conduct which would be a violation of the ethical rules were it performed by the lawyer, the lawyer should stop and correct the conduct. *See* AR 27-26, Rule 8.4(a) ("It is

professional misconduct for a lawyer to . . . violate these Rules . . ., knowingly assist or induce another to do so, or do so through the acts of another.").

E. Compensation

1. "A lawyer shall not . . . offer an inducement to a witness which is prohibited by law." AR 27-26, Rule 3.4(b). As stated in the Comment, "it is not improper to pay witness' expenses or to compensate as expert witness on terms permitted by law. [However, the] common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee." AR 27-26, Rule 3.4, Comment; s*ee also* ABA Standards for Criminal Justice: Prosecution Function 3-3.2(a).

2. *De minimus* "gifts," such as providing snacks during a long interview session, would not generally fall afoul of this prohibition. However, if the witnesses are cooperators and/or inmates, such small luxuries designed to encourage cooperation could be problematic. Even if such items would not constitute "inducements" under this rule, trial counsel may have to advise defense counsel that the cooperators received special treatment under *Giglio v. United States*, 405 U.S. 150 (1972). *See United States v.* Boyd, 55 F.3d 239 (7th Cir. 1995) (extreme case where prosecutors allowed cooperating witnesses unlimited and unsupervised telephone privileges, conjugal visits and other special treatment during witness preparation sessions).

VI. Overview of Witness Interviewing Techniques

A. The key to witness interviews is to have a game plan before you start the interview. Don't just walk in with a copy of the sworn statement and run down the sworn statement. Sworn statements are just starting points for you to start thinking about your case (they are also important later on, for impeachment). For witness interviews, you should have a list of things that you think this witness can help (or hurt) you with. You generated this list when you did your case analysis. Cover these items in your interview.

B. Be efficient. When you interview the company commander, find out what she knows about the offense; what she knows about the search and seizure issue; what she knows about the accused's military character; what she knows about the impact on the unit; etc. Do it all at once. Don't keep calling back because only later did you realize how else this witness impacted your case.

C. A witness statement is not a Shakespearean play. It is not a script, and witnesses will invariably suffer memory loss, alter their testimony (intentionally or unintentionally), or fail to report important information at some point in every case. Wise counsel therefore view prior written statements as merely the starting point for an interview; and then try to memorialize what they learn in the interview in a way that locks-in the witness to those facts.

D. The goal of CID and MPI is to close a case. The standard to opine probable cause is, by definition, lower than that of a contested criminal case. For that reason, counsel should never assume that investigators probed facts to a sufficient level of detail.

VII. Resources

A. David A. Binder, et al., *Lawyers as Counselors: A Client Centered Approach* (2d ed. 1991).

B. Francis Lee Bailey and Henry B. Rothblatt, *Investigation and Preparation of Criminal Cases* (2d ed.1985).

VIII. Keys to a Successful Interview

A. Timing of the interview

1. Counsel should always interview witnesses as early in the case as possible. Every minute, hour, or day that passes results in a loss of memory, a loss of investigative opportunities, and/or the potential loss of witnesses.

2. Trial counsel in particular should cultivate a relationship with CID and MPI that provides for a continuous channel of communications, so that trial counsel, without making themselves a witness, can be present as early during (not after) the official investigation as possible.

B. Where to find people worth interviewing

1. Within the case file;

2. At the unit;

3. By asking witnesses at the Article 32 who else might know certain facts and who else should be interviewed;

4. From asking questions of the escorts, bailiffs, and enlisted personnel associated with the processing of a case;

5. From asking people familiar with the crime or crime scene; and

6. From asking people familiar with the primary witnesses.

C. Setting the conditions for an effective interview

1. Conduct the interview at the crime scene whenever practicable;

2. Make sure a reliable witness is present; and

3. Have a means to document the interview (see Outline on Preparing Witnesses for Trial for a discussion of the pros and cons of various means of documenting the interview).

D. Obstacles to a good interview

1. Situational:

a) Try to avoid situations in which either party will feel rushed during the interview process. *Lawyers as Counselors*, at 44.

b) Avoid group interviews. At best, they are a poor means to obtain evidence (one witness will always assert themselves), and it will create the appearance that you are attempting to improperly sync testimony. Matthew Rosengart, *Preparing Witnesses for Trial: A Post Moussaoui Primer for Federal Litigators*, Fed. L., Nov/Dec 2007, at 36.

c) Carefully consider whether or not to interview a person alone, or with others from their family, friends, or unit present.

(1) Advantages: Sometimes witnesses will be more forthcoming with a spouse, NCO, or commander present.

(2) Disadvantages: Most people are far less likely to speak candidly if they are distracted by concerns about the effects their statement will produce on other listeners. This effect is particularly true with more sensitive crimes.

2. Personal:

a) *Most conversations are simply monologues delivered in the presence of a witness* -Margaret Miller. Put another way, you have to close your mouth in order to listen.

b) Performance Distracters. *Lawyers as Counselors*, at 44.

(1) You are focused on preparing for the next question when you should be listening to the answer of the question you just asked.

(2) You believe you already know the salient issues, so you steer the conversation too soon and too much, thereby missing important facts.

(3) You disclose too much information, thereby alerting the witness to your thoughts on the case. This is a particular danger for hostile witnesses.

3. Structural:

a) The "tell me everything" approach to interviewing provides very poor structure, and very little memory stimulation to the interview process. It is a poor way to develop a coherent narrative of events. If you use this format, you must also expect disjointed and confusing answers to questions, that skip back and forth chronologically. *Lawyers as Counselors*, at 117.

b) The "element by element" questioning approach exposes counsel to a serious danger of "'premature diagnosis' of the case and may prevent you from learning about significant events that are not encompassed by your initial theory." Id.

IX. Two-Phase Interviewing

A. Phase I: The Time Line.

1. Why do we want a Time Line?

a) "One common feature of persuasive litigation stories is that they have a narrative structure...Think back to 'Jack and the Beanstalk'... Chronological narratives such as 'Jack and Beanstalk' are...the typical medium of human communication..."The importance of time line questioning...is that it helps you develop understandable and meaningful narrative structures." *Lawyers as Counselors*, at 113-114.

b) "In court, you typically elicit testimony in chronological order. Time lines are thus a preview of testimony." *Lawyers as Counselors*, at 117.

2. When do we want a Time Line?

a) At the start. Your contact with the witness should begin by developing a timeline from which you and the witness can explore particular events, in sequence. This timeline is the first phase of the interview.

3. What are the three parts of the Time Line?

a) They consist of discrete events;

b) As much as possible, they are ordered chronologically;

c) The events are substantially free of specific details. *Lawyers as Counselors*, at 113-114.

d) Example: "We got to the club that night and had a couple of drinks. A while later, we kind of got into it with this big biker guy and the bouncer broke it up. Later that night, as the bar closed down, we left, and *that* is when the fight happened and he assaulted me."

4. How to do it.

a) 1st Step - Orient the Witness to the Interview Process.

(1) Greet the witness - engage in sufficient small talk for both parties to relax.

(2) Explain why you are there, and the interview structure you will use. Explain: "My job is to find out the facts, and that means that to start, You will do most of the talking. I will mainly listen, take notes, and ask a few questions."

(3) If the witness is potentially hostile, you may have to familiarize them with our system - that it is okay, and even expected for witnesses to talk to all lawyers in the case.

(4) Have them create the time line: "Let's start by you telling me, from start to finish, how you are tied to this case. Start wherever you think the story starts. "Include all the events you can remember, whether you think they are important or not."

b) 2nd Step: Elicit Events.

(1) Use open-ended time line questions, of which there are three types, to build the initial time line:

(a) Advancing questions: e.g. "What happened next?"

(b) Reversing questions: e.g. "What, if anything happened between your argument that night, and the phone call you just mentioned at 9 a.m. the next morning?"

(c) Time Neutral Questions: "Did anything else important happen that morning?"

c) Summarize periodically.

d) Listen more than you talk.

(1) “Park” new information.

(a) "As questions produce data, either in the upper or lower portion of a "T", you will often be sorely tempted to ask

about that new data before exhausting the initial event or topic...If you follow that temptation, you may become sidetracked and neglect to return to the initial event. Instead, resist the temptation and 'park' new data until you complete the initial 'T'." Id. at 173.

(2) If information comes out about a new event, do not get sidetracked.

(3) Note the information, then steer the conversation back to the event in question. Example: "We should definitely talk about that later, but for now, let's talk some more about the phone call."

e) Go back to the "parked" information only after you complete the ongoing "T."

B. Phase II: Theory Development Questioning.

1. Why do we need "Theory Development Questioning?"

a) Although the simple narrative above might satisfy your witness' battle-buddy, the level of detail is woefully insufficient for trial. It would never satisfy the elements of a charge, counter adversaries' versions of events, support your witness' credibility, etc.

b) We need to use the timeline as the reference point for questions that help us explore the specific events and details that will explain why things happen, and why the witness' story is credible.

c) Stories that emerge through time line questioning should be viewed as tentative until you have explored the specific details that elicit the fullest level of memory, and resolve potential chronology errors. *Lawyers as Counselors*, at 120.

2. When do we use “Theory Development Questioning?”

a) Once we have a reasonably well-developed time line from which to explore specific events and details.

b) Develop the timeline and then unpack events in that timeline that you are interested in. You should have a list of information that you want to explore with this witness that you developed during your case analysis.

3. What are the Characteristics of "Theory Development Questioning?" *Id*. at 150.

a) Pursuing helpful evidence. Asking questions that connect concrete time line story events to the legal elements, defenses, and rules of the case.

b) Seeking to bolster credibility. Discovering facts that tend to support helpful evidence and witnesses.

c) Exploring potentially damaging evidence. Asking questions to fully appreciate the existence and scope of bad facts, and then explore avenues that minimize the impact.

d) Seeking to undermine adversaries' legal contentions. Fleshing-out portions of the time line that reveal evidence tending to support your arguments and refute the relevant legal contentions of your opponent.

4. How to do it.

a) At this point, you will need to take a more active, directing role in the interview. The idea is to gradually narrow in on smaller and smaller details in a way that maximizes the memory of the witness. *Lawyers as Counselors*, at 149.

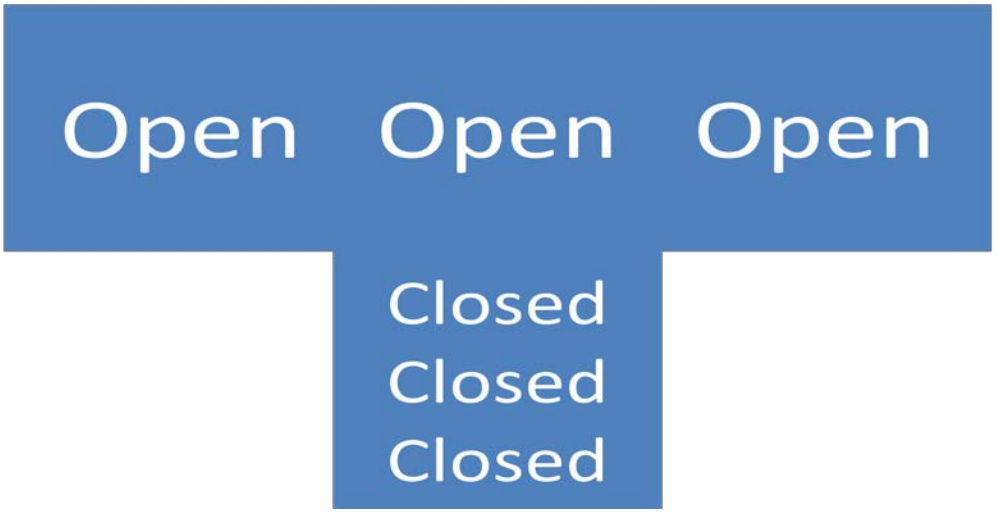
b) Use the "T-Funnel." *Id.* at 168-169.

(1) The "T-Funnel" is a visual description of how you can structure questions to elicit the most detailed memories from a witness.

(2) In practice, you begin with more open questions that set the parameters of an event. e.g. "tell me about the beginning of the fight. Now, tell me what you remember about the end of the fight."

(3) As you funnel the witness down into the specifics, you gradually use more and more closed/direct questions to probe memory until you reach the "deepest" point of the exact moment, in which the witness cannot remember any additional facts, no matter what you ask them to "focus" their memory upon. e.g. "So, as you saw his fist about to hit your face, do you remember if you saw any rings on his fingers?"

c) The "T Funnel" looks like this:



d) Procedure for T-Funneling:

(1) Identify one event from the timeline you developed.

(2) Continue to ask sufficient open-ended questions until the witness runs-out of spontaneous memory.

(3) If the client is struggling, ask them to imagine it all happening as a video, and they are narrating what they watch happening for a blind person. *Id.* at 176.

(4) Focus the witness with increasingly specific questions for them to consider.

(5) At the conclusion of any funneled interrogatory, always ask an open-ended question. e.g. "Now, let's back-up. Is there anything else you remember about the fight?"

e) Examine "Clumped" Events.

(1) Remember the story of the bar fight from above. The point in time where everyone "kind of got into it" is a "clumped" event. We know logically that there were many mini-events at this point of the story. For example, what series of events led the bouncer to break-up the squabble, and how did that happen? We may, or may not, want to break the clumped events into a mini-timeline based upon our analysis of the case. If we want to explore a clumped event, we need to:

(2) Elicit a mini-timeline.

(3) Find out what events gave rise to that clump (similar to the exploration of conclusory details - see below).

f) Explore conclusory details.

(1) Find out what gave rise to a conclusion.

(2) Example: A Marine was standing there.

(3) Basis: I saw a guy, about twenty years old. He had a high and tight haircut. He was also wearing a Marine camouflage uniform, and carrying a duffle bag with Marine Corps stickers all over it.

g) Probe Gaps:

(1) Look for where logic or your gut tells you an event may have occurred, or where you posses independent knowledge of an event, explore the event.

(2) Use forward, reverse (bookend), or neutral open questions.

(3) Look for what would have happened in the normal course of events. Probe if important information is "housed" there (dislodge with closed questions).

h) Explore Conditions and Behaviors:

(1) Sometimes witnesses describe a clumped event due to an ongoing condition or behavior. For example: "Every day I think about how much I miss my son."

(2) Explore specific memorable moments of that time period. Q: "Ma'am do you remember a specific moment when it really hit home that he was gone for good?" A: "I remember standing at the funeral home, realizing that the last choice I could ever make for my son was to bury him with a white pillow, or a gray pillow."

(3) As you develop several concrete events, it may help you uncover additional helpful evidence or events. Alternatively, as shown above, the details elicited may, in and of themselves, prove to be

far more powerful evidence than the generally described condition.

i) Bolster Credibility. *Id* at 186-191.

(1) Now explore facts that may or may not be tied directly to the events of the case, but which affect witness credibility, including:

(2) Ability to Perceive, (how good is their memory of the event).

(3) Reasons to Recall, (why is their memory so good?).

(4) Ability to Provide Surrounding Details, (can they provide details that are not legally significant, per se, but which show that clearly recall the circumstances of the event?).

(5) Consistent Actions, (Do the details of their story sync with events before and after the relevant timeline).

(6) Reasons/Motive to Engage in Conduct, (Will the panel accept their explanation of why they acted as they did, and is their explanation consistent with common sense?).

(7) Corroboration, (Does anyone or anything corroborate their statements. For example, do they have phone records they can provide you?).

(8) Neutrality/Bias.

X. Concluding the interview

A. Presume that you will need this witness again, so get their contact info, email, cell phone, etc.

B. Explain where the case will go from here.

C. Make sure they understand to contact you before they take any leave, move, go off to school, etc.

D. Ask them to contact you if they speak to anyone else about the case, or if your conversation jogs any memory.

E. If you have identified follow-up issues (for example, phone records) to collect, set a specific time and date for the meeting.

XI. DRILLS

A. All of these drills have some air of artificiality because they are detached from case analysis, and all good witness interviews are the direct result of good case analysis. Here, the point of the drills is to have the counsel understand the two-phase interview process. The counsel are not going to have ready-made theory-development questions – you may have to provide some. Or, just have the counsel work on getting a full timeline, have them park new information, and then explore the information they have parked after they complete the timeline.

1. During phase one, ensure that during the counsel orients the witness, uses open-ended questions to elicit the timeline, and parks new information.

2. During phase two, ensure the counsel un-packages interesting events, develops the theory of his or her case, and asks credibility questions.

B. The video drill. Have the "witness" watch a short video-clip of something memorable. They will then become a witness of that memorable event. Have the counsel who is going to practice the interviewing skills then conduct a two-phase interview of what the witness saw.

C. The "what happened yesterday" drill. Have the counsel partner up with a potential witness. The counsel will conduct an interview of what the witness actually did the day prior. For Basic Course students, have them identify memorable events from the Fort Lee phase (the obstacle course or the gas chamber) and then have them interview the witnesses about those memorable events.

D. The "interview the instructor" drill. Assume the role of an accident victim or witness to a crime. Have the counsel take turns interviewing you as they develop a timeline. At the end of the interview, let the counsel know what parts of the story they missed, particularly if they used closed questions.

E. As a variation of those drills, after the counsel conducts the interview, have the counsel who did the interview turn over his or her notes. Then have the counsel tell the story that he or she just heard the witness tell without referencing any notes. Point out how much the counsel was able to remember without "memorizing" anything. Work with the counsel to have him or her tell the story in present tense, foreshadowing techniques that will be used in the opening story.

APPENDIX

WITNESS WORKSHEET

Name: Date:

Rank/MOS: Witness:

Unit: Dates Unavailable:

Service History:

Interview:

CREDIBILITY CHECKLIST

KNOWLEDGE	
Intelligence	
Ability to observe	
Ability to accurately record	
Authority to engage in the observing conduct	
Reason to engage in the observing conduct	
BIAS (can be proved by extrinsic evidence)	
Friendships	
Prejudices	
Relationship to other side of case	
Manner in which witness might be affected by the verdict	
Motive to misrepresent	
RELATIONSHIP TO OTHER EVIDENCE	
Consistent with what evidence?	
Inconsistent with what evidence?	

Important inconsistency?	
OTHER	
Sincerity	
Character for truthfulness (Can anyone attack it with specific instances on cross? If adverse, who can I call to attack it?)	
Conduct in court	

Chapter 24

I. Introduction

A. "Contested military trials are won or lost on the testimony of witnesses, whether elicited by direct examination, cross-examination, or examination by the Military Judge or court members." Captain Alan K. Hahn, *Preparing Witnesses for Trial: A Methodology for New Judge Advocates*, Army Law., July 1982 at 1.

B. This outline is focused on the basics of preparing a witness for trial, whether they are friendly or hostile. Preparation for trial presupposes that counsel has already thoroughly investigated the case, and has previously interviewed the witness.

C. "It is the usual and legitimate practice for ethical and diligent counsel to confer with a witness whom he is about to call prior to his giving testimony..." but counsel "also has moral and ethical obligations to the court, embodied in the cannons of ethics of the profession..." Mathew Rosengart, *Preparing Witnesses for Trial: A Post Moussaoui Primer for Federal Litigators*, Fed. L., Nov/Dec 2007, at 36. *See* Outline on Ethics of Investigations and Interviews.

II. Resources

A. Captain Alan K. Hahn, *Preparing Witnesses for Trial: A Methodology for New Judge Advocates*, Army Law., July 1982, at 1.

B. Mathew Rosengart, *Preparing Witnesses for Trial: A Post Moussaoui Primer for Federal Litigators*, Fed. L. Nov/Dec 2007, at 34.

III. Ethical Considerations

A. Broadly stated, the objective of witness preparation is to maximize the value of a given witness' appearance and testimony. As such, it supports the lawyer's duty of zealous representation.

B. Of course, no one would dispute that a "lawyer shall not . . . counsel or assist a witness to testify falsely . . .." AR 27-26, Rule 3.4(b). Under such a rule, "subornation of perjury is clearly unacceptable. There remains, however, a vast realm of conduct that could potentially be characterized as improperly seeking to influence a witness' testimony. Within this area, there are very few guideposts to assist the attorney in maximizing his effectiveness as advocate while still remaining within the recognized limits of professional responsibility." *Professional Conduct and the Preparation of Witness for Trial*, 1 Geo. J. Legal Ethics 389 (1987); *see also Geders v. United States* 425 U.S. 80, 90 n.3 (1976) ("An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it.").

C. A lawyer may, and probably should, do the following in witness preparation:

1. Explain the mechanics of direct and cross-examination and objections;
2. Describe courtroom decorum, appropriate dress, and proper conduct;
3. Advise witness to answer truthfully;
4. Instruct witness to only answer the question asked;
5. Tell witness to refrain from volunteering information;
6. Inform witness to testify only from personal knowledge;
7. Explain that witness should avoid memorization and testify spontaneously;
8. Advise witness to pause after the question before answering;

9. Instruct witness to admit lack of knowledge where appropriate; and

10. Tell witness to ask for clarification of any unclear questions.

11. *See* R. Aron & J. Rosner, *How to Prepare Witnesses for Trial* 184-94 (1985); T. Mauet, *Fundamentals of Trial Techniques* 11-14 (1980); Schrag, *Preparing Witnesses for Trial*, in *Preparing Witnesses for Deposition and Trial*, 53-59 (1980); F.L. Bailey & H. Rothblatt, *Investigation and Preparation of Criminal Cases* § 138 (1970).

D. Altering witness' words.

1. The oft-seen general rule is that attorneys should "not advise the witness on what to say or the words to use," but rather they should explain "how to answer questions and how to tell the finder of fact what the witness knows about the case." R. Aron & J. Rosner, *supra* at 90. However, this rule can be both over- and under-inclusive. There are two circumstances when an attorney clearly may advise a witness to change specific words:

   a) Discouraging use of prefatory phrases such as "I suppose she said" or "To tell the truth."

   b) Discouraging use of technical jargon, overly formal speech or colloquial expressions.

2. What about changing substance of words?

   a) Where a witness uses language loosely, for example by referring to a small truck as a "car," an attorney can properly recommend use of the more precise term.

   b) Where a witness uses the word "piece" to refer to a firearm, an attorney may encourage use of the word "firearm" because it does not change the witness' intended meaning.

   c) Key question should be whether the change is an attempt to influence the meaning of the word. For example, recommending a change from "beat" to "hit" may run afoul of the rule because there may be a factual difference in the meaning of the words.

3. Implying acceptability of false testimony

   a) Attorneys have been known to suggest that the witness' duty is to help ensure "justice is done" rather than telling the truth. This type of advice can have the effect of influencing the witness to shade their testimony in a particular direction.

   b) Such advice would likely violate the rule against counseling a witness to testify falsely.

E. Alteration of Demeanor

1. Demeanor is usually construed as a catchall term that describes everything about a witness' appearance, excluding the actual substance of the testimony as it would appear on a written transcript.

2. Advising a witness to alter their demeanor is often perfectly ethical. However, certain tactics can go over the line. For this analysis, it is useful to divide

"demeanor" into three categories. *Professional Conduct and the Preparation of Witness for Trial*, 1 Geo. J. Legal Ethics 389, 406 (1987).

3. Behavior not intended to be communicative. Conduct in this category, such as a yawn, is involuntary and spontaneous and is not capable of being falsified or misrepresented.

4. Behavior intended to convey a general message. The class of conduct is exemplified by the use of polite mannerisms or by wearing a suit to court. Due to the very general nature of the message, it would be difficult to say that an attorney's advice to alter this type of demeanor would be improper.

5. Behavior intended to communicate a specific message. Examples of this type would include vocal inflections, emphasis on certain words, gestures and a display of surprise or emotion. An attorney who advises a witness to appear "surprised" if opposing counsel mentioned a particular event could be in violation of the rule if the expression of surprise is misrepresentative or deceitful.

F. Other considerations regarding witness preparation

1. Prior conversations with opposing counsel are proper grist for cross-examination. *See Geders v. United States*, 425 U.S. 80, 89 (1976).

2. "If attorney discloses the strategy of the case to a nonparty witness, that information is discoverable, so the attorney should be wary of what he or she communicates to a nonparty witness." Watson, *supra* at 21.

IV. Why Prepare the Witness?

A. Favorable Witnesses: "The goal of witness preparation is enhanced credibility. It is generally true that how you see a witness in your first interview is the way the court is going to see him. Preparation however, can enhance your witness' credibility and effectiveness by clarifying his testimony, reducing his fear, and smoothing his rough edges." *Hahn* at 3.

B. Adverse Witnesses: "The goal of witness preparation for the opponent is pinning the witness down and preparing for cross-examination. The focus is on limiting unfavorable facts, discovering bias, and eliciting favorable information." *Id.*

C. Expert Witnesses: In addition to the factors listed above, preparation of expert witnesses enables counsel, at trial, to fluidly use exhibits and offer testimony in a way that will be readily understood by the members.

V. Preparing to Prepare Your Witness

A. Review Your Case

1. Analyze the Law: Open DA Pamphlet 27-9, the Military Judge's Benchbook, and review the instructions for each charged offenses, any lesser-included offenses, any anticipated defenses, and any predictable secondary instructions (e.g. circumstantial evidence). Hahn, *supra*, at 4.

2. Analyze the Facts:

a) Conduct a Proof Analysis: Make a detailed and objective checklist detailing the facts that support or test each element of the offense, any defenses, lesser included offenses, etc. *Id.*

b) Consider the "Real" Issues of the Case: Why is this case at trial? "Is the real issue the failure of one element of the offense or is it an affirmative defense? Or, does the case have a theme that does not amount to a legal defense, but presents extenuating and mitigating factors so that jury nullification or light punishment is reasonably expected? *Id.*

3. Outline Closings: Using your analysis of the facts and law:

a) "Frame your argument, use the military judge's instructions verbatim for the law, and marshal the facts in a persuasive way to prove the point." *Id.* at 5.

b) Prepare the opposite side's closing (or rebuttal) argument using the same method.

c) After these two exercises, sit back and consider possible ways in which you could effectively bolster your case.

B. Analyze Your Witness. *Hahn, supra* at 5

1. Prepare a Checklist using the Benchbook Instruction on Witnesses. *See* U.S. Dep't of Army, PAM. 27-9, *Military Judge's Benchbook*, para 7-7-1 (1 Jan. 2010) (hereinafter DA Pam, 27-9). Consider, based upon your previous interviews, and your knowledge of the case, how the panel will view your witness using the following criteria:.

2. Knowledge Factors:

a) Intelligence,

b) Ability to observe,

c) Ability to accurately recall.

3. Bias Factors:

a) "Lawyers hold that there are two kinds of particularly bad witnesses - a reluctant witness, and a too-willing witness." Charles Dickens

b) Sincerity,

c) Conduct in court, Friendships and prejudices,

d) Character for truthfulness,

e) Relationship with either side of the case,

f) How the witness might be affected by the verdict,

g) Probability of their statement.

4. Objective Evaluation Criteria:

a) Is their testimony supported or contradicted by other evidence,

b) If contradicted, whether it is attributable to an innocent mistake or a deliberate lie,

c) If contradicted, is it a matter of importance, or an unimportant detail?

C. Using these Criteria, Choose Areas to Review with the Witness

1. Do you need to polish your witness' dress or courtroom demeanor?

2. If the witness has flaws, are there objective, reliable ways to buttress or attack their testimony?

   a) Example 1: What would the platoon sergeant say about the accused's character for truthfulness?

   b) Example 2: Although no one was present at the time of the alleged rape, are there other details you corroborate or refute from the witness' testimony? If you corroborate a series of minor details from earlier, the panel is more likely to believe the accuracy and truthfulness of the witness on a later detail.

   c) Example 3: Does your witness wear contacts/glasses, or is he notorious in the unit for having "eagle" vision?

VI. Let the Prepping Begin (Favorable Witnesses)

A. Refresh Their Memory. Hahn, supra at 7.

1. Let them read copies of their previous statements, summarized Article 32 testimony, etc.

2. Explain that the purpose is to refresh their memory of what they said earlier, so you can explore any differences. Stress that they are not to required to testify the same way, only to tell the truth as best they can. "After reflection, the most honest witness may recall...details that he previously overlooked." Rosengart, *supra*, at 35.

3. Identify any errors, inaccuracies, or oversights.

4. Regardless of whether there are any issues, explain to them how impeachment, rehabilitation, and refreshing recollection work. This will help to reassure the witness.

B. Revisit the Scene. Hahn, *supra* at 7.

1. Conduct a "walk-through" of the testimony. Frequently, this walk-through will trigger additional memories, provide opportunities to identify potential issues, will clarify testimony for you, and will crystallize memories for your witness.

2. Have the physical evidence, or a demonstrative aid, in hand.

3. Document (e.g. photograph) anything that might have affected their ability to observe (for good or bad), or that might have affected the accuracy of their testimony. Remember the photos of all those "bushy things" in the movie "My Cousin Vinny."

4. Measure distances. Step-off or measure distances.

C. Prep Their Direct

1. Warn the witness (other than an expert), that rehearsal is a generalized opportunity to become comfortable with court, not development of a script. Scripted exchanges appear contrived (because they are), and do not produce good results. Over-practicing also saps any emotion from the testimony.

2. Orienting your witness. HaH Hahn, *supra*, at 7-9. Most witnesses find the idea of testifying quite frightening. You can alleviate fears, and improve testimony, if you review with the witness:

a) How to take the stand, and the mechanics of the courtroom,

b) How to swear the oath,

c) How to dress and groom themselves. Check the clothes or uniform they will wear to court to make sure they are appropriate. If the witness is military, check their haircut, that all awards and badges are correctly displayed on their uniform, and that their uniform is properly tailored.

d) Explain how you will begin their examination. Demonstrate some softball questions you will give them (e.g. What is your name? What is your rank? etc.).

e) Explain that you want them to listen carefully to all questions, and ask for clarification of anything they don't understand.

f) Explain that they should look at the person asking the questions, and talk to the person asking the questions. This is the natural way we speak, and anything else appears contrived. (Note: You can position yourself so it appears the witness is looking at the panel).

g) Explain that in the event of an objection, their job is to be silent and wait.

h) Don't give answers you think I want to hear, and don't try to anticipate questions.

i) Explain that they should answer only the question asked, not volunteer additional information.

j) Generally explain the ideas of personal knowledge, conclusions, and leading questions.

(1) Example 1: "He was angry" is a conclusion, while "his face turned red and he slammed his fist into the wall, so I figured he must be pretty angry" is personal knowledge.

(2) Example 2: "He was drunk" is conclusory (and less helpful) than explaining WHY the witness reached the conclusion. It is better (if true) to say, "He was kind of slurring/singing a country tune, as he kept falling over sideways on the sidewalk and laughing. That, combined with the bottle in his hand, convinced me he was drunk."

k) Explain that they need to testify only from personal knowledge.

l) Explain that it is totally ok to make a mistake, so long as they correct it as quickly as possible.

m) Explain that they must not exaggerate.

n) Make sure they understand that no one expects them to know or remember everything. It is totally okay to be human, and even to use estimates, so long as they say it is an estimate.

(1) Example 1: Q: Was he more or less than 20 feet away? A: Well, It was about the length of a pickup away from me.

(2) Example 2: Q: So you claim that it took him five seconds to cross the room? A: I am not sure how long it was on the clock, but that is how it seemed.

(3) Example 3: "I can't remember the exact date, but I know it was the Monday of that training holiday in March."

o) Explain that if they don't know an answer, they can and should simply say "I don't remember," or "I don't know."

p) Practice speaking in paragraphs - Practice pausing as they would if they were talking to a friend on the phone. The ideal answer is neither a long narrative nor an over-controlled yes/no. It is an answer that directly addresses a specific question, and then allows the questioner to ask a logical follow-up.

q) Explain the theory of the case, and where they fit-in.

r) Let them handle any exhibits, and show them the step-by-step how you will use the exhibit.

s) If you are using a visual aid, practice having them testify to the exhibit (e.g. "this big red 1 in the upper left shows where I was standing when I saw the gun").

t) Explain why their behavior outside the courtroom is crucial. For example, if the panel members see them laughing in the hallway, right after giving teary-eyed testimony, the panel may conclude the witness was lying.

u) The last, and absolute rule, is that they simply do their best to tell the truth at all times.

D. NOW, do a Dry-Run of their Direct. Always ask "Is there anything I haven't asked you about that you think I ought to know?"

E. Next, teach them the rules of cross-examination: Hahn, *supra* at 9.

1. Be firm but polite,
2. Don't get flustered,
3. No sarcasm,
4. Don't try to outwit or play games with the attorney,
5. Don't be bullied, especially not into a yes/no answer,
6. If they were mistaken in the past, freely admit it.
7. If they feel they must explain, fine, but *don't volunteer information*
8. Tell the truth - it is the best defense.
9. Explain that you will object or redirect as necessary, so the witness can just relax.
10. If an answer is incorrect, correct it immediately.

F. Cross them, or better yet, have someone else cross them.

1. Don't pull punches, be tough.
2. Tell them that you will be harder on them than opposing counsel will be at trial, then do that.
3. Stop when necessary (for example, if you can tell they are becoming emotional), and practice "winning" techniques with them. For example "See how you were

getting angry there? Just remember, every time you keep your cool and answer professionally, you win because the lawyer trying to make you look bad just failed."

G. Wrap-up.

1. Remind them that all that matters is doing their best to tell the truth;

2. Remind them that you will handle all the other details;

3. Remind them that if they have any questions or issues, to just let you know;

4. Remind them of where they need to be, when; and

5. Give them a realistic expectation of timelines. Warn them to bring a book, a video game, or a computer. A tired, frustrated witness who has been waiting 14 hours to testify, bored, will be a much less effective witness.

VII. Prepping Hostile Witnesses

A. Can you win them over? (Works best for unit witnesses or ancillary witnesses)

1. Explain to them that it is okay for them to speak to you, as no witness really "belongs" to either side, they are all just there to tell the truth about what they know.

2. If you are the first attorney to explain the process, provide realistic timelines, tell them what the trial issues are, etc., you may win them over, or at least soften their testimony. On the other hand, be careful of disclosing too much of your theory, as your opponent will surely ask them about the discussion.

B. Ask about their discussions with opposing counsel

1. Explain that our system not only allows, but expects, that they will truthfully relate what they talked about with opposing counsel. Let the witness know that you totally expect them to also answer any questions opposing counsel has about *this* interview.

2. Now, ask questions to see what the other side is thinking.

3. At the end of the interview, always ask "is there anything you talked about with CPT ___ that we did not talk about today, even a minor detail?"

C. Pin them down on their version of events. Hahn, *supra* at 11.

1. When interviewing or preparing witnesses, it is best practice to be accompanied by another person. That person can, if necessary, serve as a witness to the witness' statements during the interview if impeachment is later necessary. Without the third person's presence, an attorney should be prepared to forgo impeachment of that witness based upon the interview. *See* AR 27-26, Rule 3.7 (Barring rare exceptions, a "lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness."); *see also* ABA Standards for Criminal Justice: Prosecution Function 3-3.1(g); ABA Standards for Criminal Justice: Defense Function 4-4.3(e). The ability to impeach a witness on the basis of statements at the interview can also be addressed by requesting the witness sign a statement of material facts after the interview is complete. *See* ABA Standards for Criminal Justice: Prosecution Function 3-3.1, Comment; ABA Standards for Criminal Justice: Prosecution Function 4-4.3, Comment (Taken Verbatim from *Ethics of Interviewing Witnesses Outline*)

2. Option 1: Have a 3rd part takes notes

   a) Advantage: Can be done easily.

   b) Disadvantages:

      (1) Easier to quibble over accuracy.

      (2) Discoverable by the other side?

      (3) To impeach orally, the impeaching lawyer will have to wait for the other party to rest, and then call the rebuttal witness. This greatly dilutes the effectiveness of the testimony.

3. Option 2: Produce a written record. Hahn, *supra* at 11-12.

   a) Inducement: "This way we both have a clear record of what was asked and said, which gives you the protection against anyone trying to twist your words, or against any of us not recording exactly what words you used, or what you meant to say."

   b) Advantages:

      (1) The witness will take the enterprise very seriously, making them "more careful when testifying," and "less prone to exaggerate and be conclusory in a way that harms you." Hahn, *supra* at 11.

      (2) If a witness contradicts their own signed, sworn statement, they will discredit themselves.

      (3) Easy to use at trial.

   c) Disadvantages:

      (1) Labor intensive to produce.

      (2) May scare the witness and reduce their willingness to cooperate.

   d) Procedure: Use a DA Form 2823. Have the witness write out the relevant facts in a narrative form, then ask questions and have them write down the questions and answers on the form. Make the last question "Do you wish to add anything, are there any details we have not discussed, or are there any corrections we need to make to what we've recorded?"

4. Option 3: Secure the witness' consent to tape the meeting (all persons present must agree).

   a) Inducement: "Since I am not a great not taker, this gives me the chance to review what you said, and gives you the security of knowing that no one can twist your words later on."

   b) Good practice is to tape the consent too.

   c) Advantages:

      (1) Great for lengthy interviews,

      (2) Freedom from note taking can lead to a looser, more natural conversation.

(3) Playing an audio recording of a contradictory statement at trial is simply devastating.

d) Disadvantages:

(1) Having to log when various statements are made, and practicing the ability to quickly play and present those statements, takes a great deal of pretrial preparation.

(2) Works best for counsel who are thoroughly prepared.

VIII. Added Prep for Foreign Witnesses

A. Explain how our system works.

B. Review why our system uses oaths, and make sure the witness is comfortable with our oath taking process.

C. Practice using the translator. Practice asking and answering questions in readily translated chunks.

D. Practice, with the witness and the translator, speaking as if the translator was not there.

Good Example: "So, then I went to the back of the truck."

Bad Example: "He says that he went to the back of the truck."

Chapter 25

I. Government Appeals

A. 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.

B. 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.

C. 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.

D. 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).

E. 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.

F. Actual v. Supervisory Jurisdiction; the All Writs Act and *Goldsmith*

1. **Background: 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.

G. 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.

H. 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.

I. 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.

J. 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. Motions Overview

A. The second half of this chapter covers motions—both the art and science. First addressed is the "science," with each rule discussed in detail. Following the rule-by-rule breakdown is a motions waiver checklist. At the end of this chapter is a section on the "art" of effective motions practice techniques, followed by a series of templates.

B. The following Rules for Courts-Martial and Military Rules of Evidence govern motions practice and form the content of this section of the chapter:

1. R.C.M. 905. Motions generally.

2. R.C.M. 906. Motions for appropriate relief.

3. R.C.M. 907. Motions to dismiss.

4. R.C.M. 915. Mistrial.

5. R.C.M. 917. Motion for a finding of not guilty.

6. R.C.M. 1102. Post-trial sessions.

7. M.R.E. 304. Confessions and admissions.

8. M.R.E. 311. Search and seizure.

9. M.R.E. 321. Eyewitness identification.

IV. Motions Generally. R.C.M. 905.

A. Definition.

1. A motion is a request to the judge for *particular relief*.

2. Based on *specific grounds* (rule or case law).

3. *Notice* should be given to the judge and opposing counsel.

4. Litigated at an *Article 39(a) session*, usually after arraignment, before a plea is entered. RCM 905(h).

a. Other than with respect to privileges, the military judge is not bound by the rules of evidence at an Article 39(a) motions hearing. MRE 104(a), *see also* MRE 1101(b) ("The rules with respect to privileges in Section III and V apply at all stages of all actions, cases, and proceedings."); RCM 909(e)(2) (applying the MRE 104(a) privileges rule to mental capacity hearings).

B. Preparation - Offer of proof.

1. *United States v. Hodge*, 26 M.J. 596 (A.C.M.R. 1988), *aff'd*, 29 M.J. 304 (C.M.A. 1989). An offer of proof should be specific and should include the names and addresses of witnesses and a summary of expected testimony.

2. *United States v. Stubbs*, 23 M.J. 188 (C.M.A. 1987), *cert. denied*, 484 U.S. 846 (1987). "[T]rial judges should not let the litigants lapse into a procedure whereby the moving party will state the motion and then launch right into argument without presenting any proof but buttressing his/her argument with the assertion that so and so would testify as indicated, if called. The other party then counters with his/her own argument and offers of proof ... Do not let counsel stray into stating what someone would say if they were called. Force them to call the witness, provide valid real and documentary evidence or provide a stipulation. Sticking to proper procedure will save you time and grief and provide a solid record." 23 M.J. at 195.

3. *United States v. Alexander*, 32 M.J. 664, (A.F.C.M.R. 1991), *aff'd*, 34 M.J. 121 (C.M.A. 1992). Court notes that "counsel based much of their argument on offers of proof; although opposing counsel frequently disagreed with the proffers, no additional *evidence* was tendered." Counsel and judges must be careful to establish a proper factual basis for evidentiary rulings. 32 M. J. at 667 n.3.

4. Notice.

a. Emphasis on prior notice to counsel and the military judge.

b. R.C.M. 905(i). Written motions shall be served on all parties. When? Exceptions?

c. Local judiciary rules. *United States v. Williams*, 23 M.J. 362 (C.M.A. 1987). A local rule is invalid if it conflicts with the Manual for Courts-Martial.

C. Timeliness.

1. Motions which must be made prior to the plea (or else they are waived). R.C.M. 905(b).

a. Defects in the charges and specifications.

b. Defects in preferral, forwarding, and referral.

c. Suppression of evidence.

d. Discovery and witness production.

e. Severance of charges, specifications, or accused.

f. Individual Military Counsel (IMC) requests.

2. Motions which should be made before final adjournment (or else waived).

a. Continuance. R.C.M. 906(b)(1).

b. Speedy trial. R.C.M. 907(b)(2)(A). Note: If speedy trial right alleges an Article 10 violation, a plea of guilty does not waive appellate review of this issue. Additionally, failure to raise an Article 10 motion prior to plea may not result in forfeiture of the issue for purposes of appeal. *See United States v. Mizgala*, 61 M.J. 122, 127 (2005) (stating that a speedy trial right under Article 10 should not be subject to rules of "waiver and forfeiture associated with guilty pleas").

c. Release from pretrial confinement. R.C.M. 906(b)(8).

d. Statute of limitations. R.C.M. 907(b)(2)(B).

e. Former jeopardy. R.C.M. 907(b)(2)(C).

f. Grant of immunity. R.C.M. 907(b)(2)(D).

3. Motions which may be made at any time, including appellate review.

a. Lack of jurisdiction over accused or offense. R.C.M. 905(e).

b. Failure to allege an offense. R.C.M. 905(e).

c. Improperly convened court.

d. Unlawful command influence. *But see United States v. Weasler*, 43 M.J. 15 (1995) Pretrial agreement initiated by accused waived any objection to UCI on appeal. Waiver of UCI in accusatory phase, as distinguished from adjudicative stage, is permissible.

D. Waiver – R.C.M. 905(e)

1. Failure to comply with timeliness requirements is generally considered a waiver *unless* the military judge finds *good cause* to consider the untimely motion.

2. *United States v. Coffin*, 25 M.J. 32, 34 (C.M.A. 1987) (finding that M.R.E. 311(d)(2) "should be liberally construed in favor of permitting an accused the right to be heard *fully* in his defense").

E. Burden of Proof – R.C.M. 905(c)

1. Who has the burden?

a. The moving party – R.C.M. 905(c)(1),

b. *Except*, the Government has the burden of proof for:

1) Jurisdiction – R.C.M. 905(c)(2)(B).

2) Speedy trial – R.C.M. 905(c)(2)(B).

3) Statute of limitations – R.C.M. 905(c)(2)(B).

4) Suppression motions: confessions, evidence, identifications – M.R.E. Sect. III.

5) Unlawful command influence.

2. What is the standard?

a. Preponderance of evidence.

b. Clear and convincing evidence standard for subterfuge inspections (three triggers for higher standard) (M.R.E. 313(b)); consent searches (M.R.E. 314(e)(5)); and, "unlawful" identifications (M.R.E. 321).

c. Command influence. When defense raises an issue of UCI at trial by some evidence sufficient to render a reasonable conclusion in favor of the allegation, burden shifts to the Government to prove, beyond a reasonable doubt (*U.S. v. Biagase* 50 M.J. 143 (1999)) that command influence did not occur. If the Government is unable to do so, then the trial court (or the appellate court) must be satisfied beyond a reasonable doubt that the findings and sentence were unaffected. *See United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 (1987) (reviewing court may not affirm the findings and sentence unless it is persuaded **beyond a reasonable doubt** that the findings and sentence have not been affected by the existence of unlawful command influence).

F. Appeal of Rulings.

1. Defense: extraordinary writs.

2. Government appeals: R.C.M. 908.

G. Effect of a Guilty Plea.

1. *General rule:* guilty plea waives all issues which are not jurisdictional or do not deprive an accused of due process. Waived by guilty plea:

a. Suppression of evidence, confessions, identifications.

1) *See, e.g., United States v. Cooper*, 32 M.J. 83 (C.M.A. 1991)(accused who pleaded guilty without condition or restriction to offense of adultery did not preserve for appellate review his motion to suppress items seized in an illegal search by pleading not guilty to rape of the same victim at the same place and time).

2) *See, e.g., United States v. Hinojosa*, 33 M.J. 353 (C.M.A. 1991). Accused's motion to suppress statements to CID was denied. Accused then entered guilty pleas to some of the offenses and not guilty to the remaining offenses. The government, however, elected to present no evidence on the contested allegations and those specifications were dismissed. Accused's guilty pleas foreclosed any appellate relief from the unsuccessful suppression motion.

b. Pretrial processing defects.

2. *Not* waived by guilty plea:

   a. Jurisdiction. *United States v. Conklan*, 41 M.J. 800, 805 (Army Ct. Crim. App. 1995) (accused may not bargain away "non-frivolous, good faith claims of lack of jurisdiction and transactional immunity.")

   b. Article 10 violation. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005).

   c. Failure to allege an offense.

   d. Unlawful command influence. *But see United States v. Weasler*, 43 M.J. 15 (C.A.A.F. 1995) (condition in PTA waiving command influence motion, originating from defense, does not violate public policy).

   e. Post-trial defects.

3. Another Exception. *United States v. Lippoldt*, 34 M.J. 523 (A.F.C.M.R. 1991). Prior to entry of plea, defense moved to require the prosecution to elect to proceed on either conspiracy to possess marijuana or distribution of same marijuana as an aider or abettor. Military judge wanted the pleas entered as a basis for development of the facts so that he could decide the motion. No waiver.

4. **Conditional Guilty Plea.** R.C.M. 910(a)(2). Will *not* waive pretrial motions made a part of the conditional guilty plea.

V. Motions for Appropriate Relief. R.C.M. 906.

A. General.

A motion for appropriate relief is a request for a ruling to cure a defect which deprives a party of a right or hinders a party from preparing or presenting its case.

B. Continuances. Some common grounds:

1. Witness unavailable. Continuance requested. *See, e.g., United States v. Mow*, 22 M.J. 906 (N.M.C.M.R. 1986); *United States v. Maresca*, 28 M.J. 328 (C.M.A. 1989).

2. Obtaining civilian counsel.

   a. Three tries you're out. *United States v. Thomas*, 22 M.J. 57 (C.M.A. 1986) (Military judge did not abuse discretion in refusing the accused a fourth continuance to permit attendance of civilian counsel where judge had gone to great lengths to accommodate accused's wishes and where civilian counsel failed to make even a written appearance.)

   b. *Compare United States v. Wilson*, 28 M.J. 1054 (N.M.C.M.R. 1989) (Judge abused discretion in denying civilian counsel's **only** request for delay after he had made a personal appearance and could not try case earlier due to "existing professional obligations.")

3. Illness of counsel, judge, witness, member.

4. Order of trial of related cases.

5. Insufficient opportunity to prepare. *United States v. Galinato*, 28 M.J. 1049 (N.M.C.M.R. 1989) (After military judge denied request for delay, defense counsel went "on strike" and refused to participate in case. Held: Accused denied assistance of counsel.)

C. Motions Concerning Charges and Specifications. R.C.M. 307; 906.

1. Amend charges or specifications. R.C.M. 603, 906(b)(4).

2. Bill of particulars. R.C.M. 906(b)(6).

3. Multiplicity. R.C.M. 307, 906(b)(12), 907(b)(3)(B), 1003(c)(1)(c).

4. Sever duplicitous specifications. R.C.M. 307, 906(b)(5).

5. Sever offenses, *but* only to prevent manifest injustice. R.C.M. 906(b)(10). In *United States v. Giles*, 59 M.J. 374 (2004), the CAAF held that a military judge abused his discretion in denying the appellant's motion for severance of new perjury charges on a rehearing of an earlier drug-related attempt offense. In order to prove the perjury charge, the Government had to prove a materiality element, which required evidence of the earlier conviction. The CAAF stated that the MJ's ruling caused actual prejudice to the accused and prevented a fair trial.

D. Defective Article 32 Investigation or Pretrial Advice. R.C.M. 405, 406.

E. Discovery. R.C.M. 701, 914.

F. Witness Production. R.C.M. 703, 1001.

G. Individual Military Counsel or Detailed Counsel Request. R.C.M. 506.

H. Pretrial Restraint. R.C.M. 305.

I. Mentally Incompetent to Stand Trial. R.C.M. 706; 909; 916.

J. Change Location of Trial. R.C.M. 906(b)(11).

K. Sever Accused. R.C.M. 307; 906(b)(9).

L. Reopen Case. R.C.M. 913(c)(5). *United States v. Fisiorek*, 43 M.J. 244 (1995).

M. Miscellaneous. *See, e.g., United States v. Stubbs*, 23 M.J. 188 (C.M.A. 1986), *cert. denied*, 484 U.S. 846 (1987). Defense moved to recuse entire prosecution office because of prior contact between one prosecutor and accused on a legal assistance matter.

N. Motion *in limine* (M.R.E. 906(b)(13)).

1. Definition. A preliminary ruling on the admissibility of evidence made outside the presence of members.

2. Procedure. Government or defense may make a motion *in limine*.

3. Rulings. The decision when to rule on a motion *in limine* is left to the discretion of the military judge. Discussion to R.C.M. 906(b)(13). Judicial economy and judicial accuracy constitute "good cause" which, under R.C.M. 905(d), allows a military judge to defer ruling on an *in limine* motion until presentation of the merits.

a. *See, e.g., United States v. Helweg*, 32 M.J. 129 (C.M.A. 1991) (separate litigation of motion would have replicated large segments of a trial on the merits and in the judge-alone format; the judge is not required to hear the case twice).

b. *See also United States v. Cannon*, 33 M.J. 376 (C.M.A. 1991) (it is appropriate to defer ruling on the admissibility of evidence until such time as it becomes an issue).

4. Common uses of a motion *in limine*.

a. Admissibility of uncharged misconduct. *See, e.g., United States v. Thompson*, 30 M.J. 99 (C.M.A. 1990). Defense moved *in limine* to suppress a sworn statement accused made one year before charged offenses wherein accused admitted to bad checks, extramarital affair and financial problems. Trial counsel intended to use statement as evidence of scheme or plan under M.R.E. 404(b).

b. Motions to keep out M.R.E. 413/414 evidence should be made *in limine.*

c. Admissibility of prior conviction for impeachment.

d. Admissibility of impeachment evidence as to credibility.

e. Admissibility of witness's out-of-court statements.

f. Admissibility of a victim's sexual behavior or predisposition under M.R.E. 412(b).

g. Motions to suppress evidence other than confessions, seizures, or identifications. *See* R.C.M. 905(b)(3) (discussion).

h. Preemptive strike by the government to exclude anticipated favorable defense evidence. Examples:

1) *United States v. Huet-Vaughn*, 43 M.J. 105 (1995). The Government made 2 motions *in limine* and prevented the accused, an Army physician, from presenting evidence of motives and reasons for refusing to support Desert Shield and views on unlawfulness of the war on charge of desertion with intent to avoid hazardous duty.

2) *United States v. West*, 27 M.J. 223 (C.M.A. 1988). The Government's motion *in limine* limited the defendant's testimony on his request for a polygraph and for sodium pentothal.

3) *United States v. Rivera*, 24 M.J. 156 (C.M.A. 1987). Defense failure to make an offer of proof does not constitute appellate waiver where Government makes a preemptive strike to exclude evidence and evidentiary issue is apparent from the record.

i. Preservation for appellate review of issue raised by motion *in limine*.

1) The accused must testify to preserve review of a denied motion *in limine* on the admissibility of accused's prior conviction. *United States v. Sutton*, 31 M.J. 11, 21 (C.M.A. 1990). This holding reverses prior military practice and adopts the U.S. Supreme Court ruling in *Luce v. United States*, 469 U.S. 38 (1984). *See also United States v. Gee*, 39 M.J. 311 (C.M.A. 1994) (character testimony) and *United States v. Williams*, 43 M.J. 348 (1995).

2) *United States v. Sheridan*, 43 M.J. 682 (A.F. Ct. Crim. App. 1995). Counsel do not have to repeat objections during trial if they first obtain unconditional, unfavorable rulings from the military judge in out-of-court sessions. *See* M.R.E. 103(a)(2); R.C.M. 801(e)(1)(A) (finality of ruling); R.C.M. 906(b)(13). However, a preliminary, tentative ruling may require a subsequent objection to preserve issue for appeal. *United States v. Jones*, 43 M.J. 708 (A.F. Ct. Crim. App. 1995).

5. Time. Rulings are generally made at the earliest possible time unless the military judge, for good cause, defers ruling until later in the trial. Written motions may be disposed of before arraignment and without an Article 39(a) session. A party may request oral argument or an evidentiary hearing concerning disposition of the motion. R.C.M. 905(h).

6. Essential findings. R.C.M. 905(d). Where factual issues are involved, the military judge *shall* state essential findings on the record.

7. Reconsideration. R.C.M. 905(f). The military judge on his or her own, or at the request of either party, may reconsider any ruling not amounting to a finding of not guilty any time before authentication of the record. Read in conjunction with R.C.M. 917(f). Motion for a Finding of Not Guilty. Reconsideration of a granted motion for a finding of not guilty is not permitted.

VI. Motions To Suppress.

A. General.

A motion to suppress is based on an alleged constitutional violation.

B. Procedure. M.R.E. 304(d) [pretrial statements], 311(d) [search & seizure], 321(c) [eyewitness identification].

1. Disclosure by the Government.

2. Notice of motion by defense.

3. Specific grounds for objection.

a. *United States v. Miller*, 31 M.J. 247 (C.M.A. 1990). Motion to suppress statement under M.R.E. 304(d)(2)(A) must be made prior to plea. Absent motion, no burden on prosecution to prove admissibility; no requirement for specific findings by MJ; and, no duty to conduct a voluntariness hearing.

b. *United States v. Vaughters*, 42 M.J. 564 (A.F. Ct. Crim. App. 1995) *aff'd*, 44 M.J. 377 (C.A.A.F. 1996). Accused challenged admissibility solely on technical *Edwards* violations. On appeal, asserts AFOSI also coerced confession by threatening to tell neighbors and alleged drug dealers that he had informed on them. As motion to suppress did not raise coercion issue, court held accused had forfeited or "waived" issue on appeal.

4. Burden on the prosecution by preponderance. If the underlying facts involve an alleged subterfuge inspection, the standard is higher for the government. Under M.R.E. 313(b), the burden is clear and convincing if the purpose of the inspection is to discover contraband *and* is directed immediately following report of specific offense, specific individuals are selected, *or* persons examined are subject to substantially different intrusions; if none of the three factors are present, the burden remains by preponderance). *See United States v. Shover*, 45 M.J. 119 (C.A.A.F. 1996) (finding clear and convincing standard met by the government).

5. Essential findings of fact, prior to plea.

6. Guilty plea waives, except conditional guilty plea.

VII. Motions To Dismiss. R.C.M. 907.

A. General. A motion to dismiss is a request that the trial judge terminate the proceedings as to those charges and specifications without a trial on the merits.

B. Nonwaivable Grounds**.** Can be raised anytime, including appellate review.

1. Lack of Jurisdiction.

2. Failure to Allege an Offense.

3. Unlawful Command Influence.

4. Improperly Convened Court.

C. Waivable Grounds**.** Must be raised before final adjournment of trial.

1. Speedy Trial. *But see United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005) (stating that court will not apply forfeiture of Article 10 issues).

2. Statute of Limitations.

a. Unlimited - capital offenses, AWOL in time of war.

b. Five years - all other offenses.

c. Child Abuse offenses – life of child, or within five years of date crime committed, whichever is longer

d. Two years - Article 15 nonjudicial punishment.

3. Former Jeopardy.

4. Presidential Pardon.

5. Grant of Immunity.

6. Constructive Condonation of Desertion.

7. Prior Article 15 Punishment for same, *minor* offense. *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989). Prior Article 15 punishment for *serious* offense does not bar subsequent trial for same offense, but the accused must be given complete sentence credit for any punishment resulting from the Article 15 proceeding. *United States v. Edwards*, 42 M.J. 381 (C.A.A.F. 1995). The military judge may apply the required credit in fashioning a sentence.

D. Permissible Grounds. *May* be dismissed upon timely motion by the accused.

1. Misleading Specification.

2. Multiplicity.

E. Other Grounds.

1. Vindictive or Selective Prosecution.

2. Constitutional Challenges.

a. Equal protection.

b. First Amendment.

c. Privacy rights. *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989). Direct observation of urine collection during urinalysis is not *per se* an unreasonable invasion of privacy.

d. Lack of notice.

e. Ex post facto laws.

VIII. Mistrial. R.C.M. 915.

A. General

1. A drastic remedy. The judge should declare a mistrial only when "*manifestly necessary* in the interest of justice" due to circumstances which "cast substantial doubt upon the fairness or impartiality of the trial." *United States v. Waldron*, 36 C.M.R. 126, 129 (C.M.A. 1966). *United States v. Brooks*, 42 M.J. 484 (1995) (MJ should not have declared mistrial based on his improper inquiry into members' deliberative process).

a. *See, e.g., 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). Mistrial not required even though trial counsel improperly communicated to civilian psychologist who was defense representative. Factors considered by the court: the psychologist would have eventually asked for the background information provided by the trial counsel; any advantage to the trial counsel from the information was minimal; and there was no bad faith on the part of the trial counsel.

b. *But see United States v. Diaz*, 59 M.J. 79 (C.A.A.F. 2003), in which the CAAF held that a military judge abused his discretion in denying a motion for a mistrial when two witnesses --one of them an expert -- testified they believed death of appellant's daughter was a homicide and appellant was the perpetrator. The combined prejudicial impact of the testimony could not be overcome by a curative instruction, particularly since the testimony went to the two main issues of the case: the cause of the death and the identity of the perpetrator.

2. Effect. A declaration of a mistrial shall have the effect of withdrawing the affected charges and specifications from the court-martial.

3. First consider alternative measures.

a. *United States v. Balagna*, 33 M.J. 54 (C.M.A. 1991). Witness testimony before panel included reference to accused's submission of Chapter 10 request. The MJ gave *curative instruction* immediately. Defense motion for mistrial was denied. MJ gave second curative instruction during findings. Held no error to deny motion for mistrial.

b. *United States v. Taylor*, 53 M.J. 195 (C.A.A.F. 2000). Military Judge did not abuse his discretion in denying a defense request for mistrial where trial counsel made several impermissible references to accused's gang affiliation in his opening statement. Curative instruction to members was sufficient, in spite of the fact that during the trial several members asked questions about the accused's gang affiliation.

c. *United States v. Mobley*, 34 M.J. 527 (A.F.C.M.R. 1991), *aff'd*, 36 M.J. 34 (C.M.A. 1992). Instructions advising members of accused's right to remain silent; that they could not draw any adverse inference from accused's failure to testify; and, that trial counsel's exposition of the facts was argument and not evidence ameliorated any prejudice caused by trial counsel's comments during closing argument that called attention to the accused's failure to testify.

d. *United States v. Skerrett*, 40 M.J. 331 (C.M.A. 1994)(no mistrial warranted where MJ admonished panel twice to disregard testimony concerning dismissed specification and each member individually assured MJ that excluded testimony would not influence consideration of remaining specifications.

4. Government can usually re-refer charges. *See United States v. Mora*, 26 M.J. 122 (C.M.A. 1988) (upholding new referral after a mistrial in a military judge alone case).

B. Retrial barred if mistrial declared after jeopardy attaches and before findings under R.C.M. 915(c)(2) if:

1. Defense objects and judge abuses discretion. *Burtt v. Schick*, 23 M.J. 140 (C.M.A. 1986). Trial counsel requested mistrial when defense divulged accomplice's sentence. Granted over defense objection; abuse of discretion, double jeopardy barred retrial.

- - or -

2. Intentional prosecution misconduct induces mistrial. *United States v. DiAngelo*, 31 M.J. 135 (C.M.A. 1990). Trial counsel's cross examination of accused elicited juvenile arrest record. Fact of arrest record had not previously been disclosed to defense despite discovery request. Trial court granted mistrial. CMA holds that conduct of trial counsel did not amount to prosecutorial misconduct and therefore, under R.C.M. 915(c)(2)(B), retrial of the accused was not barred.

C. Defense Motion for Mistrial. Examples of grounds raised in motions for mistrial:

1. Court members' actions.

a. *United States v. Johnson*, 23 M.J. 327 (C.M.A. 1987). Two motions for mistrial based on a member inadvertently seeing autopsy photos and a Government witness riding with a member.

b. *United States v. West*, 27 M.J. 223 (C.M.A. 1988). A motion for a mistrial based on an inattentive or sleeping court member.

c. *United States v. Knight*, 41 M.J. 867 (Army Ct. Crim. App. 1995)(extensive, frequent and member initiated communications with third party intended to gain improper and extrajudicial information relevant to key issues in case warranted mistrial).

d. *United States v. Hamilton*, 41 M.J. 22 (C.M.A. 1994) (mistrial not required by trial counsel's inadvertent, but improper, social conversation with president of court where no information regarding accused's case was discussed and president was removed for cause).

2. Military judge's actions.

a. *United States v. Burnett*, 27 M.J. 99 (C.M.A. 1988). "From early in the trial the relations between the military judge and the civilian defense counsel had been less than harmonious." Defense counsel held in contempt. Trial proceeded. Motion for mistrial denied.

b. *United States v. Donley*, 33 M.J. 44 (C.M.A. 1991). Military judge did not err when he failed, *sua sponte*, to declare a mistrial over a defense objection. During general court-martial for premeditated murder of accused's wife the president of court-martial over-heard sidebar conference during which military judge and counsel discussed inadmissible hearsay. Military judge offered to declare a mistrial but defense counsel objected.

c. Noncompliance with discovery rules. *United States v. Palumbo*, 27 M.J. 565 (A.C.M.R. 1988), *pet. denied*, 28 M.J. 265 (C.M.A. 1989). Mistrial not necessary as trial judge gave proper curative instructions after the trial counsel elicited statements made by the accused which were not disclosed to the defense before trial and also elicited testimony that the accused had invoked his rights.

IX. Motions For Finding Of Not Guilty. R.C.M. 917.

A. Procedure.

1. *Sua sponte* or defense motion.

2. Defense must specifically state where evidence is insufficient.

3. Opposing counsel shall be given an opportunity to be heard.

4. After the evidence on either side is closed and before findings are announced.

B. Standard.

1. Deny motion if there is *any* evidence which, together with all reasonable inferences and presumptions, could reasonably tend to establish every element of the offense.

2. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses. *See, e.g.*, *United States v. Felix*, 25 M.J. 509 (A.F.C.M.R. 1987). Allegations of deviation from standard operating procedure at a drug-testing lab. Trial judge did not abuse his discretion when he denied the defense motion for a finding of not guilty.

3. Grant motion if the government has introduced no evidence at all of an offense occurring during the charged dates of the offense. In *United States v. Parker*, 59 M.J. 195 (C.A.A.F. 2004), the Government charged the accused with raping a woman in 1995. At trial, the woman testified that the rape had actually occurred in 1993. The Government unsuccessfully moved to amend the charge, but persuaded the military judge give a variance instruction that would permit the members to substitute 1993 for 1995. The CAAF held the military judge erred in denying the defense's R.C.M. 917 motion for the 1995 rape offense; the Government had introduced no evidence of any sexual interaction between the accused and the victim in 1995.

C. Effect.

1. If motion is granted only as to part of a specification, a lesser included offense may remain.

2. If motion is denied, it may be reconsidered at any time before authentication of the Record of Trial. R.C.M. 917(f). *See also United States v. Griffith*, 27 M.J. 42 (C.M.A. 1988). Trial judge stated he had no power to set aside findings of guilty by court members. (He had previously denied a motion for a finding of not guilty due to the lower standard for such motions.) HELD: "We are convinced that, if before authenticating the record of trial, a military judge becomes aware of an error which has prejudiced the rights of the accused—whether this error involves jury misconduct, misleading instructions, or *insufficient evidence*—he may take remedial action." 27 M.J. at 47.

3. If motion is granted, it may not be reconsidered.

X. Post-Trial Sessions. R.C.M. 1102.

A. Purpose. Corrective, clean-up the record, fix obvious errors, and inquire into new matters affecting findings or sentence.

B. Hearing. Article 39(a) session or proceeding in revision directed by the military judge or the convening authority.

C. Time. Military judge - any time before the record is authenticated. Convening Authority - before initial action or if directed by a reviewing authority. R.C.M. 1102(b)(2) & (d).

D. Grounds

1. Investigate alleged court member misconduct. *United States v. Stone*, 26 M.J. 401 (C.M.A. 1988). Post-trial allegations by appellant's father concerning laughter and festive atmosphere within the deliberation room and an improper comment by a court-member made during a recess. A post-trial hearing was not required in this case, but court indicates that it is an appropriate mechanism in such cases.

2. Change plea when alleged cocaine was caffeine. *United States v. Washington*, 23 M.J. 679 (A.C.M.R. 1986), *rev. denied*, 25 M.J. 197 (C.M.A. 1987). Cocaine was caffeine. A post-trial session was appropriate.

3. Lost tapes of the announcement of findings and sentencing proceedings. *United States v. Crowell*, 21 M.J. 760 (N.M.C.M.R. 1985), *rev. denied*, 23 M.J. 281 (C.M.A. 1986). A post-trial session, before authentication of the record, was appropriate to recreate lost verbatim tapes.

4. Newly discovered evidence.

a. *United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989). "Article permitting MJ to call court into session without presence of members at any time after referral of charges to court-martial empowers judge to convene post-trial session to consider newly discovered evidence and to take whatever remedial action is appropriate." Until he authenticates the record, the MJ can set aside the findings of guilt and sentence. If the convening authority disagrees with the MJ, the only remedy is to direct trial counsel to move for reconsideration or to initiate government appeal. *See United States v. Meghdadi*, 60 M.J. 438 (C.A.A.F. 2005) (military judge abused his discretion in denying appellant's motion for a post-trial 39(a) session to inquiry into newly discovered evidence and fraud on the court).

b. *United States v. Fisiorek*, 43 M.J. 244 (C.A.A.F. 1995) (MJ applied incorrect legal standard in denying accused opportunity to reopen case to present newly discovered evidence).

XI. Motions Waiver Checklist

MOTION	HOW WAIVED
Suppression of Confession or Admission.	1. Failure to raise before submission of plea [after proper disclosure by trial counsel under MRE 304(d)(1)], except for good cause shown, as permitted by the military judge. MRE 304(d)(2)(A)]. 2. Plea of guilty regardless of whether the motion was raised prior to plea, unless conditional plea. MRE 304(d)(5). 3. When a specific motion or objection has been made, the burden on the prosecution extends only to the grounds upon which the defense moved to suppress the evidence. MRE 304(e).
Suppression of evidence seized from the accused or believed owned by the accused.	1. Failure to raise before submission of plea [after proper disclosure by trial counsel under MRE 311(d)(1)], except for good cause shown, as permitted by the military judge. MRE 311(d)(2). 2. Plea of guilty, regardless of whether the motion was raised prior to plea. MRE. 311(i). 3. When a specific motion or objection has been made, the burden on the prosecution extends only to grounds upon which the defense moved to suppress. MRE 311(e)(3).
Suppression of Eyewitness ID.	1. Failure to raise before submission of plea [after proper disclosure by trial counsel under MRE 321(c)(1)], except for good cause shown, as permitted by the military judge. MRE 321(c)(2)(A). 2. Plea of guilty, regardless of whether raised prior to plea. MRE 321(g). 3. When a specific motion or objection has been made, the burden on the prosecution extends only to grounds upon which the defense moved to suppress. MRE 321(d).
Defects (other than jurisdiction) in preferral, forwarding, investigation, or	Failure to raise before plea is entered. R.C.M. 905(b)(1).

referral of charges.	
Motions for discovery (RCM 701), or for production of witnesses or evidence.	Failure to raise before plea is entered. R.C.M. 905(b)(4).
Defects in Charges or Specs (other than juris. or stating offense).	Failure to raise before plea is entered. R.C.M. 905(b)(2).
Motions for severance of charges or accused.	Failure to raise before plea is entered. R.C.M. 905(b)(5).
Objections to denial of IMC request or for retention of detailed counsel when IMC granted.	Failure to raise before plea is entered. R.C.M. 905(b)(6).
Lack of jurisdiction over accused.	Not Waivable. R.C.M. 907(b)(1)(A).
Command Influence	Generally Not Waivable. But see *U.S. v. Weasler*, 43 M.J. 15 (1995). (Defense initiated waiver of UCI in accusatory phase for favorable PTA is permissible), and *U.S. v. Drayton*, 45 M.J. 180 (1996). (Failure to raise accusatory UCI constitutes waiver.)
Failure to State Offense	Not Waivable. RCM 907(b)(1)(B).
Improperly Convened CM (Incorrect Member Subst.)	Not Waivable.
Speedy Trial	1. Waived if not raised before final adjournment. R.C.M. 907(b)(2)(A), and 905(e). 2. Plea of guilty, except as provided in R.C.M. 910(a)(2). R.C.M. 707(e); note: Article 10 issues not waived by GP.
Statute of Limitations	Waived if not raised before final adjournment, provided it appears that the accused is aware of his right to assert the statute, otherwise the judge must inform the accused of the right. R.C.M. 907(b)(2)(B).
Use of Victims Past Sexual Behavior or Predisposition.	Failure to file written motion 5 days before trial. MRE 412(c)(1)(A).
Former Jeopardy	Waived if not raised before final adjournment of the court. R.C.M .907(b)(2)(C).
Pardon, grant of immunity, condonation of desertion or prior punishment under	Waived if not raised before final adjournment of the court. R.C.M. 907(b)(2)(D).

Articles 13 & 15.	

NOTE: RCM 910(j) provides that [except for a conditional guilty plea under RCM 910(a)(2)] a plea of guilty which 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 of the offenses to which the plea was made.

RCM 910(a)(2) provides that, with the approval of the military judge and the consent of the government, an accused may enter a conditional plea of guilty, reserving in writing the right, on further review or appeal, to review the adverse determination of any specified pretrial motion.

XII. Motions Practice Overview

A. Theme Matters.

1. Your judge is a human being. When you write, prove, and argue your motions, you need to remember that your judge, like most people, wants to right a wrong. Your job is to show her what is wrong with this particular issue and get her to not only fix it, but want to fix it. So, you need to find an appropriate theme for this motion. That theme may not be exactly the same as the theme of your case at large, but still needs to give the judge a reason to do what you want her to do. Show the actual harm that will come to this victim if the evidence of prior sexual behavior is admitted. Show how this command has not taken this court-martial – and the accused's rights – seriously. This issue is part of a dramatic story, so tell that story.

2. In a complex case, you may have a theme that runs through several motions – that the accused is not getting a fair trial, etc. Don't hesitate in this motion to reference other motions that have that same theme. Let the military judge and appellate judges know that the problem is bigger than just this one issue.

B. Pick the Right Fight

1. According to James McElhaney, you need to pick the right fight. James McElhaney, *McElhaney's Trial Notebook* 11 (4th ed. 2005). Concede the obvious. You damage your credibility when you don't. If your command has done something wrong, concede that wrong and see if you can settle on a remedy. If you can't, litigate the remedy.

2. Don't file frivolous motions. This is an ethical rule (AR 27-26, Rule 3.1) but also makes good trial sense. The rules don't provide a good definition of frivolous, other than to say that an action is frivolous "if the client desires to have the action taken solely for the purpose of harassing or maliciously injuring a person or if the lawyer is unable to either make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for the extension, modification or reversal of existing law." AR 27-26, Rule 3.1 Comment.

C. Watch Your Tone

1. In adversarial settings, when a party sees the other party do something, he or she is likely to immediately jump to a negative inference about that action. Most of the time, however, the other party is just doing their job and has no sinister intent.

2. Keep your cool. Keep personal accusations and negative inferences about the other party's intentions out of your motion. When you write nasty things in your motion, only one person looks bad.

XIII. Writing The Motion

A. To start, you should write each of your motions. Don't just rely on what is in the motions bank. Often, you will have no knowledge about the person who wrote that motion. She could have been the greatest lawyer ever – or something short of the greatest. Use old motions as idea generators. See what issues other people have spotted. See what cases they have cited. Look at those cases. Then, look at your facts and see what works. The key is to start from scratch for each motion. You will get efficient at these soon enough.

B. Keep some basic rules in mind. Keep your motion short, and keep your motion simple. You are balancing the interests of two audiences: the military judge, and the appellate judges. The military judge will read your motion but it really serves as a read-ahead for the motions hearing. None of it really matters until you prove your facts at the hearing. Your job is to familiarize her with the issue without causing her to fall asleep at her desk. At the same time, you need to develop your argument enough so that if you forget to make the *legal* point at the hearing, the issue is still preserved for appeal. (If you forget to prove the *factual* issue, generally speaking you will be out of luck).

C. See the attached motions shell for a good method for writing your motions. This motion is in the format found in the United States Army Trial Judiciary Rules of Practice before an Army Court-Martial. You don't need all of that hyper-formal stuff ("Here comes the Government, by and with counsel . . . ." You also don't need to put the judicial circuit. The judicial circuits represent the way that the Army Trial Judiciary has organized their judges for administrative purposes. Your court-martial stands alone.

D. You can use the IRAC formula (issue, rule, analysis, conclusion) – and your judges will probably appreciate it if you do. You want to have a clean, clear argument, and that formula helps you to accomplish that goal.

E. Just like with the trial in general, you want to start by writing your argument first. You do not need to write a law review article. Most of the time, the nature of the law is not at issue. The problem is the application of fact to law. Brief statements followed by the source of law are generally good enough. You don't have to be a Bluebook geek, but you should have citations that generally follow the inside back cover of the Bluebook (use the Court Documents and Legal Memoranda format, not the Law Review format). If your judge is a Bluebook geek, then you don't want to blow your credibility by not even making an effort.

F. After you state the law, state which facts apply to the immediate problem, and then tell the military judge how those facts either do or do not satisfy the law. Explicitly state the inferences that you want her to draw. Then, tell the judge how you want her to solve the problem (your conclusion).

G. Once you have written your argument, cut and paste it to the "Statement of Facts" section. Then, go through what you just pasted and delete out all of the statements of law and all of the inferences. The facts that are left are called "determinative facts." They are the facts that determine or directly inform the issue before the military judge. Now, go through and add any other facts that are needed for the story to flow and that are needed to support the theme *that is specific to this motion.* Don't put in a bunch of irrelevant facts just because you think they will make the judge get angry at, or sympathetic toward, the accused. The judge will be neutral, and all you will have done is hidden the facts that matter.

H. When you are done with that, go to the "Witnesses/Evidence" section. You need to prove every determinative fact. Putting them in your statement of facts is not enough. Prove it.

Just stapling a document to the motion may not be enough. The Military Rules of Evidence (MRE) might apply to your issue. According to MRE 1101, the MREs apply to Art. 39(a) sessions unless some other rule says the rules don't apply. One of those rules is MRE 104, which says the MREs don't apply (other than the rules related to privileges) in motions about the qualification of a person to be a witness, the existence of a privilege, the admissibility of evidence, an application for a continuance, or the availability of a witness. In addition, the MREs don't apply to competence hearings (see RCM 909(e)(2)). The key is to know that the rules apply unless you find an exception somewhere.

List all of the evidence you intend to admit and the witnesses you intend to call. For the defense, if you want the Government to produce the witness or evidence, then you will also need to comply with RCM 703. If the witness' credibility is not at issue or what they say will not be at issue, then consider entering into a stipulation of expected testimony. (If calling the witness live will help you, then don't enter the stipulation). And, if you can agree on certain facts, consider entering into a stipulation of fact.

I. Then, file the motion and get ready to call witnesses, do direct and cross-examinations, and present argument.

J. Consider filing a proposal for what you want the military judge to write – a proposed findings of fact, proposed conclusions of law, or even a proposed ruling.

K. If things change after you file your motion, file a supplemental. You may learn things through discovery, investigation, or even from litigating other motions that might impact your argument. Adjust if you need to.

XIV. Arguing The Motion

A. Motions hearings are a great opportunity to hone your trial skills in an environment that is somewhat safer than when the panel members are in the room. Prepare your direct, cross, and argument with the same rigor that you would if the members were in the room.

B. Remember, the law will not likely be the issue. This is not a law school moot court competition. Your job in argument is to tell the military judge why she should believe the facts that you presented in the hearing (credibility); what those facts mean (inferences); and why the facts satisfy or don't satisfy the law. Don't waste your time doing case briefs. You may need to state the legal factors to provide the military judge a framework for solving the problem, and might want to point to cases that have similar facts where the military judge or appellate judges solved the problem in your favor, but that is about as far as you need to go.

C. Don't resort to characterizing what the other party has done. If you think their argument is weak, show why it is weak by pointing to the facts. Do you think you help the military judge to solve the problem when you say, "Their argument is smoke and mirrors"? You don't. You do help the military judge if you say, "Their argument is weak because of X, Y, and Z."

XV. Get Better By Reading:

A. Lieutenant Colonel Patricia A. Ham, *Making the Appellate Record: A Trial Defense Attorney's Guide to Preserving Objections – the Why and How*, Army Law., Mar. 2003, at 10.

B. James McElhaney, *Dirty Dozen: Do You Want to Write a Really Bad Brief? Here Are 12 Ways to Do It*, ABA J., June 2011, at 24.

C. James McElhaney, *Listen to What You Write*, ABA J., Jan. 2011, at 20.

D. James McElhaney, *Style Matters*, ABA J., June 2008, at 28.

E. James McElhaney, *Telling It to the Judge*, ABA J., Nov. 2006, at 22.

F. James McElhaney, *Story Line*, ABA J., Apr. 2006, at 26.

MOTION SHELL

UNITED STATES OF AMERICA	)	
	)	(Defense) Motion
v.	)	for Appropriate Relief:
	)	
(Last Name), (First Name) (MI)	)	Date
(Rank), U.S. Army,	)	
(BN), (BDE)	)	
10th Mountain Division (Light Infantry)	)	
Fort Drum, New York 13603	)	
	)	

RELIEF SOUGHT

The Defense requests that the Court (**do what**) because (**briefly state the reason**).

The (Prosecution)(Defense) (does)(does not) request oral argument.

BURDEN OF PROOF AND STANDARD OF PROOF

The Defense has the burden of proof on any factual issue. R.C.M. 905(c)(2). The standard of proof on any factual issue is preponderance of the evidence. R.C.M. 905(c)(1).

(This should work for most motions. If the motion is out of MRE Section III, see the particular rule – generally, the government will have the burden and may have a higher standard. See also RCM 905(c)(2)(B) for other occasions where the government has the burden).

FACTS

(Do this section last. Include the facts that are needed to support the argument (determinative facts), and other facts only if they are needed for the judge to make sense of the determinative facts. After you write the argument section, you should be able to cut and paste it here, and then massage the facts into a chronological narrative. If the parties can agree to undisputed facts, include, "The Prosecution and Defense, with the express consent of the accused, agree to stipulate to the following facts for the purposes of this motion...")

WITNESSES / EVIDENCE

(Include witnesses or evidence that will support every fact that you have raised. The Defense almost always has the burden, so you have to prove the facts – the government may have to produce the witnesses, but you have to prove the facts.)

LEGAL AUTHORITY AND ARGUMENT

(Use the "IRAC" formula. If you have multiple arguments, do an IRAC for each, and use a separate header for each. Go ahead and use "Law", "Fact Analysis" and "Conclusion" as your headers.)

1. Article 10 Violation.

a. The issue is whether XXX.

b. Law. The test under Article 10, UCMJ, is whether the government proceeded with reasonable diligence in bringing the case to trial. United States v. Kossman, 38 M.J. 358 (C.M.A.1993). Stated in the inverse, the government cannot negligently fail to bring charges. Id. The remedy for an Article 10 violation is dismissal of all charges with prejudice. Kossman, at 262. The standard of review on appeal is de novo. United States v. Cooper, 58 M.J. 54 (2003). Article 10 analysis should include the Barker v. Wingo factors (United States v. Birge, 52 M.J. 209 (1999)), but is not limited to those factors because Article 10 is more exacting than standard Sixth Amendment analysis (United States v. Mizgala, 61 M.J. 217 (2005)).

(Use simple statements of the law followed by a case cite. Generally, the law is not in dispute, and the judge knows the law. If the law is unclear or is in dispute, you may make a more detailed argument.)

c. Fact analysis. Barker v. Wingo Factors. Many of the factors named above which serve to demonstrate an Article 10 violation are present in the facts of this case.

(State the facts that support your proposition, and explain why the facts support your proposition.

State the inferences that the judge needs to make. Tell him why these facts matter. After you have written your argument, you will know the determinative facts. Those are the facts you put in the statement of facts, above.)

1. Length of delays.
2. Reason for the delay.

d. Conclusion. ***(State your position on the issue)***.

2. Unlawful Command Influence.
   a. The issue is XXX.
   b. Law.
   c. Fact Analysis.
   d. Conclusion.

CONCLUSION

(Just copy the relief requested paragraph here.)

SIGNATURE BLOCK
CPT, JA
Defense Counsel

(Note: No certificate of service is required.)

Chapter 26

I. Introduction.

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. **RCM 910(a)(2)**. 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 th eplea 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 sitp 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. ***U*se 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 contendre 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.

Chapter 27

I. Introduction

A. **In General**. The Sixth Amendment right to a jury trial does not apply to military servicemembers. However, a military accused enjoys the right to trial before court members, as provided by Congress in Article 25, UCMJ. *See United States v. Witham*, 47 M.J. 297, 301 (C.A.A.F. 1997) ("Again, we note that a military accused has no right to a trial by jury under the Sixth Amendment. He does, however, have a right to due process of law under the Fifth Amendment, and Congress has provided for trial by members at a court-martial.") (citations omitted). To ensure the impartiality of panel members, they are subject to voir dire by the military judge and counsel. Article 41, UCMJ, and R.C.M. 912 control the process. Both sides have an unlimited number of challenges for cause against panel members. *See* Article 41(a)(1), UCMJ. Both sides are also allowed one peremptory challenge of the members. *See* Article 41(b)(1).

1. The Sixth Amendment right to a trial by an impartial jury of the "state" does not apply to the military because panel members are selected not from the "state" but from those in the military service per Article 25, UCMJ. *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950). The Sixth Amendment right to an "impartial" jury, however, applies to military practice, through the Due Process Clause.

2. "Part of the process due is the right to challenge for cause and challenge peremptorily the members detailed by the convening authority." *United States v. Witham*, 47 M.J. 297, 301 (C.A.A.F. 1997)

3. "The reliability of a verdict depends upon the impartiality of the court members. Voir dire is fundamental to a fair trial." *United States v. Jefferson*, 44 M.J. 312 (C.A.A.F. 1996).

4. "The purpose of voir dire and challenges is, in part, to ferret out facts, to make conclusions about the members' sincerity, and to adjudicate the members' ability to sit as part of a fair and impartial panel." *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008).

5. The convening authority personally selects panel members with two significant limitations:

a) The convening authority ***cannot*** select members in any manner that systematically excludes a group of otherwise qualified candidates (for example, potential members cannot be excluded on the basis of rank, religion, race, or gender).

b) The convening authority ***cannot*** "stack" a panel to obtain a certain result (for example, cannot pick members who will dole out harsh sentences).

B. **Impartial Members**. Court members must be impartial. To ensure this impartiality, both sides have an unlimited number of challenges for cause against panel members. *See* Article 41(a), UCMJ.

C. **Military Judge Controls Voir Dire**. Under R.C.M. 912(d), "The military judge ***may*** permit the parties to conduct the examination of members or may personally conduct the examination." The Discussion to R.C.M. 912(d) suggests a preference for allowing counsel to question members (noting that "[o]rdinarily, the military judge ***should permit*** counsel to personally question the members") but does not give counsel a right to personally question members. Under this rule and attendant case law, the military judge remains in virtually complete control of voir dire.

D. **Order Of March**: Depending on the military judge the process generally follows this order:

1. Selection of members.

2. Drafting of a court-martial convening order (CMCO).

3. Selected members complete questionnaires.

4. Case is referred to a certain CMCO.

5. After case is docketed, members are excused who are unavailable for the trial date and alternate members are added.

6. Counsel review questionnaires for the members who will sit.

7. On the day of trial, members come to court and are sworn as a group; the military judge then asks the entire group questions (*Military Judges' Benchbook* recommends 28 preliminary questions for group voir dire).

8. Both counsel (normally with trial counsel going first and defense second) ask the group questions.

9. Parties may request permission from the military judge to question member(s) individually as necessary.

10. After all questioning, trial counsel asserts challenges for cause.

11. Defense then asserts challenges for cause.

12. Trial counsel can use a peremptory challenge and then defense counsel can use a peremptory challenge.

13. Finally, challenged members are excused and the trial proceeds.

II. Challenging The Entire Panel

A. **In General**. There may be cases in which the defense has some reason to believe that the military panel, or the "venire,"1 has been improperly selected. In such cases, defense may wish to challenge entire panel. R.C.M. 912(b) sets out the procedure for mounting such a challenge.

1. Before voir dire begins, a party may move to stay the proceedings on the ground that members were selected improperly.

2. Once defense makes an offer of proof that, if true, would constitute improper selection of members, the moving party shall be entitled to present evidence. If the military judge determines the convening authority improperly selected the members, the military judge shall stay proceedings until members are properly selected.

3. ***Waiver***. Failure to make a timely motion under this section waives the issue of improper selection except where:

a) The issue relates to the minimum required number of members under R.C.M. 501(a);

b) The member does not have the requisite qualifications (for example, does not satisfy Article 25 criteria; or where the member is not active duty, not a commissioned or warrant officer, or is an enlisted member where the accused has not requested enlisted members); or

[1] See BLACK'S LAW DICTIONARY 1694 (9th ed. 2009) ("venire" is a "panel of persons selected for jury duty and from among whom the jurors are to be chosen").

c) The accused has requested a panel comprised of one-third (⅓) enlisted members, and they are not present or there is an inadequate explanation for their absence.

4. Defense counsel challenging panel selection frequently allege that the panel was "packed" or "stacked" to achieve a desired result; panel stacking is prohibited. *United States v. Roland*, 50 M.J. 66, 69 (C.A.A.F. 1999); *United States v. White*, 48 M.J. 251, 254 (C.A.A.F. 1998).

B. **Matters Considered By Convening Authority**. Under R.C.M. 912(a)(2), a copy of written materials considered by the convening authority in selecting the detailed members shall be provided to any party upon request. This information includes the SJA's advice to the convening authority for panel selection, the nominations from subordinate commanders, and other documents presented to the convening authority. While the rule states that "such materials pertaining solely to persons who were not selected for detail as members" need not be provided, the military judge has the authority to direct such information be disclosed for good cause.

C. **Theories For Attacking Panel Selection – In General**. In selecting panel members, the convening authority cannot systematically exclude otherwise qualified personnel from serving. *United States v. Dowty*, 60 M.J. 163, 171 (C.A.A.F. 2004); *United States v. Roland*, 50 M.J. 66, 68-69 (C.A.A.F. 1999).

D. **Attacking Selection – Exclusion Of Nominees By Rank**.

1. ***General rule***. Convening authority cannot systematically exclude personnel from panel selection based on rank. *United States v. Dowty*, 60 M.J. 163, 171 (C.A.A.F. 2004) ("[S]ystemic exclusion of otherwise qualified potential members based on an impermissible variable such as rank is improper."); *United States v. Bertie*, 50 M.J. 489, 492 (C.A.A.F. 1999) ("[W]e have also held that *deliberate and systematic exclusion* of lower grades and ranks from court-martial panels is not permissible."); *United States v. Morrison*, 66 M.J. 508, 510 (N-M. Ct. Crim. App. 2008). However, servicemembers in the grades of E-1 and E-2 are presumptively unqualified under Article 25 and may be excluded from selection. *United States v. Yager*, 7 M.J. 171 (C.M.A. 1979) (exclusion of persons in grades below E-3 permissible where there was a demonstrable relationship between exclusion and selection criteria embodied in Article 25(d)(2)).

2. ***Rationale***. *United States v. Benson*, 48 M.J. 734 (A.F. Ct. Crim. App. 1998). Convening authority violated Article 25 by sending memorandum to subordinate commands directing them to nominate "officers in all grades and NCOs in the grade of master sergeant or above" and then by failing to select members below the rank of master sergeant (E-7). Convening authority testified that he did not intend to violate Article 25, but he never selected a member below the grade of E-7; AFCCA held that systematic exclusion of junior enlisted members is inappropriate, as most junior enlisted have sufficient education and experience as to be eligible to serve (specifically, many E-4s have served at least 5 years on active duty and 88 percent have some form of post-secondary education, and the majority of E-5s have served 10 or more years on active duty and 18 percent have an associate's or higher degree).

3. ***Examples***. *United States v. Daigle*, 1 M.J. 139, 141 (C.M.A. 1975) (improper for convening authority to systematically exclude lieutenants and warrant officers); *United States v. Smith*, 37 M.J. 773 (A.C.M.R. 1993) (improper for convening authority to return initial panel selection documents and direct subordinate commanders to provide Soldiers in the grades of E-7 and E-8). *Cf. United States v. Nixon*, 33 M.J. 433 (C.M.A. 1991) (noting a panel consisting of only members in the grades of E-8s and E-9s creates an

appearance of evil and is probably contrary to Congressional intent ,but affirming because the convening authority testified he complied with Article 25 and did not use rank as a criterion).

4. ***Paperwork cannot inadvertently exclude qualified personnel***. *United States v. Kirkland*, 53 M.J. 22 (C.A.A.F. 2000). The SJA solicited nominees from subordinate commanders via a memo signed by the SPCMCA. The memo sought nominees in various grades. The chart had a column for E-9, E-8, and E-7, but no place to list a nominee in a lower grade. To nominate E-6 or below, nominating officer would have had to modify form. No one below E-7 was nominated or selected for the panel. CAAF held that where there was an "unresolved appearance" of exclusion based on rank, "reversal of the sentence is appropriate to uphold the essential fairness . . . of the military justice system."

5. ***May replace nominees with others of similar rank***. *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).

E. **Attacking Selection – Exclusion Of Nominees Based On Unit Of Assignment.** *United States v. Brocks*, 55 M.J. 614 (A.F. Ct. Crim. App. 2001), *aff'd*, 58 M.J. 11 (C.A.A.F. 2002). 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), the court said, "[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.

F. **Difficult To Mount Challenges: Hard To Find Evidence Of Impropriety**.

1. ***Composition of panel is not enough to show impropriety***. *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).

2. ***Paperwork errors may not be enough to show impropriety.*** *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); *United States v. Upshaw*, 49 M.J. 111 (C.A.A.F. 1998) (good faith administrative error resulting in exclusion of otherwise eligible members (E-6s) was not error).

3. ***Convening authority selecting commanders***. *United States v. White*, 48 M.J. 251 (C.A.A.F. 1998). A CA who issues a memorandum directing subordinate commands to include commanders, deputies and first sergeants in the court member applicant pool, and then proceeds to select more commanders than non-commanders for court-martial duty does not engage in court-packing absent evidence of improper motive or systematic exclusion of a class or group of candidates. No systematic exclusion because the CA's memo instructed that "staff officers and NCOs" and "your best and brightest staff officers" should be nominated to serve as member. 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.

III. Investigating Court Members

A. **Panel Questionnaires**. Under R.C.M. 912(a)(1), trial counsel may (and shall upon request of defense counsel) submit to members written questionnaires before trial. "Using questionnaires

before trial may expedite voir dire and may permit more informed exercise of challenges." R.C.M. 912(a)(1) Discussion.

1. ***Required questions***: Under R.C.M. 912(a)(1), the following information *shall* be requested upon application by defense counsel and *may* be requested by trial counsel in written questionnaires: date of birth; sex; race; marital status and sex, age, and number of dependents; home of record; civilian and military education, including, when available, major areas of study, name of school or institution, years of education, and degrees received; current unit to which assigned; past duty assignments; awards and decorations received; date of rank; and whether the member has acted as accuser, counsel, investigating officer, convening authority, or legal officer or staff judge advocate for the convening authority in the case, or has forwarded the charges with a recommendation as to disposition.

2. ***Additional questions***: Under R.C.M. 912(a), "Additional information may be requested with the approval of the military judge."

3. ***Format***: Under R.C.M. 912(a), "Each member's responses to the questions shall be written and signed by the member."

B. **Disclosure By Members At Trial**.

1. ***Members under oath***. Before voir dire, trial counsel administer to panel members an oath to "answer truthfully the questions concerning whether you should serve as a member of this court-martial." DA Pam 27-9, *Military Judges' Benchbook*, at 36. *See also* R.C.M. 807(b)(2) Discussion (providing suggested oath for panel members); R.C.M. 912(d) Discussion ("If the members have not already been placed under oath for the purpose of voir dire, they should be sworn before they are questioned.") (citation omitted).

2. ***Instruction about impartiality***. After panel members are sworn, the military judge instructs, "With regard to challenges, if you know of any matter that you feel might affect your impartiality to sit as a court member, you must disclose that matter when asked to do so." DA Pam 27-9, *Military Judges' Benchbook*, at 41.

3. ***Broad inquiry***. The military judge asks 28 standard questions during group voir dire, including, "Having seen the accused and having read the charge(s) and specification(s), does anyone feel that you cannot give the accused a fair trial for any reason?" *Id.* at 42.

4. ***Members have duty to disclose***. *United States v. Albaaj*, 65 M.J. 167 (C.A.A.F. 2007). Accused's brother testified as a merits witness. He was also recalled briefly as a defense sentencing witness, offering evidence in extenuation and mitigation. One of the members, LTC M, had a previous working relationship with the brother, that defense described as "extremely antagonistic." During voir dire, military judge instructed the members to disclose any matter that might affect their partiality. During trial, the defense called the brother as a witness and LTC M did not indicate at any time that he knew him, even after he recognized him. Following a *DuBay* hearing, military judge found LTC M and the brother had professional contact while the brother was at Range Control and the member developed negative impressions of the brother that were memorialized in several e-mails. However, LTC M testified that, between the last e-mail and the trial (a period of 15 months), LTC M "developed a favorable opinion" of the brother. At the *DuBay* hearing, military judge found that LTC M "did not fail to honestly answer a material question on voir dire and that [LTC M] did not fail to later disclose his knowledge of [the brother] in bad faith." CAAF reversed. Applying the test from *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), CAAF found that LTC M violated

his duty of candor as a panel member. First, LTC M incorrectly indicated that he did not know the brother during voir dire and then "fail[ed] to correct the misinformation." Second, LTC M "failed to disclose information that was material to the conduct of a fair and impartial trial" because as a result of the nondisclosure, the parties were unaware of LTC M's relationship with the brother. Third, the "correct response . . . would have provided a valid basis for challenge." Applying the implied bias standard, CAAF found that "[a] reasonable public observer of this trial would conclude that [LTC M's] actions injured the perception of fairness in the military justice system."

C. **Disclosure By Trial Counsel Or Government**.

1. ***Affirmative duty to disclose***. *United States v. Glenn*, 25 M.J. 278 (C.M.A. 1987). Case reversed because Deputy Staff Judge Advocate failed to disclose that member was his sister-in-law. Court reversed even though member signed affidavit swearing that she had no prior knowledge of the case and was not affected by the relationship.

2. ***Close calls and trial counsel duty to disclose***. *United States v. Modesto*, 43 M.J. 315 (C.A.A.F. 1995). Colonel was charged with conduct unbecoming (performing as female impersonator at gay club, sodomy with another male, indecent touching with another male, cross-dressing in public). Trial counsel failed to disclose that male panel member had dressed as a woman at Halloween Party. Court held that reversal was unwarranted because incident would not have been valid grounds for challenge, so effective voir dire was not prevented. Despite the outcome, the CAAF noted, "Both the SJA and the trial counsel have an affirmative duty to disclose any known ground for challenge for cause." *Id.* at 318.

3. ***Practice Point***: Government should liberally disclose information that might be a basis for a challenge for cause.

D. **Defense Duty To Discover**.

1. Under R.C.M. 912(f)(4), most grounds for challenging a member may be waived. The rule notes that waiver extends those matters "the party knew of or could have discovered by the exercise of diligence the ground for challenge and failed to raise it in a timely manner."

2. *United States v. Dunbar*, 48 M.J. 288 (C.A.A.F. 1998). When panel member questionnaire contains information that may result in disqualification, the defense must make reasonable inquiries into the member's background either before trial or during voir dire. The Government may not be required to provide the background for the disqualifying information in every situation. The accused was charged with dereliction of duty, conduct unbecoming an officer, and fraternization. A member's questionnaire revealed that she had testified as an expert witness in child-abuse cases prosecuted by the trial counsel. The defense failed to conduct voir dire on this issue. The defense waived the issue by failing to conduct voir dire after reviewing the questionnaire and then failing to exercise a causal or peremptory challenge. There was no additional affirmative requirement for the Government to disclose the information.

3. *United States v. Briggs*, No. ACM 35123, 2008 CCA LEXIS 227 (A.F. Ct. Crim. App. June 13, 2008) (unpublished). Accused was charged with selling survival vests and body armor taken from C-5s. This equipment was used to protect the flight crews operating these aircrafts. On appeal, defense argued for a new sentencing hearing because a member was a pilot. Essentially arguing implied bias, the defense claimed that the member, as a pilot, could not have been impartial because the crime involved "stealing safety and survival gear off an aircraft." First, the court noted the Supreme

Court standard: "[F]or an accused to be entitled to a new trial due to an incorrect voir dire response the 'party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.'" (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984)). In this case, the court held the member did fail to honestly answer a material question. Rather, he truthfully stated he worked with C-5 aircraft, which the accused "with his years and background in the Air Force" would have understood to mean the member was pilot. In biting language, the court noted, "[T]here is no evidence that the member failed to honestly answer a material question by not stating the obvious."

IV. Voir Dire

A. **Purposes Of Voir Dire**. The questioning of panel members (known as voir dire) exists so parties can intelligently exercise both challenges for cause and peremptory challenges. *See* R.C.M. 912(d) Discussion, ("The opportunity for voir dire should be used to obtain information for the intelligent exercise of challenges."); *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008) ("The purpose of voir dire and challenges is, in part, to ferret out facts, to make conclusions about the members' sincerity, and to adjudicate the members' ability to sit as part of a fair and impartial panel."). In addition to this primary purpose, there are three secondary purposes of voir dire:

1. Educate the panel and defuse weaknesses in the case. *But see* R.C.M. 912(d) Discussion ("[C]ounsel should not purposely use voir dire to present factual matter which will not be admissible or to argue the case").

2. Establish a theme.

3. Build rapport with members.

See also 2 Francis A. Gilligan and Fredric I. Lederer, Court-Martial Procedure § 15-53.00 at 15-29 (3d ed. 2006) ("Although voir dire can be used for many other purposes, such as highlighting various issues, educating the court members, or building rapport between counsel [and] members, such uses are improper unless done in the otherwise proper process of voir dire."); *id.* n.164 ("This is not to deny that voir dire may play a legitimate tactical role. Few questions can be asked in an entirely neutral fashion, and to require neutrality might well defeat the very purpose of voir dire. . . . The key, however, is that questions may not be asked for other purposes; they must have independent legitimacy as a proper part of the process of voir dire and challenges.").

B. **Military Judge Controls Voir Dire – In General**.

R.C.M. 912. Challenge of selection of members; examination and challenges of members.

. . . .

(d) *Examination of members*. The military judge may permit the parties to conduct the examination of members or may personally conduct the examination. In the latter event the military judge shall permit the parties to supplement the examination by such further inquiry as the military judge deems proper or the military judge shall submit to the members such additional questions by the parties as the military judge deems proper. A member may be questioned outside the presence of the other members when the military judge so directs.

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1. ***Rule***. "Generally, the procedures for voir dire are within the discretion of the trial judge." *United States v. Jefferson*, 44 M.J. 312, 318 (C.A.A.F. 1996). *See also* R.C.M. 912(d) (printed above) and Discussion ("The nature and scope of the examination of members is within the discretion of the military judge.").

2. ***Broad latitude to military judge in controlling voir dire***. "Neither the UCMJ nor the *Manual for Courts-Martial* gives the defense the right to individually question the members." *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001) (upholding military judge's practice of requiring written voir dire questions from counsel seven days before trial and denying defense and trial counsel requests to personally question the members). The court suggested that the military judge who reserves voir dire to the bench must conduct sufficient questioning to expose grounds for challenge: "The military judge's questions properly tested for a fair and impartial panel and allowed counsel to intelligently exercise challenges." *Id*. at 137.

3. ***Military judge may reserve voir dire to the bench***.

a) ***Before impaneled***. *United States v. Belflower*, 50 M.J. 306 (C.A.A.F. 1999) (holding military judge did not abuse his discretion in prohibiting individual voir dire by defense counsel of four members where counsel did not ask any questions on group voir dire that would demonstrate the necessity for individual voir dire).

b) ***After impaneled.*** *United States v. Lambert*, 55 M.J. 293 (C.A.A.F. 2001). Right after the members returned a verdict of guilty to one specification of indecent assault, the civilian defense counsel asked military judge to allow voir dire of the members because one member took a book titled *Guilty as Sin* into the deliberation room. The military conducted voir dire of the member who brought the book into the deliberation room, but did not allow the defense an opportunity to conduct individual or group voir dire. Noting that neither the UCMJ nor the *Manual* gives the defense the right to individually question the members, and analyzing the issue under an abuse of discretion standard, CAAF held the military judge did not err by declining to allow defense counsel to voir dire the members.

4. ***Preference for group voir dire***. *United States v. Belflower*, 50 M.J. 306 (C.A.A.F. 1999). Military judge did not abuse his discretion in prohibiting individual voir dire by defense counsel of four members where defense did not ask any questions on group voir dire that would demonstrate the necessity for individual voir dire.

5. ***Military judge may restrict method of voir dire.*** *United States v. Jefferson*, 44 M.J. 312 (C.A.A.F. 1996). Military judge did not abuse discretion by: refusing to permit "double-teaming" by defense counsel during voir dire; limiting individual voir dire regarding burden of proof, inelastic attitude toward members, and credibility of witnesses when defense counsel admitted that initial questions in these areas were confusing. However, military judge did abuse discretion in not allowing defense to reopen voir dire to explore issue of potential bias of two members who stated they had friends or close relatives who were victims of crimes.

6. ***Military judge may require questions be submitted in writing and in advance.*** *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001) (upholding military judge's practice of requiring written voir dire questions from counsel 7 days before trial); *United States v. Torres*, 25 M.J. 555 (A.C.M.R. 1987) (military judge may require counsel to submit questions in writing for approval); R.C.M. 912(d) Discussion ("The nature and scope of the examination of members is within the discretion of the military judge."). However, the military judge may not deny otherwise proper questions solely because they were not previously submitted in writing.

7. ***Liberal voir dire and appellate review.*** In limiting voir dire, military judge should consider that liberal voir dire can save cases on appeal. *See United States v. Dowty*, 60

M.J. 163 (C.A.A.F. 2004) (affirming a "novel" panel selection process, in part, due to the military judge allowing defense counsel to conduct extensive voir dire of members concerning their selection as panel members); *United States v. Simpson*, 58 M.J. 369 (C.A.A.F. 2003) (in high profile case involving allegations of unlawful command influence and unfair pretrial publicity, court notes repeatedly that the military judge permitted counsel to conduct extensive individual voir dire prior to trial).

C. **Military Judge Controls Voir Dire – Properly Disallowed Questions**.

1. ***Jury nullification.*** In *United States v. Smith*, 27 M.J. 25 (C.M.A. 1988), accused was charged with premeditated murder of his wife. Defense counsel wanted to ask members, "Are you aware that a conviction for premeditated murder carries a mandatory life sentence?" Military judge could preclude defense counsel from asking this question where "jury nullification" was motive. Court noted that voir dire should be used to obtain information for the intelligent exercise of challenges. A per se claim of relevance and materiality simply because a peremptory challenge is involved is not sufficient. The broad scope of challenges does not authorize unrestricted voir dire.

2. ***"Commitment" questions***. In *United States v. Nieto*, 66 M.J. 146 (C.A.A.F. 2008), accused was charged with wrongful use based solely on a positive urinalysis result. During voir dire, trial counsel walked the panel through the Government's case, asking specific questions about the reliability of urinalysis results. Trial counsel then received an affirmative response from each member to this confusing question: "Does any member believe that *any* technical error in the collection process, *no matter how small*[,] means that the urinalysis is *per se invalid*?" During individual voir dire, trial counsel aggressively attempted to rehabilitate members from this answer (which suggested the members would vote not guilty if evidence showed "any" technical error in the urinalysis collection process), using fact-intensive hypothetical questions related the accused's urinalysis.2 On appeal, defense argued the trial counsel's hypothetical questions improperly forced the members to commit to responses based on evidence not yet before them, denying a fair trial. Because there was no objection at trial, CAAF upheld the case under a plain error analysis. However, three judges wrote concurring opinions arguing that counsel cannot ask members to commit to findings or a sentence based on case-specific facts previewed in voir dire; the three judges even suggested that a military judge could commit plain error by not ending such questioning (presumably the questions would have to be particularly egregious to trigger a plain error finding). This case may have had a different result if the defense counsel had objected at trial.

3. ***Overly broad***. In *United States v. Toro*, 34 M.J. 506 (A.F.C.M.R. 1991), trial counsel improperly converted lengthy discourses on the history and mechanics of drug abuse, and on the misconduct of the accused and others, into voir dire questions by asking whether the members "could consider this information in their deliberations?"

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[2] CAAF provided several exchanges between trial counsel and individual members during voir dire. This fact-intensive exchange was typical:

> TC: And so it wouldn't necessarily be per se invalid if the coordinator didn't put his initials on the bottle[,] let's say. If it came back to the coordinator [and] the accused brought it back to the table, but the coordinator didn't put his initials on the bottle before it went back into the box. Would that be a violation that you couldn't over look [sic]? No matter what[,] that is an invalid test in your mind?
>
> MBR (CWO2 [C]): In that case with the initials, no.

Nieto, 66 M.J. at 148 (alterations in original).

4. ***Sanctity of life***. In *United States v. Nixon*, 30 M.J. 501 (A.F.C.M.R. 1989), accused was charged with unpremeditated murder of his Filipino wife. Air Force court found there was no abuse of discretion when military judge allowed trial counsel to ask panel whether Asian societies place a lower premium on human life and to ask if any member opposes capital punishment.

5. ***Vague or "trick" questions***. *United States v. Smart*, 21 M.J. 15, 20 (C.M.A. 1985) ("We are aware that the liberal voir dire of court members which often occurs may lure a member into replies which are not fully representative of his frame of mind.").

a) *United States v. Dorsey*, 29 M.J. 761 (A.C.M.R. 1989). In case for cocaine use, defense counsel asked, "Does anyone feel that the accused needs to explain why his urine tested positive for cocaine?" All members replied yes. MJ properly denied challenges to all panel members based on members' responses to judge's inquiries concerning prosecution's burden of proof.

b) *United States v. Rood*, NMCCA 200700186, 2008 CCA LEXIS 96 (N-M. Ct. Crim. App. Mar. 20, 2008) (unpublished). Accused was charged with several offenses, including wrongful use of marijuana. During voir dire, civilian defense counsel asked the panel, "Does any member believe that a positive urinalysis alone proves a knowing use of a controlled substance?" The senior member of the panel, a Navy Captain, responded in the affirmative. The military judge then properly instructed the members that use of a controlled substance may be inferred to be wrongful, but that such an inference was not required. All members agreed that they could follow the military judge's instructions. During individual voir dire, the senior member said, "My opinion is that you are personally responsible for everything that goes into your body." He further elaborated:

> CC: This belief that you are responsible for everything that goes into your body is a firmly held belief?
>
> Member: I believe, yes.

The defense challenged the member for cause for implied bias. The military judge rejected the challenge and the appellate court affirmed. "The beliefs he articulated in response to the defense counsel's questions were objectively reasonable for an average citizen not versed in the nuances of criminal law." The member also "clearly evinced his willingness to follow the court's instructions on the law regarding . . . a drug urinalysis case." The court seemed bothered by the civilian defense counsel's questioning, specifically framing a general voir dire question with a mild misstatement of law (whether a positive urinalysis proves wrongful use), arguably to trigger challenges for cause.

D. **Military Judge Controls Voir Dire – Limits**.

1. ***Insufficient questioning of members***. In *United States v. Richardson*, 61 M.J. 113 (C.A.A.F. 2005), four members stated they had professional dealings with detailed trial counsel. Military judge briefly questioned all four members about the nature of these dealings, and all four responded that they would not give the government's case more or less credence based on their experience with the trial counsel. Defense counsel then questioned the first three members but did not ask about their relationship with the trial counsel. For the fourth member, defense counsel asked several questions about the member's dealings with trial counsel. Following that questioning, the defense counsel asked to "briefly recall" the other three members who had prior dealings with trial

counsel. The military judge denied the request, noting that all members said they would not give the trial counsel "any special deference" and concluding, "I think there's been enough that's been brought out." *Id.* at 116. CAAF held the military judge abused his discretion by refusing to reopen voir dire to question the members about their relationships with the trial counsel. CAAF reasoned that further inquiry was necessary to determine whether the relationships with trial counsel were beyond a cursory professional connection. *Id.* at 119.

2. ***Member with friends or relatives who are crime victims***. In *United States v. Jefferson*, 44 M.J. 312 (C.A.A.F. 1996), military judge abused discretion by not allowing defense to reopen voir dire to explore potential bias of two members who said they had friends or close relatives who were victims of crimes. (Note, CAAF found no abuse of discretion in military judge refusing to permit "double-teaming" by defense counsel during voir dire or limiting individual voir dire regarding burden of proof, inelastic attitude toward members, and credibility of witnesses as defense counsel admitted those questions were confusing).

3. ***Urinalysis questions***. *United States v. Adams*, 36 M.J. 1201 (N.M.C.M.R. 1993) (abuse of discretion not to allow defense counsel to voir dire prospective members about their previous experiences with or expertise in drug urinalysis program, and their beliefs about the reliability of the program).

E. **Waiver Of Voir Dire Issues**.

1. Defense counsel should ensure the record clearly shows any voir dire issues that may be raised on appeal. Merely asking the military judge for individual voir dire without stating a legally-cognizable basis is likely waiver:

> A number of options were available to the defense counsel: (1) Defense counsel could have asked more detailed questions during group *voir dire* regarding the issues now raised on appeal; (2) defense counsel could have asked the military judge to re-open group *voir dire*; or (3) if he was concerned about the limited value of group *voir dire* alone, defense counsel could have requested an Article 39(a) session to call the military judge's attention to specific matters, thus making a record for appeal. In the absence of such actions, ***the sparse record we are presented in this case provides no basis for reversal***.

United States v. Belflower, 50 M.J. 306, 310-11 (C.A.A.F. 1999) (emphasis supplied).

2. *United States v. Williams*, 44 M.J. 482 (C.A.A.F. 1996). MJ did not unreasonably and arbitrarily restrict voir dire by denying a defense request for individual voir dire of member (SGM) who expressed difficulty with the proposition that no adverse inference could be drawn if accused failed to testify, and another member (MAJ) who disclosed that he had a few beers with one of the CID agents who would be a witness. Defense counsel did not conduct additional voir dire. The MJ granted the defense challenge for cause against the SGM. The defense peremptorily challenged the MAJ based on a theory that the denial of individual voir dire deprived the defense of an opportunity to sufficiently explore the basis for a challenge for cause. Court holds "[s]ince defense counsel decided to forego questioning, he cannot now complain that his ability to ask questions was unduly restricted."

F. **Denial of questions tested for abuse of discretion**.

1. ***Rule***. *United States v. Belflower*, 50 M.J. 306 (C.A.A.F. 1999) (military judge did not abuse his discretion in prohibiting individual voir dire by defense counsel of four

members where defense did not ask any questions on group voir dire that would demonstrate the necessity for individual voir dire).

2. ***Generally, military judge will only abuse discretion if no questions are permitted into valid area for potential challenge.*** *United States v. McDonald*, 57 M.J. 747 (N-M Ct. Crim. App. 2002), *rev'd on other grounds*, 59 M.J. 426 (C.A.A.F. 2004). Military judge required written questions beforehand, and asked several government questions (some of which the MJ revised) over defense objection. Questions involved whether members ever discussed with their children what they should do if someone propositions them in an inappropriate way, and how the members thought a child would do if an adult solicited them for sex. Citing the *Belflower* standard (that "the appellate courts will not find an abuse of discretion when counsel is given an opportunity to explore possible bias or partiality"), the court found no abuse of discretion: "Whether it is the Government or the accused, we believe that the aforementioned rules governing the content of voir dire apply equally. In other words, the TC had as much right to obtain information for the intelligent exercise of challenges as the DC."

V. Challenges For Cause – Generally

R.C.M. 912. Challenge of selection of members; examination and challenges of members.
. . . .
(f) *Challenges and removal for cause.*
(1) *Grounds.* A member shall be excused for cause whenever it appears that the member:
(A) Is not competent to serve as a member under Article 25(a), (b), or (c);
(B) Has not been properly detailed as a member of the court-martial;
(C) Is an accuser as to any offense charged;
(D) Will be a witness in the court-martial;
(E) Has acted as counsel for any party as to any offense charged;
(F) Has been an investigating officer as to any offense charged;
(G) Has acted in the same case as convening authority or as the legal officer or staff judge advocate to the convening authority;
(H) Will act in the same case as reviewing authority or as the legal officer or staff judge advocate to the reviewing authority;
(I) Has forwarded charges in the case with a personal recommendation as to disposition;
(J) Upon a rehearing or new or other trial of the case, was a member of the court-martial which heard the case before;
(K) Is junior to the accused in grade or rank, unless it is established that this could not be avoided;
(L) Is in arrest or confinement;
(M) Has informed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged;
(N) Should not sit as a member in the interest of having the court-martial free from ***substantial doubt*** as to ***legality, fairness, and impartiality***.

A. Each side has an unlimited number of challenges for cause. *See* Article 41(a)(1), UCMJ; R.C.M. 912(f).

1. ***Nondiscretionary bases***. R.C.M. 912(f)(1)(A)-(M) list rarely-used scenarios that require a panel member be excused, to include a member who is "in arrest or confinement," "an accuser to any offense charged," or "a witness in the court-martial."

2. ***Discretionary bases***. R.C.M. 912(f)(1)(N) allows a member to be challenged for actual bias and implied bias.

B. **Actual Bias & Implied Bias**. Actual and implied bias are based on R.C.M. 912(f)(1)(N), which provides that a member should be excused if serving would create a "substantial doubt as to [the] legality, fairness, and impartiality" of the proceedings. Actual and implied bias each have a separate test (set forth below), though a challenge for cause often invokes both principles. *United States v. Armstrong*, 54 M.J. 51 (C.A.A.F. 2000).

C. **Rationale For Actual And Implied Bias Doctrines**. "[T]he text of R.C.M. 912 is not framed in the absolutes of actual bias, but rather addresses the ***appearance of fairness*** as well, dictating the avoidance of situations where there will be substantial doubt as to fairness or impartiality. ***Thus, implied bias picks up where actual bias drops off because the facts are unknown, unreachable, or principles of fairness nonetheless warrant excusal***." *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008).

D. **Liberal Grant Mandate**. Military judges are charged to liberally grant challenges for cause from the defense. *United States v. James*, 61 M.J. 132 (C.A.A.F. 2005). The liberal grant mandate does not apply to Government challenges.

1. ***Rationale***. The convening authority selects the panel members and can be said to have an unlimited number of peremptory challenges. Per *James*, "Given the convening authority's broad power to appoint [panel members], we find no basis for application of the 'liberal grant' policy when a military judge is ruling on the Government's challenges for cause." *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005). Additionally, the court noted the SJA may excuse one third of the panel members under R.C.M. 505(c)(1)(B). By contrast, the accused "has only one peremptory challenge at his or her disposal." *Id.*

2. ***Long history***. *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987) ("We again take the opportunity to encourage liberality in ruling on challenges for cause. Failure to heed this exhortation only results in the creation of needless appellate issues."); *United States v. Moyar*, 24 M.J. 635, 638, 639 (A.C.M.R. 1987) ("The issue of denial of challenges for cause remains one of the most sensitive in current military practice. . . . Military law mandates military judges to liberally pass on challenges. Notwithstanding this mandate . . . some trial judges have at best only grudgingly granted challenges for cause and others frustrate the rule with *pro forma* questions to rehabilitate challenged members.").

E. **Rehabilitating Members**. Once a member gives a response that shows a potential grounds for challenge, counsel or the military judge may ask questions of that member to rehabilitate him or her. *See United States v. Napolitano*, 53 M.J. 162 (C.A.A.F. 2000) (member indicated on questionnaire disapproval of civilian defense counsel's behavior in another case; judge did not abuse discretion in denying challenge for cause because member retracted opinion and said he was not biased against the counsel). Counsel should consider these questions when attempting to rehabilitate a member:

1. Can you follow the judge's instructions regarding the law?

2. Will you base your decision only on the evidence presented at trial, rather than your own personal experience?

3. Have you made your mind up right now concerning the type of punishment the accused should receive if convicted?

4. Can you give this accused a full, fair, and impartial hearing?

Note, these standard questions may not be sufficient, especially if counsel only gets "naked disclaimers" from the members. Counsel should tailor questions to the facts of the case and

get clear, unequivocal answers. *But see United States v. Townsend*, 65 M.J. 460, 465 (C.A.A.F. 2008) ("[T]here is a point at which numerous efforts to rehabilitate a member will themselves create a perception of unfairness in the mind of a reasonable observer.").

VI. challenges for cause – actual bias

A. **Standard**. Whether the bias is such that the member will not yield to the evidence presented and the judge's instructions. *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007); *United States v. New*, 55 M.J. 95, 99 (C.A.A.F. 2001; *United States v. Warden*, 51 M.J. 78, 81 (C.M.A. 1999). Appellate courts give great deference to the military judge's rulings on actual bias because it is a question of fact, and the military judge was able to observe the demeanor of the challenged member. *United States v. Bragg*, 66 M.J. 325 (C.A.A.F. 2008); *United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F. 2000). The credibility of the member is key, so actual bias is a *subjective determination* made by the military judge.

B. **Rarely Used To Excuse A Member**. For example, in *United States v. Clay*, 64 M.J. 274 (C.A.A.F. 2007), accused was charged with rape and indecent assault. During voir dire, the senior panel member was asked whether his judgment would be affected because he had two teenage daughters. He responded, "[I]f I believed beyond a reasonable doubt that an individual were guilty of raping a young female, I would be *merciless within the limit of the law*." Trial counsel attempted to rehabilitate the member, who said, "I believe I could" when asked if he could consider the full range of permissible punishments. Despite the member's initial statement (which suggested he had an actual bias), the court ruled the case was not one of actual bias because the member said he could be fair and the military judge made "observations of those statements." *Id*. at 276. The case was ultimately reversed on implied bias grounds (that ruling is discussed below).

VII. challenges for cause – implied bias

A. **Standard**. *United States v. Elfayoumi*, 66 M.J. 354 (C.A.A.F. 2008). Challenge for cause based on implied bias is reviewed on an *objective standard*, through the eyes of the public. "Implied bias exists when most people in the same position would be prejudiced." *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996). In applying implied bias, the focus is on "the perception or appearance of fairness of the military justice system." *United States v. New*, 55 M.J. 95, 100 (C.A.A.F. 2001). Accordingly, "issues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than de novo." *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004). In *Elfayoumi*, the court provided this summary:

> Implied bias exists when most people in the same position as the court member would be prejudiced. To test whether there is substantial doubt about the fairness of the trial, we evaluate implied bias objectively, through the eyes of the public, reviewing the perception or appearance of fairness of the military justice system. This review is based on the "totality of the circumstances." Although we review issues of implied bias for an abuse of discretion, because we apply an objective test, we apply a less deferential standard than we would when reviewing a claim of actual bias.

B. **In General**.

1. ***Common issues***. Implied bias can be expansively applied, as the test considers the public's perception of the military justice system. Several cases have raised implied bias based on (1) member's knowledge of the case, issues, or witnesses; (2) member's rating chain relationship with other members; (3) member being a victim of a similar crime or knowing a victim of a similar crime; (4) member's predisposition to punishment; and (5) potential unlawful command influence. Each of these bases is discussed below.

2. ***Example.*** *United States v. Clay*, 64 M.J. 274 (C.A.A.F. 2007). Accused was charged with rape and indecent assault. During voir dire, the senior panel member was asked whether his judgment would be affected because he had two teenage daughters. He responded, "[I]f I believed beyond a reasonable doubt that an individual were guilty of raping a young female, I would be *merciless within the limit of the law*." Trial counsel attempted to rehabilitate the member, who said, "I believe I could" when asked if he could consider the full range of permissible punishments. While the court found no actual bias, the military judge erred and should have granted the challenge for cause based on implied bias and the liberal grant mandate. CAAF reasoned that the answers he gave, in response to the voir dire questions and rehabilitation questions, "create[d] the perception that if [he], the senior member of the panel, were convinced of the Appellant's guilt he would favor the harshest sentence available, without regard to the other evidence."

C. **Grounds For Challenge– Knowledge Of Case, Issues, Witnesses**.

1. ***Generally***. *United States v. Briggs*, 64 M.J. 285 (C.A.A.F. 2007). Air Force technical sergeant was tried for larceny of survival vests from the aircraft he was responsible for maintaining and re-selling them. Military judge denied challenge for cause against CPT H, the wife of the appellant's commander; she had learned from her husband that "vests went missing." In finding that the member lacked actual bias, the military did not address the liberal grant mandate or implied bias. On appeal, using the implied bias theory, CAAF found military judge erred in denying the challenge for cause. The court cited a number of reasons why this challenge should have been granted, including: the safety of the member's husband's unit was placed at risk by the accused, the husband's performance evaluation could have been affected by the accused's criminal misconduct, and the member's husband was responsible for the initial inquiry into the misconduct and recommendation as to disposition. *See also United States v. Minyard*, 46 M.J. 229 (C.A.A.F. 1997) (military judge should have granted challenge for cause against member whose husband investigated case against accused, despite member's claim that she knew little about the case, that she and he husband did not discuss cases).

2. ***Knowledge of the case***. *United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999). In a high profile case, some knowledge of the facts of the offense or an unfavorable inclination toward an offense is not per se disqualifying. The critical issue is whether a member is able to put aside outside knowledge, association, or inclination, and decide the case fairly and impartially on its merits. Accused was convicted of various offenses arising out of issues related to Operation Uphold Democracy in Haiti. The defense challenged the entire panel based on the following: an acquittal would damage the reputation of the members individually, the general court-martial convening authority, and the 10th Mountain Division; several members knew key witnesses against the accused and would give their testimony undue weight; that members were exposed to and would be affected by pretrial publicity; and members evinced an inelastic attitude about a possible sentence in the case. The court held that there was no actual bias; members are not automatically disqualified based on professional relationships with other members or with witnesses; and some knowledge of the facts or an unfavorable inclination toward and offense is not per se disqualifying.

a) *United States v. Hollings*, 65 M.J. 116 (C.A.A.F. 2007). Military judge did not abuse his discretion in denying this challenge for cause for a member that the defense alleged met the definition of legal officer under R.C.M. 912(f)(1)(G). Under the facts elicited at trial, the member did not meet the definition of "legal officer." The accused also argued on appeal that the challenge should have been

granted under an implied bias theory because he was a "career legal officer, he was familiar with [the accused's] case as a result of his duties, and at least some of those duties were legal in nature." The member's responses during voir dire did not reveal any actual or implied bias.

b) *United States v. Baum*, 30 M.J. 626 (N.M.C.M.R. 1990). Military judge improperly denied two causal challenges: first member was the sergeant major of alleged co-conspirator who had testified at separate Article 32, was interviewed by chief prosecutor, and had voluntarily attended accused's Article 32 investigation; second member was colonel who headed depot inspector's office, had official interest in investigation, and had discussed cases with chief investigator and government witness.

3. ***Member's "possible" knowledge of case may require excusal***. *United States v. Bragg*, 66 M.J. 325 (C.A.A.F. 2008). Accused was a Marine recruiter charged with rape and other offenses involving two female high students. Member stated during voir dire that he learned information about the case before trial. While he could not recall how he obtained this information, he knew the "general identity" of the victim, the general nature of the offense, and the investigatory measures taken by law enforcement. The member had been the deputy chief of staff for recruiting and, in that capacity, he normally read relief for cause (RFC) packets of recruiters. The member could not recall if he had reviewed the accused's RFC packet, though he said that if he had, he "probably would have" recommended relief. The member said he could be impartial despite his prior knowledge of the case. CAAF reversed: "In making judgments regarding implied bias, this Court looks at the totality of the factual circumstances." In this case, the member may have recommended adverse action against the accused, so he should have been excused.

4. ***Member knows about pretrial agreement***. *United States v. Jobson*, 31 M.J. 117 (C.M.A. 1990). Knowledge of pretrial agreement does not per se disqualify the court member. Whether the member is qualified to sit is a decision within the discretion of the military judge.

5. ***Member knows about accused's sanity report***. *United States v. Dinatale*, 44 M.J. 325 (C.A.A.F. 1996). In an indecent acts on minors case, military judge did not clearly abuse his discretion by denying a challenge for cause against a member (Chief of Hospital Services at the local military hospital) where voir dire supported the conclusion that the member's review of sanity report was limited to reading the psychologist's capsule findings, member did not recall seeing accused's report, member stated that she could decide the case based on the evidence and MJ instructions, and mental state of accused was not an issue at trial.

6. ***Member knows trial counsel***. *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994). Military judge denied challenges for cause against three officer members who had been past legal assistance clients of assistant trial counsel. Professional relationship not a per se basis for challenge. Members provided assurances of impartiality.

7. ***Member is a potential witness***. *United States v. Perez*, 36 M.J. 1198 (N.M.C.M.R. 1993). Three officer members stated during voir dire that they observed "stacking incident" (assault on a warrant officer). In reversing, court held potential witnesses in case should have been excused for cause.

8. ***Member's outside investigation***. *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). Accused, who worked in the comptroller's disbursing office, was convicted of

rape at a contested court-martial by members. LTC F, the eventual panel president, was the deputy comptroller and had pretrial knowledge of the accused and co-accused's cases through his own investigative efforts and newspaper articles. MJ granted seven of eight defense challenges for cause but denied the challenge against LTC F without making findings. CAAF held that LTC F's "inquiry went beyond a routine passing of information to a superior—. . . his inquires were so through that he subjectively believed he knew all there was to know—that he had the 'complete picture.'" Under the implied bias standard, an objective observer could reasonably question LTC F's impartiality and that the MJ erred in denying defense's challenge for cause. Findings reversed. *Cf. United States v. Nigro*, 28 M.J. 415 (C.M.A. 1989) (in a bad check case, military judge properly denied challenge for cause against member who called credit union to ask about banking procedures; member's responses to inquiries were clear and unequivocal that he could remain impartial and follow judge's instructions).

9. ***Experience with key trial issues***. *United States v. Daulton*, 45 M.J. 212 (C.A.A.F. 1996). In a child sexual abuse case, military judge erred in failing to grant a defense challenge for cause against a member who stated that her sister had been abused by her grandfather, and was shocked when she first heard of her sister's allegations, "but had gotten over it." The member's responses to the MJ's rehabilitative questions regarding her ability to separate her sister's abuse from the evidence in the trial were not "resounding."

10. ***Member with position and experience***. *United States v. Lattimore*, 1996 WL 595211 (A.F. Ct. Crim. App. 1996) (unpub.). In case involving stealing and use of Demerol, no abuse of discretion to deny challenge for cause against O-6-member who was a group commander and former squadron commander; had preferred charges in three or four courts-martial; recently forwarded charges of drug use; sat through portion of expert forensic toxicologist in unrelated drug case; and who indicated that, although not predisposed to give punitive discharge, some form of punishment was appropriate if accused was found guilty, but would consider sentence of no punishment. No per se exclusion for commanders and prior commanders who have preferred drug charges.

11. ***Knowledge of witnesses***.

a) *United States v. Ai*, 49 M.J. 1 (C.A.A.F. 1998). Military judge did not abuse his discretion in denying a challenge for cause against a member who was a friend and former supervisor of a key government witness. In a graft case, during voir dire, an officer member revealed that a key government witness had previously worked for him as a food manager for one year three years ago. The member indicated, during group and individual voir dire, that the relationship would not affect him as a member and he would follow all MJ instructions. CAAF recognized that while R.C.M. 912(f)(1)(N) is broad enough to permit a challenge for cause against a member on the basis of favoring witnesses for the prosecution, there was no "historical basis" in the record to support the challenge. The work relationship was limited in duration, negating any inference of predisposition.

b) *United States v. Napoleon*, 46 M.J. 279 (C.A.A.F. 1997) (holding that under both actual and implied bias standard, military judge properly denied challenge for cause against member who had *official* contacts with special agent-witness who was "very credible because of the job he has" and had knowledge of case through a staff meeting).

c) *United States v. Arnold*, 26 M.J. 965 (A.C.M.R. 1988). Member who had seen witness in another trial and formed opinion as to credibility should have been excused. However, the mere fact that a witness had appeared before the member in another case is not grounds by itself to grant a challenge; if so, this would virtually prohibit the repeated use in different trials of witnesses such as police officers and commanders.

d) ***Practice point***. Trial and defense counsel should read a list of anticipated witnesses to the members during voir dire.

D. **Grounds For Challenge – Rating Chain Relationship**. If one member is in the rating chain of one or more other members, that *may* be a basis for challenge. It is not a per se basis for challenge. *United States v. Murphy*, 26 M.J. 454 (C.M.A. 1988) (rating chain relationship is not an automatic disqualification; inquiry of both parties is necessary).

1. ***Rating chain as a voting block.***

a) *United States v. Wiesen*, 56 M.J. 172 (C.A.A.F. 2001), *recon. denied*, 57 M.J. 48 (C.A.A.F. 2002). During voir dire, COL Williams, a brigade commander and the senior member, identified six of the other nine members as his subordinates. The defense argued implied bias and attempted to challenge COL Williams. The military judge denied this causal challenge. The defense then used their peremptory challenge to remove COL Williams, but preserved the issue for appeal by stating, "but for the military judge's denial of [our] challenge for cause against COL Williams, [we] would have peremptorily challenged [another member]."3 The court concluded, "Where a panel member has a supervisory position over six of the other members, and the resulting seven members make up the two-thirds majority sufficient to convict, we are placing an intolerable strain on public perception of the military justice system." CAAF held "the military judge abused his discretion when he denied the challenge for cause against COL Williams." Finding prejudice, findings and sentence were set aside.

b) *But see United States v. Bagstad*, 67 M.J. 599 (N-M. Ct. Crim. App. 2008), *aff'd on other grounds*, 68 M.J. 177 (C.A.A.F. 2010) (affirming based on defense counsel waiver without addressing issue before the N-MCCA). In a case similar to *Wiesen*, court upheld military judge's denial of challenge against senior member who rated another panel member, even though the rater and ratee constituted the two-thirds necessary to convict on a three-member panel. In questionable reasoning, N-MCCA held the case had different "contextual facts" from *Wiesen*, as the senior member was a Capt (O-3) and the junior member was a GySgt (E-7); the court added that the NCO was three years old than the officer and had served seven years longer. Further, the third panel member was a 1stSgt (E-8). The court noted that the "camaraderie between, and respect and deference for, senior NCO's, is significant." In this context, N-MCCA concluded the presence of two senior NCOs serving on a panel with a company grade officer weakens "any reasonable perception" that the rating chain relationship could have improperly influenced deliberation; hence, an informed public would not question the fairness of this proceeding.

[3] Note, under the current RCM 912(f)(4), this "but for" peremptory challenge would *not* preserve the issue for appeal. Under the current rule, the causal challenge is waived if the challenged member is excused with a peremptory challenge.

2. ***Counsel must develop record***. *United States v. Blocker*, 33 M.J. 349 (C.M.A. 1991) (noting obligation is on the party making the challenge to inquire into any rating chain relationships; military judge has no *sua sponte* duty to conduct such inquiry); *United States v. Murphy*, 26 M.J. 454 (C.M.A. 1988) (rating chain relationship is not an automatic disqualification; careful inquiry of both parties is necessary).

3. ***Military judge may abuse discretion if questions about rating chain are not allowed***. *United States v. Garcia*, 26 M.J. 844 (A.C.M.R. 1988) (rating relationship merits inquiry and appropriate action based on members' responses). *Cf. United States v. DeNoyer*, 44 M.J. 619 (A. Ct. Crim. App. 1996). Identification of supervisory or rating chain relationship not enough to support individual member questioning. After defense asked panel in excess of 25 questions, some repetitious, in various areas, and then identified possible rating or supervisory relationships among five of the nine members, MJ denied defense request for individual voir dire. No abuse of discretion by denying defense request for individual voir dire. However, ACCA cautioned that granting defense requests would have eliminated appellate issues and enhanced perception of fairness.

E. **Grounds For Challenge – Victim (Or Indirect Victim) Of Similar Crime**.

1. ***Considerations in victim analysis***:

a) Who was victim? Panel member or a family member?

b) How similar was the accused's crime to the one the victim was involved in?

c) Was victim's crime unsolved?

d) Traumatic? How many times a victim?

e) Does the member give clear, reassuring, unequivocal answers about his impartiality?

2. ***Close relationship with victim of similar crime***. *United States v. Terry*, 64 M.J. 295 (C.A.A.F. 2007). Military judge erred in not granting challenge for cause under the implied bias theory and liberal grant mandate. In rape trial, member's girlfriend (whom he intended to marry) was raped, became pregnant, terminated their relationship, and named the child after him. Although six years had passed, "most members in [the member's position] would have difficulty sitting on a rape trial . . . . Further, an objective observer might well have doubts about the fairness of Appellant's court-martial panel."

3. ***Relative who died because of pre-natal drug use***. *United States v. Miles*, 58 M.J. 192 (C.A.A.F. 2003). Military judge abused his discretion by failing to grant challenge for cause based on implied bias where, during voir dire in guilty plea case involving wrongful use of cocaine, member revealed his ten-year-old nephew died as a result of mother's pre-natal use of cocaine. Member described tragedy in article in base newspaper scheduled for publication shortly after court-martial. Trial counsel commented that event "evidently" was "a very traumatic experience" for the member. "We conclude that asking [the member] to set aside his memories of his nephew's death and to impartially sentence Appellant for illegal drug use was 'asking too much' of him and the system." Sentence set aside.

a) ***Practice Point*:** "Where a particularly traumatic similar crime was involved . . . we have found that denial of a challenge for cause violated the liberal-grant mandate." This is ultimately a fact-specific inquiry.

b) *Cf. United States v. Denier*, 43 M.J. 693 (A.F. Ct. Crim. App. 1995) (in drug case, member stated he would be fair even though his daughter was a recovering cocaine addict, though he would be affected "some" but not intellectually; no abuse of discretion to deny challenge for cause).

4. ***Wife victim of domestic violence***. *United States v. White*, No. 2001132 (A. Ct. Crim. App. Dec. 8, 2003) (unpub.). Appellant charged with attempted murder of wife; convicted of assault with intent to inflict grievous bodily harm and other offenses. Military judge abused discretion by denying challenge for cause of member whose wife was victim of domestic abuse by her first husband. Individual voir dire revealed wife suffered a broken neck from abuse; member stated that "I've told him, simply, that, 'If I ever see you and you look like you're going to raise a hand for her, I'm gonna kill you and then we'll sort it out later.' That's kind of the way I feel about it." While court found no abuse of discretion as to actual bias, the court found error as to implied bias. Notably, court gave MJ less discretion on implied bias because he did not address that issue on the record. "On these facts, an objective observer would likely question the fairness of the military justice system." Findings set aside.

5. ***Members in robbery case were victims of robbery/burglary.*** Member in a robbery case had been a robbery victim seven times. Another member, a two-time victim of burglary, indicated "it's hard to say" if those prior incidents would influence his deliberations; it "might trigger something from the past, it may not." *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985). Perfunctory claims of impartiality are not enough; challenge should have been granted to keep outcome "free from doubt." *But see United States v. Fulton*, 44 M.J. 100 (C.A.A.F. 1996) (member on robbery and larceny case not disqualified even though prior victim of burglary).

6. ***Panel was robbed during court-martial for larceny.*** *United States v. Lavender*, 46 M.J. 485 (C.A.A.F. 1997). The implied bias doctrine will not operate to entitle an accused on trial for larceny to have the entire panel removed for cause after two members had money stolen from their unattended purses in deliberation room. The implied bias doctrine is only applied in rare cases. *See Hunley v. Godinez*, 784 F. Supp. 522 (N.D. Ill.), *aff'd*, 975 F.2d 316 (7th Cir. 1992) (holding due process does not require a new trial every time a juror has been placed in a potentially compromising situation; doctrine of implied bias appropriately applied to defendant convicted of murder during a burglary where judge denied challenges for cause against members who changed vote from "not guilty" to "guilty" after becoming victims of burglary during overnight recess in sequestered hotel).

7. ***Minor victim of gun violence***. *United States v. Hudson*, 37 M.J. 968 (A.C.M.R. 1993). E-8 member in aggravated assault case involving shooting at NCO Club had been caught in crossfire during similar incident 15 years earlier in off-post bar fight. Member indicated that he could remain fair and impartial.

8. ***Victim of dissimilar crime <u>not</u> disqualified***. *United States v. Smith*, 25 M.J. 785 (A.C.M.R. 1988). Member in a rape case had been a larceny victim. Challenge denied; any recent crime victim is not automatically disqualified.

9. ***Member duty to disclose***. *United States v. Mack*, 36 M.J. 851 (A.C.M.R. 1993). Officer member in an assault case failed to disclose that he had been held at gunpoint, tied up, and threatened with death during armed robbery thirty years earlier. Member indicated that he had "forgotten about it." Returned for *DuBay* hearing to determine (1) was there a failure to honestly answer a material question?; (2) would the correct (honest)

response provide a valid basis for challenge for cause? Case affirmed after *DuBay* hearing.

10. ***The outer limits***. Victims of similar crimes have been allowed to sit as members, provided they unequivocally evince an ability to be open-minded and consider the full range of permissible punishments.

a) *United States v. Basnight*, 29 M.J. 838 (A.C.M.R. 1989). Member was victim of three larcenies and his parents were victims of two larcenies. Denial of challenge for cause proper in light of member's candor and willingness to consider complete range of punishments.

b) *United States v. Reichardt*, 28 M.J. 113 (C.M.A. 1989). Larceny of ATM card and money; member's wife had been victim of a similar crime. Not error to deny challenge based on judge's inquiry, unequivocal responses, and judge's findings.

c) *But see United States v. Campbell*, 26 M.J. 970 (A.C.M.R. 1988). Challenge should have been granted based on equivocal responses. Member "waffled" in response to questions about his impartiality. Member "[w]ould *try* to be open-minded, *somewhat* objective, but 'not sympathetic to thieves.'"

F. **Grounds For Challenge – Inelastic Predisposition To Sentence**. A member is not automatically disqualified merely for admitting an unfavorable inclination or predisposition toward a particular offense.

1. ***Draconian view of punishment***. *United States v. Schlamer*, 52 M.J. 80 (C.A.A.F. 1999). Member disclosed her severe notions of punishment ("rape = castration;" "you take a life, you owe a life"). Nevertheless, she was adamant that she had not made up her mind in accused's case, that she believed in the presumption of innocence, and that she would follow the judge's instructions. CAAF held the military judge did not abuse his discretion in denying the challenge. Similarly, the judge's grant of a Government challenge against a member who had received an Article 15 and stated he would be "uncomfortable" judging the accused was within the judge's discretion and comported with the "liberal grant" mandate.

2. ***Would you <u>consider</u> no punishment as a sentencing option?*** *United States v. Martinez*, 67 M.J. 59 (C.A.A.F. 2008) (per curiam). Accused pled guilty to a single specification of wrongful use of methamphetamines and elected sentencing before members. During general voir dire, member was asked if he could consider "no punishment" during sentencing; he said "no," adding, "He obviously knew it was wrong and came forward with his guilt, and there has to be punishment for it." During follow-up questioning, member said he could consider the full range of sentencing options, to include no punishment, however: "[W]e'll weigh it from no punishment to the max. I can do that, but something has to be done." CAAF unanimously reversed, reasoning that the member should have been excused for implied bias, as a reasonable person would question the fairness of the proceedings because the member stated "something has to be done" when asked about sentencing. Case seems inconsistent with *Rolle*, discussed *infra*.

a) *But cf. United States v. Rolle*, 53 M.J. 187 (C.A.A.F. 2000). Accused, a Staff Sergeant, pled guilty to use of cocaine. Much of voir dire focused on whether the members could seriously consider the option of no punishment or whether they felt a particular punishment (like a punitive discharge) was appropriate. One member, CSM L, stated "I wouldn't" let the accused stay in the military, and "I am inclined to believe that probably there is some punishment in order there . . .

I very seriously doubt that he will go without punishment." CSM L conversely noted there was a difference between a discharge and an administrative elimination from the Army. Another member, SFC W, stated, "I can't [give a sentence of no punishment] . . . because basically it seems like facts have been presented to me because he evidentially [*sic*] said that he was guilty." Military judge denied the challenges for cause against CSM L and SFC W; CAAF noted that "[p]redisposition to impose some punishment is not automatically disqualifying." (citing *United States v. Jefferson*, 44 MJ 312, 319 (C.A.A.F. 1996); *United States v. Tippit*, 9 MJ 106, 107 (C.M.A. 1980)). "[T]he test is whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions."

b) *United States v. Martinez*, 67 M.J. 59 (C.A.A.F. 2008) (per curiam). During voir dire in drug case, member stated, there is "no room in my Air Force for people that abuse drugs – you know – violate the articles and law that we have set forth." After several rehabilitation questions, the member hesitated about whether he would consider the full range of punishment, to include no punishment: "So, there has to be a punishment to fit the crime—whatever that case may be. . . . [W]e'll weigh it from no punishment to the max. I can do that, but something has to be done." CAAF reversed, finding the member "did not disavow an inelastic attitude toward punishment."

c) *United States v. McLaren*, 38 M.J. 112 (C.M.A. 1993). Despite member's initial responses that he could not consider "no punishment" as an option where accused charged with rape, sodomy, and indecent acts, member's later responses showed he would listen to the evidence and follow the judge's instructions. Member's responses to defense counsel's "artful, sometimes ambiguous questioning" does not necessarily require that a challenge for cause be granted. The majority opinion included this conclusion: "I would have substantial misgivings about holding that a military judge abused his discretion by refusing to excuse a court member who could not in good conscience consider a sentence to no punishment in a case where all parties agree that a sentence to no punishment would have been well outside the range of reasonable and even remotely probable sentences." *Id.* at 119 n.*.

d) *United States v. Czekala*, 38 M.J. 566 (A.C.M.R. 1993), *aff'd*, 42 M.J. 168 (C.A.A.F. 1995). Member indicated an officer convicted of conduct unbecoming should not be permitted to remain on active duty. Member stated she would follow guidance of military judge. Denial of challenge for cause not abuse of discretion.

e) *United States v. Greaves*, 48 M.J. 885 (A.F. Ct. Crim. App. 1998). Accused pled guilty to wrongful use of cocaine. Military judge did not abuse his discretion by failing to grant a challenge for cause against member who stated during voir dire that, while he would keep an open mind, he thought that a sentence of no punishment would be an unlikely outcome, adding that in "99.9 percent of the cases, some punishment would be in order." *Id.* at 887. Court held the member did not express an inflexible attitude toward sentencing; he merely stated "what should be patently obvious to all; while a sentence to no punishment is an option which should be considered, it is not often appropriate." *Id.*

3. ***Member's strong predisposition to punitive discharge may require excusal***. *United States v. Giles*, 48 M.J. 60 (C.A.A.F. 1998). Military judge "clearly" abused his

discretion by failing to grant a challenge for cause against a member who demonstrated actual bias by his inelastic attitude toward sentencing in a case involving attempted possession of LSD with intent to distribute and attempted distribution of LSD. While member indicated that he could consider all evidence and circumstances, he responded to defense questions that anyone distributing drugs should be punitively discharged and that he had not heard of or experienced any circumstance where a punitive discharge would not be appropriate. These responses disqualified member under R.C.M. 912(f)(1)(N). *But see Rolle, supra*, a later case with similar facts but an opposite outcome.

4. ***Suggested rehabilitation questions for sentencing predisposition***:

a) Are you aware that punishment can range from no punishment, to the slight punishment of a letter of reprimand, all the way to a discharge and confinement?

b) Do you understand that you should not decide on a punishment until you hear all of the evidence?

c) Can you follow the judge's instructions regarding the law?

d) Will you listen to all of the evidence admitted at trial, before deciding a sentence?

e) Can you give this accused a full, fair, and impartial hearing?

G. **Grounds For Challenge – Unlawful Command Influence**.

1. ***Courts maintain that it is in the "rare case" where implied bias will be found.*** *United States v. Youngblood*, 47 M.J. 338 (C.A.A.F. 1997). Application of the implied bias standard is appropriate to determine whether a military judge abused his discretion in denying challenges for cause against court members based on counsel argument that members were affected by unlawful command influence. Prior to court-martial, each member attended staff meeting where convening authority and SJA gave a presentation on standards, command responsibility, and discipline; during presentation, SJA and convening authority expressed dissatisfaction with a previous commander's disposition of an offense.

2. *United States v. Stoneman*, 57 M.J. 35 (C.A.A.F. 2002). Six of nine members either received email from brigade commander threatening to "declare war on all leaders not leading by example," to "CRUSH all leaders in this Brigade who don't lead by example" or attended a "leaders conference" where the same issues were discussed. MJ denied defense challenges for cause based on implied bias, but did not conduct a hearing concerning claim of UCI. Reversed and remanded for *DuBay* hearing. Case illustrates nexus between UCI and implied bias. Quantum of evidence to raise UCI is "some evidence;" quantum of evidence to sustain challenge for cause is greater. Just because burden not met on challenge does not mean burden not met to raise UCI. "[I]n some cases, voir dire might not be enough, and . . . witnesses may be required to testify on the issue of UCI."

H. **Grounds For Challenge – Member Has Bias Against Counsel**.

1. ***Negative bias against specific counsel***. *United States v. Napolitano*, 53 M.J. 162 (C.A.A.F. 2000) (member indicated on questionnaire disapproval of civilian defense counsel's behavior in another case; judge did not abuse discretion in denying challenge for cause because member retracted opinion and said he was not biased against the counsel; different result likely if member has had adversarial dealings with counsel). *See also United States v. Rome*, 47 M.J. 467 (C.A.A.F. 1998) (military judge abused discretion by failing to grant a challenge for cause, based on implied bias, against

member who judge determined had engaged in unlawful command influence in previous unrelated court-martial and who defense counsel had personally and professionally embarrassed through cross examination in previous high-profile case).

2. ***Bias against defense attorneys (in general)*.** *United States v. Townsend*, 65 M.J. 460 (C.A.A.F. 2008). When asked his "opinions of defense counsels," member said he had a "mixed view." While he respected military defense counsel as military officers with high ethical and moral standards, he had a "lesser respect for some of the ones you see on TV, out in the civilian world," an apparent reference to the member's regular viewing of the television show *Law and Order*. Court upheld military judge's denial of the challenge for cause, noting no actual or implied bias was present.

I. **Grounds For Challenge – Accused Should Testify**. *United States v. Ovando-Moran*, 48 M.J. 300 (C.A.A.F. 1998). No abuse of discretion to deny challenge for cause against member who considered it unnatural if accused failed to testify. Court reasoned that MJ's explanation of accused's right to remain silent and member's statement that he would put preconceptions aside supported view that that member's "misperception" was not a personal bias against accused.

J. **Grounds For Challenge – Accused Should Plead Guilty**. *United States v. White*, No. 20061313 (A. Ct. Crim. App. Aug. 11, 2010) (unpublished). During individual voir dire, panel member said he observed a trial of one of his Soldiers who had been charged with sexually abusing a child. He said he resented the Soldier – who was clearly guilty – for pleading not guilty and forcing the child victim to testify.4 The trial counsel asked the member a few rehabilitation questions and the member agreed the other case would not affect his deliberations in the present case. The ACCA held the military judge did not abuse her discretion in denying the defense challenge for cause. Relying on *United States v. Elfayoumi*, 66 M.J. 354, 357 (C.A.A.F. 2008), the court noted that panel members are also members of society who may have strongly-held personal views which is part of the "human condition." In this case, a reasonable observer understanding the human condition would not question the neutrality, impartiality, and fairness of the proceeding.

VIII. Challenges for Cause – Logistics

A. **Timing Of Challenges.** UCMJ art. 41.

1. UCMJ art. 41(a). If exercise of challenge for cause reduces court below minimum required per Article 16 (5 members for GCM, 3 members for SPCM), the parties shall exercise or waive all other causal challenges *then apparent*. Peremptories will not be exercised at this time.

2. UCMJ art. 41(b). Each party gets one peremptory. If the exercise of a peremptory reduces court below the minimum required by Article 16, the parties must use or waive any remaining peremptory challenge against the remaining members of the court *before* additional members are detailed to the court.

3. UCMJ art. 41(c). When additional members are detailed to the court, the parties get to exercise causal challenges against those new members. After causal challenges are

[4] The member said, "I kind of have malice toward [the soldier] because he was guilty and I think he knew in his heart he was guilty but he made his 10-year-old daughter get on the stand and [recount] what he did to her and I didn't appreciate that very much." He added: "[I]t was very evident that the [s]oldier was guilty and he was proven to be guilty. And yes[,] you're innocent until proven guilty, but pretty much everybody knew that the guy was guilty—I mean, for lack of a better term he was a scum bag. And for him to put that little girl through the trauma was unacceptable. I just don't have any respect for a man who would put a little girl through that." (alterations in original).

decided, each party gets one peremptory challenge against members not previously subject to a peremptory challenge.

4. *See United States v. Dobson*, 63 M.J. 1 (C.A.A.F. 2006). The accused selected an enlisted panel to hear her contested premeditated murder case. After the military judge's grant of challenges for cause (CfCs) and peremptory challenges (PCs) the GCMCA needed to twice detail additional members for the court-martial to obtain ⅓ enlisted members, as required by Article 25, UCMJ. The CAAF provided the following chart as to the progression of the panel's composition:

Panel Composition	***Total***	***Officer***	***Enlisted***
Initial	10	6	4
After 1st causal challenges	7	5	2 (No 25 quorum)
After 1st peremptory challenge	**5**	**4**	**1**
After 1st additions	10	6 *(added 2)*	4 *(added 3)*
After 2d causal challenges	8	6	2 (No 25 quorum)
After 2d peremptory	**7**	**5**	**2**
After 2d additions	10	5 *(added 0)*	5 *(added 3)*
After 3d causal challenges	9	5	4
Final (after 3d peremptory)	8	5	3

The issue on appeal was whether the MJ erred by granting the parties' PCs (**bolded above**) after the ⅓ enlisted quorum, as required by Article 25, UCMJ, was busted after the 1st and 2nd CfCs (underlined above) were granted. While ⅓ enlisted quorum was broken after the 1st and 2nd CfCs, the panel membership never dropped below five members as required for a general court-martial under Article 16, UCMJ. The defense argued that the MJ should not have granted the parties' PCs once the ⅓ enlisted quorum was broken under Article 25, UCMJ even though the total membership requirements of Article 16, UCMJ were met. Article 41, UCMJ states that if the exercise of CfCs drops panel membership below Article 16 requirements that additional members will be detailed and PCs will not be granted at that time. Article 41, UCMJ, however, does not address panel membership falling below Article 25, UCMJ ⅓ enlisted requirements. The CAAF held that the MJ did not error by granting PCs when Article 25 quorum was lacking but Article 16 quorum was met. The CAAF reasoned that "[t]he enlisted representation requirement in Article 25 employs a percentage, not an absolute number[, unlike Article 16,]. . . [a]s a result, there are circumstances in which an enlisted representation deficit under Article 25 can be corrected through exercise of a peremptory challenge against an officer." Defense also objected to the GCMCA detailing two additional officers to the panel after the 1st CfCs were granted as an attempt to dilute

enlisted representation. The CAAF stated that the accused is entitled only to ⅓ enlisted membership and the rules do not "require the [GCMCA] to add only the minimum number and type [of members] necessary to address a deficit under Article 16 or 25."

B. **Preserving Denied Causal Challenges**. R.C.M. 912(f)(4).

1. ***Background***. Executive Order Amended R.C.M. 912(f)(4) and the "But For" Rule. *See* Executive Order 13387 – 2005, dated 18 October 2005. R.C.M. 912(f)(4) was amended by deleting the fifth sentence and adding other language to state: "When a challenge for cause has been denied the successful use of a peremptory challenge by either party, excusing the challenged member from further participation in the court-martial, shall preclude further consideration of the challenge of that excused member upon later review."

2. ***Old rule***. *United States v. Jobson*, 31 M.J. 117 (C.M.A. 1990). The CMA translated the old version of R.C.M. 912 (f)(4) as follows:

a) If counsel does not exercise her peremptory challenge, she waives her objection to the denied causal challenge. She preserves the denied causal if she uses her peremptory against any member of the panel. But…

b) If she uses her peremptory against the member she unsuccessfully challenged for cause and fails to state the "but for" rule, she waives your objection to the denied causal. So…

c) Counsel preserves her denied causal if she uses her peremptory against the member she unsuccessfully challenged for cause and she states the "*but for*" rule (i.e., "I'm using my peremptory to excuse Member X; but for your denial of my challenge for cause of Member X, I would have used my peremptory on Member A.").

3. ***Current rule.*** R.C.M. 912(f)(4). If "objectionable" member does not sit on the panel (for example, if defense counsel uses preemptory challenge to excuse the member), the appellate court will not review the military judge's denial of a challenge for cause for that member. The challenge will also be waived on appeal if the party exercising the challenge does not exercise its peremptory challenge against another member.

a) *Ross v. Oklahoma*, 487 U.S. 81 (1988). Defense had to use peremptory challenge to remove juror who should have been excused for cause; no violation of Sixth Amendment or due process right to an impartial jury. "Error is grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him."

b) *United States v. Medina*, 68 M.J. 587, 592 (N-M. Ct. Crim. App. 2009). Defense counsel challenged member on implied bias grounds at trial and the military judge denied the challenge. Following the denial, defense did not exercise a peremptory against any member. The court held, "Failure to exercise a peremptory challenge against any member constitute[s] waiver of further review of an earlier challenge for cause, therefore, this issue is without merit." (citing R.C.M. 912(f)(4)).

c) *Cf. United States v. Eby*, 44 M.J. 425 (C.A.A.F. 1996). The defense failed to preserve for appeal the issue of prejudice under R.C.M. 912(f)(4) by using its peremptory challenge against a member who survived a challenge for cause without stating that the defense would have peremptorily challenged *another member* if military judge had granted the challenge for cause.

C. **During-Trial Challenges**. Although challenges to court members are normally made prior to presentation of evidence, R.C.M. 912(f)(2)(B) permits a challenge for cause to be made "at any other time during trial when it becomes apparent that a ground for challenge may exist." Peremptory challenges may not, however, be made after presentation of evidence has begun.

1. *United States v. Camacho*, 58 M.J. 624 (N-M. Ct. Crim. App. 2003). During lunch break after completion of Government case on merits and rebuttal, the President of panel was overheard stating to government witness, "It's execution time," and making certain gestures, "including a vulgar one with his finger." Challenge for cause granted, which left only two members in this BCD-Special CM. Four new members were detailed, two of whom remained after voir dire and challenges. The remaining members were read all testimony without original members present. While the case was affirmed, the court noted, "Of great importance in this case is the fact that the defense offered no objection to the detailing of new members and the reading of testimony to those members . . . ."

2. *United States v. Bridges*, 58 M.J. 540 (C.G. Ct. Crim. App. 2003). After findings, DC moved to impeach findings due to unlawful command influence (SJA email reporting child sex abuse case). DC claimed that, had she known of email, she would have questioned members about it and "might have elicited some information as to bias." BUT, DC did not challenge any member for cause at that time or specifically ask the military judge to permit additional voir dire on the issue. HELD: The email on its own was not "an apparent ground for challenge for cause." As such, the military judge did not abuse his discretion by failing to *sua sponte* reopen voir dire.

3. *United States v. Millender*, 27 M.J. 568 (A.C.M.R. 1988). During break in court-martial, member asked legal clerk if it would be possible to learn the "other sentence." Challenge denied; no exposure to extra-judicial information which could influence deliberations. Court noted the legal clerk did not answer the member's questions and immediately reported the question to the military judge (who properly investigated and found no outside information had been given to the member).

4. *United States v. Arnold*, 26 M.J. 965 (A.C.M.R. 1988). If member recognizes a witness, conduct individual voir dire to test for bias.

D. **Challenges After Trial**.

1. *United States v. Sonego*, 61 M.J. 1 (C.A.A.F. 2005). Members sentenced the accused after his guilty plea to ecstasy use. During voir dire CPT Bell, a member, stated in response to the MJ's group voir dire questions that he did not have an inelastic predisposition as to punishment. Approximately a month after the accused's court-martial his attorney was representing another airman for drug use. During that court-martial CPT Bell stated that any service member convicted of a drug offense should receive a BCD. A verbatim transcript was not made for this second court-martial because it resulted in acquittal but the defense attorney submitted an affidavit recounting CPT Bell's different responses. On an issue of first impression the CAAF granted review to determine the "measure of proof required to trigger an evidentiary hearing" based on an allegation of juror dishonesty. Noting that the federal circuits differ on this issue, the CAAF adopted a "colorable claim" test requiring "something less than proof of juror dishonesty before a hearing is convened." The court, ordering a *DuBay* hearing, ruled that the defense attorney's affidavit constituted a "colorable claim" of juror dishonesty to warrant a further evidentiary hearing.

2. *United States v. Humphreys*, 57 M.J. 83 (C.A.A.F. 2002). Defense submitted a post-trial motion for a new trial based on discovery that two members were in the same rating

chain, although both answered the military judge's question on that issue in the negative. The military judge held a post-trial 39(a) session and questioned the involved members, during which both responded that they did not remember the military judge asking the question, and their answers were not an effort to conceal the rating chain relationship. The military judge concluded the members' responses during trial were "technically . . . incomplete," but their responses in the Article 39(a) session caused him to conclude he would not have granted a challenge for cause based on the relationship. He denied the defense motion for new trial. HELD: affirmed. In order to receive a new trial based on a panel member's failure to disclose info during voir dire, defense must make two showings: (1) that a panel member failed to answer honestly a material question on voir dire; and (2) that a correct response would have provided a valid basis for a challenge for cause. "[A]n evidentiary hearing is the appropriate forum in which to develop the full circumstances surrounding each of these inquiries." Appellate court's role in process is to "ensure the military judge has not abused his or her discretion in reaching the findings and conclusions." Here the military judge did not abuse his discretion where he determined that "full and accurate responses by these members would not have provided a valid basis for a challenge for cause against either or both."

3. *United States v. Dugan*, 58 M.J. 253 (C.A.A.F. 2003). The military judge refused to grant a post-trial 39(a) session to voir dire members concerning UCI in deliberations. The CAAF remanded for a *DuBay* hearing. Under these circumstances, MRE 606(b) "permits voir dire of the members regarding what was said during deliberations about [the alleged UCI comments of a commander], but the members may not be questioned regarding the impact of any member's statements or the commander's comments on any member's mind, emotions, or mental processes."

E. **Military Judge's Duty AND *Sua Sponte* ChallengeS**. Under R.C.M. 912(f)(4), a military judge may excuse a member *sua sponte* for actual or implied bias: "Notwithstanding the absence of a challenge or waiver of a challenge by the parties, the military judge *may*, in the interest of justice, excuse a member against whom a challenge for cause would lie." However, failure to excuse a member *sua sponte* will normally not require reversal.

1. *United States v. Velez*, 48 M.J. 220 (C.A.A.F. 1998). In a case involving two specifications of rape and two specifications of assault, the MJ did not err by failing, *sua sponte*, to remove three panel members based on implied bias. The implied bias doctrine was not invoked because the record established the following: the member who admitted knowing one of the rape victims had a tenuous relationship with victim, disavowed that this relationship would influence him, and the defense failed to challenge the member on such grounds; second member disavowed that command relationship with government rebuttal witness would influence him, and the defense counsel failed to challenge the member on that ground; the third member frankly disclosed that he had two friends who were victims of rape, and that he has a 15-year-old daughter he wanted to protect from rape, but disavowed improper influence and stated that he would follow the MJ's instructions.

2. *United States v. Strand*, 59 M.J. 455 (C.A.A.F. 2004). Court member was son of officer who acted as convening authority in the case. The member's father acted to excuse and detail new members in the absence of the regular GCMCA. The defense did not challenge the son for cause. On appeal, the defense contended that the military judge had a *sua sponte* duty to remove the son for implied bias. The court held that the military judge did not abuse his discretion in declining to *sua sponte* excuse the member, and declined to adopt a *per se* "familial relationship" basis for excusal. Here, the government revealed the familial relationship, and the military judge allowed both parties a full

opportunity to voir dire the member. Although the military judge may excuse an unchallenged member in the interest of justice, there must be justification in the record for such a drastic action. The record in this case did not reveal an adequate justification for such action.

3. *See also United States v. Collier*, NMCCA 20061218, 2008 CCA LEXIS 53 (N-M. Ct. Crim. App. Feb. 21, 2008) (unpublished). In a bizarre case, trial counsel challenged a member for cause, based on implied bias. Defense counsel objected to the challenge, which the government then withdrew. On appeal, defense argued the military judge should have excused the member *sua sponte* for implied bias. During voir dire, the member stated he was an Administration Officer, knew three of the witnesses in the case (he interacted with them on a daily basis and was in the rating chain for two of them), and recognized the accused's name from reviewing personnel rosters. The member had been on a cruise for seven months and had no knowledge of the facts of the case. In response to the government challenge for cause of this member, the defense counsel said: "[W]e feel that there's no problem with him. He's been on [a] cruise and has no knowledge of any of that." The military judge asked defense counsel why he objected to the government challenge and, before counsel could answer, the trial counsel withdrew the challenge for cause, but added, "We were more concerned with appearance. But, we'll withdraw our challenge for cause, if defense objects to that." In affirming the case, the court noted the member's minimal knowledge of the accused was "matter-of-fact and devoid of emotion." The member also stated that his professional relationship with three government witnesses would not affect his assessment of their testimony. Finally, in deciding there was no bias, the court noted "perhaps most tellingly" that the defense counsel at trial objected to the challenge.

IX. Peremptory Challenges Generally

A. Rule: One per side, unless new members are detailed. *See* Article 41(b)(1), UCMJ.

1. ***Additional Peremptory***. *United States v. Carter*, 25 M.J. 471 (C.M.A. 1988). Judge improperly denied defense request for additional peremptory after panel was "busted" and new members were appointed; however, error was harmless. *See also Rivera v. Illinois*, 556 U.S. ____ (2009) (noting "there is no freestanding constitutional right to peremptory challenges" and a peremptory challenge is "a creature of statute.").

a) No Sixth Amendment right to a peremptory challenge. *Ross* v. *Oklahoma*, 487 U.S. 81(1988).

b) No Fifth Amendment due process right to peremptory challenge. *United States v. Martinez-Salazar*, 528 U.S. 504 (2000).

c) *But cf. United States v. Pritchett*, 48 M.J. 609 (A.F. Ct. Crim App. 1998). Military judge erred to the prejudice of the accused by denying the accused his statutory right to exercise a peremptory challenge against one of the new court members added after the original panel as supplemented fell below quorum. In a forcible sodomy and indecent liberties with a child case, the panel twice fell below quorum. After the third voir dire, the military judge denied both sides the right to exercise peremptory challenges. The defense implied that it desired to exercise the challenge and the MJ replied, *"I don't want to hear anymore about it. I ruled."* The exercise of a peremptory challenge is a statutory right. Deprivation of that right carries a presumption of prejudice, absent other evidence in the record, requiring automatic reversal.

2. ***No conditional peremptory challenges***. *United States v. Newson*, 29 M.J. 17 (C.M.A. 1989). It was improper for judge to allow trial counsel to "withdraw" peremptory challenge after defense counsel reduced enlisted membership below one-third quorum. *But See United States v. Owens*, No. 200100297, 2005 CCA LEXIS 182 (N-M. Ct. Crim. App. June 17, 2005) (unpub.). Government exercised its peremptory challenge (PC), defense exercised its PC, and the MJ then asked defense if they had any objection to the government's PC. Defense objected but prior to the MJ's ruling the government withdrew its PC and then the MJ allowed the government to PC a different member to which procedure the defense objected. While "ordinarily" the government must exercise its PC prior to the defense and the MJ cannot alter this procedure "without a sound basis," the N-MCCA reasoned that a sound basis existed because of the defense's untimely objection which if timely made would have allowed the government to exercise its PC prior to the defense. In the alternative, even if the MJ erred no prejudice accrued to the accused particularly where the member, who the government tried to PC with defense objection, ultimately sat on the case.

3. ***If additional members are detailed (busted quorum).*** If the exercise of a peremptory reduces court below the minimum required, the parties must use or waive any remaining peremptory challenge against the remaining members of the court *before* additional members are detailed to the court. *United States v. Owens*, No. 200100297, 2005 CCA LEXIS 182 (N-M. Ct. Crim. App. June 17, 2005) (unpub.). Government exercised its peremptory challenge (PC), defense exercised its PC, and the MJ then asked defense if they had any objection to the government's PC. Defense objected but prior to the MJ's ruling the government withdrew its PC and then the MJ allowed the government to PC a different member to which procedure the defense objected. While "ordinarily" the government must exercise its PC prior to the defense and the MJ cannot alter this procedure "without a sound basis," N-MCCA reasoned that a sound basis existed because of the defense's untimely objection which if timely made would have allowed the government to exercise its PC prior to the defense. In the alternative, even if the MJ erred no prejudice accrued to the accused particularly where the member, who the government tried to PC with defense objection, ultimately sat on the case.

X. Discriminatory Peremptory Challenges – *Batson*

A. **In General**. *Batson v. Kentucky* prohibits the use of unlawful discrimination in the exercise of a peremptory challenge. The *Batson* case expressly prohibited race-based challenges. Subsequent Supreme Court cases have extended *Batson* to forbid peremptory challenges based on race or gender.

1. ***The origin***. *Batson v. Kentucky*, 476 U.S. 79 (1986). The Supreme Court held that a party alleging that an opponent was exercising peremptory challenges for the purpose of obtaining a racially-biased jury had to make a *prima facie* showing of such intent before the party exercising the challenges was required to explain the reasons for the strikes (prosecutor had used peremptory challenges to strike all four of the African-Americans from the venire, with the result that Batson, an African-American, was tried by an all-white jury). The three-part *Batson* test requires: (1) a prima facie case of discrimination, (2) then the provision of a race neutral reason, and (3) proof of purposeful discrimination.

2. ***Military application***. The Supreme Court has never specifically applied *Batson* to the military. However, military caselaw has applied *Batson* to peremptory challenges through the Fifth Amendment. Military courts have, in some instances, made *Batson* even more protective of a member's right to serve. Under *Batson*, counsel cannot exercise a peremptory challenge based on race or gender.

a) *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988) (equal protection right to be tried by a jury from which no racial group has been excluded is part of due process and applies to courts-martial). Court in *Santiago* recognized that "in our American society, the Armed Services have been a leader in eradicating racial discrimination," and held that government's use of only peremptory challenge against minority court member raised *prima facie* showing of discrimination.

b) In the military, a trial counsel addressing a *Batson* challenge cannot proffer a reason that is "unreasonable, implausible, or that otherwise makes no sense." *See United States v. Tulloch*, 47 M.J. 283, 287 (C.A.A.F. 1997). By contrast, civilian courts only need a reason that is not "inherently discriminatory," even if explanation is not "plausible." *See Rice v. Collins*, 546 U.S. 333 (2006).

c) *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989) adopted a per se rule that "every peremptory challenge by the Government of a member of an accused's race, upon objection, must be explained by trial counsel." This is further expanded by *Powers* below.

3. ***Making a* Batson *challenge***. If either side exercises a challenge against a panel member who is a member of a minority group, then the opposing side may object and require a race-neutral reason for the challenge.

4. **Batson *applies to defense***. *United States v. Witham*, 47 M.J. 297 (C.A.A.F. 1997) (holding *Batson* applicable to defense in courts-martial); *Georgia v. McCollum*, 505 U.S. 42(1992) (holding that the Constitution prohibits a civilian criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges). If the government can show a prima facie case, the burden shifts to the defense to provide a race neutral reason for their peremptory challenge.

B. **Parameters Of Race-Based Challenges**.

1. ***Accused and member need not be of the same racial group***. *Powers v. Ohio*, 499 U.S. 400 (1991). "The Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely on their race. . . ."

a) Court's holding removes the requirement from *Batson* that the accused and challenged juror be of the same race.

b) Court's ruling in *Powers* is very broad. Focuses on both the rights of the accused as well as the challenged member.

c) Prosecutors must now be prepared to articulate a race-neutral reason for all peremptory challenges, regardless of the races of the accused or member.

2. ***Race defined***. *Hernandez v. New York*, 500 U.S. 352 (1991) (extending *Batson* to potential jurors who were bilingual Latinos, with the Court viewing Latinos as a cognizable race for *Batson* purposes and referring to Latinos as both a race and as an ethnicity). *See also United States v. Martinez-Salazar*, 528 U.S. 304 (2000) ("a defendant may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race"). To date the Supreme Court has applied *Batson* only to classifications which have received heightened scrutiny; race, gender, and ethnic origin (thus far limited to Latinos). *But see Rico v. Leftridge-Byrd*, 340 F.3d 178 (3d Cir. 2003) (*Batson* prohibits the exercise of peremptory challenges based on ethnic origin of Italian-Americans).

C. **Parameters Of Gender-Based Challenges**. As discussed above, *Batson* applies to gender-based challenges. *J.E.B. v. Alabama*, 511 U.S. 127 (1994). *JEB* held that the Equal Protection Clause prohibits litigants from striking potential jurors solely on the basis of gender. Ruling extends the concept that private litigants and criminal defense attorneys are "state actors" during voir dire for purposes of Equal Protection analysis. *See also United States v. Omoruyi*, 7 F.3d 880 (9th Cir. 1993) (prosecutor claimed that he used peremptory challenges against two single females because he thought they "would be attracted to the defendant" because of his good looks; court finds this was gender-based discrimination).

1. ***Applies to military***. *United States v. Witham*, 47 M.J. 297 (C.A.A.F. 1997) (gender, like race, is an impermissible basis for the exercise of a peremptory challenge by either the prosecution or the military accused).

2. ***Trial counsel must provide gender-neutral reason for striking member***. *United States v. Ruiz*, 49 M.J. 340 (C.A.A.F. 1998) (the per se rule developed in *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989), is applicable to Government peremptory challenges based on gender whether a MJ requests a gender neutral reason or not).

3. ***Generally, additional voir dire is unnecessary***. *United States v. Bradley*, 47 M.J. 715 (A.F. Ct. Crim. App. 1997). Accused charged with rape and assault. Trial counsel's exercise of peremptory challenge against one of two remaining members based on fact that member challenged was investigating officer on a case involving the legal office was gender-neutral and valid under *Batson*, and did not require military judge to grant defense request for additional voir dire to explore the basis of the trial counsel's supporting reason. Neither *Witham* nor *Tulloch* elevate a peremptory challenge to the level of a causal challenge (party making peremptory challenge need only provide a race neutral explanation in response to a *Batson* challenge).

4. ***Occupation-based peremptory challenges (subterfuge for gender?)***. *United States v. Chaney*, 53 M.J. 383 (C.A.A.F. 2000). The government used its peremptory challenge against the sole female member. After a defense objection, TC explained that member was a nurse. Military judge interjected that in his experience TCs "rightly or wrongly" felt members of medical profession were sympathetic to accuseds, but that it was not a gender issue. Defense did not object to this contention or request further explanation from TC. CAAF upheld the military judge's ruling permitting the peremptory challenge, noting that the military judge's determination is given great deference. CAAF noted it would have been preferable for the MJ to require a more detailed clarification by TC, but here DC failed to show that the TC's occupation-based peremptory challenge was unreasonable, implausible or made no sense.

D. **Parameters Of Race- And Gender-Neutral Reasons**. The Supreme Court has held that the "genuineness of the motive" rather than "the reasonableness of the asserted nonracial motive" is what is important. *Purkett v. Elem*, 514 U.S. 765 (1995) (Missouri prosecutor struck two African-American men from panel stating "I don't like the way they looked," and they "look suspicious to me;" this is a legitimate hunch, and the *Batson* process does not demand an explanation that is "persuasive or even plausible;" only facial validity, as determined by trial judge, is required). *See Rice v. Collins*, 546 U.S. 333 (2006). The prosecutor struck a minority female because (1) she had rolled her eyes in response to a question from the court; (2) she was young and might be too tolerant of a drug crime, and (3) she was single and lacked ties to the community. The trial judge did not observe the eye roll but allowed the challenge based on the second and third grounds. The trial judge noted that the government also used a PC against a white male juror because of his youth. The Supreme Court, citing *Purkett v. Elem*, 514 U.S. 765 (1995), stated that a race neutral explanation "does not demand an explanation that is persuasive,

or even plausible, so long as the reason is not inherently discriminatory, it suffices." *See also Hernandez v. New York*, 500 U.S. 352 (1991) ("[A]n explanation based on something other than the race of the juror. . . Unless a discriminatory intent is inherent in the prosecutor's explanation the reason offered will suffice.").

1. ***Different standard for trial counsel***. Peremptory challenges are used to ensure qualified members are selected, but, in the military, the convening authority has already chosen the "best qualified" after applying Article 25, UCMJ. Therefore, under *Batson*, *Moore*, and *Witham*, trial counsel may not strike a person on a claim that is unreasonable, implausible, or otherwise nonsensical. *United States v. Tulloch*, 47 M.J. 283 (C.A.A.F. 1997). *Tulloch* is a departure from Supreme Court precedent, which requires only that counsel's reason be "genuine." *Purkett v. Elem*, 514 U.S. 765 (1995).

a) *Tulloch:* Accused was African-American. Trial counsel moved to strike African-American panel member based on "demeanor," claiming member appeared to be "blinking a lot" and "uncomfortable." CAAF held this was insufficient to "articulate any connection" between the purported demeanor and what it indicated about the member's "ability to faithfully execute his duties on a court-martial." Trial counsel's peremptories are assessed under a "different standard."

b) Trial counsel must be able to defend the peremptory challenge as non-pretext.

c) Counsel cannot simply affirm his good faith or deny bad faith in the use of the peremptory.

d) Counsel must articulate a connection between the observed behavior, etc., and a colorable basis for challenge (e.g., "member's answers to my questions suggested to me she was not comfortable judging a case based on circumstantial evidence alone," etc.).

e) Military judge should make findings of fact when the underlying factual predicate for a peremptory challenge is disputed, particularly where the dispute involves in-court observations of the member. The military judge should make "findings of fact that would establish a reasonable, plausible race-neutral explanation for a peremptory challenge by the Government of a member chosen as 'best qualified' by a senior military commander." *Tulloch*, 47 M.J. 289.

2. ***Fact-specific inquiry and inconsistent results***.

a) *United States v. Robinson*, 53 M.J. 749 (A. Ct. Crim. App. 2000). Trial counsel's proffered reason for striking minority member (that he was new to the unit and that his commander was also a panel member) was unreasonable. Counsel did not articulate any connection between the stated basis for challenge and the member's ability to faithfully execute the duties of a court-martial member. Sentence set aside.

b) *United States v. Shelby*, 26 M.J. 921 (N.M.C.M.R. 1988). Trial counsel peremptorily challenged junior African-American officer in sodomy trial of African-American accused. Inexperience of junior member was accepted racially-neutral explanation, even though other junior enlisted members remained.

c) *United States v. Curtis*, 28 M.J. 1074 (N.M.C.M.R. 1989), *rev'd on other grounds*, 33 M.J. 101 (C.M.A. 1991). Trial counsel challenged African-

American member who stated that serving on court-martial in a capital case would be a good "learning experience." Upheld as a racially-neutral explanation.

d) *United States v. Woods*, 39 M.J. 1074 (A.C.M.R. 1994). TC says, "We just did not get the feeling that SSG Perez was paying attention and would be a good member for this panel. It had nothing to do with the fact that his last name was Perez. I mean there is no drug stereotype here." Court holds TC's articulated basis (inattentiveness) was not pretext for intentional discrimination.

3. ***The numbers game and protecting quorum***. *United States v. Hurn*, 55 M.J. 446 (C.A.A.F. 2001). The DC objected after the TC exercised the government's peremptory challenge against panel's only non-Caucasian officer. TC's basis "was to protect the panel for quorum." CAAF held the reason proffered did not satisfy the underlying purpose of *Batson*, *Moore*, and *Tulloch*, which is to protect the participants in judicial proceedings from racial discrimination.

a) Case remanded for *DuBay* hearing based on TC's affidavit, filed two and a half years after trial, which set forth other reasons for challenging the member in question.

b) Post-*DuBay: United States v. Hurn*, 58 M.J. 199 (C.A.A.F. 2003). In *DuBay* hearing, TC testified he also removed the member because the member had expressed concern about his "pressing workload." MJ determined challenge was race-neutral. CAAF affirmed, finding no clear error: "The military judge's determination that the trial counsel's peremptory challenge was race-neutral is entitled to great deference and will not be overturned absent clear error" (internal quotations and citations omitted). *But see Greene*, below (holding where part of the reason for a challenge is not race-neutral, the entire reason must fail).

4. ***Valid logistical reasons for using peremptory***. *United States v. Clemente*, 46 M.J. 715 (A.F. Ct. Crim. App. 1997). Trial counsel's use of peremptory challenge to remove only Filipino member of panel because member was scheduled to go on leave during the trial was race neutral. Defense counsel acquiesced in objection by stating that "it would accept it and was ready to go ahead and continue."

E. **Mixed Motive Challenges Are Improper**. *United States v. Greene*, 36 M.J. 274 (C.M.A. 1993). Two reasons for exercise of peremptory challenge: one reason was facially valid and race-neutral; the second amounted to a "gross racial stereotype" and was clearly not race neutral. Where part of the reason for a challenge is not race neutral, the entire reason must fail. Findings and sentence set aside. *See also Georgia v. McCollum*, 505 U.S. 42, 54 (1992) (civilian defendant's use of peremptory challenges based on racial consideration was prohibited).

F. **Beyond Race/Ethnic Group And Gender, *Batson* Is Generally Inapplicable.**

1. ***Marital status***. Peremptory challenges based on marital status do not violate *Batson*. *United States v. Nichols*, 937 F.2d 1257 (7th Cir. 1991).

2. ***Age***. Peremptory challenges based on age do not violate *Batson*. *Bridges v. State*, 695 A.2d 609 (Md. Ct. Spec. App. 1997).

3. ***Religion***. The Supreme Court has not ruled on whether *Batson* extends to religious-based peremptory challenges.

a) *United States v. Williams*, 44 M.J. 482 (C.A.A.F. 1996). Trial counsel peremptorily challenged a member who was the senior African-American officer after he indicated that he was a member of the Masons. The accused was also a Mason. No abuse of discretion for the MJ to grant the peremptory challenge

where the TC indicated the race neutral reason was that the member and accused were members of the same fraternal organization. While recognizing that the Supreme Court has not extended *Batson* to religion, the court noted that the record in this case was "devoid of any indication of [the member's] religion." CAAF cites *Casarez v. Texas*, 913 S.W.2d 468, 496 (Tex. Crim. App. 1994) (on rehearing), and *State v. Davis*, 504 N.W.2d 767 (Minn. 1993), *cert. denied*, 511 U.S. 1115 (1994), as authority that *Batson* does not apply to religion.

b) Two federal circuits have decided the status of religion-based *Batson* strikes on the merits.

(1) *United States v. DeJesus*, 347 F.3d 500 (3d Cir. 2003). Court drew a distinction between a strike motivated by religious beliefs and one motivated by religious affiliation. The court found strikes motivated by religious beliefs (i.e. heightened religious activity) were permitted; no occasion to rule on issue of religious affiliation. The Seventh Circuit makes the same distinction in dicta, but did not resolve the issue because the court found no plain error. *United States v. Stafford*, 136 F.3d 1109 (7th Cir. 1998).

(2) *United States v. Brown*, 352 F.3d 654 (2d Cir. 2003). *Batson* applies to challenges based on religious affiliation. "Thus, if a prosecutor, when challenged, said that he had stricken a juror because she was Muslim, or Catholic, or evangelical, upholding such a strike would be error. Moreover, such an error would be plain." Strikes at issue involved heightened religious activity, so did not violate *Batson.*

c) ***One circuit has not addressed the issue***. *United States v. Girouard*, 521 F.3d 110, 113 (1st Cir. 2008) ("We have never held that *Batson* applies to cases of religious discrimination in jury selection. Even assuming, arguendo, that *Batson* does apply to claims of religious discrimination, we find no clear error in the district court's action. It is therefore unnecessary to resolve the open question of whether *Batson* does indeed apply to religious discrimination.").

d) ***States are split on whether* Batson *extends to religion***. *Compare Thorson v. State*, 721 So. 2d 590, 594 (Miss. 1998) (extending *Batson* to peremptory strikes based on religion); *State v. Purcell*, 18 P.3d 113, 120 (Ariz. Ct. App. 2001) (concluding that *Batson* extends to peremptory challenges based on religious affiliation); *with State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993) (rejecting argument that Batson includes peremptory strikes based on religious affiliation); *State v. Gowdy*, 727 N.E.2d 579, 586 (Ohio 2000) (permitting peremptory challenge based on juror wearing a cross); *Casarez v. State*, 913 S.W.2d 468, 496 (Tex. Crim. App. 1994) (en banc) (holding that state interests in peremptory challenges warrant excluding jurors based on religious affiliation); *James v. Commonwealth*, 442 S.E.2d 396, 398 (Va. 1994) (same).

4. ***Membership in organization***. *United States v. Williams*, 44 M.J. 482 (C.A.A.F. 1996). Accused and senior officer member of panel were members of the Masons. Peremptory challenge based on "fraternal affiliation" is race-neutral.

G. **Recent Application Of *Batson***. *Snyder v. Louisiana*, 552 U.S. 472 (2008). A civilian defendant was convicted of first-degree murder and sentenced to death. On appeal, defense argued the trial court erred by allowing the prosecution to use a peremptory challenge against an

African-American juror despite a *Batson* challenge. In a 7-2 decision, the Court ruled the trial judge committed "plain error" by denying the *Batson* challenge.

1. Before jury selection, 85 prospective jurors were questioned during normal voir dire. Of those 85, only 36 survived challenges for cause; five of those remaining jurors were black. Under Louisiana practice, each side had 12 peremptory challenges. "[A]ll 5 of the prospective black jurors were eliminated by the prosecution through the use of peremptory strikes." At issue on appeal, the defense lodged a *Batson* challenge against the prosecution's peremptory challenge of one of the five black prospective jurors. Pursuant to *Batson* and its progeny, the prosecution gave two race-neutral reasons for using a peremptory. First, the prospective juror "looked very nervous" during questioning. Second, the prospective juror was a student teacher and said during voir dire that he was concerned jury duty might keep him from completing his requirements for the semester. Based on this second challenge, the prosecution speculated, "[H]e might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase."5

2. The Court looked at the other 50 members of the venire who said that jury duty would be an "extreme hardship." Of those 50, there were 2 white members who had serious scheduling conflicts. First, Mr. Laws was a general contractor; he said that he had "two houses that are nearing completion" so if he served on the jury, those people would not be able to move in to their homes. Mr. Laws further said that he wife recently had a hysterectomy so he was taking care of his children. He added, "[S]o between the two things, it's kind of bad timing for me." Second, Mr. Donnes approached the court with an "important work commitment" later that week; though not developed on the record, it was important enough that Mr. Donnes re-raised the conflict on the second day of jury selection.

3. The Court focused on the third *Batson* step, concluding that the prosecution's "pretextual explanation naturally gives rise to an inference of discriminatory intent." During jury selection, the judge's law clerk called the dean at the prospective juror's university, who said he could complete his student teaching observation even if he served on the jury. The Court concluded that the student teaching obligations were not a valid reason for exercising a peremptory, particularly in light of the other conflicts offered by two white jurors who ultimately sat as members.

H. **Procedural Issues**.

1. ***Timing***. Defense should object to government's peremptory challenge immediately after it has been stated by the government. *See United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999). The accused attacked military practice because it unnecessarily permits the Government a peremptory challenge even when it has not been denied a challenge for cause, contrary to *Ford v. Georgia*, 498 U.S. 411 (1991), which states: "The apparent reason for the one peremptory challenge procedure is to remove any lingering doubt about a panel member's fairness . . . ." In the military, accused asserted that "the [unrestricted] peremptory challenge becomes a device subject to abuse." The CAAF noted that Article 41(b) provides accused and the trial counsel one peremptory challenge. Neither *Ford*, nor any other case invalidates this judgment of Congress and the President.

[5] Under Louisiana law in effect at the time, a capital jury would deliberate on findings and then only deliberate on sentence if the defendant was found guilty of an offense for which the death penalty was authorized. In this case, if the jury had found the defendant guilty of unpremeditated murder, the jurors would have been excused and the judge would decide the sentence.

2. ***Privacy***. Military judge should use appropriate trial procedures to best protect privacy interest of challenged member.

3. ***Type of proceedings to substantiate reasons***.

a) Argument by defense is typically enough to complete the record. But see *United States v. Downing*, 56 M.J. 419 (C.A.A.F. 2002). Appellant failed to meet burden of establishing that a court-martial panel member should have been dismissed for cause (bias), so it did not matter that the trial judge may have applied the wrong standard for challenge.

b) Affidavit, adversary hearing, and argument allowed, but evidentiary hearing denied. *United States v. Garrison*, 849 F.2d 103 (4th Cir.), *cert. denied*, 109 S. Ct. 566 (1988). *See also Ruiz* (above).

4. ***Findings on record***.

a) Judge should enter formal findings concerning sufficiency of proffered reasons. MJ should make findings of fact when underlying factual predicate for a peremptory challenge is in dispute. *See Tulloch*, above and *United States v. Perez*, 35 F.3d 632, 636 (1st Cir. 1994).

b) Military judge not required to raise the issue sua sponte, question member, or recall member for individual voir dire. *See Clemente* and *Bradley*, above.

5. ***Waiver***. To preserve the *Batson* issue, defense counsel should make timely *Batson* challenge as well as object the race- and gender-neutral reasons offered by trial counsel. Failure to object at both stages may constitute waiver.

a) *United States v. Galarza*, No. 9800075 (A. Ct. Crim. App. May 31, 2000) (unpub.) (where defense made *Batson* objection to TC's peremptory challenge of a female panel member, and TC stated member showed "indecisiveness" during voir dire, DC's failure to object or to dispute TC's proffered gender-neutral explanation for the peremptory challenge waived issue on appeal).

b) *United States v. Irvin*, 2005 CCA LEXIS 99 (A.F. Ct. Crim. App. Mar. 24, 2005) (unpub.). Trial counsel peremptorily challenged only African-American panel member in a contested rape court-martial. MJ asked the TC for a race-neutral *Batson* reason, *sua sponte*, for the challenge. TC responded that the panel member might have preconceived ideas or positions from a rape court-martial she had previously sat on the week prior and she had previously heard testimony from one of the investigators. MJ accepted this reason and defense did not object to the TC's reason or the MJ's ruling. AFCCA held the defense counsel's failure to object waived the issue and further that the MJ did not abuse his discretion in finding no purposeful discrimination by the TC.

6. ***Making the record of a* Batson *challenge – the outer limits***. *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999). Military judge erred in not requiring counsel to articulate a "race-neutral" explanation for the Government's use of its peremptory challenge against one of only two African-American panel members. Trial counsel did, however, provide a statement at the next court session, stating a race-neutral explanation for the challenge (claiming the member's responses concerning the death penalty were equivocal). Trial counsel's statement provided a sufficiently race-neutral explanation for the challenge, and the court found that public confidence in the military justice system had not been undermined. The military judge is required to make a determination as to whether trial counsel's explanation was credible or pretextual and, optimally, an express ruling on this

question is preferred. However, here the military judge clearly stated his satisfaction with trial counsel's disavowal of any racist intent in making the challenge.

a) ***Avoid the issue***. Government should use peremptory challenge sparingly and only when a challenge for cause has not been granted. The requirements of *Batson* will likely be satisfied if a facially-valid challenge for cause was denied before trial counsel exercised peremptory challenge:

b) *United States v. Allen*, 59 M.J. 515 (N-M Ct. Crim. App. 2003). Government challenged officer panel member for cause "based on the fact he had previously been a criminal accused in a military justice case and, therefore, would likely hold the Government to a higher standard of proof than required by law." Military judge denied challenge for cause; government exercised its peremptory against the same member and defense made *Batson* challenge. Government gave same reason for peremptory as for challenge for cause. Court held the TC articulated a reasonable, race neutral and plausible basis for challenge.

XI. Voir Dire And Challenges Summary Chart

MILITARY JUDGE'S Control OF **Voir Dire**	• RCM 912 grants a MJ broad authority to control the conduct of voir dire. A MJ may deny a request for individual voir dire, may limit the amount of counsel who participate in voir dire, and restrict the type of questions asked. A MJ, however, should be cautious in placing extreme limits on counsel. While the MJ may foreclose or limit counsel during voir dire, the appellate courts will review whether the MJ abused his/her discretion.
Causal Challenges: Standards for Evaluation	• MJs are to liberally grant challenges for cause (*Moyar* mandate) for the defense only (*James*). • A causal challenge based on actual bias is one of credibility and is reviewed for an abuse of discretion. MJs have significant latitude in making this subjective determination because of the opportunity to observe the demeanor of the court member. Great deference is given to MJ determination. • The bases for causal challenges include inelastic attitude on sentencing, an unfavorable inclination toward a particular offense, being a victim of a offense similar to the one being prosecuted, rating chain challenges, knowledge of the case, and/or expertise in the issues to be litigated. A member is disqualified only after a showing that the basis for a challenge will prohibit the performance of duties as a member.
The Implied Bias Doctrine	• RCM 912(f)(1)(N) also embodies the implied bias doctrine. A MJ must determine whether a member should be disqualified for implied bias based on an objective standard. The question to ask is "would a reasonable member of the public have substantial doubt as to the legality, fairness, and impartiality of the proceedings?" Implied bias occurs when the member's position, experience, or situation indicates that he/she should not sit, even though the member disavows any adverse impact on their ability to perform member duties. • Impact of *Wiesen* – grant challenge if greater that 2/3 "work" for senior member.
Procedural Issues Associated with Challenges	• Article 41 provides the procedure for challenges. The underlying intent of Article 41 is to ensure that each party gets one and only one peremptory challenge, and that causal challenges are liberally granted but for defense only. • When a causal challenge reduces a court below Article 16, as opposed to Article 25, quorum, the parties must exercise all causal challenges then apparent. Peremptory challenges will not be exercised until the CA details additional members to the court and then after causal challenges. • When a peremptory challenge reduces a court below Article

	16 quorum, the parties must use or waive any remaining peremptory challenges against remaining members before additional members are detailed to the court. When additional members are detailed, causal challenges are done and the parties get peremptory challenges against the new members.
***Batson* and Peremptory Challenges**	• *Batson v. Kentucky* prohibits the use of unlawful discrimination in the exercise of a peremptory challenge. Military case law applies *Batson* to courts-martial. A MJ, upon receiving a *Batson* objection, must ask the party making the peremptory challenge to provide a supporting race and/or gender neutral reason, and then determine whether that reason is in fact race and/or gender neutral. A *trial counsel* may not base a peremptory challenge on a reason that is implausible, unreasonable, or otherwise makes no sense. *Tulloch*. • *Batson* is applicable to the defense. See *Witham*. • The MJ does not have a *sua sponte* duty to raise a *Batson* challenge. In addition, an MJ is not required to conduct individual voir dire in a peremptory challenge situation. • The Supreme Court has not ruled on whether *Batson* prohibits peremptory challenges based on religion. Two federal circuits have held that it does. Civilian cases support that *Batson* does not prohibit peremptory challenges based on age. There is no military case on age.

XII. Conducting Voir Dire - Introduction

A. *Voir dire* is a terrible name for this phase of the trial. No one even knows how to pronounce it. It is a French phrase that literally means "to speak the truth." Well, that applies to everyone that takes an oath to tell the truth at trial. Generally speaking, though, it means a preliminary examination to test the suitability of a potential juror or the competence of a potential witness.

B. So, we could call this phase, "Preliminary Panel-Member Examination." And for part of this phase of the trial – the written phase – that is an appropriate title. But for the other part of this phase of the trial – the in-court, oral exchange – that is not a good title. That part of *voir dire* should be called "Conversations with Panel Members" because that is what you want to achieve: a conversation with your panel members.

C. Note that the oral exchange has two parts – individual and group. So, we really have three parts of *voir dire* to deal with: written individual, oral individual and oral group. For simplicity's sake, we will use the term *voir dire* during this instruction, but we will distinguish between individual written *voir dire*, individual oral *voir dire*, and group oral *voir dire*.

D. Once we understand the overall goals of *voir dire*, we will see that some of these goals should be accomplished in written *voir dire* plus individual spoken *voir dire*, and some in group spoken *voir dire*.

E. At the end of this instruction, you will have a simple system that you can use to approach *voir dire*. This framework is derived from Lin S. Lilley's excellent article, *Techniques for Targeting Juror Bias*, Trial, November 1994, at 74.

F. WARNING: If you are going to defend a capital case, then you need to learn a particular form of *voir dire* called the Colorado method.

XIII. Goals and How to Reach Them

A. We need to understand the goals of *voir dire* if we are to understand the best way to approach our panel members. As we go through this, remember the meaning of goal-centered trial advocacy: if you don't have a reason for doing it, don't do it.

B. Information Gathering.

1. The first goal (and the only one officially sanctioned by the Rules for Court-Martial) is information gathering. Panel members cannot sit unless they can be fair and impartial (RCM 912(f)(1)(N)), so you need to be able to gather information on fairness and impartiality in order to make meaningful use of peremptory and causal challenges.

2. In civilian trials, the prospective juror pool is very large and somewhat represents a cross-section of society. Civilian attorneys have a bigger information gathering challenge that military attorneys do. Civilian attorneys really know nothing about these people and one of their primary goals is to get rid of the jerks and weirdos. We don't have that problem. The convening authority has already screened this population and we should not expect jerks and weirdos to make the cut. Therefore, you can really refine your information gathering goals.

3. The problem is that panel members, like most human beings, will not say socially unacceptable things in public. Many psychological studies have shown that when people are put in group settings, they generally will say what they think the group expects them to say. If you ask panel members who are sitting in a formal court-room in their Army Service Uniform and who might themselves be a field-grade officer and whose boss might also be on the panel, "Do you look at pornography," don't expect a lot of hands to go up. If you ask, "Would you be concerned if your daughter dated outside of your race," don't expect a lot of hands to go up.

4. To get responses that will accurately tell you whether a panel member might have a bias or belief that will impact your case, you need to ask those questions in a safe place – **written individual *voir dire***.

   a) All of your panel members will have already completed a written questionnaire, but that questionnaire contains vanilla questions and answers. You want the panel members to complete a supplemental questionnaire where you provide them with a forum that will allow them to expose their beliefs without causing themselves personal embarrassment, and where they can have some "outs" (as in, shift the questioned belief or behavior to someone else). Here, you are much more likely to get reflective and accurate answers.

   b) You will need to identify what experiences, biases, and beliefs exist that might impact how your panel members will solve the problem in your case. If your case involves homosexual conduct, or pornography, or cross-racial sexual relationships, or cross-racial violence, or a sexual-assault victim that has behaved in ways that are contrary to traditional sex role expectations, or [add a bias or belief here], then you need to explore that with your panel members.

      (1) In a case involving pornography or non-traditional sexual behavior, you might ask: "Have you or someone you are close to (a college roommate, brother or sister, close friend) ever regularly looked at pornography? If someone else did, did your opinion of him or her change after you found out? Explain how it changed."

      (2) In a case involving cross-racial sexual relationships, you might ask: "If your son or daughter became romantically involved with someone from another race, how would that concern you? And then have a scale from "0" (not concern me at all) to "10" (concern me greatly)."

      You can ask similar questions about homosexuality (if your son or daughter told you he or she was gay, would that concern you, and then a scale). Or, the relationship between race and violence (Imagine that you are at home sleeping in bed with your wife, with the kids in their rooms, when you hear a window break and the unmistakable sounds of someone in your house. Now, what is the color of the skin of the person that you imagined was in your house?) Or, the validity of the mental health field as a real science (In your opinion, are psychology and psychiatry valid sciences or psycho-babble, with a scale). Or, whether they

associate a stigma with seeking help for mental health problems (Have your or has someone close to you been to a mental health professional? If someone else, did your opinion of him or her change? How?)

(3) Take a look back at those questions. If they were asked in a group setting, what would the answers have been? Most likely, the socially acceptable answers. So, reduce these types of questions to something that is close to an anonymous survey (the written supplemental) and see if you can get accurate replies. You might even consider having a psychologist or psychiatrist help you to draft the questions. An added benefit of asking the questions via a supplemental questionnaire is that the members won't know which party is seeking the information.

c) You might also look for other indicators of belief systems, like what news shows they watch and what magazines they receive. And you might look for the ways that they learn: "[O]ne of the most important things to look for is how the different jurors learn. Are they more creative or more logical? Would they rather look at a graph or read a book? What magazines to they read? What kind of entertainment do they enjoy? What kinds of games do they like to play?" James McElhaney, *Making Limited Time for Voir Dire Count*, A.B.A. J., Dec. 1998, at 66.

d) You should also ask about life experiences that might impact how the panel member will approach the problem. The military judge will ask some of these questions in front of everybody. For example, "Has anyone, or any member of your family, or anyone close to you personally ever been the victim of an offense similar to the offense charged?" In a case of child molestation, if a panel member was molested as a child but has not told anyone, do you think he or she will raise her hand and say that he or she has in front of all of these strangers? The better place to ask that question is in written *voir dire*.

e) As with anything else in trial work, the decision to submit an additional questionnaire needs to be goal oriented. If you don't need to gather information via a supplemental questionnaire in this particular case, don't.

f) And, you need to start working on this early. You need to identify these issues, structure arguments around them, and draft written *voir dire* questions during the trial preparation process – not on the day before trial. Generally, to do a written supplemental questionnaire, you will need to distribute the questionnaires a week or two before trial so that they can be sent to the members, the members can complete them, and then the questionnaires can be collected and reviewed by the attorneys. Using this process forces you to get your thoughts together well before trial.

5. This leads to the use of **individual spoken *voir dire***.

a) If the panel member has responded in a way that causes you concern, you should consider challenging them based solely on their written response. If the military judge wants more, then bring the issue up in individual spoken *voir dire* – not in group spoken *voir dire*. Give the prospective panel member as much anonymity as you can.

6. Note how using written questionnaires and individual spoken *voir dire* greatly simplifies the process of *voir dire*. You don't have to come up with complex charts and try to keep up with who's hands go up when in response to what questions. You get the answers you need ahead of time, on paper, or later when just one person is on the stand. *Voir dire* can be pretty easy.

7. Again, only do individual spoken *voir dire* if you need to. If you don't have a good reason for doing it, don't do it.

8. The bottom line is: if you want to learn particular information about this panel member, use written *voir dire* to discovery that information and then use individual spoken *voir dire* to follow-up the written *voir dire*, if needed. Don't waste your group spoken *voir dire* time doing information gathering.

C. Education

1. The next goal is education – not education on your theory or theme of your case, but education on the counter-intuitive things the panel members will have to deal with.

2. Don't educate on your theory.

a) When you theory-shop or theme-shop with your panel, you might think you are doing what lawyers should be doing, and other lawyers might be impressed, but your panel members will not be impressed. First, you risk coming across as a used-car salesman or as a lawyer trying to pull a lawyer-trick. According to James McElhaney, "Arguing your case before the jury panel members even know what it's about triggers genuine sales resistance. So does trying to push the jurors into making commitments about how they are going to decide the case." James McElhaney, *Making Limited Time for Voir Dire Count*, A.B.A. J. Dec. 1998, at 66-67.

b) And when you ask questions that you think are related to your case, like, "Would you agree that cops sometimes lie?", you are insulting their intelligence. Of course they know that cops sometimes lie. What they want to know is, did a cop lie in *this* case. And they want to wait until they hear the case to deal with that issue. They don't want to feel like you are pressuring them to agree with you before they know the facts.

c) Look at these questions, for example:

(1) Do you believe that, under certain circumstances, eyewitness' memory might not be accurate?

(2) How do you feel about witnesses who testify after receiving special treatment from the government?

(3) Do you think criminals might lie in order to get a better deal from the government?

(4) Do you agree that many words of the English language have various meanings?

(5) Do you agree that the mere presence at the scene of the crime does not establish guilt?

d) Each of these questions only has one answer. The panel members know that so they wonder why you are asking them and why you want them to state something so obvious. You might think you are doing something clever, but they are wondering why you are wasting their time and insulting their intelligence with questions like this.

e) As a good rule of thumb, if what you intend to ask is really an inference, then don't ask the question. Note that for all of the questions above, you can just argue that statement. Instead of asking those questions, do what the panel members want you to do: put on the evidence, and then argue the inferences. They will appreciate that.

3. So, if we aren't going to theory-test and theme-test, what are we going to educate the panel members about?

4. Educate them on the counter-intuitive aspects of the law or of your case, and on generally-held beliefs that run counter to your case. This is how you will use **group oral *voir dire***.

a) The judge is going to ask some perfunctory questions that address some of these issues, particularly system bias that runs against the accused. However, all of these questions only illicit the socially acceptable response. There is only one to answer, "The accused has pled not guilty to all charges and specifications and is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt. Does anyone disagree with this rule of law?" No panel member is going to raise her hand while wearing her Army Service Uniform and say, "You know what, your honor? I cannot abide by that fundamental principle of American law." The panel members will only respond with the socially acceptable answer, but you need to be aware that they will still likely solve the problem before them by relying on deeply-embedded generalizations about human behavior.

b) Note, your goal is to educate them about these beliefs, *not to challenge them for cause*. Some panel members will respond with answers that show that they have beliefs that run counter to your case. That is okay. You are going to make them aware of their beliefs so that they will be more receptive to counter-arguments and other belief structures. (You are not going to win most challenges for cause in this area, anyway, because the other party or the military judge will be able to ask questions that will rehabilitate the panel member).

c) As James McElhaney states, "A sermonette and long strings of questions will not change how anybody feels about basic issues. Even if they seem to go along with you, they will not reject their personal opinions. They will keep their personal opinions and reject you." James McElhaney, *Making Limited Time for Voir Dire Count*, A.B.A. J., Dec. 1998, at 66.

d) We need to find a way to get them to be aware of their underlying beliefs so that they will not act on them. To do this, you want them to describe the 800-pound gorilla in the room (the belief they would otherwise use to solve the problem). And then you want to kill the gorilla.

e) Kill the gorilla. Don't challenge the panel member.

f) You want them to gain insight on how the natural way that they might have solved the problem contains error. (For a good discussion of the neurological reasons why you explore these beliefs with the panel members, read Jonah Lehrer's book, *How We Decide*).

g) For the defense counsel, there are several places in the law where the law runs counter to our intuitive problem-solving processes.

(1) For example, if the accused does not testify, we all draw negative inferences from that (he must have something to hide; if I were falsely accused, I would testify to set the record straight, so so should he – he isn't, so therefore he is guilty). Because normal people draw an inference that runs counter to constitutional protections (here, the right not to testify), the law says, "Don't do that."

(2) Same for the prohibition against drawing a negative inference if the defense does not put on a case (if evidence that said he didn't do it were available, of course he would put it on – so it must not exist), or for the inference that just because the person is sitting at that table, they must have done something wrong (he has been through transmittals from commanders, an Art. 32, and the CG referral – all those people think he did something wrong, or else he would not be sitting at this table). Those last two instances implicate the presumption of innocence, and it turns out that 60-80% of jurors presume guilt.

h) These inferences draw from a person's lifelong experiences. A simple instruction from the judge that tells them not to use those generalizations does not mean that they will not use those lifelong-held generalizations to solve the problem. It just means that they will not talk out loud about their use of those generalizations.

i) How to kill the gorilla.

(1) In group *voir dire*, ask this simple question: "What is the first thing that comes to your mind when you hear that the accused will not testify?" Wait a few moments. There may be some silence. Eventually, someone will say, "He is guilty." Now, don't rush to challenge that person. Instead, say, "Thank you, SFC Jones." And then ask, "Did anyone else think that?" Then say, "Thank you, [Names]." Then, have them describe the elephant. Ask, "Okay, MAJ Smith, why do you think that?" Continue asking questions until the 800-pound gorilla is fully described.

(2) Do not be judgmental with the answers. Instead, validate them. Say, "Thank you, MAJ Smith, I see your point" or variations on that.

(3) Then, ask, "Okay, why would someone who is innocent not take the stand?" Again, wait a few moments. There may be some silence. But then somebody will start finding the swords: "He might not be a good public speaker;" "His attorney might have told him not to;" "He have some embarrassing skeletons in his closet;" "He might be afraid that a trained federal prosecutor will twist his words;" "He might be really nervous, particularly when this much is at stake." (If no one comes up with a reason after several moments have gone by, then toss them a sword to get them talking.)

(4) The key is to have them list all of the reasons that *no one* ever wants to testify. Then ask, "Does everyone now see why the military judge told you not to hold it against SGT Adams if he doesn't testify? Please raise your hand if you can see that. Everyone raised their hand. Thank you."

(5) For the presumption of innocence, you might ask, "What is the first thing you think when you see that the government has gone through all this trouble to bring the accused to trial?" The answer will probably be, "He did something wrong." Then you respond with, "Why could it be that innocent people are brought in to court?" Let them grab some swords. ("He was framed." "He was the best of several suspects." "He was in the wrong place at the wrong time." "Someone misidentified him.") If they can't find any, ask them, "Well, have any of you ever been accused of doing something you didn't do? Either recently, or even as a kid?" Have them describe the situations. Then ask, "Now, does everyone see the reason why we have this presumption of innocence? Please raise your hand if you see that. Everyone raised their hand. Thank you."

(6) You killed the gorilla. Now, the panel members are much less likely to rely on the life-long held generalizations that work against your client. Note, you didn't try to challenge anyone.

5. Again, you need to have a good reason for doing **group spoken *voir dire***. If you do not have a good reason for doing it, don't do it. You only need to do this when the bias might exist in your case. If your client is going to testify or put on evidence, then you don't need to explore those system biases. Only have them describe the 800-pound gorillas that need killing.

6. For the trial counsel prosecuting an acquaintance sex assault case where the victim has behaved in ways prior to the assault that are outside of traditional sex-role expectations, you will run into two beliefs that will hurt your case, both of which shift blame to the victim: first, she asked for it, and second, she assumed the risk that this would happen.

a) If slightly more than one-third of your panel members has one of these beliefs (and research shows that these are commonly-held beliefs) and you don't deal with these beliefs, then you may have an acquittal coming.

b) If your victim did something like drink with the accused ahead of time and then consensually engaged in kissing or oral sex, but then claims that the accused forced sexual intercourse on her, then some panel members might think that she asked for it. Essentially, she shares culpability for what happened next. If she had not done all of those things, then this guy would not have lost control of his libido.

c) You can counter that by asking, "Are there circumstances where a woman can get a man so worked up that, even if she says no later, it is too late to say no?" Wait. Someone may raise their hand. Ask why they think that way. Have them describe the 800-pound gorilla and see if other people agree, using the same technique as above.

d) Then, give them a sword. Ask them, "Okay, well, if someone comes up to you and asks to borrow $50, and you say, 'I won't loan you $50, but I will loan you $25,' can that person then go ahead and take the other $25? Who thinks no? Everybody raised their hands."

e) If your victim placed herself in a risky situation, particularly by her own voluntary drinking, then you need to address this assumption of risk. You might first ask, "If a woman does X, Y, and Z, do you think she assumes some risk in what might happen to her?" Wait. You will probably get several people who agree. Ask why they think that way. Describe the 800-pound gorilla.

f) The next step is to see if they think that because she assumed some risk, the offender might be less culpable. Ask, "Well, if someone gets really drunk and stumbles out of a bar, they have placed themselves at risk of getting mugged. If someone does mug them, do we let the mugger go because the victim was drunk?" Or you might ask, "If a well-dressed business man goes to a ATM late at night in a crime-ridden part of town and gets mugged, do we let the mugger go because the victim was in dangerous situation?"

7. The bottom line is: describe those generalizations (describe the 800-pound gorilla) and then have the panel members find reasons why those generalizations are dangerous (have them find some swords); then, have them kill the gorilla. Again, you need to have a good reason for doing group spoken *voir dire*. If you do not have a good reason for doing it, don' t do it.

D. Rapport and Persuasion

1. The third and fourth goals of *voir dire*, rapport and persuasion, are really byproducts of what you have accomplished in written and spoken *voir dire*. You have established rapport with the panel by not wasting their time; by asking questions that matter; and by showing them that you are prepared. Don't ask test-like questions. Show an interest in what they are saying. Don't ask judgmental questions, and don't judge their answers. Validate all of their responses.

2. And by addressing the biases and beliefs that run counter to your case, you have made them more open to the case you are about to present.

XIV. Summary: The Three Parts of *Voir Dire* and How to Use Them

	WRITTEN *VOIR DIRE*	INDIVIDUAL SPOKEN *VOIR DIRE*	GROUP SPOKEN *VOIR DIRE*
PURPOSE	Gather information for challenges	Follow-up on written voir dire; gather information for challenges	Educate on counter-intuitive aspects of the case – this is not the place to gather information for challenges!
METHOD	Written questions; reinforce semi-anonymous nature of questions; provide the panel member with "outs"	Open-ended questions; listen more than you talk; build case for challenge	Open-ended questions; listen more than you talk; develop the counter-intuitive belief; then "kill the elephant"
FOR ALL OF THEM, ASK: DO I HAVE A GOOD REASON FOR DOING THIS?			

XV. Don't Rely on Stereotypes

A. For the most part, do not make decisions about panel member selection based on the person's demographic profile. First, most of the data on how certain groups tends to vote shows only weak correlations between the profile and the voting pattern, if there are any correlations. Second, you don't know if this particular person will vote consistent with that pattern. You need to know what this person thinks. Otherwise, you might kick a favorable person off your panel because you relied on a demographic profile.

B. That said, here are some findings:

1. There are no correlations between the race of the panel, the race of the defendant, and the verdict.
2. Single panel members tend to be better for the prosecution.
3. Panel members with traditional sex-role expectations, especially women with traditional sex-role expectations, tend to follow assumption of risk belief patterns in acquaintance sex-assault cases.
4. Women panel members tend to be better for the defendant when the defendant is the breadwinner.
5. Young panel members (21-35) tend to side with the prosecution; middle-aged panel members (36-55) tend to side with the defense; and older panel members (55+) tend to side with the prosecution.

XVI. Questioning Techniques

A. Remember, this is a conversation. In fact, this is the only two-way conversation you get to have with the panel members during the whole trial. Don't waste it by talking the whole time. You should be asking simple, open-ended questions, and then allowing the panel members to talk about their beliefs or experiences. Have your co-counsel give you a cue if you are doing what lawyers love to do – monopolizing the conversation.

B. Be comfortable with silence. Three, four, or five seconds may go by – or even more – before someone answers. That is okay. Wait for them to talk.

C. Make eye contact.

D. Listen to and observe the verbal and non-verbal responses of panel members. Watch for changes in facial expressions, body movements, avoidance of eye contact, hesitancy to respond, and other indications that a member is uncomfortable or insincere in his or her response.

E. Direct your questions to every panel member, not just the president.

F. Ask questions in a conversational tone.

G. Use simple language; avoid legalese.

H. Don't say things like, "Affirmative response from all members." Instead, say, "Everyone raised their hands."

I. Each time you speak to someone, use his or her name: "SFC Jones, your hand is up. What do you think?" That will keep the record straight as to who is saying what.

XVII. Know Your Judge

A. Know your Judge. The nature and scope of voir dire is within the discretion of the military judge, but most military judges will allow you to ask questions. Some military judges may require you to submit questions before hand. This is a response to having seen many bad voir dire sessions – particularly ones with unabashed theme and theory testing.

B. Be prepared to tell your judge why your client (either the government or the accused) may not be able to get a fair trial without your having the ability to ask the question. You need to be able to explain why what you are asking directly relates to the panel member's ability to sit fairly and impartially.

C. The judge will likely ask several preliminary questions similar to the questions set out in the Military Judge's Bench Book. Listen to the member's responses to these questions. Don't repeat those questions. Note that most of these questions can only be answered with the socially acceptable response and so you might not learn the panel member's true beliefs. If you need to explore these areas, be prepared to tell the judge why you need to ask additional questions.

XVIII. Some Final Tips and Pointers

A. Always review questionnaires, ORBs, and the 2A/2-1s of prospective panel members. These documents will prompt narrowly tailored questions, give counsel a better picture of the panel, and prevent counsel from asking repetitive questions.

B. Sit in on other trials to observe counsel and members in the voir dire process.

C. If a standing panel is used, ask counsel who have tried cases before the same panel about the panel members.

D. Practice by asking non-lawyers who don't know the case to listen to your questions.

E. Put a member's nonverbal actions and expressions on the record. (e.g. "Major X looked down and was shaking his head from side to side").

F. Know the *Batson* Requirements. See the "*Voir Dire* – Law" outline for more.

XIX. Get Better By Reading And Watching:

A. Jeffrey T. Frederick, Mastering Voir Dire and Jury Selection (3d ed. 2011).

B. Harry Kalven and Hans Zeisel, The American Jury (1966).

C. Gary LaFree, Rape and Criminal Justice: The Social Construction of Sexual Assault (1989).

D. MAJ Rebecca Dyer, *Psychological Considerations for Jury Selection and Trial Consulting*, available as streaming video on the Criminal Law Video Library.

E. James McElhaney, *Making Limited Time for Voir Dire Count*, A.B.A. J., Dec. 1998, at 66.

F. James McElhaney, *Listen, Don't Talk*, ABA J., Nov. 2009, at 20.

G. Amy Singer, *Selecting Jurors: What to Do About Bias*, Trial, Apr. 1996, at 29.

H. Lin S. Lilley, *Techniques for Targeting Juror Bias*, Trial, Nov. 1994, at 74.

I. James McElhaney, *Rejiggering Jury Selection*, ABA J., Apr. 2008, at 30.

J. http://www.trialtheater.com/jury-selection/

XX. Drills

Drill 1: Written Voir Dire Analysis

Using the Archie fact pattern, think about what written individual voir dire questions you would want to ask in a supplemental questionnaire. Take a look at what the judge will have asked with the Benchbook questions and take a look at the questionnaires that the panel members will already have filled out. Recognize that you really don't learn much information about the panel members from those two sources. Ask yourself, what other information do I need in order to learn whether this particular panel member should not sit on this court-martial? Your goal in the written individual voir dire is to gather information so you can properly exercise your challenges.

Drill 2: Individual Oral Voir Dire.

Take the written voir dire questions that you have come up with and give them to a mock panel member. The key is to find someone that is not a lawyer or a paralegal – you want a regular person. After they answer the written questions, ask the person short, open-ended questions so that you can really learn about their belief system or their personal experience. You should do very little talking. The person should do most of the talking. Get comfortable giving up control. A common mistake is to stop the questioning short because "I didn't want to go any farther because I didn't want to set him up for a challenge or I didn't want him to rehab himself." Don't hide your head in the sand. Get the truth. If you don't go there, the other side will, so just go there.

You should be saying, "Why do you think that" and "what do you mean by that."

You also need to be able to tie everything they are doing into a causal challenge under "fair and impartial" or so that they can rank the panel members to properly exercise their peremptory. Someone who has inaccurate folk knowledge about the rate of false allegations might not be fair and impartial.

Drill 3: Group Voir Dire

Group voir dire is not a good place for gathering information. If you never do group voir dire again, you would do better than most people are doing right now. If you do group voir dire, it should be about educating the panel on belief systems that might run counter to their case.

Put together a mock panel of five to eight people. The key is that they cannot be lawyers or paralegals. Read them the basic Benchbook instructions. Then try to expose belief systems and work to teach the panel not to use those belief systems.

Ask should ask a lead-in question, then allow the panel to respond. To protect the record, you should say, "Thank you, panel member X." Once the you is exposed, they should ask why the bias should not be followed. The goal is not to kick people. The goal is to kill the bias.

1. What is the first thing that comes to mind when you hear that the accused will not testify?

Well, why would it be that an innocent person might not testify?

Does everyone now see why the judge told you that you can't hold it against SGT Jones if he doesn't testify?

ONLY DO THIS IF THE ACCUSED ISN'T GOING TO TESTIFY

2. What is the first thing that comes to mind when you know the accused will not put on a case?

Well, why might it be than an innocent person might not present evidence?

Does everyone now see why the judge instructed you that you cannot hold it against SGT Jones if he doesn't produce any evidence?

ONLY DO THIS IF YOU ARE NOT PUTTING ON A CASE

3. What is the first thing you think when you see the government has gone through all this trouble to bring the accused to trial?

Well, how could it be that an innocent person is brought into court?

Does everyone now see why the judge instructed you to presume that SGT Jones is innocent?

4. If a woman can get a man so worked sexually that if the man then takes the sex father than the woman wanted, should the man not be punished?

The 25/50 loan scenario (If a friend asks for a $50 loan, but you only want to loan him $25 so you only give him $25, can the friend then say, "Well, I'm taking the whole $50 anyway?")

The law says, no means no. Can everyone follow that?

5. If a woman behaves in a way that places her in a risky situation, does she assume some of the risk or blame for what might happen to her later?

The ATM scenario (If a well-dressed man goes to an ATM late at night in a crime-ridden part of town where the lighting is bad and no one is around, and he then gets mugged, do we let the mugger off?)

The law says, no means no; words or acts that show a freely given agreement. Can everyone follow that?

Chapter 28

I. Introduction.

A. Art.

1. Opening statements should really be called something else. They should be called, "opening stories." That is what we will call them here.

2. You may have heard that 80% of jurors make up their minds after the opening statement. Well, it turns out that that is a myth – no evidence exists that supports that claim. *See* William Lewis Burke et al., *Fact or Fiction: The Effect on the Opening Statement*, 18 J. Contemp. L. 195 (1992). We don't know whether panel members make up their minds based on the opening story. However, we do know that jurors get their first information about the case during opening statements, and they are likely to view all subsequent evidence, information, and arguments in light of this first information. In doing so, it is likely that a juror will "take a side."

   a. They will choose a team and from that point on, they will look at the evidence from the perspective of the members of that team. They may eventually change teams, but it is harder to make people change their minds than to persuade them in the first place.

   b. If you are familiar with the concept of "confirmation bias," which is the tendency of people to pay attention to the facts that support their preconceptions and disregard or minimize facts that don't, then you will see that the panel members may very well follow that observation of human psychology. After they choose sides, they will likely pay more attention to the facts that support the team they have chosen and pay less attention to the facts that work against their team. Because of this, counsel should *never* waive opening statement. And defense counsel should *rarely* reserve an opening statement. You want the panel members to join your team – right now.

3. We ask panel members to do something extraordinarily difficult. We bring them in cold and then order them to solve a problem that the lawyers couldn't solve (the lawyers weren't able to get a plea agreement for whatever reasons, right?). Then, we ask them to solve this problem by hitting them with a firehose of facts and unfamiliar legal concepts.

4. In your opening statement, you need to help them. Tell them what the problem is and then tell them a story that will show them how they can solve that problem. Your theme (what makes you angry about this case) will motivate them to solve the problem in your client's favor. Your theory (the story) gives them a framework on which they can begin to organize the information they are about to receive.

B. The relationship between closing argument and the opening story.

1. In this deskbook, the instruction on opening stories comes before the section on how to deliver arguments for no better reason than that is how it is always done in trial advocacy books. In reality, you will polish your opening statement *last*. The *first* thing you do is construct your arguments and themes. You then find the evidence that supports those arguments and themes. A few days before trial, you will finalize your closing argument. Your sub-arguments will have a claim, some facts, and inferences that connect those facts to your claim. One argument might look like this:

Claim: The accused thought the victim consented to sex.
Most probative evidence: The Accused watched a porn movie with the Victim before the intercourse.
Generalization: A man who watches a porno movie with a woman often thinks that woman wants to have sex with him
Especially when: She did not leave when he turned on the movie; she never said turn off the movie; she watched the movie for twenty minutes; she leaned against the Accused while watching the movie; the movie has scenes of a particular sex act; she says she might do that if "relaxed;" she later says she was "relaxed;" and the alleged sex act is the same as it was in the movie.

2. In closing argument, you would pretty much read down that argument, to include stating the claim and the generalization. You would say, "The accused thought the victim consented to sex. The Accused watched a porn movie with the Victim before the intercourse. She admits to that. Now, a man who watches a porno movie with a woman often thinks that woman wants to have sex with him. Especially when she does not leave when he turns on the movie; she never says, "Turn off the movie;" she watches the movie for twenty minutes while, the whole time, she is leaning against the accused. And, the has scenes of a particular sex act. She says she might do that if she were "relaxed," and later she says she is relaxed – and they then have the same kind of sex that was in the movie."

3. For the opening story, you just drop out the claim, the generalization, and don't say, "especially when." Your facts are now organized persuasively. In your opening, for the scene described above, you would say, "The Accused watched a porn movie with the Victim before the intercourse. She does not leave when he turns on the movie. She never says, "Turn off the movie." She watches the movie for twenty minutes. She is leaning against the accused the whole time. The movie has a scene of a particular sex act. She says she might do that if she were "relaxed," and later she says she is relaxed. They then have the same kind of sex that was in the movie."

4. When the facts are organized persuasively, you don't have to state the inferences or the conclusion during your opening story (that would be arguing, which you are not allowed to do in the opening story). You don't need to because the panel members can see the inferences and reach the conclusion without you stating them overtly.

5. So, write your argument first. Drop out the inferences and claims and you will have a persuasively constructed opening story.

II. Organization.

A. Your opening should have an introduction, a story, and then a conclusion. The introduction will only be a few sentences. The story might be pretty long. The conclusion will also only be a few sentences. You should have your introduction and conclusion down cold (as in, memorized.) You don't need to memorize the story – you just need to tell it.

B. The introduction.

1. For the introduction, don't be boring. Don't start with platitudes and an explanation of what the panel is expected to do and what your role in the case is and what the law is and what the procedures are. That stuff is boring. Let the military judge do that. Start with a simple, "President of the panel, members," and then:

BANG!

Hit them with one sentence that tells them what is so terrible about this case. This is your theme. (See the Constructing Arguments and Theme Development Outline for how to develop your theme).

2. For your next couple of sentences, *tell them what the problem is that they have to solve*. This is whatever one or two key issues exist in the case and maybe a brief statement of the test (law) that they will need to use to solve the problem. Service members are used to getting a BLUF (bottom line up front). Give them the BLUF. Do this in plain English.

3. Then, tell them what you want them to do.

4. Your intro, then, is: theme, problem, action. And that is it. Be clear. Get the theme, problem, and action out there, and that is it.

C. Story.

1. Now, tell your story. Before you do, you might pause and say in your mind, "Once upon a time," and then start story-telling.

2. The story has a beginning and a middle. The middle will be the end of the action taken by the actors in the case.

3. However, the end of the story has not occurred yet. The end of the story is what the panel does when they return the verdict. The end of the story is when the panel rights the wrong or fixes the injustice that you revealed in your first sentence.

D. Conclusion. Your conclusion might sound a lot like your introduction. You will tell them what you want them to do – find the accused guilty or not guilty. Tell them to right a wrong. Tell them how to finish this story.

INTRODUCTION • Theme • Problem • Action
STORY • Beginning • Middle (that ends at the end of the action taken by the actors in the case)c
CONCLUSION • Theme • Problem • Action – then end of the story. The panel members' action is the end of the story

III. Storytelling.

A. Story telling is critical through every phase of trial, and here is paramount. According to James McElhaney, "Stories go deeper than just the law. They are at the heart of how we think and act. Stories have been used since the beginning of time to make sense of the world." James W. McElhaney, *McElaney's Trial Notebook* 183 (4th ed. 2005).

1. When Urgh the Caveman returned from the hunt without any meat, he needed to be able to tell a good story (through paintings, on a cave wall if needed) to explain to his family why the family was going to go hungry – or else he would suffer the consequences.

B. Lawyers like to think that the law solves the problem, but it doesn't. The story solves the problem. Again, McElhaney: "The law is just the structure. It gives minimum requirements for an adequate story, but it says very little about how you tell it. And it is the story – not the structure – that decides the case." *Id*.

C. McElhaney describes four elements of the stories.

1. First, stories have beginnings and endings. You get to choose where to start, and ultimately the panel will decide the ending.

2. Second, the story is set in time and place. You need to describe the scene and the backdrop for all of the action.

3. Third, there are characters: "actors who make things happen or fail to keep them from happening. They respond to the forces that act on them and participate in the unfolding events. Your job is to make those characters come alive and to show that they are – or are not – responsible for the events." *Id*. at 184.

4. Fourth, something happens.

D. Organize your story by scenes.

1. You will usually (but not always) use a chronological narrative, organizing your story into a series of scenes. Sometimes your story will need flashbacks or foreshadowing or parallel action. If so, use those. The key thing is don't organize your story around legal principles. You don't do that when you tell stories in real life.

2. You need to paint the scenes. Give some of the most important details. Pick two or three of the most important events, and paint colorful, lasting snapshots of those moments.

E. Be interesting. If your panel member tunes out and starts thinking about what he has to get done, that he has to get little Johnnie to soccer practice by 1800 and the grass needs mowed and the boss wants that appendix to the OPORD by Wednesday and – well, then you might as well have not been talking.

F. The good news is that you tell stories every day. Pay attention to how often you tell stories. Once you recognize that telling stories is one of the primary ways in life that you convey information, you'll see that opening stories are not that intimidating. When you get to trial, you will know your facts cold. The hard part is preparing for the trial. The easy part is telling the story.

IV. Addressing Your Weaknesses.

A. It is what it is. You weren't responsible for the facts. You are just stuck with them. You will have bad facts in your case. Get over it.

B. Don't bypass the bad facts. The panel members will find them. Organize the other facts that help to diffuse them. Using the same argument from above, if you are the trial counsel, you are stuck with the fact that the victim watched a porn movie with the accused. And that is bad, except when: she didn't choose the movie; he didn't tell her he was going to put on a porno before he brought her to his room; she didn't have a car and had no way to get to the other side of post if she did decide to leave; the accused was her supervisor and he had earlier threatened to cancel her leave if she didn't go on a date with him; she was really drunk and trying to do everything she could at that moment not to vomit; etc.

C. You will have to counter-argue those bad facts in the closing statement, so might as well put the facts that support your counter-argument right there in your opening story.

V. Using Visual Aids.

A. When you tell a story, you are activating the listener's imagination. You need to use visual aids to help the factfinder imagine the scene accurately.

B. You need to identify places where the factfinder will natural imagine the story in a way that will be different than the way things were in reality.

1. If you are defending someone who had sex with a fifteen-year old in a church, when the panel members hear, "church," they will probably imagine a grand, brick cathedral with stained glass windows and spires. If the church was in reality a converted Taco Bell building, you will need to correct their imagination.

2. Or, if you are prosecuting a case of child neglect, if you state that the house was in squalor, you will probably not be able to convey the actual filth and disrepair that the child was living in.

3. Get the pictures and show them early. Make sure they are imagining the right thing.

C. You can use anything that you have believe in good faith will be admitted. The best practice is to pre-admit whatever you want to use in your opening story , but the law does not require that.

VI. Delivery.

A. Tone. The tone of your presentation should be conversational. You want to sound like a *teacher*, not lawyer. Avoid over emotional presentation or theatrics. The panel will think you are a used car salesperson.

B. Tense. When telling your opening story, think not only about what you're describing, but also what perspective you are describing things from.

1. Use present tense to tell your story from a favorable perspective (such as the victim's or your client's). Your verbs should end with "s" and "ing," not "ed." Telling as story this way invites the listener to stand in the shoes of the person from whose perspective the story is being told. The events are described as if they are happening right now, and the listener will be inclined to feel a degree of sympathy for that person.

2. When describing the actions of an adverse party, use the past tense. This method encourages the listener to treat the facts and details as final, closed, and in the past. It does not encourage any sympathy towards the "bad actor" in your story, and does not invite the listener to question the motivation of the character you're talking about.

C. Honesty. Be the person you are every day. Don't try to be someone you aren't – the panel will see through that and you'll lose credibility. Stand the way you normally stand. Use your hands the way you normally do. Do not "talk like a lawyer." Avoid "legalese."

D. Remove barriers. Don't put a podium between you and the people you are trying to talk to. If you use notes (and there is nothing wrong with using notes), put them on a low table or hold them.

E. Believe in your case. If you have done the hard work ahead of time in theme development, you will believe in what you are saying, and that will show.

F. Deliver one complete sentence to each panel member. Don't scan with your eyes -- connect with your eyes. Tell someone a complete sentence, and then move to someone else. By doing that, you will deliver a key fact to one person. If you are looking them in the eyes when you say that one fact, then that person will remember that fact when he or she goes back to the deliberation room. You need that person to carry that fact for you. Otherwise, it might get lost. Put them in charge of that fact.

G. If you read, it's a script. And that is boring. Don't do that.

H. Use pauses effectively. Silence is golden. Silence is not your enemy.

VII. Get Better by Reading or Watching.

A. James W. McElhaney, *Persuasive Organization*, A.B.A. J., Dec. 2006, at 24.

B. James W. McElhaney, *That's a Good One: Effective Trial Lawyers Know How to Tell a Good Story*, A.B.A. J., Apr. 2011, at 22.

C. Trial Theater, http://www.trialtheater.com/opening-statement/

D. Stetson University College of Law's Advocacy Resource Center, http://www.law.stetson.edu/ARC

VIII. Drills.

A. In daily life. Practicing opening statements is easy. You tell stories every day. That is how you communicate, to your spouse or significant other, your friends, your parents, your children. After you have told a story, catch yourself. Check whether you spoke in present tense. Check how you were standing and how you were using your hands. The person you were when you told that story is the person you want to be in court.

B. The chauffer drill. Get a handheld mirror or use a wall mirror. Sit in a chair and turn your back to the group. Tell the story like you were driving your mom to the airport, looking at the group through the "rear-view mirror."

C. 30-second drill. Keep doing the intro paragraph until you get it under 30 seconds. This forces you to reduce the phrases to their core action words.

D. The Haiku. Use some variation of a haiku – five words, seven words, five words; seventeen syllables spread over three lines, etc. Reduce your theme to a haiku.

E. The Twitter drill. Tweet your theme. Reduce it to 140 characters, ensuring that you tell the person receiving the tweet what you want them to do.

F. Group Story Telling:

1. To prepare for this drill, each member of the group needs to come with a short (3-4 min) story that they can tell the group. The story doesn't need to be about a case, or even a crime, but should involve some kind of "bad" thing done by someone—it could be the guy who cut you off in traffic, the co-worker who steals from the office fridge, or maybe the customer service rep who made you wait… whatever. The important thing is that you need to identify a "bad act" and a "bad actor."

2. First, a student will stand and tell their story. This part of the drill is all about not becoming "the lawyer version of yourself." Students may not use traditional introductory phrases, like "ladies and gentlemen of the panel. . . ." Students should try to tell the story in a way that's brief, interesting, and clear

3. After the short (3-4min!) story ends, the group should offer suggestions about how to improve the story. For example, feedback might include which characters or facts were interesting or memorable (or weren't!). This is not a "style session" that focuses on tone of voice or mannerisms. This part of the drill makes students think about how to improve their story without changing the underlying facts.

4. After a few comments about improving the story, the group should offer ideas about an overture or opening. The student making the suggestion should stand and try to deliver their idea to the group.

5. Repeat the process with another student and story. Where helpful, the storyteller may speak as if talking to a particular audience: a superior, parents, a group of junior Soldiers, or strangers, etc..

G. The hands-up drill. Give an opening statement before several people. Everyone raises their right hand. You point to one person and everyone else puts their hands down. You speak one complete sentence to that person. That person puts her hand down; everyone raises their hands, and you find someone new, point to them, and then speak one complete sentence to that person; then repeat. As an alternative, instead of pointing, actually take the person's hand in a handshake grip and hold their hand until you deliver the complete sentence. They are instructed not to let go until you get the whole sentence out.

H. The co-pilot, or, what comes next drill. If you have a co-counsel on an upcoming case, both of you will participate in this drill. You fully describe one scene in the story. Turn to your co-counsel and ask, "What comes next?" Your co-counsel then describes the next scene in the story. Repeat.

I. The red-light, green-light drill. Give your panel members a piece of red card stock paper and a piece of green card stock paper. Tell the panel members that when they recognize that they have tuned out of the opening statement, to hold the red card in front of their chest. The attorney should scan for those people and then re-engage them. Another option is to have the panel members hold up a green card when they feel like they haven't been talked to in a while. The attorney will then scan, find the person with the green card, and connect with that person.

J. The "Talk to me" drill. If a counsel is having a problem breaking out of her "lawyery" persona, have her stop. Have her sit down. Ask her, "Where does the story start?" Then, "Okay, talk to me. Tell me in simple terms what happened." What follows will probably be a good opening statement.

K. Dissect trial records. Pull an opening from a record of trial. Photocopy it and have counsel draw a line at the point at which the statement *starts* to have anything to do with the case at hand. Frequently counsel "wheel spin" through a paragraph or two or three in which they issue generalities about what an opening statement is, who has what burden, who they are, etc. Now look at the first sentence that relates to this case or client. Was there a theme? Was there an emotional pull? End strong, too. Draw a line at the end of opening statements when counsel diverge from the case at hand and go into closing generalities about the burden, keeping an open mind, paying attention to all of the evidence, listening to the judge, paying attention to cross, etc. Look at the last line during which counsel actually talked about the case. Now make that punchier and more dramatic. Then stop.

IX. Law

A. Timing. Each party may make one opening statement to the court-martial before presentation of evidence has begun. The defense may elect to make its statement after the prosecution has rested, before the presentation of evidence for the defense. The military judge may, as a matter of discretion, permit the parties to address the court-martial at other times. RCM 913(b).

B. Content.

1. Counsel should confine their remarks to evidence they expect to be offered which they believe in good faith will be available and admissible and a brief statement of the issues of the case. RCM 913(b) discussion.

2. "An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict." *United States v. Dinitz*, 424 U.S. 600, 612 (1976) (C.J. Burger, concurring).

C. Remedying Improper Statements. Discussion RCM 915(a).

1. "The Power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons. As examples, a mistrial may be appropriate when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members…" Discussion RCM 915(a).

2. "The preferred remedy for curing error by members hearing an improper opening statement is a curative instruction, so long as the instruction negates any prejudice to the accused." *United States v. Castonguay*, No. ACM 28678, 1992 WL 42933 (A.F.C.M.R. Feb. 27, 1992) (*citing United States v. Nixon*, 30 M.J. 501 (A.F.C.M.R. 1989)).

3. *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009) (military judge's curative instruction, after the trial counsel mentioned appellant's invocation of his right to silence in her opening statement, was sufficient to cure any prejudice).

D. Types of Improper Statements.

1. Comments that implicate a fundamental right of the accused. (*See also* the Arguments Outline)

a. The accused's possible failure to testify. A curative instruction given by the military judge after trial counsel stated during opening statement, "We anticipate you will hear the accused testify" was appropriate. *United States v. Castonguay*, No. ACM 28678, 1992 WL 42933 (A.F.C.M.R. Feb. 27, 1992).

b. The right to remain silent.

(1) The trial counsel's description in opening statement of accused's demeanor when confronted by Air Force OSI agent constituted a comment on Appellant's silent in response to law enforcement post-apprehension, pre-advisement accusation of criminal conduct, in violation of M.R.E. 304(h)(3) and the Fifth Amendment. While error was plain, error was nevertheless harmless beyond a reasonable doubt. *United States v. Clark*, 69 M.J. 438, 445-48 (C.A.A.F. 2011).

(2) Trial counsel's comment during opening statement that Accused invoked his right to remain silent was improper, but error was harmless when entire record was considered including military judge's immediate corrective action and curative instruction. *United States v. Ashby*, 68 M.J. 108, 121-23 (C.A.A.F. 2009).

c. Personal belief or opinion. *United States v. Horn*, 9 M.J. 429 (C.M.A. 1980) (trial counsel improperly remarked "I think" fifteen times during opening statement).

d. Argument.

(1) Argument is when the counsel states what the evidence means or whether the fact finder should believe certain evidence exists. If the counsel starts to state inferences or mention credibility, then the counsel is probably arguing.

(2) "During the ATC's opening statement, the military judge sustained two objections from the defense counsel based on the argumentative nature of the comments. On two other occasions, the military judge sua sponte interrupted the ATC and instructed him not to make "conclusions" or "characterizations" of the evidence. The military judge also gave a cautionary instruction to the panel that an opening statement is not evidence, improper argument had been presented to the panel, and panel members were to listen carefully to the evidence." *United States v. Thompkins*, No. A.C.M. 33630, 2001 WL 1525319 (A.F.C.C.A., Nov. 16, 2001)

e. Reference to inadmissible evidence.

(1) *See generally* ABA Standards for Criminal Justice, 5.5 (The Prosecution Function) and 7.4 (The Defense Function) (1980) ("It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing such evidence will be tendered and admitted in evidence.").

(2) *United States v. Matthews*, 13 M.J. 501, 515 (A.C.M.R. 1982), *rev'd on other grounds*, 16 M.J. 354 (C.M.A. 1983) (in an opening statement, trial counsel must avoid including or suggesting matters as to which no admissible evidence is available or intended to be offered; opening statement should be limited to matters which prosecutor believes in good faith will be available and admissible).

(3) *United States v. Evilsizer*, 1991 WL 120217 (A.F.C.M.R., 1991) (assistant trial counsel's comment during opening statement on the refusal of the accused to consent to a search of his apartment was improper and a "gross error" where military judge had granted a defense motion in limine to preclude trial counsel from referring to that fact, but error was not prejudicial in light of military judge's curative instruction).

f. Opening the Door in Opening Statement. "[I]f a defense counsel contends in an opening statement that the evidence will show [something] and then the evidence in fact is not forthcoming, that remark is fair game for appropriate comment in the prosecutor's closing argument." *United States v. Turner*, 39 M.J. 259, 263 (C.M.A.1994).

Chapter 29

I. Introduction

A. Direct examinations are often boring. The witness is probably boring. The lawyer asking the questions is probably using legalese and hyper-formalism. The lawyer asking the questions already knows what the answers are going to be and so is only half-listening to the answers. The witness has been through so many interviews and preparations that she is on autopilot. Even the name of this event falls victim to those criticisms. Look at it: direct examination. Do you ever do "direct examinations" in real life? No. You ask people questions. You figure out what they know.

B. Remember back to when you first interviewed the witness. You had no idea what the answers were going to be. You followed an intuitive path to get to the information you needed. You naturally asked open-ended questions and used upward inflection. The interview was probably really interesting. If we re-branded "direct examination" as "asking questions" or "witness interview," many lawyers would immediately become better at this event.

C. The challenge for the good trial advocate is finding a way to make direct examinations interesting and even entertaining. Your job is to get the witness to tell an interesting story and to serve as the narrator in the background. Always ask yourself, "How can I make this more interesting?"

D. There are not many specific direct exam rules. (MRE 611 states that the Military Judge (hereinafter MJ) controls mode and order of interrogating witnesses and presenting evidence). However, all of the rules of evidence apply to what you do during direct exam – when you can introduce hearsay, what you need to do to authenticate something, etc.

II. Goal-Oriented Direct Exam

A. Direct examination must be goal-oriented. Your presumption should be, "I am not going to call this witness or put on this evidence." By having that as your presumption, you force yourself to think through why you are putting on this witness or evidence. Will this witness or evidence directly advance your theory of the case? Will this witness or evidence directly advance your theme? If not, don't call the witness or put on the evidence.

B. If you put on witnesses or evidence just because you know they exist, you will likely clutter up your case and make it harder for the panel to solve the problem the way you want them to solve it. *See* James McElhaney, *Clean Up Your Mess: A Case Full of Clutter Won't Look Very Good to the Jury*, A.B.A. J., Apr. 2005, at 26. When you do this, you have fallen into the Curse of Knowledge that is described by the Heath brothers in *Made to Stick*. Because you know it, you think everyone else needs to know it. After all, you went through all of that work to learn it, right? And you don't want that to go to waste. Well, let it go. Focus on what is necessary. Cut to the core message.

C. If you have done proper case analysis, by this point, you should have already constructed your basic arguments. So, you know how this witness relates to your case and how what you are going to get from this witness is relevant. If you have constructed your argument first, the following should be music to your ears: "Objection, relevance." When you hear that, you know that you can now make a mini-closing argument. You get to tell everyone in that room how that fact advances your argument *right now*. You don't have to wait until closing argument to do that. In fact, you should later thank the opposing counsel for alerting you to the fact that you were confusing people with this witness and for giving you the opportunity right then and there to clear up any confusion.

III. Organizing and Presenting Your Examination Using Storytelling Techniques

A. Once you know what you need from a witness, organize that information into scenes.

1. A useful way to do this is to make a storyboard. Go to PowerPoint and print out some handout (x6) slides. Now, go through and draw a quick sketch of the main things that your witness will testify about.

2. If you have too much action for one box, you know you need to create another scene.

3. Put in the details that matter – whatever you need to get from that witness.

B. When you talk to the witness, you can use that storyboard instead of notes. Or, you can reduce those scenes into bullets – print out the blank PowerPoint handout in (x3) mode so you get the lines on the side. Reduce that information into short bullets and put those bullets under the title of that scene.

C. Now, when you ask the witness questions, you take on the role of director or narrator. Your job is to get them to describe those scenes.

1. Ask questions that will help the witness paint that scene.

2. Who, What, When, Where, Why? Explore their motivations, too.

3. What did you See, Hear, Smell, Taste, Feel?

D. Have the witness speak in the present tense. Their verbs should end in "s" and "ing" and not in "ed." Good stories are told in the present tense, and your witness should be telling a compelling story.

E. Use "brackets" to orient the witness and the panel to the scene you are going to deal with. Use words to draw borders around your scene. Ask the witness, "I'd like to ask you some questions about what happened after you left the bar but before you arrived at the barracks, okay?"

F. When you are done with that scene, let everyone know. Simply ask, "Now that we have talked about the walk back to the barracks, I'd like to ask you some questions about what happened from the time you arrived at the barracks until the time you arrived at your room, okay?"

G. Most importantly, *you need to listen to the answers*. Look at your witness while they are talking, not at your notes. Don't worry about the next question. Ask follow up questions based on how well that witness described the scene that you have in your mind. After the witness is done talking, it is okay to look down at your storyboard or notes before you move on from that scene to make sure you have captured the details you want. Cross them off. It is okay to pause for a few seconds to do this. But don't look down when they are talking. Would you do that if you were having a conversation with someone you just met? No. That would be rude. Instead, use active listening techniques. And pay attention.

H. To avoid the "facts not in evidence" objection – and to just make things clear for everyone – you should have your witness walk through the entire story once, quickly, at the very beginning of the interview. Then, go back and look at each scene in detail.

IV. Tips on Asking Questions

A. Use single fact, non-leading, open-ended questions. Allow the witness to tell the story. Minimize your presence.

B. Use an upward inflection. This signals that you don't know the answer and will shift attention to the witness. Notice the difference between, "I did that?" versus "I did that."

C. Make sure the witness' vocal cone and body is facing the panel. An easy way to do this is to position yourself behind the panel box or near the panel member who is the furthest away. The added benefit of doing this is it takes you out of the picture. Remember, the witness is the center of attention, not you.

D. John Lowe talks about turning thunderclaps into thunderstorms. When your witness describes a moment of fast action, have them stop and then unpackage that moment. Have them get out of the witness box and demonstrate the action. Pull out a diagram and have them go over that moment again, this time on the diagram. Don't let that moment pass without fully developing it.

E. Tone, Pitch and Speed.

1. "Shoot!" can mean many things in many contexts. It also provides an easy-to-understand illustration of how tone, pitch and speed can alter its meaning to the listener.

   a. "Shoot!" shouted quickly after missing a nail with a hammer and instead hitting a finger clearly shows anger, frustration and that one is upset.

   b. "Shoot!" spoken slowly and softly after receiving a compliment can project a slight embarrassment at having received the compliment in a homey kind of "Aw, shucks," way.

   c. "Shoot!" shouted loudly and quickly during exercises can mean that it is time to open fire on a target.

   d. "Shoot!" yelled loudly and in a drawn out fashion on a movie set would indicate that it is time to roll film.

2. As demonstrated above, the same phrase can have a number of meanings based upon what emphasis is put on the words in the context in which they are spoken.

F. Vary the hooks.

1. Listeners do not want to hear the same thing over and over again—which goes for witnesses and fact finders alike. Since much of direct examination involves prompting witnesses to walk baby steps through a series of events, mixing up these hooks to prompt the story-telling is a must. Some examples are:

   a. "And what happened next?"

   b. "Then what?"

   c. "And afterwards you did what?"

   d. "Please continue."

   e. "What happened after that?"

   f. "What did you do next?"

   g. "What did you do after that?"

h. "Can you break that down for me a little more?"

2. The above list is certainly not all of the hooks that may be used in direct examination to facilitate the telling of the story but is illustrative of the types of non-leading questions that may be used to accomplish getting the witness to tell his or her story in an appropriate, non-narrative format.

G. Try looping. Use a portion of the witness' answer to form the basis of the next question: "After you passed Sergeant Archie in the hallway, what happened next?"

H. Make use of the principles of primacy and recency.

I. Avoid legalese.

1. Use simple language and avoid legalese. See Footnotes 1 & 2 in *U.S. v. Marshall*, 488 F.2d 1169 (9th Cir. 1973).

a. The motor vehicle was occupied 4 times = 4 people were in the car

b. The recovered evidence from the crime scene, collected and submitted through proper channels, was subjected to appropriate scientific testing by a qualified laboratory technician who, after conducting the gas chromatograph, mass spectrometer examination, determined to a reasonable degree of scientific certainty that the evidence's composition and weight were that of marijuana and 4.2 oz., respectively = the crime lab tech tested the evidence taken from the accused's home and found it to be 4.2 ounces of pot.

2. Not only will the fact finder more easily follow you and not be bored to tears by how smart you are trying to make yourself sound, the court reporter will love you and might not make as many typos on your part of the transcript.

V. Exhibits

A. After you have done a storyboard, figure out what you can do to help the panel members visualize each scene. Go out at take photos. You should ask yourself, "Can I display some pictures that will help the witness to tell the story and to trigger the panel member's imagination? Do I need to show pictures because the panel member will likely imagine something that is different from reality?" Be creative. Don't be boring.

B. Work through each foundation ahead of time.

C. Practice with the witness in the courtroom! However, don't overdo it to the point where your once emotional witness, now appears cold and unaffected.

D. Make the exhibits accurate and "panel friendly."

E. Use the evidence. Do you want to hear about the murder weapon or see it? Do you want them to imagine the scene or see it?

VI. The Confrontational Direct Exam

A. If you have a witness that you know is going to face a rigorous, damaging cross-examination (the accused, for example), you might consider doing a confrontational direct exam.

B. In a confrontational direct exam, you are essentially going to conduct a tough cross-exam of your witness and then give him or her a chance to explain that unreasonable or illogical behavior.

1. First, in your very first questions, you confront the witness with the ultimate question: "Did you kill Jones?" "Did you rape Smith?" "Did you go miss the flight to Iraq because you wanted to avoid hazardous duty?"

2. Then, you do a cross-examination, in a stern tone of voice. "You didn't kill Jones, but you did do X? You did do Y? You did do Z?"

3. But then, at the end of the line of questioning, you ask, "Well, why did you do that?" Or, "Well, why should they believe you after you did something like that?" Or, "That doesn't make any sense, does it? Can you explain that?" You give the witness a chance to explain away the main points of the other party's cross-examination questions before the other party even gets to ask them.

C. To do this technique, you need to develop the entire line of cross-examination that the other party is going to use.

D. You can use a confrontational direct exam with victims, too, but you need to explain this technique to the victim before doing it, and you should not use a confrontational tone. Take the victim through the counter-intuitive behaviors, and then have the victim explain why he or she took those counter-intuitive actions.

VII. Leading Questions

A. MRE 611(c) states, "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness."

B. However, leading questions may be used on direct examination, "[w]hen a party calls a hostile witness or a witness identified with an adverse party."

C. What is a leading question? "[O]ne which suggests the answer it is desired that the witness give. Generally, a question that is susceptible to being answered by 'yes' or 'no' is a leading question." MRE 611 analysis.

D. Leading questions may and should be used during routine, introductory-type questions to get the fact finder to "know" the witness prior to the "meat" of the testimony being elicited. Ask introductory leading questions to save time such as, "You are a military police officer assigned to the 1st Military Police Company, 716th Military Police Battalion at Ft. Riley, Kansas?" and "Drawing your attention to Sunday, 1 June 2004, at approximately 1800, what contact if any did you have with the accused, Private John Doe?"

E. If a witness has limited understanding / intellect / politeness, the MJ may allow counsel to lead his or her witness due to the inherent problems questioning such a witness (young child, mentally challenged individual, hostile witness, etc.

F. Lastly, leading questions may be used to further develop testimony. In other words, if a witness' answer after an open-ended question could have more than one meaning or is somewhat confusing—alone or in context with other answers—leading questions may be asked to clarify the previous answers.

G. All of the above is subject to the discretion of the MJ hearing the case.

VIII. Get Better by Reading and Watching

A. James McElhaney, *Clean Up Your Mess: A Case Full of Clutter Won't Look Very Good to the Jury*, A.B.A. J., Apr. 2005, at 26.

B. James McElhaney, *Persuasive Direct: The Less You Sound Like a Lawyer, the Better Off You'll Be*, A.B.A. J., Jan. 2009, at 22.

C. Video: *Evidentiary Tactics: Making the Most of Your Evidence with Prof. David Schlueter* (TJAGLCS 2000) (available in streaming video on the Criminal Law Department webpage).

D. DVD: *Less Boring Direct Exam by Terence MacCarthy* (American Bar Association 1996) (available for loan at the TJAGS Law Library).

E. Video: *Zingers, Ringers, and Sandbags: Winning Trial Techniques with John Lowe* (TJAGLCS 1990) (available in streaming video on the Criminal Law Department webpage).

IX. Drills

A. Drill 1: Form of question.

1. Each counsel conducts a direct examination of a witness using the character from a fair tail or Star Wars movie or some other story that everyone knows. Do a direct exam of Snow White and how she found the Dwarves hut in the forest. Do a direct exam of Goldilocks or one of the three bears. Do a direct exam of Cinderella. Or of when Luke Skywalker found that his aunt and uncle's house had been burned down.

2. The counsel must ask simple, open-ended, nonleading questions to develop the facts. If the counsel asks a compound, confusing question, the witness will just stare back at the counsel until the counsel gets it right. The supervisor should write on the board or provide a handout with the classic list of questions for direct examination: who, what, where, when, why, and how.

B. Drill 2: The story board.

1. Build a story board on a common fable, like Goldilocks or the three little pigs. Each counsel will do a direct exam of one of those scenes, taking turns as they go around the table.

2. The counsel should focus on using brackets to keep the witness and the panel members focused on that scene. Once that scene is fully developed, have the next counsel use a bracket to end that scene and then use brackets to contain the next scene.

C. Drill 3: The tennis ball.

1. Do a direct exam as outlined in Drill 1. Give the counsel a tennis ball. After the counsel asks the question, have her toss the ball to the witness. This represents the shift in attention from the lawyer to the witness.

2. If the counsel quits paying attention to the witness, the witness can toss the ball back at the counsel. Toss, not beam.

D. Drill 4: Inflection.

1. Have counsel stand in front of the group. Choose a short phrase, one listed below or one you make up. Have the counsel repeat the sentence and each time, have the student emphasize a different word. Each time counsel repeats the statement, the inflection is placed on a different word. Very quickly counsel will see how the meaning of the sentence changes. Discuss with counsel how it is not the inflection alone but related conduct - e.g., pace of the speech and facial expression - that make the inflection even more powerful.

a. This is a really stupid idea.

b. I never said I'd give you money.

c. Show me the money.

d. What did you see?

e. You never saw him leave the bank?

E. Drill 5: Listening and Looping.

1. Read the section on "looping" covered above. Looping involves incorporating part of the answer to one question into the next question. Have the counsel do a direct exam as listed in Drill 1, but now have them incorporate looping into the drill.

F. Drill 6: The who-what-when-where.

1. In this drill, the supervisor or instructor will be the witness. The witness will pick a real-life event and give tell the counsel just a few facts about that even – that you did something on this date in that city, for example. The students each get two questions. Have them rotate through "who, what, when, where, why, describe, explain" questions until the entire scene has been described. Note the inflection the counsel use – it will probably be upward, because they do not know the answer to the question they are asking.

2. As the counsel get better, have them incorporate the answer to the last counsel's question into the form of their question.

G. Drill 7: The thunder clap to thunderstorm.

1. Tell the students to pay close attention to you. Then, do something like take a book from a table and then drop it on the ground. Or, take your wallet from your pocket and slam it on the table. Then, have a counsel do a direct examination of another one of the counsel, who is now a witness. Have them elicit what happened in one or two questions, and then have them take the witness through each little detail of the event. Have the witness demonstrate what he or she saw.

Chapter 30

EXPERT TESTIMONY

Chapter Is Currently Under Construction

Chapter 31

I. Goal-Oriented Objections

A. Rethink how you approach objections. As James McElhaney explains, "[O]ne of the problems with modern legal education [is that w]ithout even trying, we somehow train lawyers to think they're evidence cops – people who are supposed to guard against improper information beign admitted in trial. But that's not our job. A trial is not an evidence exam . . . The point of objecting is to shape the case." James W. McElhaney, *Persuasive Objections*, A.B.A. J., Jan. 1999, at 70.

B. It turns out, not surprisingly, that jurors don't like it when lawyers object: "[J]urors don't like testimony to be interrupted by multiple objections. They want to hear both sides of the story, and a lawyer who repeatedly objects can leave the jury with the impression that his client has something to hide." Margaret Graham Tebo, *Duty Calls*, A.B.A. J., Apr. 2005, at 35, 37.

C. Rather, your presumption should be, "I am not going to object." That forces you to think through why you are making an objection and whether you are going to be persuasive when you make that objection.

D. Here is a very simple system and is really all you need to remember at the counsel's table: don't make the objection unless: 1) you will likely win, AND 2) you have a good reason for making the objection.

E. That system is a simplified version of one advanced by Professor David Schlueter. Here is his system. Object when:

1. The objection is plausible, AND
2. The judge will probably sustain the objection, AND
3. You have a strategic or tactical reason for making the objection.
    a. Strategic objectives include:
        (1) Excludes evidence that will rebut my theory of the case.
        (2) Excludes evidence that might significantly corroborate the opponent's case.
        (3) Forces the opponent to rely on less persuasive evidence.
        (4) Note that you should be able to spot these objectives early and so can litigate the issue with a *motion in limine*. You should know what hearsay is going to hurt and which doesn't matter. You should know what evidence cannot be authenticated. Take care of that before trial.
    b. Tactical objectives include:
        (1) Break the flow of a great exam.
        (2) Fluster another attorney.
        (3) Fluster a witness.
        (4) Give your witness time to think.
        (5) Give yourself time to think.
        (6) Note that it is not unethical to do this. Look back to Prof. Schlueter's first two points. If you made the objection, then the

objection is plausible and you will likely win. Therefore, the objection you are making is not frivolous or baseless under AR 27-26, Rule 3.1 – in fact, you will likely *win* the objection. And, you are not making the objection *solely* for the purpose of harassing or maliciously injuring someone. You are taking the action primarily to exclude improper evidence or questioning.

II. Waiving Objections

A. In addition to the system above, Prof. Schlueter gives the following reasons for waiving objections:

1. The witness' answer will help you.
2. Objecting would decrease the chance to offer similar evidence later at trial.
3. The witness' answer opens the door to certain evidence.
4. The objection would force the opponent to use more persuasive forms of evidence.
5. The objection will force the opponent to lay a more persuasive objection. Think through the "foundation" objection before you make it. Unless the other party really cannot meet the foundational requirements (and if they can't, you should have taken care of that in a *motion in limine*), then the military judge will likely complete the basic foundation to keep the trial moving along. If the evidence is going to come it, it is better that it comes in with a weak foundation than a great, persuasive foundation.
6. The evidence doesn't hurt that much.

III. Additional Tips

A. Don't make running objections ("Objection, your honor, that is hearsay because it is not an excited utterance, in fact, over two hours passed before he made the statement.") Rather, say, "Objection, your honor. Hearsay." And then stop and see if the judge wants to hear anything else.

B. If you are overruled without giving an argument, ask to be heard.

C. State the prejudice that will occur to your client if the judge does not sustain the objection.

D. Ask for the remedy that you want.

E. If you win the objection, quit talking.

F. Don't argue *with* the judge. Argue *to* the judge.

IV. Responding to Objections

A. The following is adapted from Elliott Wilcox, *How to Successfully Make and Meet Objections*, available at www.trialtheater.com.

B. Pause. Don't panic.

C. Think. Why should the judge admit your evidence? Tell the judge why your evidence is relevant, reliable, and right (or fair). If you can't think of the hyper-legalistic response to an objection at that moment, if you can answer why it is relevant, reliable, and right (fair), then you will get most of the way to the right answer.

D. Wait. Don't change your line of questioning until you get a ruling from the judge.

E. Receive. Get a ruling from the judge. If the judge says, "Move along, counsel," then the judge has not ruled. If that happens, ask the judge, "Your honor, so that means the objection sustained?"

F. Regroup. If the judge sustains the objection, take a moment to gather your thoughts. Figure out what you need to do to continue in the direction you wanted to go. Then, start talking again.

V. Get Better by Reading and Watching

A. James W. McElhaney, *Persuasive Objections*, A.B.A. J., Jan. 1999, at 70.

B. Elliott Wilcox, *How to Successfully Make and Meet Objections*, available at www.trialtheater.com.

C. VIDEO: Objections with Prof. David Schlueter (TJAGLCS 2000) (available in streaming video on the Criminal Law Department website).

OBJECTION	MRE
Accused's testimony, limited purpose	304(f)
Ambiguous question	611(a)
Argumentative	611(a)
Asked & answered	611(a), 403
Authentication inadequate	901
• Self authentication inadequate	902
Best evidence (no original /duplicate)	1002
Beyond the scope	611(b)
Bolstering, improper	608(a)
Character evidence	
• For truthfulness/untruthfulness	608(b)
• Method of proving	405(a)
• Specific instances of conduct	
o Not permissible on direct (but exceptions)	405(b)
o Permissible on cross	404(a)
Child testimony, remote (RCM 914A)	611(d)
Completeness	
• Remainder of accused's statement	304(h)(2)
• Rule of, generally	106
Compound question	611(a)
Conclusion, calling for	602
• Experts	701, 702
Counsel testifying (no oath)	603
Conviction, prior to impeach	609
Copy (duplicate) in lieu of original	1003
Cross exam exceeds the scope of direct	611(b)
Cumulative	611(a),403,102
Degrading question	303, 611(a)
Duplicate in lieu of original (best evid)	1003
Expert, no foundation	703
Expert qualifications lacking	702
Facts not in evidence	611(a), 103(c)
• For experts	703
Foundation	901
• Expert authentication inadequate	703
• Self-Authentication defective	902
Harassing question	303, 611(1)
Prepared by U.S. Army Trial Defense Service Defense Counsel Assistance Program DCAP@conus.army.mil	Objections Checklist Version 1, 1 Dec 10

OBJECTION	MRE
Impeachment, improper	
• cross on basis permissible	608(b)
• no extrinsic evidence as to specific instances	608(b)
• only by reputation or opinion	608(a)
Interpreters, to be qualified as expert	604
Lack of personal knowledge	602
Leading on direct	611(c)
Military judge, recusal	RCM 902
Mislead members unduly	403
Misquoting a witness	611(a)
Misstating evidence	103(c)
Narrative response	611(a)
Opinion, lay opinion improper	701
Opinion on ultimate issue for experts	704
Other crimes, wrong acts	404(b)
Personal knowledge, lack of	602
Polygraph evidence inadmissible	707
Prior conviction to impeach	609
Present memory refreshed	**612**
Prior statement to impeach	613(a)
Prior statement, extrinsic evidence	613(b)
Relevance, conditioned on other facts	104(b)
Relevance, not relevant not admissible	402
Refreshed recollection	**612**
Remote testimony of a child (RCM 914A)	611(d)
Scope of direct exceeded on cross	611(b)
Speculative	602, 611(a)
Specific instances of truthfulness	**608(b)**
Vague question	611(a), (c)
Uncharged misconduct	404(b)
Waste of time	403
Witness, judge disqualified to serve	605(a)
Writing to refresh memory	612

B A R P H

Best Evidence (MRE 1001)
Authentication (MRE 901)
Relevance (MRE 402)
Privilege (MRE 301, 302 and 500 series)
Hearsay (MRE 801)

HEARSAY	
Hearsay defined	801(c)
STATEMENTS THAT ARE NOT HEARSAY	**MRE**
Admission by agent	801(d)(2)(C)-(D)
Admission by a party opponent	801(d)(2)(A)-(B)
Prior identification	801(d)(1)(C)
Prior statement by declarant	801(d)(1)(A)-(C)
Statement of co-conspirator	801(d)(2)(E)
HEARSAY EXCEPTIONS	**MRE**
Ancient records	803(16)
Boundaries, reputation of	803(20)
Business records or their absence	803(6),(7)
Commercial data/publications	803(17)
Dying declaration	804(B)(2)
Excited utterance	803(2)
Existing mental, physical, emotional	803(3)
Family records	803(13)
Former testimony	804(b)(1)
General history	803(20)
Judgment-personal, family history	803(23)
Learned treatise	803(18)
Market reports	803(17)
Marriage, baptism & similar	803(12)
Medical treatment	803(4)
Present sense impressions	803(1)
Previous convictions	803(22)
Property-records and statements	803(14)-(15)
Public records and their absence	803(8),(7)
Religious records	803(11)
Reputation of personal/family history	803(19)
Residual	807
Statement of personal/family history	804(b)(4)
Vital statistics	803(9)
PRIVILEGES	**MRE**
Attorney/client	502
Comment upon deliberations	509
Classified information	505
Clergy	503
Commenting upon privilege	512
Identification of informants	507

PRIVILEGES, continued	MRE
Government information, unclassified	506
Husband/wife	504
Mental examination of accused	302
Political vote	508
Psychotherapist	513
Self-incrimination	301
Waiver by disclosure	510
SEARCH & SEIZURE	**MRE**
Apprehension	RCM 302
Body intrusions/views	312
Probable cause not required	314
Probable cause required	315
Procedural issues	311
Seizure, power to	316(e)
Seizures of property or evidence	316
Wire taps	317
AUTHORIZATION EXCEPTIONS	**MRE**
Automobile exception	315(g)(3)
Consent	314(e)
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Chapter 32

I. Introduction

A. "Cross-examination" is not a good title for this part of the trial. Rather, we should call this part of the trial, "My turn to testify." *See* James W. McElhaney, *The Power of the Proper Mindset: During Cross-Examination, the Real Witness Is You*, A.B.A. J. Apr. 2007, at 30. Cross-examination is your turn to testify directly to the jury or panel.

B. Once you realize that cross-examination is not an examination at all, then things will start to click. This is your chance to testify directly to the jury or panel, and the role of the witness is to *validate* your testimony. You are not there to get information from the witness. You are there to have the witness confirm the information you already know.

C. The witness should play very little role while you are testifying. If you are doing this right, the witness might as well not be there. You are telling a story (testifying) and the witness is just along for the ride. You could can even look directly at the panel while you are testifying, with the witness just be making "yes," "no," or "I don't know" sounds in the background.

II. Goal-Oriented Cross Examination

A. Your presumption about cross-examination is that *you should not do it*. That forces you to think through why you are going to ask this particular witness questions. And you need to have a good reason. You may be entering hostile territory, and you should be conducting a raid, not an invasion. *See* Major Sitler, *An Approach to Cross-Examination: "It's a Commando Raid, not the Invasion of Europe"*, Army Law., July 1998, at 80.

B. First ask, should I cross this witness?

1. Did the witness significantly damage my case?
2. Is this witness important?
3. What are my goals?
4. Can I conduct an effective cross?
5. Can I conduct a safe cross?
6. Can I get the information I need from another witness?
7. Is the issue that she testified about in dispute?

C. Then, examine your goals for conducting this cross-examination.

1. Damage this witness' credibility.

   a) You could destroy the witness' entire credibility, through story inconsistencies, by exposing bias or a reason that this witness is lying, or through prior convictions.

   b) You might attack just a limited subset of credibility, like the ability to perceive or remember. You are not saying that his witness is a liar; rather, you are saying this witness is mistaken.

2. Elicit facts that are helpful to my case.

   a) Here, you have to balance the risk that you are entering hostile territory with the value that comes by getting concessions from a witness that was called by the other side.

b) Under concession-based cross-examination, you elicit facts from an opposing witness because those facts carry greater weight with the jury since the jury knows the witness was not called to assist the other side.

c) When eliciting concessions, the lawyer seeks agreement by an opposing witness of relevant areas of the lawyer's own "story."

3. Elicit facts that damage the other party's story.

a) The lawyer is not attempting to tell a story, but rather attempting to unravel the one told by the opponent.

D. In order to identify what your goals are (and therefore, whether you should cross-examine this witness), you need to do a thorough case analysis early in the process. See the Case Analysis outline. If you have constructed your arguments in advance using the method found in that outline, then you will see that your "especially whens" and "except whens" form the titles of your cross-examination chapters, which we will discuss below.

III. Organizing Your Cross Examination

A. Use a logical progression to reach a specific goal.

1. A logical progression is the optimal approach to educate the jury. Identify your goal (your main point), and then progress through your questions until your goal becomes logically true. The progression reduces the witness's ability to evade.

2. Use this planned, logical progression to walk the witness to the edge of a cliff. Use the goal question to force the witness to step back, or to fall off that cliff. That is, progress to the point where the witness either must concede your goal fact, or will look foolish denying it.

3. You do not have to know the answer to this goal question. If you have walked the witness to the edge of that cliff, *you don't care what the answer is to the goal question.* The witness will concede (you win) or look like a liar or a fool (you win). This victory will not occur unless you prepare ahead of time.

B. Analyze what cross-exam can accomplish and then organize the examination before the witness testifies. Create theme-based "chapters" for the examination.

1. A chapter is a *controlled* inquiry into a specific area. A chapter is a sequence of questions designed to establish a *goal question.* A chapter advances your theory of the case one goal at a time.

a) Identify your goal question.

b) Review all materials to see how many different ways that you can prove the goal question. Select the witness.

c) Move backwards to a more general point where the witness will agree with your question.

d) Draft a series of questions leading to the goal. Start general, and use increasingly more specific questions until you reach your goal question.

e) The more difficult the witness, the more general your starting point should be.

2. Each chapter has one main point that you will use to directly support your primary argument. If you have more than one main point, you have more than one goal question. Create separate chapters for each goal question.

C. The progression creates context and makes the goal fact more persuasive. By using a series of questions you support the goal fact with as much detail and as many supporting facts as you can to ensure the goal fact is believed and understood. *One question is not a chapter.*

D. Example. The goal is a concession that the car was blue.

1. Less persuasive: a single fact, leading question: "The car was blue?"

2. More persuasive: A chapter:

a) You were standing on the corner.

b) The car drove past you.

c) The car drove within five feet of you.

d) Nothing blocked your view from just five feet.

e) It was about 1500 hours.

f) It was light out.

g) You got a good look at the car.

h) Goal question: The car was blue.

E. Chapter bundles. A proper explanation of an event may require several goal questions. Use one goal per chapter and then bundle the related chapters together. Start with the most general chapter first and work toward the most specific.

1. Example:

a) PVT Jones, you've been convicted of a felony.

b) You were convicted of robbery.

c) You pled guilty in exchange for a five-year deal.

d) As part of the deal you agreed to testify against PFC Sitler.

2. Better:

a) Goal Questions:

(1) You are an armed robber.

(2) You got caught red handed.

(3) You admitted to <one fact of the robbery>.

(4) You admitted to <second fact of the robbery>.

(5) [Note: this is relevant, b/c it supports how guilty Jones was, and how much Jones needed the deal.]

(6) You were facing 15 years confinement.

(7) You cut a deal.

(8) After the deal, you were looking at no more than 5 years confinement.

(9) You became a cooperating witness (or "snitch").

(10) That was part of the deal.

(11) You agreed to testify against the accused.

(12) You know the government will be happier with you if the accused is convicted.

b) Chapter 1: Goal question: You are an armed robber.

(1) On July 15th you needed some money.

(2) So you picked up your gun.

(3) Your gun is a .44 magnum revolver.

(4) Your .44 was loaded.

(5) You went to the shoppette.

(6) You pointed your loaded .44 at the clerk.

(7) You told her to give you the money.

(8) You told her you'd kill her if she didn't.

(9) She was pregnant.

(10) She looked very scared.

(11) She gave you the money.

(12) So you didn't kill her.

(13) You ran out of the shoppette.

(14) You are an armed robber.

c) Chapter 2: goal question: you got caught red handed.

(1) The police caught you while you were running away from the shoppette.

(2) They caught you with the .44 magnum.

(3) They caught you with the shoppette's money.

(4) The pregnant clerk got a good look at you.

(5) She could identify you.

(6) You were caught red handed.

d) Chapter 3: goal question: you were facing 15 years confinement.

(1) (1) After being caught red handed, you saw an attorney.

(2) (2) You were charged with armed robbery.

(3) (3) You knew you were in a lot of trouble.

(4) (4) You knew you were facing 15 years confinement.

F. Be flexible.

1. Write down something that organizes your cross-exam in a way you can follow while questioning the witness.

2. You might put each of your chapters on its own piece of paper. As you close a chapter, line out that paper, then move to the next sheet. If the examination starts to flow in another direction, feel free to go out of order on your sheets.

IV. Sequence of Cross Examination

A. Here is a suggested sequence for your cross-examination.

1. Gain concessions. Gain concessions before attacking, If the witness concedes every point you want from the witness. *Sit down*. Do not impeach.
2. Show impossibility or improbability.
3. Show poor perceptive skills.
   a) [Note that these first three approaches neither *confront* nor *impeach* the witness.]
4. Impeach with Bias or Prejudice.
5. Impeach for lack of qualifications
6. Impeach with conflicting statements.
7. Impeach with convictions.
8. Impeach by demonstrating lies on a *material* point.

B. Other considerations.

1. Start strong. End strong. "Primacy/recency." Close cross-examination with a theme chapter.
2. Generally, avoid chronological order. It allows the witness to predict the cross-exam and become comfortable.
3. Develop risky areas only after establishing control of the witness through safe chapters.
4. If you have more than one impeachment chapter, use the cleanest chapter first.
5. Reference your theme early and often.

V. How to Ask the Questions

A. Short statements = control.

1. The shorter your question, the better. If you can ask a one-word question, then you have mastered cross-examination.
2. Break down questions into the shortest possible question. A series of short questions provide little opportunity to equivocate or avoid the answer.
3. Simplicity leaves no escape route for the witness. Simplicity builds precision.

B. Only one new fact per question.

1. If your question has multiple new facts in it, you lose control of your witness. You witness now has room to wiggle. If you inquire into more than one area in a question, which part of the question is the witness answering? The first part? The second? Both? Use of compound questions impedes an effective cross.

C. Only use leading questions.

1. The attorney asking the questions controls the witness by not allowing him/ her to elaborate on his/her answers to the fact finder.

2. The attorney is testifying, rather than the witness.

3. The questions may come in more "rapid-fire" fashion, giving the witness less time to think through the answer before making it and thus increasing the likelihood of a mistake (or honesty) in answering.

D. Occasionally break that rule by using an open-ended question

1. A counsel may ask open-ended questions on cross examination at any time. Doing so, of course, means a loss of control over the witness. This should almost never be used by inexperienced counsel or those not knowing the answers to their propounded questions.

2. Mix in open-ended questions to break up the pace of the cross-examination. For example, after a series of rapid-fire leading questions that concern a written statement, you might ask, "Where in that statement did you say X?" when you know that the witness never said X in the statement. By using that open-ended question, you create a pause in the action where everyone now has to look at the witness as the witness fumbles through the statement, only to reply, "It isn't in the statement."

E. Listen to the answers. Often those answers are helpful. They may be unexpected concessions, or contain powerful language you did not anticipate.

F. Use descriptive words to create a picture in the jury's mind.

1. Leading Question: You saw a man lying on the side of the road?

2. A better sequence using short, simple leading questions, descriptive statements, adding one new fact at a time:

a) You saw a man *thrown* from the car.

b) He was thrown from a *Jeep Cherokee*.

c) The man was lying on the ground.

d) In the *dirt*.

e) He was lying on the side of the road.

G. Do not use *danger* words.

1. *Danger* words are any words that are not facts (nouns). Danger words are words that are really conclusions based on other facts (drunk, hot, mad, happy). Beware of words like, "angry," as in, "So you were angry." Using that word gives the witness wriggle room. The witness can answer, "Well, I was a little mad, I wouldn't say I was angry." Rather, get the person to describe all of the *facts* that would lead a reasonable person to get angry (she stepped on your toe; poked you in the eye; slapped the side of your face; called you a loser), and then save the conclusion ("this witness was angry") for your argument.

2. Just the facts, ma'am. Just the facts. Beware of adverbs and adjectives. Focus on nouns.

H. Ask safe questions – ones you know the answer to, or ones that you know the witness can only answer one way.

I. Vary your pitch.

J. Vary your tone.

K. Vary the speed at which you speak.

L. Use downward or neutral inflection.

1. When someone speaks with a downward inflection, the listener is cued in that the speaker is making a statement. The listener is being told something. Not asked. Told. Notice how this sounds: "You went to the park." There is no room to argue or answer. The listener is being told, "You went to the park." Downward inflection = control.

2. When someone speaks with a neutral inflection, the listener is cued in that the speaker has not given up control of the conversation. Notice how this sounds: "You went to the park . . . and the store . . . and the library . . . and the theater . . ." The speaker still owns the conversation. Neutral inflection = control.

3. Compare that to how this sounds: "You went to the park?" You should have naturally heard an upward inflection. That was a question. The upward inflection cues the listener in that the speaker does not know the answer, and the listener should therefore respond to the speaker. The listener is given control of the conversation. Upward inflection = loss of control.

M. Vary or eliminate your "hooks" or "tags" while conducting cross examination.

1. Leading questions may be asked in a number of ways. Usually they are declarations with a hook or tag at either end of them to signal that it is a question and not a statement (although we know better!). Sometimes inflection alone allows these hooks or tags to be discarded completely.

2. Some examples are:

a) "Isn't it true that…?"

b) "…right?"

c) "...isn't that correct?"

d) "…correct?"

e) "…isn't that right?"

f) "It's true that…"

3. Often, there is neither hook nor question mark in a leading question. Ex: "You ate cereal for breakfast" Is not actually a question, but with inflection, it works just fine, and emphasizes that the lawyer is the focus of cross-exam, not the witness. If the opponent objects, repeat the "statement" exactly, and add a hook. "You ate cereal for breakfast, didn't you?" The objection will look petty, because everyone knows what the "statement" meant.

4. Your goal should be to condition the witness to the point where you don't need to use hooks or tags. You may need to use hooks or tags at the beginning of the examination to help establish control and rhythm, and once the witness understands that you are in control, you can drop the tags.

N. Avoid legalese.

1. Use simple language and avoid legalese.

2. If the fact finder does not understand the jargon, the witness may not, either. Do you really want to mess up a good cross examination's rhythm with a dictionary lesson? Talk about losing your momentum, and maybe a good cross examination.

O. Looping.

1. A loop begins with a single fact, leading question. The next question contains one additional fact but includes an important fact from the previous question.

2. Technique.

a) Listen to any answer that's not yes or no. Lift any useful word or phrase. Loop the useful word or phrase into the next question. Move to safety.

b) Example:

(1) The car was *speeding*?

(2) The *speeding car* drove *past the formation*?

(3) The *speeding car* passed *the formation* and hit the road guard?

3. The double loop. Establish two desired facts using two separate single-fact, leading questions. Then combine both desired facts into one question.

a) Double Loops can be use to link two facts together or to contrast one fact against another.

b) Example.

(1) Establish fact 1: PFC Sitler is *six-foot-four*?

(2) Establish fact 2: SGT Saunders is *five-foot-six*?

(3) Loop fact 1 and fact 2 into a question for contrast: Six-foot-four PFC Sitler *beat* five-foot-six SGT Saunders?

(4) Six-foot-four PFC Sitler *beat* five-foot-six SGT Saunders *with his fists*?

(5) Six-foot-four PFC Sitler *beat* five-foot-six SGT Saunders *with his fists* until *he was unconscious*?

c) Contrast Inconsistent Facts.

(1) Establish fact 1: PFC Turney *is your friend*?

(2) Establish fact 2: PFC Turney *stole $100 from you*?

(3) Contrast: PFC Turney *is your friend*, but *he stole $100 from you*?

P. Asking the "ultimate question."

1. The "ultimate question" is not the same thing as "the one question too many." The "ultimate question" is the inference that you seek to draw from your line of questioning. Don't ask the witness to agree with your inference because the witness most likely won't. Save the "ultimate question" or that inference for when you make your argument. Run down the list of facts that you elicited from the witness, and then, in the safety of the closing argument, tell the panel what those facts mean.

a) Example: through a series of short, one-fact questions, you establish that the witness is a close friend of the accused. Do NOT ask, "So you would do anything to help him out, right?" The answer will always be "I would never lie for anyone in court!"

2. The "one question too many" is something else entirely. You should never ask the "one question too many." The "one question too many" is the question that blows apart the entire line of questioning you just pursued.

a) Terence MacCarthy, in *MacCarthy on Cross-Examination*, page 52, recounts this story. "You will recall the infamous 'nose bite' case. No less than Abraham Lincoln was the criminal defense lawyer. Initially he brought out that the witness was birdwatching. A good theme, but again, a relatively weak criminal defense theme. He was using what he had. Then Lincoln suggested to the witness that, in fact, he, the witness, had not seen the defendant bite off the poor fellow's nose. The witness agreed. We are told by Younger that Lincoln should then have stopped and sat down. But he continued and violated the commandment against asking the one question too many. Lincoln's last question to the witness, the one question too many, was: 'So if you did not see him bite the nose off, how do you know he bit it off?' The witness answer sticks with us: 'I saw him spit it out.'"

b) In fact, you should not even ask the line of questioning that leads to the "one question too many." Because even if you don't ask the "one question too many," and you walk away from the witness in triumph because you did not ask the "one question too many," what do you think will be the first question that the other side asks when she approaches the witness? Only she won't call it the "one question too many." She will call it "the greatest question ever." She will ask, "How do you know he bit it off?"

VI. Witness Control

A. Leading questions are designed to keep the witness under control. Sometimes witnesses (especially experts) try to take control of the examination by answering with a narrative.

B. When this happens, don't argue with the witness or plead with him or her to answer your questions with a yes or no answer. And don't go to the judge for help. Instead, let everyone in the room know who the jerk in the room is – this witness that just won't answer questions. The panel members or jurors want the same thing that you want – for this witness to answer the question and to not waste their time. The more the witness

C. If the witness is rambling, try this:

1. Use a hand signal. Make a simple "stop" sign with your outstretched palm.

2. Go back to your table, look at your notes, confer with your co-counsel – anything that lets this witness know that you are going to make better use of your time than listening to her rambling. Once they are done rambling, look up and say, "You answered a different question. Here is the question that I asked you."

D. If the witness won't stay in control, try this technique.

1. Repeat the question. "The house was empty?"

2. Repeat the question again, but this time, use the person's name: "Mr. Jones, the house was empty?"

3. If that does not work, ask the question in the inverse: "Mr. Jones, the house was full of people?"

E. Here are some other techniques.

1. "My question may have confused you. My question was not X, my question was Y." Or, "perhaps I wasn't clear."

2. "Let me repeat the question since that is not what I asked," and then repeat your previous question.

F. If the witness says, "I don't remember," try asking these questions (*see* Jim McElhaney, *Evasion: Why Witnesses Do It, and How to Make Them Stop*, A.B.A. J., Mar. 2010, at 26):

1. Did you once know the answer to my question?

2. Who did you tell?

3. Who might you have talked to about this?

4. Where would it be?

5. What other documents might have that information?

6. Where would they be?

7. Who might know the information?

8. Where would they be?

9. If your life depended on finding this information tomorrow morning, where would you look?

10. Do you understand that if you find the answer to this question or remember what it is, you should promptly bring that to our attention?

G. The Evasive Witness : "I don't remember." "I might have . . ."

1. Don't try to get better answers if the witness' demeanor is dramatically different than on direct. If he cannot remember things on cross, but could on direct, seek as many "I can't remember"s as possible, to areas temporally similar to areas he could remember on direct. Eventually, you can ask:

a) "When Major DC was asking questions about the traffic, you could remember the colors of each car in the area of the intersection, couldn't you?" Yes.

b) "But now that I am asking questions, you *claim* you can't remember how close the red car was to the blue car?"

2. Or, after the witness evades for a while, simply ask, "Mr. Witness, is there a reason why you don't want the jury to know the answer to that question?"

VII. Using Exhibits

A. Demonstratives are helpful in direct examination *and* cross examination. If you prepare well you can use your own charts/photos with an expert. If you prepare well, you can have the expert fill in the missing information in his own chart. If you are prepared, you

can use contradictory theses, books, illustrations in a leading manner, after locking the witness in to their authenticity and authority.

B. If a witness is adverse enough to your position that you are asking leading questions, the demonstrative should also be used in a leading fashion. Great care must be taken to avoid the temptation of then asking, "So how was this used?" or something of the kind.

VIII. Law

A. U.S. Constitution, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." For more, see the Confrontation outline.

B. MRE 611 grants the Military Judge (hereinafter MJ) control over mode and order of interrogating witnesses and presenting evidence.

1. MRE 611(a)(3) allows the military judge to protect witnesses from harassment or undue embarrassment.

2. The scope of cross-examination is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. However, if the attorney wants to ask the witness questions that are beyond that scope, the attorney can – but must now ask questions in the direct exam (non-leading) mode. MRE 611(b).

C. The inquiring attorney "Must have good faith basis for questions," *United States v. Pruitt*, 46 M.J. 148 (C.A.A.F. 1997).

IX. Get Better By Reading And Watching

A. Major Sitler, *An Approach to Cross-Examination: "It's a Commando Raid, not the Invasion of Europe"*, Army Law., July 1998, at 80.

B. Jim McElhaney, *Evasion: Why Witnesses Do It, and How to Make Them Stop*, A.B.A. J., Mar. 2010, at 26.

C. James W. McElhaney, *The Power of the Proper Mindset: During Cross-Examination, the Real Witness Is You*, A.B.A. J. Apr. 2007, at 30.

D. Jim McElhaney, *The Point of Cross: It's Another Change to Tell the Jury Your Side of the Case*, A.B.A. J., Jul. 2008, at 24.

E. James W. McElhaney, *Speaking of Liars: Showing That a Witness Is Untruthful Carries More Power Than Just Saying It*, A.B.A. J., Mar. 2006, at 26.

F. Alan C. Kohn, *The Gentle Art of Cross-Examination*, J. Miss. Bar, Mar.-Apr. 2008, at 82.

G. Steven C. Day, *Of Atticus Finch, Abraham Lincoln, and the Art of Setting the Trap*, Litigation, Winter 2011, at 28.

H. Video: *Cross-Examination with Terence MacCarthy* (TJAGLCS 2000), available in streaming video on the Criminal Law Department's website.

I. Video: *My Cousin Vinny*.

J. Ronald H. Clark, et al., *Cross-examination Handbook* (2010)

K. Larry S. Pozner and Roger J. Dodd, *Cross-Examination: Science and Techniques* (2d ed. 2004).

L. Thomas A. Mauet, *Trial Techniques* (6th ed. 2002).

X. Drills

A. For the first three drills, instruct the witness to not be a jerk. Have them answer "yes" or "no." If they can't answer a question "yes" or "no" because the attorney asked them a confusing question, tell the witness to just sit there until the attorney gets it right. The focus on these drills is for the attorney to get the rhythm, pace, and feel of cross-examination, not to tangle with uncooperative witnesses. Consider having the instructor serve as the witness.

B. Drill 1: Short statements.

1. Find any object that is in your workspace. Have the attorney describe the object, say, a coffee mug. The attorney can only use one new fact per question and needs to use a falling inflection. For the coffee mug, the attorney would say, "You are a cup. A coffee cup. White. With a handle. And you have a logo on the side. A green logo. The symbol of a coffee company, etc." Rotate through the attorneys, finding a new object to describe for each attorney. Have the attorneys ask at least one or two one-word questions.

2. As a progression, have the attorneys start with using tags, and then after two or three questions, have them work out of using tags.

C. Drill 2: Describe the action.

1. Have half of the class shut their eyes. Then have the witness do some physical activity – some jumping jacks, some push-ups, walk a square that is four paces on each side, do a cart-wheel (space permitting). The attorney will then cross-examine the witness on that physical activity using short statements, one new fact per question, with a falling inflection. For a witness that ran in place, the cross might be, "You pushed off with your foot. Your right foot. And brought it into the air. At the same time, you move your arm. Your left arm. You made a fist with your left hand. And pushed that fist forward. At the same time, you brought your left foot down. From the air. Onto the ground, etc."

2. As a progression, have the attorneys start with using tags, and then after two or three questions, have them work out of using tags.

D. Drill 3: Describe the scene.

1. Have the attorney describe the room that he or she is in (or another room that they are familiar with, like a local restaurant), to include sound levels, light levels, temperature, and smell. The attorney needs to use short statements, downward inflection, and only one new fact per question. Have other attorneys describe their favorite bar at the time they usually attend it, or their church when they usually attend it, or the coffee shop they usually go to.

E. Drill 4: The runaway witness.

1. Modify one of the drills above. This time, instruct the witness to take a question and start rambling ("well, that depends on . . .). Have the attorney run through some witness control techniques (repeat the question, repeat the question using the witness' name, state the inverse of the question).

F. Drill 5: Identifying danger words.

1. Modify one of the drills above. Instruct the witness that anytime the attorney uses a danger word (a word that is really a conclusion based on other underlying facts), the witness will stand up and say, "Gotcha!"

G. Drill 6: Case specific.

1. If the counsel have the basics down, have the counsel break out into teams to come up with a cross examination, based on one chapter, of one of the witnesses in US v. Archie. Bring an arguments worksheet for the counsel to use when developing the chapter.

XI. Appendix. Example of a Leading, Concession-Based Cross-Examination

[Case: non-stranger sexual assault in accused's barracks room on July 1]

A. This cross-examination has four goals:

1. Accused and Victim were only casual acquaintances.
2. Accused initiated contact.
3. Accused purchased the drinks.
4. Accused isolated the victim.

B. First chapter: Accused and Victim were only casual acquaintances.

1. You know Victim. Yes.
2. You don't work together. No.
3. You live in the different barracks. Yes.
4. You never had breakfast at the same table. No.
5. You never had lunch at the same table. No.
6. You never had dinner at the same table. No.
7. You had both been to the club at the same time before. Yes.
8. You had been to the club, but you had never had drinks with Victim before July 1. No.
9. She never told you where she was raised. No.
10. She never told you her brother's name. (Especially good if she doesn't have a brother). No.
11. You didn't really know each other, did you. No.

C. Second chapter: Accused initiated contact.

1. On July 1, Victim came to the club separately from you, didn't she. Yes.
2. She came to the club separately, and she sat down with friends of hers. Yes.
3. They were not friends of yours, though, were they? *Well, I knew a few of them.*
4. You claim *you knew a few of them*, but you had never had drinks with any of them before, had you. No.
5. And you had never had drinks with the victim before either. No.
6. You did not approach any of her friends, who you claim you knew. No.
7. You approached Victim, didn't you. Yes.
8. *You didn't really know each other*, but you approached her. Yes.

9. She did not approach you. No.
10. You didn't approach one of the people you knew. No.
11. You asked her to dance. Yes.
12. She did not approach you or your friends. No.
13. She did not suggest dancing. No.

D. Chapter 3: Accused purchased the drinks.

1. You bought her a drink. Yes.
2. You did not buy anyone else a drink. Yes.
3. *You didn't really know each other*, but you bought her a drink. Yes.
4. You bought her another drink before you had finished your first drink. Yes.
5. You bought her a third drink. Yes.
6. She told you she had enough. Yes.
7. You urged her to drink the third drink. *No, I didn't urge her to do anything. I just bought it.*
8. You claim *you didn't urge her to drink*, but you still gave the third drink to her.
9. And you suggested she drink it. Yes.
10. You gave it to her even though she said she'd had enough.
11. You bought all her drinks that night. Yes.
12. She did not buy any drinks, did she.
13. You supplied her with more drinks than you had yourself, didn't you.
14. She started to slur her words.
15. She had some trouble with balance.
16. She was slurring her words and having trouble with balance, but you bought her another drink, didn't you.
17. [Etc. --- by now, his answers hardly matter.]

E. Chapter 4: Accused isolated the victim.

1. Victim was slurring her words and having trouble with her balance.
2. Her friends said she should go home, didn't they.
3. Her friends offered to take her home, didn't they.
4. You claim that you were concerned about her, right.
5. You offered to take her home.
6. You offered to take her home, *because you were concerned for her*.
7. You told her friends you would 'take care of her.'
8. You told them they should stay at the club.
9. Her friends made it clear that Victim should go home, right.

10. She needed to go home, but you did not take her home, did you.

11. She needed to go home, but you took her to *your* room, didn't you.

F. [Chapter 5 can be "*You were concerned for her*, but you . . . (details of his actions during sexual assault, based on his testimony & hers);" or "You said you would 'take care of her,' but . . . ."]

Chapter 33

USING EVIDENCE AT TRIAL

Chapter Is Currently Under Construction

Chapter 34

I. Introduction

A. General

1. At its core, an argument is a claim supported by reasons. John D. Ramage & John C. Bean, Writing Arguments, 43 (1989).

2. According to Black's Law Dictionary, arguments are "the remarks of a counsel in analyzing and pointing out or repudiating a desired inference, for the assistance of a decision-maker." Black's Law Dictionary 102 (7th ed. 1999).

3. These definitions are important for understanding the difference between opening statements and arguments. In opening statements, counsel comment on what the evidence *is*. In argument, counsel comment on what the evidence *means* (what inferences should be drawn) and why this evidence is trustworthy or not.

4. The rules reflect that distinction.

a) Argument is not allowed in the opening statement. In opening statement, counsel should confine their remarks to evidence they expect to be offered and a brief statement of the issues in the case. R.C.M. 913(b) discussion.

b) Argument is allowed on motions (R.C.M. 905(h)), findings (R.C.M. 919), and sentencing (R.C.M. 1001(g)).

B. Cross-reference: the Findings and Sentencing Outline and Evidence Outline.

1. See those outlines for a complete discussion of matters that may be introduced by the parties and considered by the factfinder during the merits and presentencing proceedings.

II. Procedure

A. Control of argument by the military judge

1. The military judge may exercise reasonable control over argument, R.C.M. 801(a)(3).

2. A military judge may restrict argument to reasonable limits in the exercise of sound discretion. However, the military judge may not arbitrarily limit the defense counsel's argument. *United States v. Dock*, 20 M.J. 556 (A.C.M.R. 1985).

3. Remedies for improper argument.

a) Military judge can sua sponte stop the argument. *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975); *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983).

b) Military judge can give a curative instruction. *United States v. Carpenter*, 29 C.M.R. 234 (C.M.A. 1960); *United States v. Horn*, 9 M.J. 429 (C.M.A 1980).

c) Military judge can require a retraction from counsel. *United States v. Lackey*, 25 C.M.R. 222 (C.M.A. 1958).

d) Military judge can declare a mistrial. *United States v. O'Neal*, 36 C.M.R. 189 (C.M.A. 1966); *United States v. McPhaul*, 22 M.J. 808 (A.C.M.R. 1986).

e) Counsel must cease argument once military judge rules on issue in question. *United States v. Warnock*, 34 M.J. 567 (A.C.M.R. 1991).

B. Motions argument.

1. Upon request, either party is entitled to an Article 39(a) session to present oral argument. R.C.M. 905(h).

C. Findings argument.

1. Trial counsel argues first, then defense counsel shall be permitted to reply, and then the trial counsel shall then be permitted to present rebuttal. R.C.M. 919(a).

2. The trial counsel's rebuttal argument is generally limited to matters argued by the defense. If trial counsel introduces new matter in rebuttal, then the defense counsel should be allowed to reply in rebuttal. However, the trial counsel will be allowed to make the final argument. R.C.M. 919(b) discussion.

D. Sentencing argument.

1. Trial counsel argues first, then defense counsel. R.C.M. 1001(a)(1), (g).

2. The military judge has the discretion to permit rebuttal sentencing arguments. R.C.M. 1001(a)(1)(F), (d).

a) As a general rule, there is no right of government counsel to present rebuttal argument because the government does not have a burden of proof during presentencing proceedings in non-capital cases. *United States v. McGee*, 30 M.J. 1086 (N.M.C.M.R. 1989). The propriety of permitting such argument is dependent upon the need to address matters newly raised by the defense in its sentencing argument. *Id*.

3. Absent "good cause" the military judge should not permit departure from the order of argument set forth in R.C.M. 1001(a)(1).

a) *United States v. Budicin*, 32 M.J. 795 (N.M.C.M.R. 1990). Military judge erred by allowing trial counsel to argue last but defense counsel waived error by not objecting.

b) *United States v. Martin*, 36 M.J. 739 (A.F.C.M.R. 1993). Trial counsel should not be routinely permitted to choose whether to argue first or last on sentencing.

E. Waiver of argument.

1. *United States v. McMahan*, 21 C.M.R. 31 (C.M.A. 1956). Defense counsel has a right and duty to argue and should only waive argument in unusual circumstances.

2. Defense counsel are not required to argue but need to have sound reasons for not doing so. *United States v. Sadler*, 16 M.J. 982 (A.C.M.R. 1983) (defense counsel was ineffective when he did not present any favorable matters or argue during the presentencing proceeding).

3. Trial counsel may waive argument. R.C.M. 919(a) analysis, at A21-68.

III. Findings Argument

A. Counsel may comment on the evidence in the case, including inferences to be drawn from the evidence. R.C.M. 919(b).

1. Counsel may comment on the testimony, conduct, motives, and evidence of malice of witnesses to the extent supported by the evidence. R.C.M. 919(b) discussion.

2. Counsel may argue as though the testimony of their witnesses conclusively established the facts related by them. R.C.M. 919(b) discussion.

3. Counsel may not argue facts not in evidence. *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975) (It is error for counsel to include inadmissible hearsay in findings argument).

4. Counsel may not argue irrelevant matters. M.R.E. 401, 402, 403. *But see United States v. Jefferson*, 22 M.J. 315 (C.M.A. 1986) (defense counsel should have been permitted to inform members of mandatory minimum life sentence to impress seriousness of offense upon them).

5. Counsel may not argue evidence beyond its limited purpose. *United States v. Sterling*, 34 M.J. 1248 (A.C.M.R. 1992). Accused was charged with two specifications of use of cocaine based on two positive urinalysis tests. Trial counsel improperly argued that one test corroborated the other.

B. Counsel may comment generally on contemporary history or other matters of common knowledge.

1. *United States v. Jones*, 11 M.J. 829 (A.F.C.M.R. 1981); *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005) (references to public figures must be generic and not specific details of sensationalized topics).

C. Use of providence inquiry statements in mixed plea cases.

1. Admissions in a plea of guilty to one offense cannot be used as evidence to support a finding of guilty of an essential element of a separate and different offense; however, the guilty plea inquiry and stipulation of fact may be used to satisfy the common elements of a greater offense if the pled to charge is LIO of the contested charge. *United States v. Abdullah*, 37 M.J. 692 (A.C.M.R. 1993); *United States v. Rivera*, 23 M.J. 89, 95 (C.M.A. 1986); *United States v. Flores*, 69 M.J. 651 (A.F. Ct. Crim. App. 2010).

2. Plea of guilty may be used to establish common facts and elements of a greater offense within the same specification, but may not be used as proof of a separate offense. The elements of a LIO established by guilty plea (but not the accused's admissions made in support of that plea) can be used to establish common elements of the greater offense. *United States v. Ramelb*, 44 M.J. 625 (Army Ct. Crim. App. 1996).

3. *United States v. Grijalva*, 55 M.J. 223 (C.A.A.F. 2001). Admissions concerning the elements of the LIO made during providence inquiry can be considered insofar as the admissions relate to common elements of the greater offense, but it was error for the military judge to consider the accused's admissions that pertained to different elements of the greater offense.

D. Counsel may not make inaccurate reference to law or cite legal authority to the members.

1. *United States v. McCauley*, 25 C.M.R. 327 (C.M.A. 1958) (it was error for trial counsel to read from case in the Court-Martial Reports); *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983) (citing Wigmore before the panel).

E. Counsel should not argue the nonexistence of evidence after a successful suppression motion.

1. *ABA Standards for Criminal Justice*, Standard 4-7.8 and its Commentary: "A lawyer who has successfully urged the court to exclude evidence should not be allowed to point to the absence of that evidence to create an inference that it does not exist." The few reported cases on this issue take the position that such an argument misrepresents the facts to the tribunal.

2. Counsel may not mention evidence that has been suppressed or suggest that other evidence exists. *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983).

3. *State v. McNeely*, 664 P.2d 277 (Idaho Ct. App. 1983). After the defense successfully suppressed currency and cocaine, the prosecution filed a motion in limine to prevent the defense from arguing that the state produced no evidence because it had no evidence. The trial court granted the motion, and the Idaho Court of Appeals affirmed, citing treatises and commentary for the proposition that it is a form of misrepresentation for counsel to argue the absence of evidence when it is absent only because it was suppressed.

4. *Pritchard v. State*, 673 P.2d 291 (Alaska Ct. App. 1983) ("Defense counsel clearly has the right to argue in support of a Scotch verdict, *i.e.*, that the prosecution has failed to sustain its burden of proof. . . . He may not, however, state to be true something he knows to be false. Thus, for example, he may not base his argument on the nonexistence of evidence which in fact was present but was suppressed on motion by the defense.")

5. *State v. Provost*, 741 A.2d 295 (Conn. 1999). The defense claimed the prosecutor had committed misconduct by suppressing the statements of several witnesses and then arguing that the defense produced no evidence that a witness had an improper motivation for identifying the defendant. Citing, *inter alia*, the *McNeely* case for the proposition that it is improper to argue the nonexistence of suppressed evidence, the court nevertheless held under the facts of the instant case, the prosecutor had not argued improperly.

F. Trial counsel may not comment on the probable effect of the court-martial's findings on relations between the military and civilian community. R.C.M. 919(b) discussion.

IV. Sentencing Argument

A. Counsel may refer to generally accepted sentencing philosophies. R.C.M. 1001(g).

1. These include rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution. R.C.M. 1001(g).

2. General deterrence is a proper subject of argument. *United States v. Lania*, 9 M.J. 100 (C.M.A. 1980).

B. Counsel may recommend a specific lawful sentence. R.C.M. 1001(g).

1. Counsel need to remember that the sentence is not about whether the accused stays in the service or not, but whether the accused deserves a *punitive* discharge.

a) *United States v. Motsinger*, 34 M.J. 255 (C.M.A. 1992). Trial counsel improperly blurred distinction between a punitive discharge and administrative separation by arguing "would you really want this individual working for you? I don't think so. . . . Is this really the individual . . . that we need in the United States Air Force?."

b) *See also United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989).

2. Trial counsel may inform members of maximum penalty which court-martial may impose. *United States v. Capps*, 1 M.J. 1184 (A.F.C.M.R. 1976).

a) However, trial counsel may not comment on "the average sentence." *United States v. Simmons*, 31 M.J. 884 (A.F.C.M.R. 1990). Trial counsel improperly explained that "average" sentence was mathematical average between no punishment and the possible maximum punishment.

3. Defense counsel may argue for a specific sentence. *See generally United States v. Goodman*, 33 M.J. 84 (C.M.A. 1991).

4. Counsel may generally argue for any legal sentence regardless of limitations contained in a pretrial agreement. *United States v. Rivera*, 49 C.M.R. 838 (A.C.M.R. 1975); *United States v. Rich*, 12 M.J. 661 (A.C.M.R. 1981).

a) However, counsel may not make misleading arguments. *United States v. Cassity*, 36 M.J. 759 (N.M.C.M.R. 1992) (finding error in government's disingenuous argument for leniency as to confinement which was designed to enhance punishment by operation of the pretrial agreement). Trial counsel may not argue for a quantum of punishment greater than that court-martial may adjudge. R.C.M. 1001(g).

C. Counsel may comment on any evidence properly introduced on the merits.

1. This includes evidence of other offenses or acts of misconduct, even if introduced for a limited purpose, and evidence relating to any mental impairment or deficiency of the accused. R.C.M. 1001(f).

D. Counsel may comment on matters that arise during the providence inquiry.

1. This includes uncharged misconduct, if the evidence otherwise satisfies R.C.M. 1001(b)(4) and M.R.E. 403. *United States v. Arceneaux*, 21 M.J. 571 (A.C.M.R. 1985); *United States v. Holt*, 22 M.J. 553 (A.C.M.R. 1986).

2. See the "Findings and Sentencing Outline" for a discussion of the procedures required for using the providence inquiry.

E. Counsel may comment on matters introduced pursuant to R.C.M. 1001(b).

1. Counsel may not argue facts not in evidence or introduced for a limited purpose.

a) *United States v. Shoup*, 31 M.J. 819 (A.F.C.M.R. 1990). Trial counsel improperly mentioned facts not in evidence by arguing to the military judge "This is the third drug case you have heard this week; there were many before and there will be many more in the future...Over twenty people died in Panama a few weeks ago trying to stop drugs from coming into this country."

b) Trial counsel may not comment on uncharged misconduct that comes up as impeachment evidence during the presentencing proceeding. *United States v. White*, 36 M.J. 306 (C.M.A. 1993). In trial for drug use based on positive urinalysis, the trial counsel cross-examined a defense character witness regarding uncharged second positive urinalysis. Trial counsel erred by arguing that "we are not just talking about one use of Cocaine."

2. Trial counsel cannot take proper rehabilitation testimony and then state that the inference to draw from that testimony is that the accused should not be in the service.

   a) *United States v. Hampton*, 40 M.J. 457 (C.M.A. 1994). A stipulation of expected testimony admitted during presentencing stated that in the witness' opinion, the accused did not have any rehabilitative potential. During sentencing argument, trial counsel stated that the expected testimony was that accused "doesn't have rehabilitative potential, doesn't deserve to be in the Army." The court held that even if trial counsel's misstatement is characterized as a reasonable inference drawn from the expected testimony, such argument is still improper.

3. Counsel may argue impact on unit or service if there is evidence that the accused's crimes affected the unit.

   a) *United States v. Simmons*, 31 M.J. 884 (A.F.C.M.R. 1990). Trial counsel's argument in drug case that "[w]e're going to find out who uses drugs when a plane crashes" was improper where the accused's duty was to clean airplanes and there was no evidence that appellant's use of amphetamines affected his duty.

   b) *United States v. Spears*, 32 M.J. 934 (A.F.C.M.R. 1991). Trial counsel's argument that an inspection which revealed a missing meal card had an impact on the entire unit was not a reasonable inference. If trial counsel want to make an argument that the crime affected the unit, the trial counsel need to introduce proper sentence evidence under R.C.M. 1001(b)(4).

F. Counsel may comment generally on contemporary history or other matters of common knowledge.

   a) *United States v. Barrazamartinez*, 58 M.J. 173 (C.A.A.F. 2003). The war on drugs is common knowledge and so permissible for comment.

   b) *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005) (references to public figures must be generic and not specific details of sensationalized topics).

G. Counsel may comment on the accused's status as officer or NCO, but not duty position.

1. Counsel may mention accused's status as officer or NCO. *United States v. Everett*, 33 M.J. 534 (A.F.C.M.R. 1991). NCO status of accused was appropriate aggravating factor in drug use case.

2. However, counsel may not argue that an accused should receive greater punishment because of their *duty position*, unless their position was integral to the commission of the offense. *United States v. Rhodes*, 64 M.J. 630, 632 (A.F. Ct. Crim. App. 2007), *United States v. Skidmore*, 64 M.J. 655, 661 (C.G. Ct. Crim. App. 2007).

H. Commenting on collateral consequences.

1. Generally, the collateral consequences of a sentence are not relevant to the sentencing decision and are not allowed to be argued in sentencing. *United States v. Griffin*, 25 M.J. 423 (C.M.A. 1988).

2. Loss of VA benefits is a relevant consideration on sentencing. *United States v. Stargell*, 49 M.J. 92 (C.A.A.F. 1998).

3. Effect of sentence on retirement benefits is relevant.

a) Defense counsel may introduce evidence of the effect of a punitive discharge on retirement benefits. *See* Military Judges' Benchbook para. 2-5-22. The instruction must be given if requested and:

(1) The accused has sufficient time in service to retire;

(2) For an enlisted accused, the accused has sufficient time left on his current term of enlistment to retire without having to reenlist;

(3) For an accused that is a commissioned or warrant officer, it is reasonable that the accused would be permitted to retire but for a punitive discharge.

b) *See also United States v. Washington*, 55 M.J. 441 (C.A.A.F. 2001); *United States v. Boyd*, 55 M.J. 217 (C.A.A.F. 2001); *United States v. Luster*, 55 M.J. 67 (C.A.A.F. 2001); *United States v. Becker*, 46 M.J. 141 (C.A.A.F. 1997); *United States v. Greaves*, 46 M.J. 133 (C.A.A.F. 1997); *United States v. Sumrall*, 45 M.J. 207 (C.A.A.F. 1996); *United States v. Polk*, 47 M.J. 116 (C.A.A.F. 1997).

c) *United States v. Stargell*, 49 M.J. 92 (C.A.A.F. 1998). Trial counsel argued the accused, with nineteen and a half years, will get an honorable retirement unless the panel gave him a BCD. Military judge provided curative instruction to panel.

4. The availability of a subsequent administrative discharge is not relevant. *United States v. Briggs*, 69 M.J. 648 (A.F. Ct. Crim. App. 2010).

I. Defense counsel may comment that a plea of guilty is a mitigating factor. R.C.M. 1001(f).

J. Defense counsel may argue for a punitive discharge if the accused consents.

1. The accused's consent must be indicated on record. *United States v. Holcomb*, 43 C.M.R. 149 (C.M.A. 1971); *United States v. Williams*, 21 M.J. 524 (A.C.M.R. 1985) (argument urging discharge presumed prejudicial unless accused consents); *United States v. Robinson*, 25 M.J. 43 (C.M.A. 1987) (erroneous argument urging military judge to adjudge a suspended discharge, despite accused's desire to remain in the service, held not to be prejudicial).

2. The standard for reversal when a defense counsel concedes a punitive discharge without consent is whether it is reasonably likely that the concession affected the sentence. *United States v. Quick*, 59 M.J. 383, 387 (C.A.A.F. 2004).

3. The military judge should question the accused to determine whether he concurs with defense counsel's argument for a discharge. *United States v. McNally*, 16 M.J. 32, 35 (C.M.A. 1983) (Cooke, J. concurring). The Military Judges' Benchbook contains a colloquy at para. 2-7-27.

4. The military judge need not question the accused if a discharge is highly likely. *United States v. Volmar*, 15 M.J. 339 (C.M.A. 1983).

5. *See also United States v. Bolkan*, 55 M.J. 425 (C.A.A.F. 2001); *United States v. Pineda*, 54 M.J. 298 (C.A.A.F. 2001); *United States v. Adame*, 57 M.J. 812 (N-M. Ct. Crim. App. 2003).

6. Defense counsel may argue only for a bad-conduct discharge in lieu of confinement but not a dishonorable discharge or "a punitive discharge." *United States v. Dotson*, 9 M.J. 542 (C.G.C.M.R. 1980); *United States v. McMillan*, 42 C.M.R. 601 (A.C.M.R. 1970).

K. Defense counsel cannot argue irrelevant matters that are raised in the unsworn statement.

1. If the accused, in the unsworn statement, mentions irrelevant matters, the military judge may issue a *Friedmann* instruction. This typically arises when the accused mentions the punishments that other co-accused in the case have received. This instruction comes from *United States v. Friedmann*, 53 M.J. 800 (A.F. Ct. Crim. App. 2000). The instruction tells the panel that those comments are irrelevant.

2. *See also United States v. Barrier*, 61 M.J. 482 (C.A.A.F. 2005) (the right to allocution is broad, and largely unfettered, but it is not without limits); *United States v. Sowell*, 62 M.J. 150 (C.A.A.F. 2005).

3. For more discussion on what matters may be covered in an unsworn statement, see the "Findings and Sentencing" Outline.

L. Defense counsel cannot argue for reconsideration of the findings.

1. Defense counsel may not argue during the sentencing argument that the panel should reconsider their findings on the merits. *United States v. Vanderslip*, 28 M.J. 1070 (N.M.C.M.R. 1989). The fact that members may reconsider findings does not authorize a request for reconsideration.

V. Comments That Implicate Fundamental Rights

A. Trial counsel may not comment on the accused's exercise of a fundamental right.

1. *Griffin v. California*, 380 U.S. 609 (1965); R.C.M. 919(b) discussion.

B. Right to remain silent at trial.

1. The basic rule is that if the accused does not speak (sworn or unsworn) at trial and his counsel does not otherwise open the door, then the trial counsel cannot make any comments to the panel that suggest that they should draw a negative inference from that failure to speak.

2. If the accused remains silent at trial, the trial counsel cannot comment on that election.

a) The fact that a witness has asserted the right against self-incrimination cannot be considered as raising any inference unfavorable to either the accused or the government. M.R.E. 301(f)(1).

b) Trial counsel may not argue that the prosecution's evidence is unrebutted if the only rebuttal could come from the accused or if the members would naturally and necessarily interpret the summation as comment on the failure of the accused to testify. R.C.M. 919(b) discussion; *United States v. Paige*, 67 M.J. 442 (C.A.A.F. 2009); *United States v. Flores*, 69 M.J. 366 (C.A.A.F. 2011).

(1) To make sense of this statement, note that it applies when the defense presents its own evidence at trial. If the defense puts on some evidence, the government can generally say that the parts of its case that the defense did not respond to are unrebutted – unless the only way the defense could respond to the government's case would be for the accused to testify, and the accused elected not to testify. *United States v. Carter*, 61 M.J. 30 (C.A.A.F. 2005); *United States v. Paige*, 67 M.J. 442, 454 (C.A.A.F. 2009) (Stucky, J., dissenting).

(2) Note that even if an argument does not comment on the right to remain silent, the same comment may improperly imply that the accused has the burden of proof (see paragraph 5 below).

c) *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990). Trial counsel's use of rhetorical questions in argument which focused on "unanswered questions" was improper indirect comment on accused's failure to testify and failure to produce witnesses. These comments essentially amounted to a rhetorical cross-examination of a mute accused.

d) *United States v. Harris*, 14 M.J. 728 (A.F.C.M.R. 1982). Trial counsel's comment that case before court was "one-on-one" and that government case was uncontroverted was impermissible comment on accused's election not to testify.

e) *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009). Military judge ruled that trial counsel's comments in opening improperly referenced the accused's election of rights. The military judge issued curative instructions and polled the members. These corrective actions kept error harmless beyond a reasonable doubt.

3. If the accused does speak at trial, then the trial counsel can make certain comments.

a) Accused elects to testify on the merits.

(1) If the accused elects to testify on the merits regarding an offense charged, and during that testimony, the accused does not deny or explain specific incrimination facts introduced by the government, the trial counsel may comment on that failure to explain those facts during closing argument on the findings. R.C.M. 919(b) discussion.

(2) The "mendacious accused."

(a) If the accused elects to testify, the trial counsel may comment on the fact that the accused's merits testimony differed from the ultimate findings. Here, the accused has testified on his own behalf on the merits and then the factfinder has found him guilty contrary to that testimony. Can the trial counsel state that the accused's testimony was a lie and that he should get a greater sentence for lying?

(b) Courts have held that the answer is yes, but only as an indication of the accused's rehabilitative potential and

with a limiting instruction. Any over-emphasis by the trial counsel may be inflammatory argument. *United States v. Warren*, 13 M.J. 278 (C.M.A. 1982).

(c) The "mendacious accused" instruction is found in the Military Judge's Benchbook in paras. 2-5-23 and 2-6-1, and for capital cases at para. 8-3-38.

(d) Military judges should act with caution when giving this instruction *sua sponte* over defense objection, but to do so is not error. *United States v. Ryan*, 21 M.J. 627 (A.C.M.R. 1985)

(e) Trial counsel may should avoid language like "hasn't accepted responsibility for his actions" and "hasn't' faced up to what he did" because that comes dangerously close to improper comment on accused's exercise of fundamental rights. *United States v. Standifer*, 31 M.J. 742 (A.F.C.M.R. 1990). *See also United States v. Jenkins*, 54 M.J. 12 (C.A.A.F. 2000).

b) Accused makes an unsworn statement.

(1) If the accused elects to make an unsworn statement during the presentencing proceeding, trial counsel may comment on the *nature* of an accused's unsworn statement. Trial counsel can point out that the unsworn statement has less evidentiary value than a sworn statement but cannot ask the court to draw an adverse inference against the accused for making an unsworn rather than a sworn statement. *United States v. Breese*, 11 M.J. 17 (C.M.A. 1981). *See also United States v. Marsh*, __ M.J. __ (C.A.A.F. 2011).

4. In-court demeanor and lack of remorse.

a) If the accused elects to speak at trial, trial counsel may comment on the accused's demeanor and lack of remorse.

(1) Don't confuse this type of demeanor (in-court physical responses to questioning) with the type of demeanor (out-of-court physical responses to questioning) described in *United States v. Clark*, 69 M.J. 438 (C.A.A.F. 2011).

(2) Trial counsel may comment on the accused's lack of remorse provided the trial counsel can do so without commenting on the accused's exercise of a fundamental right. The argument must come from evidence that is before the court-martial and not arise because the accused did not do something while exercising a fundamental right. *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992). *See also United States v. Garren*, 53 M.J. 142 (C.A.A.F. 2000).

(3) The proper foundation for commenting on an accused's lack of remorse is: the accused has either testified or made an unsworn statement, and has either expressed no remorse or his expressions of remorse can be arguably construed to be shallow,

artificial, or contrived. *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992).

(4) *United States v. Toro*, 37 M.J. 313 (C.M.A. 1993). Trial counsel's comment that the accused did not "acknowledge [the] finding of guilty" in his unsworn statement was not plain error. Such argument may be a proper comment on the accused's lack of remorse.

(5) *United States v. Carroll*, 34 M.J. 843 (A.C.M.R. 1992). Demeanor of an accused who does testify is evidence.

b) However, the demeanor of non-testifying accused is not evidence.

(1) *United States v. Kirks*, 34 M.J. 646 (A.C.M.R. 1992). Trial counsel improperly referred to accused as the "iceman." Commenting on the demeanor of a non-testifying accused can violate the rules against arguing facts not in evidence, the rules against using character evidence, and the rules against commenting on a fundamental right. Defense counsel should object on all grounds.

(2) *See also United States v. Paxton*, 64 M.J. 484 (C.A.A.F. 2007) (when the accused does not testify or give an unsworn statement, a lack of remorse argument must be based on other evidence in the record); *see generally United States v. Cook*, 48 M.J. 64 (C.A.A.F. 1998).

C. Right to remain silent during the investigation.

1. Trial counsel (or a government witness) cannot comment that an accused affirmatively invoked his rights during the investigation

a) The fact that the accused during official questioning and in the exercise of rights under the Fifth Amendment or Article 31 remained silent, refused to answer certain questions, or requested counsel is inadmissible against the accused. M.R.E. 301(f)(3); *United States v. Frentz*, 21 M.J. 813 (N.M.C.M.R. 1985); *United States v. Palumbo*, 27 M.J. 565 (A.C.M.R. 1988).

2. Non-verbal communication and silence.

a) Trial counsel may not comment on pre-trial silence and physical responses to official questioning. Trial counsel may comment on out-of-court, non-verbal communication that is not in response to official questioning.

b) The primary case in this area is *United States v. Clark*, 69 M.J. 438 (C.A.A.F. 2011). Clark established this framework:

(1) Decide what type of “demeanor” is at issue. (Don’t confuse this with “in-court demeanor,” which is the response to questioning in the courtroom. That is discussed above.)

(a) “Testimonial demeanor” is essentially pre-trial silence and physical responses to official questioning. This type of “demeanor” may not be commented on.

(i) A person's failure to deny an accusation of wrongdoing concerning an offense for which at the time of the alleged failure the person was under official investigation or was in confinement, arrest, or custody does not support an inference of an admission of the truth of the accusation. M.R.E. 304(h)(3).

(ii) "A lack of response or reaction to an accusation is not 'demeanor' evidence, but a failure to speak." *United States v. Alameda*, 57 M.J. 190 (C.A.A.F. 2002). After an investigator informed the accused that he was going to be apprehended, the accused did not say anything and stared straight ahead. The investigator testified about that at trial and the trial counsel argued that this lack of response reflected his consciousness of guilt. The admission of the testimony and the argument was error. *But see United States v. Pope*, 69 M.J. 328 (C.A.A.F. 2011).

(b) "Non-testimonial demeanor" is essentially out-of-court, non-verbal communication that is not in response to official questioning. Provided this evidence is otherwise admissible, trial counsel may comment on it.

c) *See also United States v. Moran*, 65 M.J. 178 (C.A.A.F. 2007) (without deciding error, the court found that comments on the accused's invocation of rights was harmless beyond a reasonable doubt); *United States v. Flores*, 69 M.J. 366 (C.A.A.F. 2011) (commenting that an accused has not been forthcoming of her version of the facts during the investigation, when the accused does not testify, is fraught with danger); *see generally* Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little, Reassessing the Probative Value of Silence*, U. Louisville L. Rev. 21 (2008).

3. Trial counsel may not comment on the failure of the defense to call witnesses or testify at the Article 32. R.C.M. 919(b) discussion.

4. Trial counsel can comment on whether the accused makes inconsistent statements to investigators.

a) If the accused makes inconsistent statements to investigators, the trial counsel may be able to argue that those statements show that the accused has not accepted responsibility for his actions. *United States v. Garren*, 53 M.J. 142 (2000).

D. Right to silence before the investigation.

1. A defendant's silence before an arrest and rights warning does not violation the Constitution when used to impeach the defendant's testimony. *Jenkins v. Anderson*, 447 U.S. 231 (1980).

E. Comments that shift the burden of proof.

1. An improper implication that the accused carries the burden of proof on an issue of guilt violates due process. *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004).

2. Use of the words "uncontradicted," "uncontroverted," and "unrebutted."

   a) These words can improperly imply that the accused has an obligation to produce evidence and witnesses to contradict the government's case. These types of comments improperly imply that the burden has shifted to the defense. *United States v. Carter*, 61 M.J. 30, 34 (C.A.A.F. 2005).

3. Pointing out that the defense did not call witnesses or produce evidence.

   a) Counsel cannot comment on the an accused's failure to call witnesses. *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990); *United States v. Swoape*, 21 M.J. 414 (C.M.A. 1986).

   b) *United States v. Turner*, 30 M.J. 1183 (A.F.C.M.R. 1990). During argument trial counsel presented a list of facts court would have to find before the panel could find the accused innocent. This was erroneous statement that shifted the burden of proof to the accused but was not prejudicial.

4. Counsel may want to look to the framework for commenting on the right not to testify before making these types of comments. If the defense has not presented *any* evidence (similar to not speaking at trial), then the trial counsel should not make any "unrebutted evidence" comments. If the defense has put on *some* evidence (similar to speaking at trial), then the trial counsel can comment on the failure to present other evidence along with any other weaknesses in the defense case. *See generally United States v. Paige*, 67 M.J. 442 (C.A.A.F. 2009).

F. Right to counsel.

1. The fact that the accused during official questioning and in the exercise of rights under the Fifth Amendment or Article 31 remained silent, refused to answer certain questions, or requested counsel is inadmissible against the accused. M.R.E. 301(f)(3).

2. *United States v. Zaccheus*, 31 M.J. 766 (A.C.M.R. 1990). Trial counsel improperly commented on accused's invocation of right to counsel.

G. Right to plead not guilty.

1. *United States v. Jones*, 30 M.J. 898 (A.F.C.M.R. 1990). It was impermissible for trial counsel to argue that accused should not be considered for rehabilitation because he had failed to admit his responsibility by pleading not guilty. *See also United States v. Turner*, 30 M.J. 1183 (A.F.C.M.R. 1990).

H. Right to confront witnesses.

1. *United States v. Carr*, 25 M.J. 637 (A.C.M.R. 1987). Trial counsel may not argue the adverse impact flowing from the accused's exercise of his constitutional rights to confront and cross-examine witnesses against him.

2. However, it may be permissible to elicit "a brief reference to the effect of the entire proceeding (including, but not limited to, the trial) on Appellant's victim." *United States v. Stephens*, 67 M.J. 233 (C.A.A.F. 2009).

I. Defense opens the door – the "invited response" or "invited reply."

1. If the defense says in opening statement that the accused will testify or produce certain evidence or call certain witnesses, places the issue before the members, or gives a disingenuous argument, the defense opens the door to government comment. *See generally United States v. Robinson*, 485 U.S. 25 (1988).

2. *United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001). The defense counsel defense counsel brought up the issue of why an interview with investigators ended and argued that it ended because the contents of the written statement were false. In fairness, the government was allowed to argue that the accused never saw the contents of the statement to even know if the contents were false and did not sign the statement because he invoked his right to counsel. The court was still troubled by the government's repeated references to the invocation of rights.

3. *United States v. Espronceda*, 36 M.J. 535 (A.F.C.M.R. 1992). When defense counsel proffers anticipated testimony of a potential witness and then does not call that witness, the defense opens the door to a proper government response.

4. *United States v. Webb*, 38 M.J. 62 (C.M.A. 1993). Trial counsel properly commented that defense counsel did not live up to the promise he made during his opening statement to present an alibi witness.

5. *United States v. Haney*, 64 M.J. 101 (C.A.A.F. 2006). Not plain error when government commented on accused's invocation of right to silence and failure to seek counsel when those facts were introduced by the defense and integral to the defense theory.

6. *See also United States v. Carter*, 61 M.J. 30, 34 (C.A.A.F. 2005); *United States v. Lewis*, 69 M.J. 379 (C.A.A.F. 2011); *see generally United States v. Turner*, 30 M.J. 1183, 1184 (A.F.C.M.R. 1990); *Jenkins v. Anderson*, 447 U.S. 231 (1980).

J. Standard of review. *United States v. Clark*, 69 M.J. 438 (C.A.A.F. 2011).

1. Whether there has been an improper reference to the exercise of a constitutional right is a question of law that is reviewed *de novo*.

2. If the defense counsel objected at trial, the test for prejudice is harmless beyond a reasonable doubt.

3. If the defense counsel did not object at trial, apply plain error analysis. *United States v. Clark*, 69 M.J. 438 (C.A.A.F. 2011). To find plain error, the appellant must show:

a) Error;

b) The error was plain or obvious; and

c) The error material prejudiced the accused's substantial rights.

VI. Inflaming Passions Rather Than Hard But Fair Blows

A. Counsel should not make arguments that are calculated to inflame passions.

1. R.C.M. 919(b) discussion. The line between that and hard but fair blows is not always easy to see.

B. Counsel may not refer to accused or witnesses in *unduly* demeaning terms.

1. *United States v. Erickson*, 65 M.J. 221 (C.A.A.F. 2007). Trial counsel erred by comparing the accused with Hitler, Saddam Hussein, and Osama bin Laden, and described the accused as a demon belonging in hell. Defense counsel did not

object at trial, however, so the court tested for plain error under prosecutorial misconduct standards and under that high standard found no prejudice.

2. *United States v. Quarles*, 25 M.J. 761 (N.M.C.M.R. 1987). During findings argument, trial counsel characterized the accused as a prurient sex fiend and a deviant pervert. This improperly urged the members to cast aside reason and to impermissibly convict based on the accused alleged deviant character.

3. *United States v. Waldrup*, 30 M.J. 1126 (N.M.C.M.R. 1989). Portraying accused as a "despicable and disgusting" man who took advantage of the "sacred" relationship between a mother and child was improper.

4. *United States v. Barrazamartinez*, 58 M.J. 173 (C.A.A.F. 2003). The appellant pled guilty to wrongfully importing marijuana into the United States across the border from Mexico. At sentencing, the trial counsel argued that the appellant's actions were abhorrent because the United States was engaged in a war on drugs. He also argued that the appellant was "almost a traitor" because he brought drugs into the country when the nation was trying to stop drugs from coming into the country. Although the trial counsel's use of the word "traitor" was a matter of concern, it did not rise to the level of unduly inflaming the passions or prejudices of the panel members.

5. *United States v. McPhaul*, 22 M.J. 808 (A.C.M.R. 1986). Trial counsel's argument that accused was a degenerate scum and miserable human being was properly based on evidence in the record.

6. Comparing a defense witness to Hitler was improper. *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975).

C. Asking the panel to "imagine" or "Golden Rule" arguments.

1. Counsel may not ask members to place themselves in position of victim's relative when determining punishment. *United States v. Shamberger*, 1 M.J. 377 (C.M.A. 1976).

2. Counsel may not ask the panel to place themselves in the position of the victim, as in, use the word "imagine." *United States v. Baer*, 53 M.J. 235 (C.A.A.F. 2000). Trial counsel to asked the members to "imagine being [the victim] sitting there as these people are beating him," and "imagine the pain and agony . . . you can't move. You're being taped and bound almost like a mummy. Imagine as you sit there as they start binding." The court stated that such "Golden Rule arguments" are impermissible and improper. The court also warned that "trial counsel who make impermissible Golden Rule arguments and military judges who do not sustain proper objections based upon them are risking reversal." *See also United States v. McClary*, 68 M.J. 606 (C.G. Ct. Crim. App. 2010) (error to ask the panel to imagine what it would be like to have your neck squeezed while being choked). *But see United States v. Edmonds*, 36 M.J. 791 (A.C.M.R. 1993); *United States v. Melbourne*, 58 M.J. 682 (N-M. Ct. Crim. App. 2003).

3. However, counsel can ask the members to *consider* the fear and pain of the victim. *United States v. Baer*, 53 M.J. 235 (C.A.A.F. 2000).

D. Arguing that if the accused stays in the service, then the accused might cause them future, personal harm (potential future victim).

1. Counsel cannot a panel full of aviators to put themselves in an aircraft that might hypothetically be repaired in the future by the accused and then instill the fear in

them that that hypothetical aircraft would crash. *United States v. Marsh*, __ M.J. __ (C.A.A.F. 2011).

E. Arguing that an acquittal would have a negative impact on the command.

1. *United States v. Causey*, 37 M.J. 308 (C.M.A. 1993). In urinalysis case, trial counsel argued that if members accepted accused's innocent ingestion defense they would "hear it a million times again" in their units. Court held this improperly inflamed members with fear that urinalysis program would break down.

F. Appealing to personal interests of sentencing authority.

1. *United States v. Nellum*, 21 M.J. 700 (A.C.M.R. 1985). It was improper for trial counsel to ask the military judge if he wanted the accused walking the streets of the judge's neighborhood.

VII. Clearly Impermissible Argument

A. Counsel may not make racist comments.

1. Counsel should not make arguments that are calculated to inflame prejudices. R.C.M. 919(b) discussion.

2. *United States v. Lawrence*, 47 M.J. 572 (N.M. Ct. Crim. App. 1997). Trial counsel'' rebuttal argument referring to testimony by the accused and his "Jamaican brothers" was plain error and was unmistakenly pejorative, even if trial counsel did not intend to evoke racial animus.

3. *United States v. Thompson*, 37 M.J. 1023 (A.C.M.R. 1993). Trial counsel improperly argued that accused dealt drugs because of the "stereotypic view of what the good life is, Boyz in the Hood - drug dealing - sorry to say, the black male and the black population. But nevertheless, it is that look, it is that gold chain, it is that nice car that epitomizes a successful individual."

4. *United States v. Rodriguez*, 60 M.J. 87 (C.A.A.F. 2004). In a case involving a Latino accused, the prosecutor made a passing reference to a "Latin movie" during closing argument. The court declined to adopt a *per se* prejudice test for statements about race, but it did caution that improper racial comments could deny an accused a fair trial.

5. The trial counsel's use of the phrase "chilling with his boy" in describing a defense witness's association with the appellant was at the least insensitive sarcasm and could have been racist. *United States v. Walker*, 50 M.J. 749 (N-M. Ct. Crim. App. 1999).

B. Counsel may not argue a personal opinion or belief.

1. Counsel should not express a personal belief or opinion as to the truth or falsity of any testimony or evidence. R.C.M. 919(b) discussion; *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983).

a) Counsel should not phrase argument in personal terms. *United States v. Horn*, 9 M.J. 429 (C.M.A. 1980) (trial counsel's repeated use of term "I think" during argument was improper); *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005).

b) Telling the panel members that a witness testified truthfully and using the word "clearly" is not improper. *United States v. McClary*, 68 M.J. 606 (C.G. Ct. Crim. App. 2010).

c) Counsel may not express personal opinion as to guilt of accused. *United States v. Knickerbocker*, 2 M.J. 128 (C.M.A. 1977); *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005).

d) *United States v. Terlep*, 57 M.J. 344 (C.A.A.F. 2002). Appellant, charged with burglary and rape, pled to LIOs of the unlawful entry and battery. In his argument, trial counsel noted that the victim had to undergo a rape protocol kit at the hospital and suffer the feelings of being "violated" and "contaminated" on the night the appellant entered her home. In rebuttal, the trial counsel stated: "[the victim] has weathered the storm of this whole incident with dignity and with a courageous spirit to get up there and tell you what happened that night, to tell you the truth." On appeal, the court found that the trial counsel's argument did not constitute plain error. The court noted that the argument did not personally vouch for the victim's credibility in general or with respect to her allegation of rape.

2. Expression of personal opinion by defense counsel does not confer license on trial counsel to respond in kind. *United States v. Young*, 470 U.S. 1 (1985).

C. Counsel may not disparage or malign the other counsel.

1. *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005).

D. Trial counsel may not to refer to the convening authority or argue command policies.

1. R.C.M. 1001(g).

2. *United States v. Thomas*, 44 M.J. 667 (N-M. Ct. Crim. App. 1996). Trial counsel argued in drug case that "the CNO . . . has a zero tolerance policy for anyone who uses any kinds of drugs." Court found TC reference improper, and noted, "references to command or departmental policies have no place in the determination of an appropriate sentence in a trial by court-martial." Error for military judge not to give instruction even though defense counsel failed to object.

3. *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983). Military judge had *sua sponte* duty to correct counsel's improper comments on Strategic Air Command policies on drugs.

4. *United States v. Sparrow*, 33 M.J. 139 (C.M.A. 1991). It was improper for the trial counsel to mention the convening authority by name and then to tell the members to "do the right thing."

5. *United States v. Simpson*, 12 M.J. 732 (A.F.C.M.R. 1981). It was error for trial counsel to argue that referral to special court-martial was exercise of clemency by convening authority.

6. *United States v. Fortner*, 48 M.J. 882 (N-M. Ct. Crim. App. 1998). Trial counsel's reference in closing argument to Navy core values did not constitute improper reference to higher authority, as prohibited in RCM 1001(g). Such values are aspirational concepts that do not require specific punishment for failure to comply.

E. Counsel may not make misleading arguments.

1. *United States v. Cassity*, 36 M.J. 759 (N.M.C.M.R. 1992) (finding error in government's disingenuous argument for leniency as to confinement which was designed to enhance punishment by operation of the pretrial agreement). Trial counsel may not argue for a quantum of punishment greater than that court-martial may adjudge. R.C.M. 1001(g).

2. *United States v. Martinez*, 30 M.J. 1194 (A.F.C.M.R. 1990). Where the government allowed an accused to plead guilty as an aider and abettor in providing the gun to actual shooter, it could not then argue that the accused pulled the trigger.

VIII. Effect of Failure to Object to Improper Argument

A. The Waiver Rule.

1. Failure to object to improper argument constitutes waiver. *United States v. McPhaul*, 22 M.J. 808 (A.C.M.R. 1986).

a) If the defense counsel does not object, appellate courts will infer that the argument is not that offensive; if it was, the defense counsel would have objected. *See United States v. Jenkins*, 54 M.J. 12 (C.A.A.F. 2000).

b) *United States v. Kirks*, 34 M.J. 646 (A.C.M.R. 1992). Where three possible objections to argument existed and defense counsel only made one, other two were waived.

c) An objection by opposing counsel is the most appropriate response to an erroneous argument. *See United States v. Espronceda*, 36 M.J. 535 (A.F.C.M.R. 1992).

d) *United States v. Desiderio*, 30 M.J. 894 (A.F.C.M.R. 1990). Defense counsel's failure to object during trial counsel's argument constituted waiver, even though defense counsel stated in his argument, "Now I didn't say anything during [trial counsel's] argument as he stood up and talked about the impact of drug use on the mission and that kind of thing. It probably was objectionable."

2. Findings. Failure to object to improper argument before the military judge begins to instruct the members on findings shall constitute waiver of the objection. R.C.M. 919(c).

3. Sentencing. Failure to object to improper argument before the military judge begins to instruct the members on sentencing shall constitute waiver of the objection. R.C.M. 1001(g).

B. The Plain Error Exception.

1. Failure to object does not waive plain error. *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986); *United States v. Williams*, 23 M.J. 776 (A.C.M.R. 1987). *See also United States v. Young*, 470 U.S. 1 (1985).

2. In order to constitute plain error, the error must:

a) Be obvious and substantial; and

b) Have had an unfair prejudicial impact.

3. In some circumstances, prejudice is not necessary. *United States v. Thompson*, 37 M.J. 1023, (A.C.M.R. 1993). Trial counsel's racist sentencing argument was found to be plain error, despite the fact that it did not prejudice the accused's sentence.

Chapter 35

I. Introduction

Basic Procedures. RCM 1001(a)(1).

A. Matters to be presented by the government. The Trial Counsel's case in "aggravation." **RCM 1001(b)**. Counsel may present:

1. Service data relating to the accused from the charge sheet.
2. Personnel records reflecting the character of the accused's prior service.
3. Prior convictions.
4. Circumstances directly relating to or resulting from the offense(s).
5. Opinion evidence regarding past duty performance and rehabilitative potential.

B. Defense counsel presents the case in extenuation and mitigation. **RCM 1001(c)**.

C. Rebuttal and surrebuttal. **RCM 1001(d)**.

D. Additional matters. **RCM 1001(f)**.

E. Arguments. **RCM 1001(g)**.

F. Rebuttal argument at MJ's discretion. **RCM 1001(a)(1)(F)**.

Matters Presented by the Prosecution. RCM 1001(b).

G. Service data relating to the accused taken from the charge sheet. **RCM 1001(b)(1)**.

1. Name, rank and unit or organization.
2. Pay per month.
3. Current service (initial date and term).
4. Nature of restraint and date imposed.
5. Note: Personal data is ALWAYS subject to change and should be verified PRIOR to trial and announcement by the Trial Counsel in open court. Consider promotions, reductions, time-in-grade pay raises, calendar year pay changes, pretrial restraint, etc.

H. Personnel records reflecting character of prior service. **RCM 1001(b)(2).**

1. "*Under regulations of the Secretary concerned,* trial counsel may obtain and introduce from the personnel records of the accused evidence of . . . character of prior service" (emphasis added). These records may include personnel records contained in the Official Military Personnel File (OMPF) *or located elsewhere*, unless prohibited by law or other regulation. Army Regulation (AR) 27-10, para. 5-29*a* implements RCM 1001(b)(2).

2. AR 27-10, para. 5-29*a* illustrates, in a non-exclusive manner, those items qualifying for admissibility under RCM 1001(b)(2) and (d).

3. Personnel records are NOT limited to matters contained in a service member's Military Personnel Records Jacket (MPRJ), OMPF or Career Management Information File (CMIF). AR 27-10, para. 5-29*a*. The rule of *United States v. Weatherspoon*, 39 M.J. 762 (A.C.M.R. 1994) (holding that personnel records are only those records in the OMPF, MPRJ, and CMIF) is no longer good law. The key is whether the record is maintained IAW applicable departmental regulations.

a) *United States v. Davis*, 44 M.J. 13 (1996). By failing to object at trial, appellant waived any objection to the admissibility of a Discipline and Adjustment (D&A) report created and maintained by the United States Disciplinary Barracks in accordance with a local regulation. The Court of Appeals for the Armed Forces (CAAF) did *not* decide whether the report was admissible under RCM 1001(b)(2).

b) *United States v. Fontenot*, 29 M.J. 244 (C.M.A. 1989). Handwritten statements attached to appellant's DD Form 508s (Report of/or Recommendation for Disciplinary Action) made during the appellant's pretrial confinement not admissible under RCM 1001(b)(2). The miscellaneous pieces of paper that accompanied the DD 508s were not provided for in the applicable departmental regulation, AR 190-47. The Court of Military Appeals (CMA) did not decide whether the DD 508s themselves were admissible. *Id*. at 248 n.2.

c) *United States v. Ariail*, 48 M.J. 285 (1998). National Agency Questionnaire, DD Form 398-2, completed by accused and showing history of traffic offenses, was admissible under RCM 1001(b)(2), where it did not meet admission criteria under RCM 1001(b)(3) [prior conviction].

d) *United States v. Douglas, III*, 57 M.J. 270 (2002). A stipulation of fact from a prior court-martial as evidence of a prior conviction was properly admissible under RCM 1001(b)(2) *not* RCM 1001(b)(3) as part of a personnel record.

e) *United States v. Lane*, 48 M.J. 851 (A.F. Ct. Crim. App. 1998). AF Form 2098 (reflecting the current AWOL status of the accused who was tried *in absentia*) was admissible pursuant to RCM 1001(b)(2).

f) *United States v. Reyes*, 63 M.J. 265 (2006). During the sentencing phase, the trial counsel offered into evidence Prosecution Exhibit (PE) 6, which was represented to be "excerpts" from Reyes's Service Record Book. Apparently, neither the defense counsel nor the military judge checked PE 6 to make sure it was free of any defects, as it was admitted without objection. There were a variety of unrelated documents "[t]ucked between the actual excerpts" from the Service Record Book. Such documents included the entire military police investigation, the pretrial advice from the SJA, inadmissible photographs, and appellant's pretrial offer to plead guilty to charges on which the members had just acquitted appellant. The sentence was set aside and a rehearing authorized.

4. Article 15s.

a) Ordinarily, to be admissible in sentencing, the proponent must show that that the accused had opportunity to consult with counsel <u>and</u> that accused waived the right to demand trial by court-martial. *United States v. Booker*, 5 M.J. 238 (C.M.A. 1978); *United States v. Mack*, 9 M.J. 300 (C.M.A. 1980). Absent objection by defense counsel, however, Military Rule of Evidence (MRE) 103 does *not* require the military judge to affirmatively determine whether an accused had an opportunity to consult with counsel and that the accused waived the right to demand trial by court-martial before admitting a record of nonjudicial punishment (NJP) (an accused's "*Booker*" rights). Absent objection, a military judge's ruling admitting evidence is subject plain error analysis. *See United States v. Kahmann*, 59 M.J. 309, 313 (2004). *See also United States v. Dyke*, 16 M.J. 426 (C.M.A. 1983) (suggesting without holding that MRE 103 applies to

MJ's determination of admissibility of NJP records).

b) *United States v. Edwards*, 46 M.J. 41 (1997). Whether a vessel is operational affects the validity of an Article 15 for its subsequent use at a court-martial. If the vessel is not operational, for a record of prior NJP to be admissible, the accused must have had a right to consult with counsel regarding the Article 15.

c) *United States v. Dire*, 46 M.J. 804 (C.G. Ct. Crim. App. 1997). Accused was awarded Captain's Mast (NJP) for wrongful use of marijuana and lysergic acid diethylamide. He was later charged for several drug offenses, including the two that were the subject of the earlier NJP. He was convicted of several of the charged offenses, including one specification covering the same offense subject to the NJP. Defense counsel failed to object to personnel records with references to a prior NJP. That failure to object waived any objection.

d) *United States v. Rimmer*, 39 M.J. 1083 (A.C.M.R. 1994) (per curiam). Exhibit of previous misconduct containing deficiencies on its face is not qualified for admission into evidence. Record of NJP lacked any indication of accused's election concerning appeal of punishment, and imposing officer failed to check whether he conducted an open or closed hearing.

e) *United States v. Godden*, 44 M.J. 716 (A.F. Ct. Crim. App. 1996). Accused objected to the admission of a prior record of NJP based on government's failure to properly complete the form (absence of the typed signature block of the reviewing attorney and the dates the form was forwarded to other administrative offices for processing). The Air Force Court concluded that the omissions were "administrative trivia" and did not affect any procedural due process rights.

f) *United States v. Gammons*, 51 M.J. 169 (1999). The accused was court-martialed for various offenses involving the use of illegal drugs. The accused had already received an Article 15 for one of those offenses. At the outset of the trial, the trial counsel offered a record of NJP. Defense counsel had no objection and, in fact, intended to use the Article 15 themselves. The court pointed out that under Article 15(f) and *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989), the defense had a gate keeping role regarding the Article 15. If defense says the Article 15 is going to stay out, it stays out.

g) *United States v. LePage*, 59 M.J. 659 (N-M. Ct. Crim. App. 2003). Military judge erred by admitting PE 3, an NJP action which was stale by § 0141 of the JAGMAN because it predated any offenses on the charge sheet by more than two years. After noting that "plain error leaps from the pages of this record," the court determined that the MJ would not have imposed a BCD but for his consideration of the prior NJP.

h) *United States v. Cary*, 62 M.J. 277 (2006). Trial counsel introduced personal data sheet of the accused erroneously indicating that the accused had received one prior Article 15. Without an objection from defense counsel, CAAF proceeded under a plain error standard. Although there may have been error and it may have been plain, the accused's rights were not materially prejudiced.

5. Letters of Reprimand.

a) *United States v. Zakaria*, 38 M.J. 280 (C.M.A. 1993). Applying MRE

403, the court held that the MJ erred in admitting LOR given the accused for sexual misconduct with his teenage stepdaughter and other teenage girls where accused was convicted of larceny of property of a value less than $100.00. "[The reprimand's] probative value as to his military character was significantly reduced because of its obvious reliability problems. In addition, it is difficult to imagine more damaging sentencing evidence to a soon-to-be sentenced thief than also brandishing him a sexual deviant or molester of teenage girls." *Id*. at 283.

b) *United States v. Williams*, 47 M.J. 142 (1997). Pursuant to a pretrial agreement, the prosecution withdrew a previously referred additional charge and specification alleging similar misconduct to original charge. The accused's commander then issued a memorandum of reprimand for the same misconduct as contained in the withdrawn charge. The CAAF held lack of objection at trial constituted waiver absent plain error, and found none "given the other evidence presented in aggravation." Court notes matter in letter of reprimand became uncharged misconduct on basis of mutual agreement, *i.e.*, pretrial agreement, and does not address the propriety of trying to "back door" evidence of uncharged misconduct.

c) *United States v. Clemente*, 50 M.J. 36 (1999). Two letters of reprimand in accused's personnel file properly admitted pursuant to RCM 1001(b)(2), even though letters were for conduct dissimilar to charged offenses. The CAAF noted there was no defense challenge to the accuracy, completeness or proper maintenance of the letters, and the evidence directly rebutted defense evidence. The court applied an abuse of discretion standard and held that the LORs were personnel records that did reflect past behavior and performance, and MRE 403 was not abused.

6. Caveats.

a) No "rule of completeness." Trial counsel cannot be compelled to present favorable portions of personnel records if unfavorable portions have been introduced in aggravation. *See* analysis to RCM 1001(b)(2).

b) RCM 1001(b)(2) cannot be used as a "backdoor means" of admitting otherwise inadmissible evidence. *United States v. Delaney*, 27 M.J. 501 (A.C.M.R. 1988) (observing that government cannot use enlistment document (e.g., enlistment contract) to back door inadmissible prior arrests; cannot then use police report to rebut accused's attempted explanations of arrests). *Compare with Ariail*, 48 M.J. 285 (1998) (holding that information on NAQ that had information on prior convictions was admissible under RCM 1001(b)(2)).

c) *United States v. Vasquez*, 54 M.J. 303 (2001). Plea-bargaining statements are not admissible (MRE 410) even if those statements relate to offenses that are not pending before the court-martial at which they are offered. It was error for the judge to admit into evidence a request for an administrative discharge in lieu of trial by court-martial. *See also United States v. Anderson*, 55 M.J. 182 (2001).

7. Defects in documentary evidence.

a) *United States v. Donohue*, 30 M.J. 734 (A.F.C.M.R. 1990). Government introduced document that did not comply with AF Reg. requiring <u>evidence on the document or attached thereto</u> that accused received a copy and had an opportunity to respond. ISSUE: May Government cure the defect with testimony

that accused did receive a copy and was offered an opportunity to respond? "The short answer is no." Why – because the applicable AF Reg. required evidence on the document itself. Absent a specific regulatory requirement such as that in *Donahue*, live testimony could cure a documentary/procedural defect. *See also, United States v. Kahmann*, 58 M.J. 667 (N-M. Ct. Crim. App. 2003), *aff'd*, 59 M.J. 309 (2004) *supra*.

b) MJ must apply MRE 403 to RCM 1001(b)(2) evidence. *See United States v. Zengel*, 32 M.J. 642 (C.G.C.M.R. 1991) (suppressing a prior "arrest" that was documented in the accused's personnel records). *See also United States v. Stone*, 37 M.J. 558 (A.C.M.R. 1993); and *United States v. Zakaria*, 38 M.J. 280 (C.M.A. 1993).

II. Prior Convictions - Civilian And Military. RCM 1001(b)(3).

1. There is a "conviction" in a court-martial case when a sentence has been adjudged. RCM 1001(b)(3)(A). **2002 Amendment to RCM 1001(b)(3)(A):** "In a civilian case, a 'conviction' includes any disposition following an initial judicial determination or assumption of guilt, such as when guilt has been established by guilty plea, trial, or **plea of nolo contendere**, regardless of the subsequent disposition, sentencing procedure, or final judgment. However, a 'civilian conviction' does not include a diversion from the judicial process without a finding or admission of guilt; expunged convictions; juvenile adjudications; minor traffic violations; foreign convictions; tribal court convictions; or convictions reversed, vacated, invalidated or pardoned because of errors of law or because of subsequently discovered evidence exonerating the accused."

a) *United States v. Caniete*, 28 M.J. 426 (C.M.A. 1989). Convictions obtained between date of offense for which accused was on trial and date of trial were "prior convictions" per RCM 1001(b)(3)(A).

b) Juvenile adjudications are not convictions within the meaning of RCM 1001(b)(3) and are therefore inadmissible in aggravation. *United States v. Slovacek*, 24 M.J. 140 (C.M.A. 1987).

2. Use of prior conviction.

a) *United States v. Tillar*, 48 M.J. 541 (A.F. Ct. Crim. App. 1998). At sentencing, trial counsel offered evidence of 18-year-old special court-martial conviction for larceny of property of value less than $100.00. MJ allowed evidence, but instructed panel not to increase sentence solely on basis of prior conviction. The Air Force Court upheld admission of the conviction, noting only time limitation is whether such evidence is unfairly prejudicial (MRE 403).

b) Military judge must apply the MRE 403 balancing test. *United States v. Glover*, 53 M.J. 366 (2000).

c) *United States v. White*, 47 M.J. 139 (1997). Accused who testified during sentencing about prior bad check convictions waived issue of proper form of admission of such prior convictions under RCM 1001(b)(3). TC offered in aggravation four warrants for bad checks that indicated plea in civilian court of "*nolo*" by accused. Accused then testified she had paid the required fines for the offenses shown on the warrants. There was also no indication by the defense that accused would not have testified to such information if the MJ had sustained the original defense objection to the warrants when offered by the TC.

d) *United States v. Cantrell*, 44 M.J. 711 (A.F. Ct. Crim. App. 1996). "The proper use of a prior conviction . . . is limited to the basic sentencing equation. Evidence is admissible in sentencing either because it shows the nature and effects of the crime(s) or it illumines the background and character of the offender." *Id*. at 714.

3. Pendency of appeal. RCM 1001(b)(3)(B).

a) Conviction is still admissible.

b) Pendency of appeal is admissible as a matter of weight to be accorded the conviction.

c) Conviction by **summary court-martial or special court-martial without a military judge** is not admissible until review under UCMJ Article 64 or 66 is complete.

4. Authentication under Section IX of MRE required.

5. "MCM provides only for consideration of *prior convictions*, and not of *any* prior criminal record in sentencing." *United States v. Delaney*, 27 M.J. 501 (A.C.M.R. 1988).

6. Methods of proof.

a) DA Form 2-2 (Insert Sheet to DA Form 2-1, Record of Court Martial Convictions).

b) DD Form 493 (Extract of Military Records of Previous Convictions).

c) Promulgating order (an order is not required for a SCM (RCM 1114(a)(3))).

d) Record of trial. DD Form 490 (Record of Trial) or 491 (Summarized Record of Trial) for special and general courts-martial and DD Form 2329 for SCM.

e) Arraignment calendar.

f) State agency records. *United States v. Eady*, 35 M.J. 15 (C.M.A. 1992). Proof of conviction in form of letter from police department and by indictment and offer to plead guilty not prohibited under the MRE.

g) Use of personnel records of the accused. *United States v. Barnes*, 33 M.J. 468 (C.M.A. 1992). Government may use Department of Defense Form 1966/3 to prove accused's prior conviction IAW:

(1) MRE 803(6), records of regularly conducted activity; or

(2) MRE 801(d)(2), admission by party opponent.

7. Other considerations

a) So long as only relevant portions are used and the probative value outweighs the prejudicial effect. United States v. Wright, 20 M.J. 518 (A.C.M.R. 1985).

b) A trial judge may, in his discretion, allow both parties to present evidence that explains a previous conviction, including the stipulation of fact from the record of trial of the accused's prior court-martial. United States v. Nellum, 24 M.J. 693 (A.C.M.R. 1987).

c) United States v. Kelly, 45 M.J. 259 (1996) (holding that it was improper for court-martial to consider SCM conviction on sentencing when there was no evidence accused was ever advised of the right to consult with counsel or to be represented by counsel at his SCM).

d) United States v. Prophete, 29 M.J. 925 (A.F.C.M.R. 1989). Properly authenticated computer print-out of calendar (reflecting guilty plea by accused) can provide proof of a civilian conviction for purposes of RCM 1001(b)(3)(A).

e) United States v. Mahaney, 33 M.J. 846 (A.C.M.R. 1991). Civilian conviction is not self-authenticating because not under seal.

B. Aggravation Evidence. **RCM 1001(b)(4).** A military judge has broad discretion in determining whether to admit evidence under 1001(b)(4). *United States v. Rust*, 41 M.J. 472, 478 (1995); *United States v. Wilson*, 47 M.J. 152, 155 (1997); *United States v. Gogas*, 58 M.J. 96 (2003).

1. ". . . [E]vidence as to any aggravating circumstances *directly relating to or resulting from* the offenses of which the accused has been found guilty" (emphasis added). See *United States v. Hardison*, 64 M.J. 279 (2007)

2. Three components – "Evidence in aggravation includes, but is not limited to":

a) Victim-Impact: "[E]vidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of the offense committed by the accused."

b) Mission-Impact: "[E]vidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense."

c) Hate-Crime Evidence: "[E]vidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."

3. *United States v. Nourse*, 55 M.J. 229 (C.A.A.F. 2001). The CAAF held that it was permissible to admit evidence of other uncharged larcenies of property from the same victim by the accused because such evidence "directly related to the charged offenses as part of a continuing scheme to steal from the . . . [victim]." This evidence showed the "full impact of appellant's crimes" upon the victim. *See also United States v. Shupe*, 36 M.J. 431 (C.M.A. 1993); *United States v. Mullens*, 29 M.J. 398 (C.M.A. 1990).

4. *United States v. Patterson*, 54 M.J. 74 (C.A.A.F. 2000). Testimony by government expert regarding patterns of pedophiles, to include "grooming" of victims, admissible where the expert did not expressly testify that the accused was a pedophile. *Compare with United States v. McElhaney*, 54 M.J. 120 (2000) (holding that the military judge erred when he allowed a child psychiatrist to testify about future dangerousness).

5. *United States v. Maynard*, 66 M.J. 242 (C.A.A.F. 2008). Absent defense objection, the court will apply the plain error test to determine if a military judge erred in admitting aggravation evidence.

6. *United States v. Anderson*, 60 M.J. 548 (A.F. Ct. Crim. App. 2004). The court affirmed the MJ's decision to permit the TC to introduce portions of a Senate report detailing its findings related to child pornography (appellant convicted of various offenses related to child pornography). The excerpt specifically addressed the impact of

child pornography on the children involved, particularly the physical and psychological harm they experience. The court observed that the children depicted are victims for RCM 1001(b)(4) purposes and the information in the report was sufficiently direct to qualify for admission as impact evidence under the same rule. "The increased predictable risk that child pornography victims may develop psychological or behavioral problems is precisely the kind of information the sentencing authority needs to fulfill" its function of discerning a proper sentence.

7. *United States v. Sittingbear*, 54 M.J. 737 (N-M. Ct. Crim. App. 2001). Victim's testimony that she sustained a rectal tear during a rape is admissible even where a sodomy charge had been withdrawn and dismissed.

8. *United States v. Cameron*, 54 M.J. 618 (A.F. Ct. Crim. App. 2000). Uncharged false statements about charged offenses, as a general rule, are not proper evidence in aggravation. *But see United States v. Driver*, 57 M.J. 760 (N-M. Ct. Crim. App. 2002). False official statement to NCIS agent relating to conspiracy to commit arson and arson charge admissible in aggravation despite appellant's acquittal of the Article 107 offense provided: there is sufficient evidence that the act (i.e., false official statement occurred); the MJ properly does an MRE 403 balancing; and the sentencing authority is fully aware of the acquittal on the charged offense.

9. *United States v. Alis*, 47 M.J. 817 (A.F. Ct. Crim. App. 1998). Accused's awareness of magnitude of crime, and remorseless attitude toward offenses, is admissible in sentencing.

10. *United States v. Sanchez*, 47 M.J. 794 (N-M. Ct. Crim. App. 1998). Victim's testimony about assault, extent of injuries suffered, hospitalization, and general adverse effects of assault admissible against accused found guilty of misprision of offense. TC also offered pictures of wounds and record of medical treatment of victim. Navy-Marine Court noted this evidence in aggravation under RCM 1001(b)(4) did not *result from* misprision conviction, but did *directly relate* to the offense and was therefore admissible.

11. *United States v. Wilson*, 47 M.J. 152 (1997). Accused convicted of disrespect for commenting to another party that, "Captain Power, that f_____g b____h is out to get me." Officer testified at sentencing to "concern" statement caused her. The CAAF held that the testimony was properly admissible.

12. *United States v. Jones*, 44 M.J. 103 (1996). HIV-positive accused charged with aggravated assault and adultery; convicted only of latter in judge alone trial and sentenced to the maximum punishment. In imposing his sentence, the MJ criticized the accused's "disregard for the health and safety of an unknown victim and this purposeful conduct committed immediately after being made aware of the circumstances . . . ." The CAAF held medical condition was a fact directly related to the offense under RCM 1001(b)(4) and essential to understanding the circumstances surrounding the offense.

13. *United States v. Zimmerman*, 43 M.J. 782 (Army Ct. Crim. App. 1996). Evidence that accused was motivated by white supremacist views when he wrongfully disposed of military munitions to what he believed was a white supremacist group constituted aggravating circumstances directly related to the offense.

14. *United States v. Gargaro*, 45 M.J. 99 (1996). Evidence that civilian drug dealer triggered the investigation when he was arrested with an AK-47 that he said he obtained from a Fort Bragg soldier showed the extent of the conspiracy and the responsibility of the accused's commander. Any unfair prejudice stemming from the fact that the weapon was found in the hands of a drug dealer was outweighed by the probative value showing

the facts and circumstances surrounding the investigation of the charged offenses.

15. *United States v. Hollingsworth*, 44 M.J. 688 (C.G. Ct. Crim. App. 1996). Testimony of child victim to offense which was the basis of a withdrawn specification admissible when it showed extent of scheme with evidence of other transactions. Also, testimony of expert child psychologist that sexual abuse victim's recovery was affected or hindered by the pendency of legal proceedings admissible where defense raised factors affecting a victim's recovery rate and expert's testimony provided a "more complete" explanation of the victim's prognosis.

16. *United States v. Scott*, 42 M.J. 457 (1995). Initial findings to involuntary manslaughter and assault with a dangerous weapon set aside (accused fired into a crowd). On appeal, the charge that remained was carrying a concealed weapon. Evidence of death and injuries showed circumstances "directly related to or resulting from" the accused's carrying of a concealed weapon.

17. *United States v. Terlep*, 57 M.J. 344 (2002). Appellant, initially charged with burglary and rape, plead to unlawful entry and assault. On sentencing, victim testified she awoke from what she thought was a "sex dream" only to discover the appellant on top of her. She testified, in part, that "when I told him to get off of me, he had to take his private part out of me and get off. . . ." She also testified "He admitted—he said what he had done. He said, 'I raped you.'" The CAAF found that the victim's testimony did not constitute error. The court noted that although the appellant entered into a pretrial agreement to lesser offenses, the victim could testify to "her complete version of the truth, as she saw it" limited only by the terms of the pretrial agreement and stipulation of fact. Neither the pretrial agreement nor the stipulation of fact limited the evidence the government could present on sentencing. The court noted that "absent an express provision in the pretrial agreement or some applicable rule of evidence or procedure barring such evidence, this important victim impact evidence was properly admitted." RCM 1001(b)(4) provides for "accuracy in the sentencing process by permitting the judge to fully appreciate the true plight of the victim in each case."

18. *United States v. Marchand*, 56 M.J. 630 (C.G. Ct. Crim. App. 2001). Expert testimony describing impact of child pornography upon minors depicted in images admissible notwithstanding that expert did not establish that the particular victims in the images viewed by accused actually suffered any adverse impact, only that there was an increased risk to sexually abused minors generally of developing complications from abuse.

19. *United States v. Smith*, 56 M.J. 653 (Army Ct. Crim. App. 2001). Unwarned testimony by appellant to U.S.D.B. Custody Reclassification Board where appellant said "'it's an inmates duty to try and escape, especially long-termers" and that he is "'an escape risk and always will be'" admissible on aggravation.

20. *United States v. Gogas*, 58 M.J. 96 (2003). Letter from accused to his Congressman complaining about being prosecuted for LSD use admissible under 1001(b)(4) as directly related to the offense of drug use. The letter highlighted the appellant's "indifference to anything other than his own pleasure." The court did not rule on whether the evidence was also admissible on the issue of rehabilitative potential.

21. *United States v. Dezotell*, 58 M.J. 517 (N-M. Ct. Crim. App. 2003). Witness' testimony that appellant's unauthorized absence and missing movement adversely affected ship's mission and efficiency during a period of heightened responsibilities proper testimony despite the fact that the appellant, at the time, was not working for the

witness and the witness' testimony was not subject "to precise measurement or quantification." All that is required is a "direct logical connection or relation between the offense and the evidence offered."

22. *United States v. Pertelle*, No. 9700689 (Army Ct. Crim. App., Jun. 30, 1998) (unpub.). Testimony of accused's company commander that he intended to publicize results of court-martial in company did not constitute proper evidence in aggravation. Such evidence related only to prospective application of sentence, and did not "directly relate to or result from the accused's offense."

23. *United States v. Powell*, 45 M.J. 637 (N.M. Ct. Crim. App. 1997), *aff'd*, 49 M.J. 360 (1998). Uncharged misconduct that accused lost government property, was financially irresponsible, and passed worthless checks was **not** directly related to offenses of which convicted - *i.e*., failure to report to work on time and travel and housing allowance fraud - and therefore not admissible at sentencing under RCM 1001(b)(4). The court also noted that "MRE 404(b) does not determine the admissibility of evidence of uncharged misconduct during sentencing . . . admissibility of such evidence is determined solely by RCM 1001(b)(4) . . . ." *Id*. at 640.

24. *United States v. Rust*, 41 M.J. 472 (1995). Prejudicial error to admit suicide note in aggravation phase of physician's trial for dereliction of duty and false official statement. The murder-suicide was too attenuated *even if* the government could establish link between accused's conduct and murder-suicide, and clearly failed MRE 403's balancing test.

25. *United States v. Davis*, 39 M.J. 281 (C.M.A. 1994). Victim's testimony as to how he would feel if the accused received no punishment not admissible as evidence of impact evidence under RCM 1001(b)(4) or as evidence regarding accused's rehabilitative potential under RCM 1001(b)(5).

26. *United States v. Lowe*, 56 M.J. 914 (N-M. Ct. Crim. App. 2002). During the sentencing phase of trial, the MJ relaxed the rules of evidence for defense admitting DE A, a letter from a Navy psychologist which assessed appellant, concluding "'in my professional opinion, he does not present a serious threat to society.'" In rebuttal, the MJ admitted over defense objection PE 3, a seventeen-page incident report with twenty-eight pages of attached statements alleging that appellant harassed and assaulted various women, only one of whom was the victim of an offense for which appellant was convicted. The MJ also admitted the evidence as aggravation evidence. Held – admission of PE 3 by the MJ was an abuse of discretion since the evidence did not directly relate to or result from the offenses. It involved different victims and did not involve a continuing course of conduct with the same victim. The court also found that despite the MJ's relaxation of the rules of evidence, the introduction of PE 3 was not proper rebuttal evidence. "Inadmissible aggravation evidence cannot be introduced through the rebuttal 'backdoor' after the military judge relaxed the rules of evidence for sentencing." *Id*. at 917. Specific instances of conduct are admissible on cross-examination to test an opinion, however, extrinsic evidence as to the specific instances is not.

27. *United States v. Pope*, 63 M.J. 68 (2006). Air Force recruiters who received training at "Recruiter Technical School" received a letter signed by the Commander of the Air Force Recruiting Service, stating that if they failed to treat applicants respectfully and professionally, they "should not be surprised when, once you are caught, harsh adverse action follows." During the sentencing phase of appellant's trial, the military judge allowed the Government to admit the letter in aggravation, over defense objection. The sentence was set aside and a rehearing on sentence was authorized. The CAAF

reviews a military judge's decision to admit evidence on sentencing for a clear abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (2004). In the present case, CAAF was not convinced beyond reasonable doubt that the members were not influenced by the letter.

28. *United States v. Bungert*, 62 M.J. 346 (2006). After appellant's misdeeds of drug use and distribution were discovered, he offered to identify other drug users with whom he worked in exchange for "a deal." Appellant implicated eleven individuals, and in doing so, launched an extensive investigation by the Coast Guard Investigative Service that uncovered no evidence. During presentencing, two witnesses testified primarily about the nature and scope of the investigation brought about as a result of Appellant's allegations. Defense counsel made no objection. Applying a plain error standard, CAAF found that Appellant offered no evidence that he was prejudiced in any substantial way by the testimony of the Government's sentencing witnesses.

29. *United States v. Hardison*, 64 M.J. 279 (2007). The military judge committed plain error in admitting evidence of Appellant's pre-service drug use and a service waiver for that drug use. Admissible evidence in aggravation must be "directly related" to the convicted crime.

30. *United States v. Palomares*, 2007 WL 2405293 (N-M. Ct. Crim. App. 2007) (unpublished): While serving in Afghanistan and engaged in combat operations, accused purchased and used valium. During sentencing, the CO talked about the nature of the unit's combat operations, how the accused's and other's use complicated relief in place and required a unit urinalysis and search upon redeployment. No defense objection. Even though the accused was not the only Marine who used Valium, his offense had an unnecessary and harmful impact on the mission, discipline, and efficiency.

31. *United States v. Chapman*, 2007 WL 2059743 (NMCCA 2006) (unpublished): In missing movement case, sentencing witness allowed to testify about: (1) how accused's absence caused another Marine to deploy with little notice and one year ahead of scheduled deployment, and (2) injuries witness received on deployment. Military judge did not abuse his discretion because he limited his consideration of the injury testimony to the nature of the environment to which the accused was suppose to go and the type of danger. Military judge also performed MRE 403 balancing.

32. *United States v. McKeague*, 2007 WL 2791701 (AFCCA 2007) (unpublished): No error when judicial notice taken that fatigue is a withdrawal symptom of methamphetamine. Supervisor testified, without objection, about how the accused was observed sleeping seven times in a two- person shop, thereby increasing the workload. It was a reasonable inference that Accused's chronic sleepiness was caused by unlawful drug use.

C. Opinion evidence regarding past duty performance and rehabilitative potential. **RCM 1001(b)(5).**

1. What does "rehabilitative potential" mean?

a) The term "rehabilitative potential" means potential to be restored to "a useful and constructive place in *society*." **RCM 1001(b)(5).**

b) *United States v. Williams*, 41 M.J. 134 (C.M.A. 1994). Psychiatric expert's prediction of future dangerousness was proper matter for consideration in sentencing under rule providing for admission of evidence of accused's potential for rehabilitation under RCM 1001(b)(5).

c) *United States v. Davis*, 39 M.J. 281 (C.M.A. 1994). Victim's testimony as to how he would feel if the accused received no punishment was not admissible as evidence of accused's rehabilitative potential under RCM 1001(b)(5).

2. Foundation for opinion testimony. **RCM 1001(b)(5)(B).**

a) The witness must possess sufficient information and knowledge about the accused's "character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offenses" in order to offer a "helpful," rationally based opinion. **RCM 1001(b)(5)(B)**, codifying *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989).

b) *United States v. Powell*, 49 M.J. 460 (1998). In laying a foundation for opinion evidence of an accused's rehabilitative potential, a witness may not refer to specific acts.

c) Quality of the opinion depends on the foundation. *United States v. Boughton*, 16 M.J. 649 (A.F.C.M.R. 1983). Opinions expressed should be based on personal observation, but may also be based on reports and other information provided by subordinates.

d) *United States v. Sylvester*, 38 M.J. 720 (A.C.M.R. 1994). Opinion evidence regarding rehabilitative potential is not *per se* inadmissible merely because defense counsel establishes on cross-examination that witness's assessment goes only to potential for military service. Once proper foundation for opinion has been established, such cross examination goes to weight to be given evidence, not to its admissibility.

e) *United States v. McElhaney*, 54 M.J. 120 (2000). Error for the military judge to allow testimony of psychiatrist regarding future dangerousness of the accused as related to pedophilia, where witness had not examined the accused or reviewed his records, and had testified that he was unable to diagnose the accused as a pedophile. *Compare with United States v. Patterson*, 54 M.J. 74 (2000).

3. What's a proper basis of opinion testimony? **RCM 1001(b)(5)(C).**

a) Opinion evidence of rehabilitative potential may *not* be based solely on the severity of the offense; must be based upon relevant information and knowledge possessed by the witness of the accused's personal circumstances. RCM 1001(b)(5)(C); *United States v. Horner*, 22 M.J. 294 (C.M.A. 1986).

b) *United States v. Armon*, 51 M.J. 83 (1999). Accused wrongfully wore SF tab, SF combat patch, CIB, and combat parachutist badge. COL answered negatively the question, "based upon what you've seen of the accused, if you were jumping into combat tomorrow, would you want him around?" COL did not know accused and was not familiar with his service record. The CAAF held testimony may have violated 1001(b)(5) but was not plain error and would be permissible in this context (to show the detrimental effect this misconduct had on other soldiers) under 1001(b)(4).

4. What's the proper scope of opinion testimony? **RCM 1001(b)(5)(D).**

a) The scope "is limited to whether the accused has rehabilitative potential and to the magnitude or quality of any such potential. A witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the

accused should be returned to the accused's unit." RCM 1001(b)(5)(D).

b) It is improper for a witness to use a euphemism for a punitive discharge in commenting on an accused's rehabilitative potential. *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989).

(1) *United States v. Aurich*, 31 M.J. 95 (C.M.A. 1990). The commander's opinion that he does not want the accused back in his unit "proves absolutely nothing."

(2) *United States v. Yerich*, 47 M.J. 615 (Army Ct. Crim. App. 1997). Senior NCO testified that he could "form [an opinion] as to his military rehabilitation," and that accused did not have any such rehabilitative potential. The Army Court noted difficulty of grappling with claimed "euphemisms." Whether the words used by a witness constitute a euphemism depends on the circumstantial context. The court also noted that a noncommissioned officer is normally incapable of exerting improper command influence over an officer panel.

(3) *United States v. Warner*, 59 M.J. 590 (C.G. Ct. Crim. App. 2003). On cross-examination of appellant's supervisor (whom the defense called to establish that the appellant had rehabilitation potential), the government asked the witness about the appellant's rehabilitative potential "*in the Coast Guard*, given his drug abuse." The government's questions were improper because they linked the witness' opinion on rehabilitative potential with award of a punitive discharge.

(4) "There can be a thin line between an opinion that an accused should be returned to duty and the expression of an opinion regarding the appropriateness of a punitive discharge. Obviously, an accused cannot return to serve in his unit if he receives a punitive discharge. But an explicit declaration that an accused should not receive a punitive discharge or that any such discharge should be of a certain severity is disallowed for the defense not because of RCM 1001(b)(5)(D), but because such evidence invades the province of the member to decide alone on punishment." *United States v. Griggs*, 61 M.J. 402, 409 (C.A.A.F. 2005). *But see United States v. Eslinger*, 70 M.J. 193 (C.A.A.F. 2011)(finding no error (3-2 decision) when defense witnesses said the accused should stay in the Army, the government did not object, and the government's rebuttal witnesses said the accused should not stay in the Army).

5. Same rules may apply to the defense? "The mirror image might reasonably be that an opinion that an accused could 'continue to serve and contribute to the United States Army' simply is a euphemism for, 'I do not believe you should give him a punitive discharge.'" *United States v. Ramos*, 42 M.J. 392, 396 (1995).

a) *United States v. Hoyt*, No. ACM 33145, 2000 CCA LEXIS 180 (A.F. Ct. Crim. App. July 5, 2000), *pet. denied*, 54 M.J. 365 (2000), held that defense witnesses cannot comment on the inappropriateness of a punitive discharge. *But see United States v. Bish*, 54 M.J. 860 (A.F. Ct. Crim. App. 2001) (noting that since the rule prohibiting euphemism falls under prosecution evidence (RCM 1001(b)(5)(D)), "it does not appear to prohibit the defense from offering evidence that a member of the accused's unit wants him back."

b) *United States v. Griggs*, 61 M.J. 402 (2005). Appellant tried and convicted of various drug-related offenses. On sentencing, the DC offered six letters with opinions on to appellant's rehabilitative potential in the Air Force rather than as a productive member of society. The TC objected on the grounds that the statements were recommendations for retention and would confuse the members. The military judge ordered the disputed language redacted. The AFCCA held that the MJ did not abuse his discretion by ordering the redaction and, even if he did, the error was harmless (i.e., there was no prejudice to the appellant). The court cited confusion in this area of law as to whether such evidence is proper from the *accused* as a basis for its conclusion. The court also noted that the DC conceded that RCM 1001(b)(5) applied to the defense letters. CAAF granted review and concluded "the better view is that R.C.M. 1001(b)(5)(D) does not apply to defense mitigation evidence, and specifically does not preclude evidence that a witness would willingly serve with the accused again." However, CAAF further restated, as in *Aurich*, "if an accused 'opens the door' by bringing witnesses before the court to testify that they want him or her backing the unit, the Government is permitted to prove that that is not a consensus view of the command." 31 M.J. at 96-97.

c) *United States v. Hill*, 62 M.J. 271 (2006). During the defense sentencing case, the appellant's battalion commander was called to testify about his rehabilitative potential. Before a military judge alone, he testified that he did not think he could come back to the unit as a physician's assistant. He further testified, "[i]f I was sitting in that panel over there as a juror would I allow him [Appellant] to remain in the Army? No-." The military judge promptly stated that the battalion commander's remarks were "not responsive" and consisted of testimony "that a witness is not allowed to make." However, following trial during a "Bridge the Gap" session, the military judge commented, "I was thinking of keeping him until his commander said he didn't want him back," or words to that effect. The CAAF determined from the record that the military judge was referring to back as a "physician's assistant" as opposed to "back in the Army."

6. Specific acts? RCM 1001(b)(5)(E) and (F).

a) On direct, government may not introduce specific acts of uncharged misconduct that form the basis of the opinion. See *United States v. Rhoads*, 32 M.J. 114 (C.M.A. 1991).

b) If the defense opens the door during cross-examination, on redirect the trial counsel should also be able to address specific incidents of conduct. *United States v. Clarke*, 29 M.J. 582 (A.F.C.M.R. 1989). See also *United States v. Gregory*, 31 M.J. 236 (C.M.A. 1990) (RCM 1001(b)(5) witness cannot testify about specific instance of misconduct as basis for opinion until cross-examined on specific good acts).

7. Future Dangerousness.

a) *United States v. Williams*, 41 M.J. 134 (C.M.A. 1994). Psychiatric expert's prediction of future dangerousness was proper matter for consideration in sentencing under rule providing for admission of evidence of accused's potential for rehabilitation under RCM 1001(b)(5).

b) *United States v. Scott*, 51 M.J. 326 (1999). During the presentencing

phase of trial, the government offered an expert to testify about the accused's future dangerousness. Defense objected to the witness on the basis that the witness had never interviewed his client so he lacked an adequate basis to form an opinion. The judge overruled the objection. Defense's failure to object at trial that there was a violation of the accused's Fifth and Sixth Amendment rights at trial forfeited those objections, absent plain error. Although there was no evidence to indicate that the government witness had examined the full sanity report regarding the accused, the court concluded there was no plain error in this case where the doctor testified that based on the twenty offenses the accused had committed in the last two years, he was likely to re-offend.

c) *United States v. George*, 52 M.J. 259 (2000). A social worker testified that the "accused's prognosis for rehabilitation was 'guarded' and 'questionable.'" The CAAF noted that evidence of future dangerousness is a proper matter under RCM 1001(b)(5).

8. Rebuttal Witnesses. *United States v. Pompey*, 33 M.J. 266 (C.M.A. 1991). The *Ohrt/Horner* rules apply to government rebuttal witnesses to keep unlawful command influence out of the sentencing proceedings (a rational basis for expressing opinion is still required). *But see United States v. Aurich*, 32 M.J. 95 (C.M.A. 1990) (observing that where defense witnesses testify they want accused back in unit, the government may prove that that is not a consensus of the command).

9. Absence of rehabilitative potential is a factor for consideration in determining a proper sentence; that absence is NOT a matter in aggravation. *United States v. Loving*, 41 M.J. 213 (C.M.A. 1994), *aff'd*, 517 U.S. 748 (1996). MJ's characterization of accused's disciplinary record and his company commander's testimony about accused's duty performance as aggravating circumstances was error since lack of rehabilitative potential is not an aggravating circumstance.

D. Matters admitted into evidence during findings. **RCM 1001(f)**.

1. **RCM 1001(f)(2).** The court-martial may consider any evidence properly introduced on the merits before findings, including evidence of other offenses or acts of misconduct even if introduced for a limited purpose.

2. Statements from providence inquiry.

a) *United States v. Figura*, 44 M.J. 308 (1996). There is no demonstrative right way to introduce evidence from the providence inquiry, but MJ should permit parties to choose method of presentation.

b) *United States v. English*, 37 M.J. 1107 (N.M.C.M.R. 1993). MJ does not have authority to consider statements of accused made during providence inquiry, absent offering of statements, and defense opportunity to object to consideration of any or all of providence inquiry.

c) *United States v. Irwin*, 39 M.J. 1062 (A.C.M.R. 1994). The accused must be given notice of what matters are going to be considered and an opportunity to object to all or part of the providence inquiry. Tapes of the inquiry are admissible.

d) *United States v. Holt*, 27 M.J. 57 (C.M.A. 1988). Sworn testimony given by the accused during providence inquiry may be received as admission at sentencing hearing.

e) How to do it: authenticated copy of trial transcript, witness, tapes. *See*

United States v. Irwin, 42 M.J. 479 (1995). Admissibility of various portions of providence inquiry should be analyzed in same manner as any other piece of evidence offered by the government under RCM 1001.

E. "Aggravation evidence" in stipulations of fact.

1. *United States v. Glazier*, 26 M.J. 268 (C.M.A. 1988).

a) Inadmissible evidence may be stipulated to (subject to RCM 811(b) "interests of justice" and no government overreaching).

b) Stipulation should be unequivocal that all parties agree stipulation is "admissible."

2. *United States v. DeYoung*, 29 M.J. 78 (C.M.A. 1989). Military judge must affirmatively rule on defense objections, even if the stipulation states that the contents are admissible. Parties cannot usurp the MJ's role.

3. *United States v. Vargas*, 29 M.J. 968 (A.C.M.R. 1990). The stipulated facts constitute uncharged misconduct not closely related to the facts alleged; therefore, they were "generally" inadmissible. BUT, the accused agreed to permit their use in return for favorable sentence limits, and there was no evidence of government overreaching.

F. Three-step process for analyzing sentencing matter presented by the prosecution per RCM 1001(b):

1. Does the evidence fit one of the enumerated categories of RCM 1001(b)?

a) Evidence inadmissible under one theory (e.g., prior conviction under 1001(b)(4)) may be admissible under another theory (e.g., personnel record under 1001(b)(2)). *See e.g.*, *United States v. Ariail*, 48 M.J. 285 (1998); *United States v. Douglas*, 57 M.J. 270 (2002); *United States v. Gogas*, 58 M.J. 96 (2003).

2. Is the evidence in an admissible form? *United States v. Bolden*, 34 M.J. 728 (N.M.C.M.R. 1991).

3. Is the probative value substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence? MRE 403. *See United States v. Zengel*, 32 M.J. 642 (C.G.C.M.R. 1991); *United States v. Martin*, 20 M.J. 227 (C.M.A. 1985).

III. The Case in Extenuation and Mitigation. RCM 1001(c).

A. Matters in extenuation. **RCM 1001(c)(1)(A).**

1. Explains circumstances surrounding commission of the offense, including those reasons that do not constitute a legal justification or excuse.

2. *United States v. Loya*, 49 M.J. 104 (1998). Evidence of quality of medical care was relevant evidence in extenuation and mitigation for an accused convicted of negligent killing, inasmuch as such evidence might reduce the appellant's blame.

B. Matters in mitigation. **RCM 1001(c)(1)(B).**

1. Personal factors concerning the accused introduced to lessen the punishment; *e.g.*, evidence of the accused's reputation or record in the service for efficiency, fidelity, temperance, courage, etc.

2. *United States v. Demerse*, 37 M.J. 488 (C.M.A. 1993). Counsel should pay

particular attention to awards and decorations based on combat service.

3. *United States v. Perry*, 48 M.J. 197 (1998). The CAAF upheld military judge's decision not to instruct panel that accused stood to be found liable for $80,000 recoupment by USNA of accused's education expenses, when separated from service prior to completion of five year commitment due to misconduct, as too collateral in this case.

4. *United States v. Simmons*, 48 M.J. 193 (1998). The military judge's prohibition on the accused from offering evidence of a civilian court sentence for the same offenses that were the basis of his court-martial was error. Civilian conviction and sentence for same misconduct may be aggravating or mitigating, but defense counsel is in the best position to decide.

5. *United States v. Bray*, 49 M.J. 300 (1998). Proper mitigation evidence under RCM 1001(c) included the possibility that the accused suffered a psychotic reaction as a result of insecticide poisoning. Such evidence might lessen the adjudged sentence, and is therefore relevant.

6. Retirement benefits.

a) *United States v. Washington*, 55 M.J. 441 (2001). At time of trial, accused was a senior airman (E-4) who could retire during her current enlistment. The military judge excluded defense evidence that estimated the accused's retirement pay if she retired after twenty years in the pay grades of E-4 and E-3. The military judge erred by refusing to admit a summary of expected lost retirement of approximately $240,000.00 if accused was awarded a punitive discharge.

b) *United States v. Boyd*, 55 M.J. 217 (2001). The military judge declined to give a requested defense instruction on the loss of retirement benefits that could result from a punitive discharge. The accused had fifteen and a half years active service. The court held that there was no error in this case, but stated "we will require military judges in all cases tried after the date of this opinion (10 July 2001) to instruct on the impact of a punitive discharge on retirement benefits, if there is an evidentiary predicate for the instruction and a party requests it."

c) *United States v. Luster*, 55 M.J. 67 (2001). The military judge erred when she prevented defense from introducing evidence that would show the financial impact of lost retirement resulting from a punitive discharge. The accused had eighteen years and three months of active service. The court cautioned against using the time left until retirement as the basis for deciding whether such evidence should be admitted. The probability of retirement was not remote and the financial loss was substantial. *Compare with United States v. Henderson*, 29 M.J. 221 (C.M.A. 1989). The military judge correctly denied defense introduction of financial impact data about accused's loss of retirement benefits if reduced in rank or discharged (accused was 3+ years and a reenlistment away from retirement eligibility). "[T]he impact upon appellant's retirement benefits was not 'a direct and proximate consequence' of the bad-conduct discharge."

d) *United States v. Becker*, 46 M.J. 141 (1997). The MJ erred when he refused to allow accused with 19 years and 8-1/2 months active duty service at time of court-martial to present evidence in mitigation of loss in retired pay if discharged. "The relevance of evidence of potential loss of retirement benefits

depends upon the facts and circumstances of the individual accused's case."

e) *United States v. Greaves*, 46 M.J. 133 (1997). The military judge should give some instructions when the panel asks for direction in important area of retirement benefits. Accused was nine weeks away from retirement eligibility and did not have to reenlist.

f) *United States v. Sumrall*, 45 M.J. 207 (1996). The CAAF recognized right of retirement-eligible accused to introduce evidence that punitive discharge will deny retirement benefits, and with proper foundation, evidence of potential dollar amount subject to loss.

g) *United States v. Polk*, 47 M.J. 116 (1997). No Fifth Amendment due process violation where Master Sergeant lost substantial retired pay as result of bad-conduct discharge. Accused with twenty-three years of service proffered no other evidence of loss of retirement benefits, but in unsworn statement addressed loss if discharged. DC multiplied half of base pay times thirty years to argue severe penalty.

C. Statement by the accused. **RCM 1001(c)(2).**

1. Sworn statement. RCM 1001(c)(2)(B).

a) Subject to cross-examination by trial counsel, military judge, and members.

b) Rebuttable by:

(1) Opinion and reputation evidence of character for untruthfulness. RCM 608(a).

(2) Evidence of bias, prejudice, or any motive to misrepresent. RCM 608(c).

(3) Extrinsic evidence of prior inconsistent statements. RCM 613.

2. Unsworn statement by accused. **RCM 1001(c)(2)(C).**

a) May be oral, written, or both.

b) May be made by accused, counsel, or both.

c) Matters covered in unsworn statement.

(1) *United States v. Grill*, 48 M.J. 131 (1998). The right of an accused to make a statement in allocution is not wholly unfettered, but must be evaluated in the context of statements in specific cases. It was error to sustain the government's objection to the accused making any reference to his co-conspirators being treated more leniently by civilian jurisdictions (*i.e.*, not prosecuted, deported, probation). "The mere fact that a statement in allocution might contain matter that would be inadmissible if offered as sworn testimony does not, by itself, provide a basis for constraining the right of allocution."

(2) *United States v. Jeffery*, 48 M.J. 229 (1998). An accused's rights in allocution are broad, but not wholly unconstrained. The mere fact, however, that an unsworn statement might contain otherwise inadmissible evidence – *e.g.*, the possibility of receiving an administrative rather than punitive discharge – does not render it

inadmissible.

(3) *United States v. Britt*, 48 M.J. 233 (1998). There are some limits on an accused's right of allocution, but "comments that address options to a punitive separation from the service . . . are not outside the pale." Error for the military judge to redact portion of the accused's unsworn statement telling panel that commander intended to discharge him administratively if no punitive discharge imposed by court-martial.

(4) *United States v. Tschip*, 58 M.J. 275 (2003). Appellant, in his unsworn, told the panel "I know my commander can discharge me even if I do not receive a bad conduct discharge today." The military judge advised the panel that an unsworn was an authorized means of conveying information; they were to give the appellant's comments regarding an administrative discharge the consideration they believed it was due, to include none; administrative discharge information is generally not admissible at trial; and they were free to disregard any reference to the appellants comment made by counsel. The court held that the instruction was appropriate because the judge placed the appellant's comments "in context" for the decision makers. The court noted that the instruction was proper in light of appellant's "unfocused, incidental reference to an administrative discharge." The court left for another day whether it would be proper if the unsworn was specific and focused.

(5) *United States v. Sowell*, 62 M.J. 150 (2005). A military judge's decision to restrict an accused's sentencing statement is reviewed for abuse of discretion. In following *United States v. Grill*, 48 M.J. 132, although the right of allocution is "*generally* considered unrestricted," it is not "*wholly* unrestricted." However, CAAF distinguished this case, citing the Government's argument on findings opened the door to proper rebuttal during Appellant's unsworn statement on sentencing. The Court focused on the fact that trial counsel was aware of FC3 Elliott's acquittal the previous week. Her references to FC3 Elliott as a co-conspirator, implying criminal liability, during her findings argument indicated that FC3 Elliott was guilty of the same offense as Appellant, and therefore had a motive to lie.

(6) *United States v. Johnson*, 62 M.J. 31 (2005). Prior to trial, Appellant took a privately administered polygraph examination arranged by the defense. The examiner concluded that appellant was not deceptive when he denied knowing that he transported marijuana. During the sentencing hearing he sought to refer to his "exculpatory" polygraph test during his unsworn statement. The military judge ruled that the test results were inadmissible. The CAAF found that polygraph evidence squarely implicates its own admonition against impeaching or relitigating the verdict on sentencing. Furthermore, the court was not persuaded that exculpatory polygraph information qualifies as extenuation, mitigation, or rebuttal under R.C.M. 1001(c).

(7) *United States v. Barrier*, 61 M.J. 482 (2005). The military judge did not err when, over defense objection, he gave the "Friedmann" instruction. During appellant's unsworn statement, the military judge

called the panel members' attention to the sentence received in an unrelated similar case. The military judge gave an instruction which essentially told the panel members that that part of the accused's unsworn statement was irrelevant and that they should not consider it in determining an appropriate sentence.

(8) When the accused makes an unsworn statement, he does not become a witness:

(9) Not subject to cross-examination. *See United States v. Grady*, 30 M.J. 911 (A.C.M.R. 1990) (noting that it was improper for MJ to question the unsworn accused).

(10) *United States v. Martinsmith*, 42 M.J. 343 (1995). No prejudicial error where MJ did not permit accused in unsworn statement to respond to member's question concerning whereabouts of money which accused admitted stealing. Further, the judge did not abuse discretion in denying defense request at that point to reopen its case, to introduce a "sworn statement" of the accused.

(11) *United States v. Satterley*, 55 M.J. 168 (2001). Defense counsel requested to reopen the defense case to answer a court member's question via an unsworn statement by the accused. The military judge denied the request but stated he would allow the defense to work out a stipulation of fact, or allow the accused to testify under oath. The court concluded that the military judge did NOT abuse his discretion in refusing to allow accused to make an additional, unsworn statement. The court did note, however, that "there may be other circumstances beyond legitimate surrebuttal which may warrant an additional unsworn statement . . . . Nevertheless, whether such circumstances exist in a particular case is a matter properly imparted to the sound discretion of the trial judge."

(12) *United States v. Adame*, 57 M.J. 812 (N-M. Ct. Crim. App. 2003). Error for military judge to conduct extensive inquiry regarding accused's desire for a punitive discharge in his unsworn where inquiry got into attorney-client communications. The court described the MJ's inquiry as "invasive," however, found no prejudice.

d) *United States v. Friedmann*, 53 M.J. 800 (A.F. Ct. Crim. App. 2000), *pet. denied*, 54 M.J. 425 (2001). Proper for military judge to provide sentencing instruction to clarify for the members comments made in the accused's unsworn statement.

3. The defense may **not** present evidence or argument that challenges or re-litigates the prior guilty findings of the court. *United States v. Teeter*, 16 M.J. 68 (C.M.A. 1983).

4. If accused made an unsworn statement, government may only rebut statements of fact.

a) *United States v. Manns*, 54 M.J. 164 (2000). "I have tried throughout my life, even during childhood, to stay within the laws and regulations of this country," was held to be a statement of fact and could be rebutted by evidence of the accused's admission to marijuana use.

b) *United States v. Willis*, 43 M.J. 889 (A.F. Ct. Crim. App. 1996), *aff'd*, 46

M.J. 258 (1997). Government allowed to rebut accused's expression of remorse with inconsistent statements made previously by accused on psychological questionnaire and audio tape of telephone message to brother of victim.

c) *United States v. Cleveland*, 29 M.J. 361 (C.M.A. 1990). "Although I have not been perfect, I feel that I have served well and would like an opportunity to remain in the service. . . ." The court determined that the statement was more in the nature of an opinion, "indeed, an argument;" therefore, not subject to rebuttal.

d) *United States v. Thomas*, 36 M.J. 638 (A.C.M.R. 1992). Accused's unsworn statement commented on his upbringing, pregnant girlfriend, reasons for enlisting in the Army, and the extenuating circumstances surrounding his offenses. The accused also apologized to the Army and the victim. The court held that it was improper rebuttal to have the 1SG testify that the accused was not truthful since character for truthfulness was not at issue.

5. Relaxed rules of evidence. **RCM 1001(c)(3)**. *United States v. Saferite*, 59 M.J. 270. The rules of evidence apply at sentencing, but the MJ may relax the rules of evidence. A relaxation of the rules, however, goes more toward whether evidence is reliable and authentic; otherwise inadmissible evidence is still not admitted (citing *United States v. Boone*, 49 M.J. 187, 198 n.14 (1998)). *See also United States v. Steward*, 55 M.J. 630 (N-M. Ct. Crim. App. 2001) (observing that relaxed rules of evidence is not limited to only documentary evidence).

D. Right to a "Complete Sentencing Proceeding." *United States v. Libecap*, 57 M.J. 611 (C.G. Ct. Crim. App. 2002) [*Libecap I*]. On appeal, the appellant argued that a term of his pretrial agreement that required him to request a punitive discharge was both a violation of RCM 705 and contrary to public policy. The court agreed, setting aside the sentence and authorizing a rehearing on sentence. The court found that the provision violated RCM 705(c)(1)(B) because "as a practical matter, it deprived the accused of a complete sentencing proceeding." The court also found that the provision was contrary to public policy.

E. Mental Impairment. *United States v. Doss*, 57 M.J. 182 (2002). Noting that defense counsel was ineffective for failing to present "extant" psychological evidence.

F. Rebuttal. **RCM 1001(d)**. Government rebuttal evidence must actually "explain, repel, counteract or disprove the evidence introduced by the opposing party." *United States v. Wirth*, 18 M.J. 214, 218 (C.M.A. 1984).

1. *United States v. Hursey*, 55 M.J. 34 (C.A.A.F. 2001). The military judge abused his discretion when he admitted the testimony of NCOIC of the base Military Justice Division to testify that the accused was late for his court-martial as rebuttal to defense evidence of the accused's dependability at work (where NCOIC unable to say whether the accused was at fault or whether his being late was unavoidable). Testimony had little probative value, was potentially misleading, and time wasting.

2. *United States v. Reveles*, 41 M.J. 388 (C.A.A.F. 1994). Accused is not entitled to present his sentencing case free from the chilling effect of legitimate government evidence (if DC introduces too much evidence of the accused's life then military judge might allow government to introduce victim life video).

3. *United States v. Edwards*, 39 M.J. 528 (A.F.C.M.R. 1994). Air Force Regulation 111-1 prohibits admission of records of NJP at courts-martial if the record is over five years old as of the date the charges were referred. Accordingly, admission of a five year-

old NJP was error, even though it properly rebutted matter submitted by the defense.

4. *United States v. Dudding*, 37 M.J. 429 (C.M.A. 1993). A Licensed Clinical Social Worker (LCSW) testified that accused was good candidate for group therapy and recommended eighteen months of group treatment. A government witness, from USDB, testified that accused would be exposed to more treatment groups if sentenced to ten years versus five years. The defense interposed no objection. The court held not plain error.

5. *United States v. Roth*, 52 M.J. 187 (C.A.A.F. 1999). The defense sought to call a witness to testify that there was no gang problem in the housing area discussed by the CID agent. The witness had been in the courtroom during the testimony of the CID agent. The judge held that the defense had violated the sequestration rule and refused to let the witness testify. The CAAF held that the military judge abused her discretion. The court noted that the ultimate sanction of excluding a witness should ordinarily be used to punish intentional or willful disobedience of a military judge's sequestration order.

6. *Horner* and *Ohrt* apply to government rebuttal witnesses. *See United States v. Pompey*, 32 M.J. 547 (A.F.C.M.R. 1990). The basic foundational requirements from those cases govern rebuttal witnesses who are testifying about rehabilitation potential; RCM 1001(b)(5) does not expressly apply. *United States v. Griggs*, 61 M.J. 402 (C.A.A.F. 2005); United *States v. Eslinger*, 70 M.J. 193 (C.A.A.F. 2011).

7. When to allow rebuttal? *United States v. Tilly*, 44 M.J. 851 (N-M. Ct. Crim. App. 1996). The military judge began to deliberate on sentence, then granted trial counsel motion to reopen sentencing to allow rebuttal with newly-discovered evidence. The court found that the beginning of the judge's deliberation was not a bar to reopening the taking of evidence for rebuttal.

8. *United States v. Henson*, 58 M.J. 529 (Army Ct. Crim. App. 2003). During the presentencing case, the defense presented good military character evidence which the government rebutted by offering extrinsic evidence of bad acts: evidence of the wrongful taking and pawning of a microwave; evidence of racially insensitive acts by appellant in the barracks; evidence of substandard performance and appearance; evidence of uniform violations; and evidence of an unkempt room. The military judge abused his discretion when, over defense's objection, he allowed extrinsic evidence to rebut the good character and reputation evidence presented by the defense. The Army Court found, however, that the error did not prejudice a material right of the appellant especially in light of the clemency recommendation made by the military judge and the convening authority's following that recommendation. The court did, however, reduce the appellant's period of confinement by one month to "moot any claim of possible prejudice." *Id*. at 533.

9. *United States v. Saferite*, 59 M.J. 270 (C.A.A.F. 2004). The appellant was charged and convicted of various offenses including larceny, and faced over 230 years confinement. After arraignment but before trial, the appellant escaped from confinement and was tried *in absentia*. The defense called the appellant's spouse to talk about him as a husband and father. In rebuttal, the government offered two sworn statements that implied that the appellant's spouse was complicit in the appellant's escape, an escape already known to the panel and for which the military judge gave an instruction on sentencing that the appellant was NOT to be sentenced for the escape. The government offered the two statements to show the witness' bias. The court held that the judge abused his discretion, under MRE 403, in admitting the statements. The court found that the government's theory of complicity was "tenuous at best" and the government improperly focused its argument on the two statements and the spouse's alleged complicity in the

escape.

10. *United States v. Bridges*, 66 M.J. 246 (C.A.A.F. 2008). Under Article 59(a) UCMJ an error of law regarding the sentence does not provide a basis for relief unless the error materially prejudiced the substantial rights of the accused.

G. Surrebuttal. **RCM 1001(d)**. *United States v. Provost*, 32 M.J. 98 (C.M.A. 1991). After government rebuttal to accused's first unsworn statement, accused was entitled to make a second unsworn statement. *But see United States v. Satterley*, 55 M.J. 168 (2001).

H. Witnesses. **RCM 1001(e)**.

1. Who must the government bring?

a) *United States v. Mitchell*, 41 M.J. 512 (A.C.M.R. 1994). The military judge did not err by denying accused's request for Chief of Chaplains as character witness. While acknowledging accused's right to present material testimony, court upheld judge's exercise of discretion in determining the form of presentation. Proffered government stipulation of fact detailed the witness's background, strong opinions favoring the accused, and the government's refusal to fund the witness's travel.

b) *United States v. Briscoe*, 56 M.J. 903 (A.F. Ct. Crim. App. 2002). The appellant alleged the military judge erred by not ordering the government to produce the appellant's father as a sentencing witness. The court held that there was no evidence of "extraordinary circumstances" that required the production of a live witness; therefore, the military judge's ruling, in light of the government's offer to enter into a stipulation of fact, was not an abuse of discretion.

IV. Argument. RCM 1001(g).

A. See the "Arguments" Outline for a discussion of proper and improper sentencing arguments.

V. Permissible Punishments. RCM 1003.

A. Reprimand. **RCM 1003(b)(1).** "A court-martial shall not specify the terms or wording of a reprimand. A reprimand, if approved, shall be issued, in writing, by the convening authority [CA]." The reprimand, when issued, is placed in the CA's action.

B. Forfeiture of pay and allowances. **RCM 1003(b)(2).**

1. Adjudged Forfeitures. At a general court-martial (GCM), the court may adjudge forfeiture of ALL pay and allowances (a.k.a., "total forfeitures"). At a special court-martial (SPCM), the court may adjudge forfeiture of 2/3 pay only. Allowances at a special court-martial are NOT subject to forfeiture.

2. Automatic Forfeitures (**Art. 58b, UCMJ**). Confined soldiers from GCMs shall, subject to conditions below, forfeit all pay and allowances due them during confinement or parole. Soldiers confined as a result of SPCMs, subject to conditions below, shall forfeit 2/3 pay during confinement. Sentences covered are those which include:

a) Confinement of MORE THAN 6 months, or death, or

b) ANY confinement **AND** a punitive discharge.

3. Art. 58b, UCMJ, waiver. If an accused has dependents, the convening authority may ***waive*** any/all AUTOMATIC (i.e., Art. 58b, UCMJ) forfeitures for a period not to exceed six (6) months, with money waived to be paid to the dependents of the accused.

Adjudged forfeitures may NOT be waived. See also, RCM 1101(d).

4. Effective date of forfeitures (**Art. 57(a), UCMJ**). ANY forfeiture of pay or allowances (or *adjudged* reduction) in a court-martial sentence takes effect on the earlier of:

a) fourteen (14) days after sentencing, or

b) the date on which the CA approves the sentence.

5. Deferment of forfeitures. On application of accused, CA may ***defer*** forfeiture (and reduction and confinement) until approval of sentence; but CA may rescind such deferral at any time. Deferment ceases automatically at action, unless sooner rescinded. Rescission prior to action entitles accused to minimal due process. See RCM 1101(c).

6. *United States v. Short*, 48 M.J. 892 (A.F. Ct. Crim. App. 1998). The court finds ineffective assistance of counsel when DC failed to make timely request for deferment or waiver of automatic forfeitures, notwithstanding recommendation of military judge that convening authority waive such forfeitures. Defense counsel relied on SJA office to process action for deferment and waiver.

7. *United States v. Clemente*, 46 M.J. 715, 719 (A.F. Ct. Crim. App. 1997). The CA has broad discretion in deciding to waive forfeitures, and need not explain his decision to an accused. Unlike a request for deferment of confinement, an accused does not have standing to challenge the CA's decision as to waiver of forfeitures.

8. *United States v. Zimmer*, 56 M.J. 869 (Army 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. Court set aside four months of confinement and the adjudged forfeitures.

9. *United States v. Dewald*, 39 M.J. 901 (A.C.M.R. 1994). Forfeitures may not exceed two-thirds pay per month during periods of a sentence when an accused is not in confinement. Accordingly, during periods that adjudged confinement is suspended, forfeitures are limited to two-thirds pay per month. *See* RCM 1107(d)(2), discussion.

10. Partial forfeitures. Unless total forfeitures are adjudged (i.e., forfeiture of ALL pay and allowances), partial forfeitures MUST be stated in whole dollar amounts for a specific number of months and the number of months the forfeitures will last. RCM 1003(b)(2).

11. Forfeitures are calculated at reduced pay grade WHETHER suspended or not. *United States v. Esposito*, 57 M.J. 608 (C.G. Ct. Crim. App. 2002). *See also* RCM 1003(b)(2).

12. *United States v. Stewart*, 62 M.J. 291 (2006). Where a sentence to forfeiture of all pay and allowances is adjudged, such sentence shall run until such time as the servicemember is discharged or returns to a duty status, whichever comes first, unless the sentencing authority expressly provides for partial forfeitures post-confinement.

C. Fine. RCM 1003(b)(3).

1. *United States v. Tualla*, 52 M.J. 228 (2000). A special court-martial is not precluded from imposing a sentence that includes both a fine and forfeitures as long as the combined fine and forfeitures do not exceed the maximum two-thirds forfeitures that can be adjudged at a special court-martial. A 2002 amendment to RCM 1003(b)(3) reflects this holding.

2. *United States v. Williams*, 18 M.J. 186 (C.M.A. 1984). Other than limits on cruel and unusual punishment, there are no limits on the amount of fine. Provision that fines are "normally for unjust enrichment" is directory rather than mandatory. Unless there is some evidence the accused was aware that a fine could be imposed, a fine cannot be imposed in a guilty plea case.

3. *United States v. Morales-Santana*, 32 M.J. 557 (A.C.M.R. 1990). "Because a fine was not specifically mentioned in the pretrial agreement and the military judge failed to advise the accused that a fine might be imposed, the accused may have entered a plea of guilty while under a misconception as to the punishment he might receive." The court disapproved the fine.

4. *United States v. Motsinger*, 34 M.J. 255 (C.M.A. 1992). The military judge's failure to mention fine in oral instructions did not preclude court-martial from imposing fine, where sentence worksheet submitted to court members with agreement of counsel addressed the issue.

5. *United States v. Smith*, 44 M.J. 720 (Army Ct. Crim. App. 1996). Accused pled guilty to kidnapping, rape and felony murder of child. Sentenced by MJ to DD, confinement for life, total forfeitures, reduction to E-1, and fine of $100,000.00. The military judge included a fine enforcement provision as follows: "In the event the fine has not been paid by the time the accused is considered for parole, sometime in the next century, that the accused be further confined for 50 years, beginning on that date, or until the fine is paid, or until he dies, whichever comes first." The Army Court found fine permissible punishment, but found the fine enforcement provision not "legal, appropriate and adequate." Fine enforcement provision void as matter of public policy, so court approved sentence, including fine, but without enforcement provision.

6. *United States v. Phillips*, 64 M.J. 410 (2007). Accused found guilty of various charges and was sentenced to a reprimand, 5 years, dismissal, and $400,000 fine. The military judge included a contingent confinement provision that if the fine was not paid, Phillips would serve an additional 5 year confinement. The Convening Authority reduced the fine to $300,000 and suspended for 24 months execution of the sentence adjudging a fine in excess of $200,000. Upon Phillips failure to pay the fine, the commanding general ordered a fine enforcement hearing. After the hearing, Phillips was ordered to serve an additional 5 years for willful failure to pay the unsuspended fine. CAAF held that the CG who executed the contingent confinement provision was authorized to do so and he was not required to consider alternatives to contingent confinement after concluding that Phillips was not indigent. Fine is due on the date that the Convening Authority takes action on the sentence.

D. Reduction in grade. RCM 1003(b)(4); UCMJ art. 58a.

1. "Unless otherwise provided in regulations to be prescribed by the Secretary concerned, a court-martial sentence of an enlisted member in a pay grade above E-1, as approved by the convening authority, that includes

a) a dishonorable or bad conduct discharge;

b) confinement; or

c) hard labor without confinement,

(1) reduces that member to pay grade E-1."

2. ARMY. The automatic reduction to pay grade E-1 mandated by Article 58a applies only to enlisted soldiers with an approved sentence, whether or not suspended,

that includes EITHER a punitive discharge OR confinement of more than 180 days (if adjudged in days) or six months (if adjudged in months). AR 27-10, para. 5-29*e*.

3. NAVY. The Navy and Marine Corps' implementing regulation provides for automatic reduction to the grade of E-1 when sentence, whether suspended or not, includes EITHER a punitive discharge OR confinement in excess of ninety days or three months. JAGMAN, 0152c(1).

4. AIR FORCE. Requires, as part of the approved sentence, a reduction AND either confinement, a punitive discharge, or hard labor without confinement before an airman is "automatically reduced" HOWEVER only reduced to the grade approved as part of the adjudged sentence (i.e., there is no automatic reduction to the grade of E-1). AFI 151-201, para. 9.10 (26 Nov 03).

5. COAST GUARD. As a matter of policy does NOT permit an automatic reduction. Military Justice Manual, Commandant Instruction M5810.1D, Chapter 4, Para. 4.E.1.

a) *United States v. Combs*, 47 M.J. 330 (1997). Punishment to reduction in rank, when unlawfully imposed, warrants sentence relief. The accused's court-martial sentence included reduction to the grade of E-1, but was subsequently set aside. Pending rehearing on sentence, the accused's chain of command ordered that he wear E-1 rank on his uniform and that he get a new identification card showing his grade as E-1. The court awarded the accused twenty months sentence credit, equal to the period of time he was ordered to wear reduced rank pending a rehearing.

b) Rank of retiree, in Army, may not be reduced by court-martial, or by operation of law. *United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992).

E. Restriction. **RCM 1003(b)(5)**. No more than 2 months; confinement and restriction may be adjudged in the same case but together may not exceed maximum authorized confinement (where 1 month confinement equals 2 months restriction).

F. Hard labor without confinement. **RCM 1003(b)(6)**. No more than 3 months; confinement and hard labor may be adjudged in the same case but together may not exceed maximum authorized confinement (where 1 month confinement equals 1.5 months hard labor w/o confinement); enlisted members only; court-martial does not prescribe the hard labor to be performed.

G. Confinement. **RCM 1003(b)(7)**.

1. FY98 DOD Authorization Act created new U.C.M.J. Article 56a, creating new sentence of "confinement for life without eligibility for parole." Applicable to any offense occurring after 18 Nov 97 that carries possible punishment of life. *United States v. Ronghi*, 60 M.J. 83 (2004) (holding that confinement for life without eligibility for parole was authorized punishment for accused who committed premeditated murder on January 13, 2000, which was before the President amended the MCM to incorporate Executive Order dated April 11, 2002). Sentence subject to modification only by the convening authority, or the military appellate courts, the President, or the Supreme Court.

2. *United States v. Andrade*, 32 M.J. 520 (A.C.M.R. 1990). Consecutive and concurrent sentences ("life plus five years") have never been part of military law.

3. Instruction on *Allen* Credit. *United States v. Balboa*, 33 M.J. 304 (C.M.A. 1991). Proper for military judge to instruct panel that accused would get sixty-eight days *Allen* credit. Panel adjudged a BCD, confinement for twelve months *and sixty-eight days*.

4. Contingent Confinement. *United States v. Palmer*, 59 M.J. 362 (2004). Appellant convicted of larceny of government property valued in excess of $100,000 and was sentenced to a BCD, thirty months confinement, total forfeitures, reduction to E-1, a $30,000 fine, and an additional twelve months confinement if the fine was not paid. The court held that the evidence sported a finding of "no indigency," that the appellant was afforded the process due under RCM 1113, and that the appellant's "untimely unilateral efforts to make partial payments" after the time for said payments expired did not create any obligation on the part of the CA to accept the payment or amend his action remitting the outstanding balance of the fine and ordering the appellant into confinement.

H. Punitive Separation. **RCM 1003(b)(8)**.

1. Dismissal.

a) Applies to commissioned officers and warrant officers who have been commissioned. *United States v. Carbo*, 37 M.J. 523 (A.C.M.R. 1993).

2. DD is available to non-commissioned warrant officers or enlisted.

3. BCD is available <u>only</u> to enlisted.

I. Death. RCM 1003(b)(9).

1. Death may be adjudged in accordance with RCM 1004 (mechanics, aggravating factors, votes). *Loving v. United States*, 517 U.S. 748 (1996).

2. Specifically authorized for thirteen different offenses, including aiding the enemy, espionage, murder, and rape.

3. Requires the concurrence of all the members as to: (1) findings on the merits of capital offense, (2) existence of at least one aggravating factor under RCM 1004(c), (3) extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances, including aggravating factors, and (4) sentence of death.

4. *Loving v. Hart*, 47 M.J. 438, 444 (1998). In denying extraordinary writ to set aside death penalty, the CAAF held "that the aggravating factor in RCM 1004(c)(8) – that appellant was the 'actual perpetrator of the killing' – is constitutionally valid on its face, provided that it is understood to be limited to a person who kills intentionally or acts with reckless indifference to human life."

5. *United States v. Simoy*, 50 M.J. 1 (1998). Lower court approved sentence of death where accused convicted of felony murder, notwithstanding accused did not actually commit murder. On appeal, the CAAF set aside the sentence and ordered a rehearing because the military judge committed plain error in advising the panel to vote on death before life. On rehearing, accused sentenced to DD, life, and reduction to E-1. *United States v. Simoy, ACM 30496, 2000 CCA LEXIS 183 (unpub. op, July 7, 2000).*

6. Panel Membership. UCMJ art. 25a. For offenses committed after 31 December 2002 – no less than twelve members for a death sentence. "In a case in which the accused may be sentenced to a penalty of death, the number of members shall be not less than 12, unless 12 members are not reasonably available because of physical conditions or military exigencies, in which case the convening authority shall specify a lesser number of members not less than five, and the court may be assembled and the trial held with not less than the number of members so specified. In such a case, the convening authority shall make a detailed written statement, to be appended to the record, stating why a greater number of members were not reasonably available."

J. Maximum Punishment. *See* Manual for Courts-Martial, Appendix 12.

1. Generally – lesser of jurisdiction of court or punishment in Part IV.

2. Offenses not listed in the Table of Maximum Punishments.

a) Included or related offenses.

b) United States Code.

3. Habitual offenders. **RCM 1003(d).**

a) Three or more convictions within one year – DD, TF, one year confinement.

b) Two or more convictions within three years – BCD, TF, three months confinement.

c) Two or more offenses which carry total authorized confinement of 6 months automatically authorizes BCD and TF.

K. Article 133 punishment. *United States v. Hart*, 32 M.J. 101 (C.M.A. 1991). In mega-article 133 specification, the maximum possible punishment is the largest maximum punishment for any offense included in the mega-specification.

L. Prior NJP for same offense.

1. *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989). Accused must be given credit for prior Article 15 punishment for same offense: day for day, dollar for dollar, and stripe for stripe.

2. *United States v. Redlinski*, 56 M.J. 508 (C.G. Ct .Crim. App. 2001), *rev'd on other grounds*, 58 M.J. 177 (C.A.A.F. 2003). Explaining how credit can be "administrative"/confinement credit applied to the approved sentence, or can be "judicial"/punishment credit applied to the adjudged sentence.

3. *United States v. Edwards*, 42 M.J. 381 (1995). When accused has received NJP for same offense, the military judge may, on defense request, give *Pierce* credit, obviating need for CA to do so.

4. *United States v. Flynn*, 39 M.J. 774 (A.C.M.R. 1994). When military judge is the sentencing authority, he is to announce the sentence and then state on the record the specific credit given for prior nonjudicial punishment in arriving at the sentence.

5. *United States v. Zamberlan*, 45 M.J. 491 (1997). Accused tested positive for THC, causing commander to vacate suspended Art. 15 punishment and also to prefer court-martial charge. Defense counsel requested instruction to panel that they must consider punishment already imposed by virtue of vacation action taken by commander with regard to suspended Art. 15 punishment. The court noted, "vacation of a suspension of nonjudicial punishment is not itself nonjudicial punishment."

6. *United States v. Bracey*, 56 M.J. 387 (2002). Appellant convicted at a special court-martial of, among other offenses, disrespect to a superior commissioned officer and was sentenced to forfeiture of $630.00 pay per month for six months, reduction to E-1, confinement for six months and a BCD. Appellant argued, for the first time on appeal, that the disobedience handled at the Article 15 and the disrespect charge arose out of the same incident thus entitling him to *Pierce* credit. The CAAF held that the appellant was not entitled to *Pierce* credit since the offenses in question resulted from separate and distinct incidents despite their occurrence close in time and involving the same officer (i.e. victim). *See also United States v. Anastacio*, 56 M.J. 830 (C.G. Ct. Crim. App. 2002).

7. *United States v. Minyen*, 57 M.J. 804 (C.G. Ct. Crim. App. 2002). The appellant was convicted of unauthorized absence and missing movement; sentenced to eighty days confinement and a bad conduct discharge. One of the two unauthorized absence specifications was for a four and a half month absence for which the accused previously received nonjudicial punishment, specifically thirty days restriction, thirty days extra duty, and reduction to E-1. At trial, the military judge awarded the appellant thirty-three days of *Allen* credit (pretrial confinement credit) and thirty days of *Pierce* credit (prior nonjudicial punishment credit). The military judge advised the appellant that the sixty-three days credit would be deducted from the adjudged eighty day sentence. On appeal, the court noted that although the judge failed to follow the CAAF's "guidance" in *United States v. Gammons*, 51 M.J. 169, 184 (1999), by failing to state on the record how he arrived at the specific *Pierce* credit awarded, *Gammons* was nonetheless satisfied by the award of the thirty days of *Pierce* credit (fifteen days for the restriction and fifteen for the extra duty). As for the action's failure to specify the credit awarded, the court found no error, finding that the action complied with RCM 1107(f). The court did go on, however, to again recommend that a Convening Authority expressly state all applicable credits in his or her action.

M. Prior board proceedings. *United States v. Blocker*, 30 M.J. 1152 (A.C.M.R. 1990). Accused entitled to credit for consequences of administrative board proceedings arising from same misconduct that is the subject of the court-martial.

VI. Instructions. RCM 1005.

A. *United States v. Boyd*, 55 M.J. 217 (2001). Military judges must instruct on the impact of a punitive discharge on retirement benefits, if there is an evidentiary predicate for the instruction and a party requests it.

B. *United States v. Hopkins*, 55 M.J. 546 (A.F. Ct. Crim. App. 2001), *aff'd*, 56 M.J. 393 (2002). The military judge sustained government's objection to the defense counsel's request that the judge instruct the members that they should consider the accused's expression of remorse as a matter in mitigation. The Air Force Court held that RCM 1005(e) lists the required instructions that must be given on sentencing and that case law "does not require the military judge to list each and every possible mitigating factor for the court members to consider."

C. *United States v. Rush*, 54 M.J. 313 (2001). Following the sentencing instructions to the members that included the standard bad-conduct discharge instruction, the defense counsel requested the ineradicable stigma instruction. The judge, without explanation as to why, refused to give the requested instruction. The CAAF held that while the military judge abused his discretion when he failed to explain why he refused to give the standard sentencing instruction after a timely request by the defense, there was no prejudice.

D. *United States v. Duncan*, 53 M.J. 494 (2000). The members interrupted their deliberations to ask the military judge if rehabilitation/therapy would be required if the accused were incarcerated, and if parole or good behavior were available to someone with a life sentence. Instructions on collateral consequences are permitted, but need to be clear and legally correct. It is appropriate for the judge to answer questions if he/she can draw upon a reasonably available body of information which rationally relates to sentencing considerations (here the panel members questions related to both aggravation evidence (heinous nature of the crimes) and rehabilitation potential (his potential unreformed release into society).

E. *United States v. Friedmann*, 53 M.J. 800 (A.F. Ct. Crim. App. 2000), *review denied*, 54 M.J. 425 (2001). During his unsworn statement, the accused told the members that others received Article 15s and general discharges for the same misconduct and to permit his

commander to administratively discharge him. The military judge provided a sentencing instruction seeking to clarify for the members the administrative discharge process and the irrelevance of using sentencing comparisons to adjudge an appropriate sentence. It was not error for the judge to give the instruction.

F. *United States v. Stargell*, 49 M.J. 92 (1998). Court found proper curative instruction by military judge in response to trial counsel argument that accused with nineteen and a half years of service "will get an honorable retirement unless you give him a BCD." In response to defense objection, judge instructed members that their decision "is not a vote to retain or separate the member but whether or not to give the accused a punitive discharge as a form of punishment." The majority cited to common knowledge in the military that an accused at twenty years is eligible to retire, usually under honorable conditions, and if processed for administrative discharge following court-martial would be entitled to special consideration.

G. *United States v. Perry*, 48 M.J. 197 (1998). The court upheld the military judge's decision not to instruct the panel that the accused stood to be found liable for an $80,000 recoupment by the U.S. Naval Academy for educational costs. The defense requested an instruction at sentencing, based on evidence of the practice of recoupment of the cost of education when separated prior to completion of a five year commitment due to misconduct. The defense did not, however, offer any evidence of likelihood of such recoupment in this case.

H. *United States v. Simmons*, 48 M.J. 193 (1998). Absent direct evidence that the accused was "emotionally or physically abused during his childhood," there was no requirement for the military judge to give an instruction to the panel to consider such information. The court noted a dispute over whether the accused actually suffered such abuse. Therefore, the instruction required modification so the members *could*, not *must*, consider such evidence *if* they found the accused had in fact been abused.

I. *United States v. Hall*, 46 M.J. 145 (1997). Failure of defense to object at trial to military judge's instruction regarding collateral benefits constitutes waiver. Accused captain was dependent of Air Force retiree. At sentencing phase of her court-martial, panel asked effect of dismissal on her benefits as dependent. The judge answered that neither conviction nor sentence would have any effect on benefits she would receive as a dependent. No objection by the defense to this correct instruction by the MJ.

J. *United States v. Thompson*, 43 M.J. 703 (A.F. Ct. Crim. App. 1995). Accused introduced evidence of child's upcoming surgery, and offered medical testimony that accused should be present for surgery and a few weeks thereafter. In response to member question, the military judge informed panel that CA has discretion to defer confinement. No abuse of discretion or improper advice to panel on collateral matters where assisted panel in making informed decision.

K. *United States v. Burt*, 56 M.J. 261 (2002). Accused, at time of trial, was retirement eligible (i.e., 225 mos. of active service). The military judge asked the defense if they wanted an instruction, which covered the Service Secretary's authority to allow the accused to retire even if a punitive discharge was awarded. The defense objected to the instruction. The panel ultimately adjudged a BCD, which the CA approved. The CAAF rejected an IAC attack noting that the decision to object to the instruction was a reasoned tactical decision.

L. *United States v. Blough*, 57 M.J. 528 (A.F. Ct. Crim. App. 2002). Defense counsel requested a specific, detailed instruction that focused the panel on the appellant's age, performance report, lack of prior disciplinary actions, his character as reflected in several defense, the testimony of the defense witnesses, and the appellant's expressed desire to remain in the Air Force. The military judge denied the defense request and gave the panel general guidance on what they should consider on sentencing consistent with *United States v. Hopkins*, 55 M.J. 546 (A.F.

Ct. Crim. App. 2001), *aff'd*, 56 M.J. 393 (2002). The military judge did NOT instruct the panel that a guilty plea (mixed plea case) was a matter in mitigation. A military judge is not required to detail each piece of evidence that may be considered by the panel in arriving at a sentencing. Rather, the judge need only give general guidelines to the members on the matters they should consider on sentencing (e.g., extenuation and mitigation such as good character, good service record, pretrial restraint, mental impairment, etc.). Also, absent plain error, failure to request an instruction or to object to an instruction as given waives any issue. The court noted that perhaps counsel had a valid tactical reason for not requesting the instruction. Finally, the court noted that even if there were error, any error was harmless.

M. *U.S. v Rasnick*, 58 M.J. 9 (2003). The military judge did not err in failing to give the "punitive discharge is an 'ineradicable' stigma" instruction despite a specific request by defense counsel when the instruction advised the members that a punitive discharge was severe punishment, that it would entail specific adverse consequences, and that it would affect appellant's future with regard to his legal rights, economic opportunities, and social acceptability. The instructions were sufficient to require the members to consider the enduring stigma of a punitive discharge." *See also United States v. Greszler*, 56 M.J. 745 (A.F. Ct. Crim. App. 2002) (observing that judge's decision to use other terms to describe a punitive discharge other than "ineradicable" not error; instruction must convey that a punitive discharge is severe punishment and other terminology may be used).

N. *United States v. Miller*, 58 M.J. 266 (2003). The military judge erred by failing to advise panel to consider appellant's pretrial confinement (three days) in arriving at an appropriate sentence. It is a mandatory instruction, therefore, waiver did not apply. The judge also failed to give a defense requested pretrial confinement sentence credit instruction. This failure was not error because although the requested instruction was correct and not covered by the other instructions, it was not on so vital a point as to deprive the appellant of a defense or seriously impair its presentation.

VII. Sentence Credit.

A. *United States v. Rock*, 52 M.J. 154 (1999). The CAAF held the military judge did not err in applying the sentence credit received by the accused for illegal pretrial punishment against the accused's adjudged sentence rather than the approved sentence (accused was awarded 240 days credit against his adjudged confinement as a result of pretrial conditions on his liberty not amounting to confinement; the military judge credited the 240 days against the accused's adjudged sentence not the approved sentence; the accused was sentenced to sixty-one months of confinement, thus the judge only gave the accused fifty-three months; the accused's pretrial agreement further reduced the sentence to thirty-six months, minus three days of actual pretrial confinement). The court distinguished between actual or constructive confinement credit and pretrial punishment credit. Actual confinement credit and constructive confinement credit are administrative credits that come off of the approved sentence. Pretrial punishment credit for something other than confinement (like restrictions on liberty that do not rise to the level of being tantamount to confinement) is generally judicial credit and thus comes off of the adjudged sentence. If the military judge determines that *Allen*, *Mason*, or *Suzuki* credit is warranted, that sentence credit will be tacked on to the sentence after the pretrial agreement is considered.

B. *United States v. Rosendahl*, 53 M.J. 344 (2000). The accused's original approved sentence included a BCD, four months confinement, and suspended forfeitures of $150 per month for four months and suspended reduction below the grade of E-4 for six months. On rehearing, he was sentenced to a BCD and reduction to the lowest enlisted grade. The convening authority approved this sentence, again suspending reduction below the grade of E-4 for six months. The accused argued he was entitled to credit (in the form of disapproval of his BCD) for the 120 days

confinement he served as a result of his first sentence. The CAAF disagreed stating that reduction and punitive separations are qualitatively different from confinement and, therefore, credit for excess confinement has no "readily measurable equivalence" in terms of reductions and separations. NOTE: The CAAF declined to address whether a case involving lengthy confinement might warrant a different result. It also distinguished this situation from the "unrelated issue of a convening authority's clemency power to commute a BCD to a term of confinement."

C. *United States v. Smith*, 56 M.J. 290 (2002). No requirement that accused be given credit for lawful pretrial confinement when no confinement is adjudged.

D. *United States v. Chapa III*, 57 M.J. 140 (2002). Failure to raise RCM 305(k) credit waives the issue, absent plain error.

E. *United States v. King*, 58 M.J. 110 (2003). Failure to raise *Mason* credit (i.e., pretrial restriction tantamount to confinement) waives the issue, absent plain error.

F. *United States v. Coreteguera*, 56 M.J. 330 (2002). When placed into PTC, the appellant was forced to run to several windows yelling he "couldn't get it right," was made to sing the Air Force song or "song of choice," and was asked by a cadre member whether he wanted to pawn "this" jewelry while being shown a pair of shackles. The appellant was in pretrial confinement for, in part, pawning government computers. Additionally, appellant was made to perform duties similar to post-trial inmates BUT not with the inmates. The military judge denied the defense's motion for additional credit under Article 13. The judge found no intent to punish on the part of the cadre, the conditions of confinement were not unduly harsh or rigorous, and the actions of AF personnel were not excessively demeaning or of a punitive nature. The CAAF held that discomforting administrative measures and "de minimis" imposition on detainees, even if unreasonable, do not warrant credit under Article 13. As for the work, the court looked to the nature, duration, and purpose of the work to determine whether it was punitive in nature – it was not, therefore, no credit. The court noted that although the judge did not err in denying the credit, the court did not "condone" the actions of the AF personnel.

G. *United States v. Mosby*, 56 M.J. 309 (2002). Solitary confinement, in and of itself, does not equal an intent to punish warranting additional credit under Article 13, UCMJ.

H. *United States v. Bracey*, 56 M.J. 387 (2002). Appellant was not entitled to *Pierce* credit since the offenses in question resulted from separate and distinct incidents despite their occurrence close in time and involving the same officer (i.e., victim). The CAAF, in holding that the appellant was not entitled to *Pierce* credit stated: "Neither the Constitution nor the UCMJ precludes a person from being convicted for multiples offenses growing out of the same transaction, so long as the offenses are not multiplicious . . . . Likewise, although *Pierce* precludes double punishment for the same offense, it does not preclude multiple punishments for multiple offenses growing out of the same transaction when the offenses are not multiplicious."

I. *United States v. Spaustat*, 57 M.J. 256 (2002). Accused sentenced to reduction to the grade of E-1, ten months confinement, and a BCD. The accused's PTA had a confinement limitation of eight months. At trial, the accused successfully brought an Article 13 motion for his treatment while in pretrial confinement and was awarded ninety-two days Article 13 credit (day-for-day) as well as 102 days *Allen* credit, all of which the judge applied against the lesser sentence provided for in the PTA. In announcing the sentence, the judge initially announced a sentence, after incorporating the Article 13 credit of 202 days and then announced another sentence of 212 days after he was advised by the TC that the Article 13 violations did not begin until after day ten of the accused's placement into pretrial confinement, thus reducing the Article 13 credit from 102 days to ninety-two days. Appellant argued that the judge, in increasing the

sentence from 202 days to 212 days, unlawfully reconsidered the sentence. The CAAF held that the judge did not unlawfully reconsider the sentence. The sentence was always ten months. All that the judge did was correct his calculation of sentence credits and clarify his calculations. Further, the judge did not err in applying the sentence credit to the lesser sentence provided for in the PTA. Recognizing the confusion created by its *Rock* decision, the court established a bright line rule for use by all courts effective 30 August 2002:

> 1. *[I]n order to avoid further confusion and to ensure meaningful relief in all future cases after the date of this decision, this Court will require the convening authority to direct application of all confinement credits for violations 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, as further reduced by any clemency granted by the convening authority, unless the pretrial agreement provides otherwise.*

J. *United States v. Josey*, 58 M.J. 105 (2003). Service member spent thirty months and twenty-eight days in post-trial confinement before the findings in his case was partially set aside. On reassessment, the CA only approved forfeiture of $600 pay/month for four months and reduction from E-8 to E-6. Appellant argued he was entitled to sentence credit against both forfeitures and the reduction. The CAAF disagreed, finding that "reprimands, reductions in rank, and punitive separations are so qualitatively different from other punishment that conversion is not required as a matter of law." *See also United States v. Stirewalt*, 58 M.J. 552 (C.G. Ct. Crim. App. 2003); *United States v. Rosendahl*, 53 M.J. 344 (2000).

K. *United States v. Rendon*, 58 M.J. 221 (2003). RCM 305(k) credit for non-compliance with RCM 305(f), (h), (i), or (j) does NOT apply to restriction tantamount to confinement UNLESS restriction rises to the level of physical restraint depriving appellant of his or her freedom (i.e., equivalent of actual confinement) (abrogating *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)).

L. *United States v. Oliver*, 56 M.J. 779 (A.F. Ct. Crim. App. 2002). A day of pretrial confinement warrants *Allen* credit unless that day is the day the accused is sentenced, then the day counts as post-trial confinement.

M. *United States v. Sherman*, 56 M.J. 900 (A.F. Ct. Crim. App. 2002). Time spent in civilian confinement for offenses forming the basis of a subsequent court-martial warrant confinement credit under *Allen*. *See also United States v. West*, 56 M.J. 626 (C.G. Ct. Crim. App. 2001).

N. *United States v. Inong*, 58 M.J. 460 (2003). "[F]ailure at trial to raise the issue of illegal pretrial punishment waives that issue for purposes of appellate review absent plain error," overruling *United States v. Huffman*, 40 M.J. 225 (C.M.A. 1994). Additionally, *United States v. Southwick*, 53 M.J. 412 (2000) and *United States v. Tanksley*, 54 M.J. 169 (2000) were overruled to the extent that they establish a "'tantamount to affirmative waiver rule' in the Article 13 arena."

O. *United States v. Regan*, 62 M.J. 299 (2006). After the third positive test, Regan's commander gave her the choice of voluntarily admitting herself for inpatient treatment or going into pretrial confinement. The military judge concluded that appellant was really given no choice at all and based on the "totality of the conditions imposed" and "the facts and circumstances" of the case, the time appellant was in the treatment facility (twenty-one days) amounted to restriction tantamount to confinement and determined that appellant was entitled to *Mason* credit. However, the military judge denied the defense motion for additional credit under R.C.M. 305(k) for failure to comply with the requirements of R.C.M. 305. Affirmed.

VIII. Deliberations and Voting. RCM 1006.

A. What May be Considered. **RCM 1006.**

1. Notes of the members.

2. Any exhibits.

3. Any written instructions.

a) Instructions must have been given orally.

b) Written copies, or any part thereof, may also be given to the members unless either party objects.

4. Pretrial agreement (PTA) terms.

a) RCM 705(e). Except in a court-martial without an MJ, no member of a court-martial shall be informed of the existence of a PTA.

b) *United States v. Schnitzer*, 41 M.J. 603 (Army Ct. Crim. App. 1994), *aff'd* 44 MJ 380 (1996). Mention of sentencing limitation in co-actor's PTA constituted unlawful command influence and plain error. Rehearing on sentencing required. *See United States v. Royster*, 9400201 (Army Ct. Crim. App. 15 June 1995) (unpub.), limiting *Schnitzer* to its facts.

B. Deliberations and Voting on Sentence. **UCMJ art. 52, RCM 1006.**

1. Number of votes required:

a) Death – unanimous.

b) Confinement for more than ten years – at least three-fourths of the members.

c) All other sentences – at least two-thirds of the members.

2. *Garrett v. Lowe*, 39 M.J. 293 (C.M.A. 1994). Members must vote on sentences in their entirety. Accordingly, it was error for the court to instruct jurors that only two-thirds of the members were required to vote for sentence for felony murder, where that sentence must, by law, include confinement for life.

3. *United States v. Weatherspoon*, 44 M.J. 211 (1996). Court-martial panel asked if must impose confinement for life, or merely vote for life, in premeditated murder conviction. The military judge advised the members that sentence must include confinement for life, but they could, collectively or individually, recommend clemency. The judge made clear individual rights of members to recommend clemency.

4. *United States v. Thomas*, 46 M.J. 311 (1997). In capital sentencing procedures under RCM 1004(b)(7), the President extended to capital cases the right of having a vote on the least severe sentence first. At sentencing phase of accused's capital court-martial, the judge instructed the panel first to vote on a death sentence, and if not unanimous, then to consider a sentence of confinement for life and other types of punishments. The CAAF held RCM 1006(d)(3)(A) required voting on proposed sentences "*beginning with the least severe*." *See also United States v. Simoy*, 50 M.J. 1 (1998) (holding that the military judge committed plain error when he fails to advise a panel to vote on the sentences in order of least severe to most severe).

IX. Announcement of Sentence. RCM 1007.

A. Sentence worksheet is used to put the sentence in proper form (*See* Appendix 11, MCM, Forms of Sentences).

B. President or military judge makes announcement.

1. *United States v. Dodd*, 46 M.J. 864 (Army Ct. Crim. App. 1997). Announcement by court-martial president of sentence did not include bad conduct discharge, and court adjourned. When president notified the military judge of incorrect announcement within two minutes of adjournment, judge convened a proceeding in revision to include bad conduct discharge. The Army Court noted that proceeding in revision inappropriate where it increases severity of sentence, no matter how clear that announcement was erroneous. NOTE: Court commends to trial judges practice of enforcing requirement that president mark out all inapplicable language on findings and sentence worksheets, rather than pursuing own means to clarify intended sentence of court.

2. *United States v. Goddard*, 47 M.J. 581 (N-M. Ct. Crim. App. 1997). Upon a rehearing the N-M Ct. Crim. App. set aside appellant's conviction for maltreatment because the evidence was legally and factually insufficient, but affirmed a conviction for the lesser-included offense of a simple disorder, the court then reassessed appellant's sentence. 54 M.J. 763 (N-M Ct. Crim. App. 2000). In case alleging maltreatment and fraternization, judge, in announcing finding of guilty, stated offense against one victim was "tantamount to rape." The court noted comments of judge were mere surplusage on findings, but raised concern that the judge may have based sentence on more serious crime of rape, than maltreatment alleged. The ordered a rehearing on sentence.

3. *United States v. Stewart*, 62 M.J. 291 (2006). Where a sentence to forfeiture of all pay and allowances is adjudged, such sentence shall run until such time as the servicemember is discharged or returns to a duty status, whichever comes first, unless the sentencing authority expressly provides for partial forfeitures post-confinement.

C. Polling prohibited (MRE 606; RCM 1007(c)).

X. Impeachment of Sentence. RCM 1008.

A. Policy: Strong policy against the impeachment of verdicts.

1. Promotes finality.

2. Encourages full and free deliberation.

B. General rule: Deliberative privilege – court deliberations are privileged (MRE 509). *United States v. Langer*, 41 M.J. 780 (A.F. Ct. Crim. App. 1995) (observing that post-trial questionnaire purportedly intended for feedback to counsel improperly invaded members' deliberative process).

C. Exceptions: Court members' testimony or affidavits cannot be used to impeach the verdict except in three limited situations. RCM 1008; MRE 606. *See United States v. Loving*, 41 M.J. 213 (C.M.A. 1994).

1. Outside influence (e.g. bribery, jury tampering).

2. Extraneous prejudicial information.

a) *United States v. Witherspoon*, 16 M.J. 252 (C.M.A. 1983) (holding that it was improper for court member visit to crime scene).

b) *United States v. Almeida*, 19 M.J. 874 (A.F.C.M.R. 1985) (finding no

prejudice where court member talked to witness about Thai cooking during a recess in the trial).

c) *United States v. Elmore*, 33 M.J. 387 (C.M.A. 1991) (holding that blood expert witness who had dinner with the members was not err because extensive *voir dire* established the lack of taint).

d) *United States v. McNutt*, 62 M.J. 16 (2005). The military judge improperly considered the collateral administrative effect of the "good-time" policy in determining Appellant's sentence and this error prejudiced Appellant. "Courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration." *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1998). The general preference for prohibiting consideration of collateral consequences is applicable to the military judge's consideration of the Army "good-time" credits.[1]

3. Unlawful command influence.

a) *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984) (holding that it was unlawful command control for president to order a re-vote after a finding of not guilty had been reached).

b) *United States v. Accordino*, 20 M.J. 102 (C.M.A. 1985) (observing that president of court can express opinions in strong terms and call for a vote when discussion is complete or further debate is pointless; but improper for him to use superiority of rank to coerce a subordinate to vote in a particular manner).

c) *United States v. Dugan*, 58 M.J. 253 (2003). Post-trial, member submitted RCM 1105/6 memorandum to defense counsel expressing several concerns, two of which raised potential UCI during the sentencing phase: that some members believed a punitive discharge was "a given" and that mention was made of a commanders call and that the commander (i.e., convening authority) would review the sentence in the case and know what they decided to do. On receipt of the memorandum, the defense counsel sought a post-trial 39a session, which the military judge denied, citing the deliberative privilege, and finding no UCI. The lower court affirmed. The CAAF directed a *DuBay* hearing to examine the allegation of UCI in the sentencing phase with the following limitations: questions regarding the objective manifestation of the members during deliberations was permitted whereas questions surrounding the subjective manifestations were not.

D. Threshold relatively high. *See United States v. Brooks*, 41 M.J. 792 (Army Ct. Crim. App. 1995) (observing that there must be colorable allegations to justify judicial inquiry, and even then the judge must be very cautious about inquiring into voting procedures).

E. *United States v. McConnell*, 46 M.J. 501 (A.F. Ct. Crim. App. 1997). To impeach a sentence that is facially proper, the claimant must show that extraneous prejudicial information, outside influence, or command influence had an impact on the deliberations. Accused asserted in post-trial submissions that the panel was confused over how the period of confinement and BCD would affect his retirement. The court noted unique personal knowledge of a court member might

[1] *See United States v. Howell*, 16 M.J. 1003 (A.C.M.R. 1983) (Naughton, J. concurring) (finding it improper for the trial counsel to argue that the appellant would not serve the full confinement time adjudged by the members because of "good-time" credit).

constitute extraneous prejudicial information, but "general and common knowledge that a court member brings to deliberations is an intrinsic part of the deliberative process."

F. *United States v. Combs*, 41 M.J. 400 (C.M.A. 1994). Court member's statement that accused would have received a lighter sentence if there had been evidence of cooperation did not reflect consideration of extraneous prejudicial information which could be subject of inquiry into validity of sentence.

XI. Reconsideration of Sentence. RCM 1009.

A. Time of reconsideration.

1. May be reconsidered any time before the sentence is announced.

2. After announcement, sentence may not be increased upon reconsideration unless sentence was less than mandatory minimum.

3. *United States v. Jennings*, 44 M.J. 658 (C.G. Ct. Crim. App. 1996). Error in sentence may be corrected if announced sentence not one actually determined by court-martial. But confusion of military judge's intended sentence and application of *Allen* credit arose from comments by judge after court closed. If ambiguity exists on record as to sentence, must be resolved in favor of accused.

B. Procedure for reconsideration.

1. Any member may propose reconsideration.

2. Proposal to reconsider is voted on in closed session by secret written ballot.

C. Number of votes required.

1. With a view to increasing sentence – may reconsider only if at least a majority votes for reconsideration.

2. With a view to decreasing sentence – may reconsider if the following vote:

a) For death sentence, only one vote to reconsider required.

b) For sentence of life or more than ten years, more than one-fourth vote for reconsideration.

c) For all other sentences, more than one-third vote for reconsideration.

D. Objections Required. *United States v. Moreno*, 41 M.J. 537 (N-M. Ct. Crim. App. 1994). Rule for Courts-Martial 1109 does not permit members to consider increasing a sentence when a request for reconsideration has been made with a view to decreasing the sentence and accepted by the affirmative vote of less than a majority of the members. The judge erred when he indicated that the members could "start all over again" and consider the full spectrum of authorized punishments once any request for reconsideration had been accepted, without regard to whether it was with a view to increasing or decreasing the sentence.

XII. Appellate Review.

1. Under Article 59(a) UCMJ an error of law regarding the sentence does not provide a basis for relief unless the error materially prejudiced the substantial rights of the accused. *United States v. Bridges*, 66 M.J. 246 (C.A.A.F. 2008).

Chapter 36

I. Introduction

A. General.

1. At its core, an argument is a claim supported by reasons. John D. Ramage & John C. Bean, Writing Arguments, 43 (1989).

2. According to Black's Law Dictionary, arguments are "the remarks of a counsel in analyzing and pointing out or repudiating a desired inference, for the assistance of a decision-maker." Black's Law Dictionary 102 (7th ed. 1999).

3. These definitions are important for understanding the difference between opening statements and arguments. In opening statements, counsel comment on what the evidence *is*. In argument, counsel comment on what the evidence *means* (what inferences should be drawn) and why this evidence is trustworthy or not.

4. The rules reflect that distinction.

a) Argument is not allowed in the opening statement. In opening statement, counsel should confine their remarks to evidence they expect to be offered and a brief statement of the issues in the case. R.C.M. 913(b) discussion.

b) Argument is allowed on motions (R.C.M. 905(h)), findings (R.C.M. 919), and sentencing (R.C.M. 1001(g)).

B. Cross-reference: the Findings and Sentencing Outline and Evidence Outline.

1. See those outlines for a complete discussion of matters that may be introduced by the parties and considered by the factfinder during the merits and presentencing proceedings.

II. Procedure

A. Control of argument by the military judge.

1. The military judge may exercise reasonable control over argument, R.C.M. 801(a)(3).

2. A military judge may restrict argument to reasonable limits in the exercise of sound discretion. However, the military judge may not arbitrarily limit the defense counsel's argument. *United States v. Dock*, 20 M.J. 556 (A.C.M.R. 1985).

3. Remedies for improper argument.

a) Military judge can sua sponte stop the argument. *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975); *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983).

b) Military judge can give a curative instruction. *United States v. Carpenter*, 29 C.M.R. 234 (C.M.A. 1960); *United States v. Horn*, 9 M.J. 429 (C.M.A 1980).

c) Military judge can require a retraction from counsel. *United States v. Lackey*, 25 C.M.R. 222 (C.M.A. 1958).

d) Military judge can declare a mistrial. *United States v. O'Neal*, 36 C.M.R. 189 (C.M.A. 1966); *United States v. McPhaul*, 22 M.J. 808 (A.C.M.R. 1986).

e) Counsel must cease argument once military judge rules on issue in question. *United States v. Warnock*, 34 M.J. 567 (A.C.M.R. 1991).

B. Motions argument.

1. Upon request, either party is entitled to an Article 39(a) session to present oral argument. R.C.M. 905(h).

C. Findings argument.

1. Trial counsel argues first, then defense counsel shall be permitted to reply, and then the trial counsel shall then be permitted to present rebuttal. R.C.M. 919(a).

2. The trial counsel's rebuttal argument is generally limited to matters argued by the defense. If trial counsel introduces new matter in rebuttal, then the defense counsel should be allowed to reply in rebuttal. However, the trial counsel will be allowed to make the final argument. R.C.M. 919(b) discussion.

D. Sentencing Argument.

1. Trial counsel argues first, then defense counsel. R.C.M. 1001(a)(1), (g).

2. The military judge has the discretion to permit rebuttal sentencing arguments. R.C.M. 1001(a)(1)(F), (d).

a) As a general rule, there is no right of government counsel to present rebuttal argument because the government does not have a burden of proof during presentencing proceedings in non-capital cases. *United States v. McGee*, 30 M.J. 1086 (N.M.C.M.R. 1989). The propriety of permitting such argument is dependent upon the need to address matters newly raised by the defense in its sentencing argument. *Id*.

3. Absent "good cause" the military judge should not permit departure from the order of argument set forth in R.C.M. 1001(a)(1).

a) *United States v. Budicin*, 32 M.J. 795 (N.M.C.M.R. 1990). Military judge erred by allowing trial counsel to argue last but defense counsel waived error by not objecting.

b) *United States v. Martin*, 36 M.J. 739 (A.F.C.M.R. 1993). Trial counsel should not be routinely permitted to choose whether to argue first or last on sentencing.

E. Waiver of argument.

1. *United States v. McMahan*, 21 C.M.R. 31 (C.M.A. 1956). Defense counsel has a right and duty to argue and should only waive argument in unusual circumstances.

2. Defense counsel are not required to argue but need to have sound reasons for not doing so. *United States v. Sadler*, 16 M.J. 982 (A.C.M.R. 1983) (defense counsel was ineffective when he did not present any favorable matters or argue during the presentencing proceeding).

3. Trial counsel may waive argument. R.C.M. 919(a) analysis, at A21-68.

III. Findings Argument

A. Counsel may comment on the evidence in the case, including inferences to be drawn from the evidence. R.C.M. 919(b).

1. Counsel may comment on the testimony, conduct, motives, and evidence of malice of witnesses to the extent supported by the evidence. R.C.M. 919(b) discussion.

2. Counsel may argue as though the testimony of their witnesses conclusively established the facts related by them. R.C.M. 919(b) discussion.

3. Counsel may not argue facts not in evidence. *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975) (It is error for counsel to include inadmissible hearsay in findings argument).

4. Counsel may not argue irrelevant matters. M.R.E. 401, 402, 403. *But see United States v. Jefferson*, 22 M.J. 315 (C.M.A. 1986) (defense counsel should have been permitted to inform members of mandatory minimum life sentence to impress seriousness of offense upon them).

5. Counsel may not argue evidence beyond its limited purpose. *United States v. Sterling*, 34 M.J. 1248 (A.C.M.R. 1992). Accused was charged with two specifications of use of cocaine based on two positive urinalysis tests. Trial counsel improperly argued that one test corroborated the other.

B. Counsel may comment generally on contemporary history or other matters of common knowledge.

1. *United States v. Jones*, 11 M.J. 829 (A.F.C.M.R. 1981); *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005) (references to public figures must be generic and not specific details of sensationalized topics).

C. Use of providence inquiry statements in mixed plea cases.

1. Admissions in a plea of guilty to one offense cannot be used as evidence to support a finding of guilty of an essential element of a separate and different offense; however, the guilty plea inquiry and stipulation of fact may be used to satisfy the common elements of a greater offense if the pled to charge is LIO of the contested charge. *United States v. Abdullah*, 37 M.J. 692 (A.C.M.R. 1993); *United States v. Rivera*, 23 M.J. 89, 95 (C.M.A. 1986); *United States v. Flores*, 69 M.J. 651 (A.F. Ct. Crim. App. 2010).

2. Plea of guilty may be used to establish common facts and elements of a greater offense within the same specification, but may not be used as proof of a separate offense. The elements of a LIO established by guilty plea (but not the accused's admissions made in support of that plea) can be used to establish common elements of the greater offense. *United States v. Ramelb*, 44 M.J. 625 (Army Ct. Crim. App. 1996).

3. *United States v. Grijalva*, 55 M.J. 223 (C.A.A.F. 2001). Admissions concerning the elements of the LIO made during providence inquiry can be considered insofar as the admissions relate to common elements of the greater offense, but it was error for the military judge to consider the accused's admissions that pertained to different elements of the greater offense.

D. Counsel may not make inaccurate reference to law or cite legal authority to the members.

1. *United States v. McCauley*, 25 C.M.R. 327 (C.M.A. 1958) (it was error for trial counsel to read from case in the Court-Martial Reports); *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983) (citing Wigmore before the panel).

E. Counsel should not argue the nonexistence of evidence after a successful suppression motion.

1. *ABA Standards for Criminal Justice*, Standard 4-7.8 and its Commentary: "A lawyer who has successfully urged the court to exclude evidence should not be allowed to point to the absence of that evidence to create an inference that it does not exist." The few reported cases on this issue take the position that such an argument misrepresents the facts to the tribunal.

2. Counsel may not mention evidence that has been suppressed or suggest that other evidence exists. *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983).

3. *State v. McNeely*, 664 P.2d 277 (Idaho Ct. App. 1983). After the defense successfully suppressed currency and cocaine, the prosecution filed a motion in limine to prevent the defense from arguing that the state produced no evidence because it had no evidence. The trial court granted the motion, and the Idaho Court of Appeals affirmed, citing treatises and commentary for the proposition that it is a form of misrepresentation for counsel to argue the absence of evidence when it is absent only because it was suppressed.

4. *Pritchard v. State*, 673 P.2d 291 (Alaska Ct. App. 1983) ("Defense counsel clearly has the right to argue in support of a Scotch verdict, *i.e.*, that the prosecution has failed to sustain its burden of proof. . . . He may not, however, state to be true something he knows to be false. Thus, for example, he may not base his argument on the nonexistence of evidence which in fact was present but was suppressed on motion by the defense.")

5. *State v. Provost*, 741 A.2d 295 (Conn. 1999). The defense claimed the prosecutor had committed misconduct by suppressing the statements of several witnesses and then arguing that the defense produced no evidence that a witness had an improper motivation for identifying the defendant. Citing, *inter alia*, the *McNeely* case for the proposition that it is improper to argue the nonexistence of suppressed evidence, the court nevertheless held under the facts of the instant case, the prosecutor had not argued improperly.

F. Trial counsel may not comment on the probable effect of the court-martial's findings on relations between the military and civilian community. R.C.M. 919(b) discussion.

IV. Sentencing Argument

A. Counsel may refer to generally accepted sentencing philosophies. R.C.M. 1001(g).

1. These include rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution. R.C.M. 1001(g).

2. General deterrence is a proper subject of argument. *United States v. Lania*, 9 M.J. 100 (C.M.A. 1980).

B. Counsel may recommend a specific lawful sentence. R.C.M. 1001(g).

1. Counsel need to remember that the sentence is not about whether the accused stays in the service or not, but whether the accused deserves a *punitive* discharge.

a) *United States v. Motsinger*, 34 M.J. 255 (C.M.A. 1992). Trial counsel improperly blurred distinction between a punitive discharge and administrative separation by arguing "would you really want this individual working for you? I don't think so. . . . Is this really the individual . . . that we need in the United States Air Force?."

b) *See also United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989).

2. Trial counsel may inform members of maximum penalty which court-martial may impose. *United States v. Capps*, 1 M.J. 1184 (A.F.C.M.R. 1976).

a) However, trial counsel may not comment on "the average sentence." *United States v. Simmons*, 31 M.J. 884 (A.F.C.M.R. 1990). Trial counsel improperly explained that "average" sentence was mathematical average between no punishment and the possible maximum punishment.

3. Defense counsel may argue for a specific sentence. *See generally United States v. Goodman*, 33 M.J. 84 (C.M.A. 1991).

4. Counsel may generally argue for any legal sentence regardless of limitations contained in a pretrial agreement. *United States v. Rivera*, 49 C.M.R. 838 (A.C.M.R. 1975); *United States v. Rich*, 12 M.J. 661 (A.C.M.R. 1981).

a) However, counsel may not make misleading arguments. *United States v. Cassity*, 36 M.J. 759 (N.M.C.M.R. 1992) (finding error in government's disingenuous argument for leniency as to confinement which was designed to enhance punishment by operation of the pretrial agreement). Trial counsel may not argue for a quantum of punishment greater than that court-martial may adjudge. R.C.M. 1001(g).

C. Counsel may comment on any evidence properly introduced on the merits.

1. This includes evidence of other offenses or acts of misconduct, even if introduced for a limited purpose, and evidence relating to any mental impairment or deficiency of the accused. R.C.M. 1001(f).

D. Counsel may comment on matters that arise during the providence inquiry.

1. This includes uncharged misconduct, if the evidence otherwise satisfies R.C.M. 1001(b)(4) and M.R.E. 403. *United States v. Arceneaux*, 21 M.J. 571 (A.C.M.R. 1985); *United States v. Holt*, 22 M.J. 553 (A.C.M.R. 1986).

2. See the "Findings and Sentencing Outline" for a discussion of the procedures required for using the providence inquiry.

E. Counsel may comment on matters introduced pursuant to R.C.M. 1001(b).

1. Counsel may not argue facts not in evidence or introduced for a limited purpose.

a) *United States v. Shoup*, 31 M.J. 819 (A.F.C.M.R. 1990). Trial counsel improperly mentioned facts not in evidence by arguing to the military judge "This is the third drug case you have heard this week; there were many before and there will be many more in the future...Over twenty people died in Panama a few weeks ago trying to stop drugs from coming into this country."

b) Trial counsel may not comment on uncharged misconduct that comes up as impeachment evidence during the presentencing proceeding. *United States v. White*, 36 M.J. 306 (C.M.A. 1993). In trial for drug use based on positive urinalysis, the trial counsel cross-examined a defense character witness regarding uncharged second positive urinalysis. Trial counsel erred by arguing that "we are not just talking about one use of Cocaine."

2. Trial counsel cannot take proper rehabilitation testimony and then state that the inference to draw from that testimony is that the accused should not be in the service.

   a) *United States v. Hampton*, 40 M.J. 457 (C.M.A. 1994). A stipulation of expected testimony admitted during presentencing stated that in the witness' opinion, the accused did not have any rehabilitative potential. During sentencing argument, trial counsel stated that the expected testimony was that accused "doesn't have rehabilitative potential, doesn't deserve to be in the Army." The court held that even if trial counsel's misstatement is characterized as a reasonable inference drawn from the expected testimony, such argument is still improper.

3. Counsel may argue impact on unit or service if there is evidence that the accused's crimes affected the unit.

   a) *United States v. Simmons*, 31 M.J. 884 (A.F.C.M.R. 1990). Trial counsel's argument in drug case that "[w]e're going to find out who uses drugs when a plane crashes" was improper where the accused's duty was to clean airplanes and there was no evidence that appellant's use of amphetamines affected his duty.

   b) *United States v. Spears*, 32 M.J. 934 (A.F.C.M.R. 1991). Trial counsel's argument that an inspection which revealed a missing meal card had an impact on the entire unit was not a reasonable inference. If trial counsel want to make an argument that the crime affected the unit, the trial counsel need to introduce proper sentence evidence under R.C.M. 1001(b)(4).

F. Counsel may comment generally on contemporary history or other matters of common knowledge.

   a) *United States v. Barrazamartinez*, 58 M.J. 173 (C.A.A.F. 2003). The war on drugs is common knowledge and so permissible for comment.

   b) *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005) (references to public figures must be generic and not specific details of sensationalized topics).

G. Counsel may comment on the accused's status as officer or NCO, but not duty position.

1. Counsel may mention accused's status as officer or NCO. *United States v. Everett*, 33 M.J. 534 (A.F.C.M.R. 1991). NCO status of accused was appropriate aggravating factor in drug use case.

2. However, counsel may not argue that an accused should receive greater punishment because of their *duty position*, unless their position was integral to the commission of the offense. *United States v. Rhodes*, 64 M.J. 630, 632 (A.F. Ct. Crim. App. 2007), *United States v. Skidmore*, 64 M.J. 655, 661 (C.G. Ct. Crim. App. 2007).

H. Commenting on collateral consequences.

1. Generally, the collateral consequences of a sentence are not relevant to the sentencing decision and are not allowed to be argued in sentencing. *United States v. Griffin*, 25 M.J. 423 (C.M.A. 1988).

2. Loss of VA benefits is a relevant consideration on sentencing. *United States v. Stargell*, 49 M.J. 92 (C.A.A.F. 1998).

3. Effect of sentence on retirement benefits is relevant.

a) Defense counsel may introduce evidence of the effect of a punitive discharge on retirement benefits. *See* Military Judges' Benchbook para. 2-5-22. The instruction must be given if requested and:

(1) The accused has sufficient time in service to retire;

(2) For an enlisted accused, the accused has sufficient time left on his current term of enlistment to retire without having to reenlist;

(3) For an accused that is a commissioned or warrant officer, it is reasonable that the accused would be permitted to retire but for a punitive discharge.

b) *See also United States v. Washington*, 55 M.J. 441 (C.A.A.F. 2001); *United States v. Boyd*, 55 M.J. 217 (C.A.A.F. 2001); *United States v. Luster*, 55 M.J. 67 (C.A.A.F. 2001); *United States v. Becker*, 46 M.J. 141 (C.A.A.F. 1997); *United States v. Greaves*, 46 M.J. 133 (C.A.A.F. 1997); *United States v. Sumrall*, 45 M.J. 207 (C.A.A.F. 1996); *United States v. Polk*, 47 M.J. 116 (C.A.A.F. 1997).

c) *United States v. Stargell*, 49 M.J. 92 (C.A.A.F. 1998). Trial counsel argued the accused, with nineteen and a half years, will get an honorable retirement unless the panel gave him a BCD. Military judge provided curative instruction to panel.

4. The availability of a subsequent administrative discharge is not relevant. *United States v. Briggs*, 69 M.J. 648 (A.F. Ct. Crim. App. 2010).

I. Defense counsel may comment that a plea of guilty is a mitigating factor. R.C.M. 1001(f).

J. Defense counsel may argue for a punitive discharge if the accused consents.

1. The accused's consent must be indicated on record. *United States v. Holcomb*, 43 C.M.R. 149 (C.M.A. 1971); *United States v. Williams*, 21 M.J. 524 (A.C.M.R. 1985) (argument urging discharge presumed prejudicial unless accused consents); *United States v. Robinson*, 25 M.J. 43 (C.M.A. 1987) (erroneous argument urging military judge to adjudge a suspended discharge, despite accused's desire to remain in the service, held not to be prejudicial).

2. The standard for reversal when a defense counsel concedes a punitive discharge without consent is whether it is reasonably likely that the concession affected the sentence. *United States v. Quick*, 59 M.J. 383, 387 (C.A.A.F. 2004).

3. The military judge should question the accused to determine whether he concurs with defense counsel's argument for a discharge. *United States v. McNally*, 16 M.J. 32, 35 (C.M.A. 1983) (Cooke, J. concurring). The Military Judges' Benchbook contains a colloquy at para. 2-7-27.

4. The military judge need not question the accused if a discharge is highly likely. *United States v. Volmar*, 15 M.J. 339 (C.M.A. 1983).

5. *See also United States v. Bolkan*, 55 M.J. 425 (C.A.A.F. 2001); *United States v. Pineda*, 54 M.J. 298 (C.A.A.F. 2001); *United States v. Adame*, 57 M.J. 812 (N-M. Ct. Crim. App. 2003).

6. Defense counsel may argue only for a bad-conduct discharge in lieu of confinement but not a dishonorable discharge or "a punitive discharge." *United States v. Dotson*, 9 M.J. 542 (C.G.C.M.R. 1980); *United States v. McMillan*, 42 C.M.R. 601 (A.C.M.R. 1970).

K. Defense counsel cannot argue irrelevant matters that are raised in the unsworn statement.

1. If the accused, in the unsworn statement, mentions irrelevant matters, the military judge may issue a *Friedmann* instruction. This typically arises when the accused mentions the punishments that other co-accused in the case have received. This instruction comes from *United States v. Friedmann*, 53 M.J. 800 (A.F. Ct. Crim. App. 2000). The instruction tells the panel that those comments are irrelevant.

2. *See also United States v. Barrier*, 61 M.J. 482 (C.A.A.F. 2005) (the right to allocution is broad, and largely unfettered, but it is not without limits); *United States v. Sowell*, 62 M.J. 150 (C.A.A.F. 2005).

3. For more discussion on what matters may be covered in an unsworn statement, see the "Findings and Sentencing" Outline.

L. Defense counsel cannot argue for reconsideration of the findings.

1. Defense counsel may not argue during the sentencing argument that the panel should reconsider their findings on the merits. *United States v. Vanderslip*, 28 M.J. 1070 (N.M.C.M.R. 1989). The fact that members may reconsider findings does not authorize a request for reconsideration.

V. Comments That Implicate Fundamental Rights

A. Trial counsel may not comment on the accused's exercise of a fundamental right.

1. *Griffin v. California*, 380 U.S. 609 (1965); R.C.M. 919(b) discussion.

B. Right to remain silent at trial.

1. The basic rule is that if the accused does not speak (sworn or unsworn) at trial and his counsel does not otherwise open the door, then the trial counsel cannot make any comments to the panel that suggest that they should draw a negative inference from that failure to speak.

2. If the accused remains silent at trial, the trial counsel cannot comment on that election.

a) The fact that a witness has asserted the right against self-incrimination cannot be considered as raising any inference unfavorable to either the accused or the government. M.R.E. 301(f)(1).

b) Trial counsel may not argue that the prosecution's evidence is unrebutted if the only rebuttal could come from the accused or if the members would naturally and necessarily interpret the summation as comment on the failure of the accused to testify. R.C.M. 919(b) discussion; *United States v. Paige*, 67 M.J. 442 (C.A.A.F. 2009); *United States v. Flores*, 69 M.J. 366 (C.A.A.F. 2011).

(1) To make sense of this statement, note that it applies when the defense presents its own evidence at trial. If the defense puts on some evidence, the government can generally say that the parts of its case that the defense did not respond to are unrebutted – unless the only way the defense could respond to the government's case would be for the accused to testify, and the accused elected not to testify. *United States v. Carter*, 61 M.J. 30 (C.A.A.F. 2005); *United States v. Paige*, 67 M.J. 442, 454 (C.A.A.F. 2009) (Stucky, J., dissenting).

(2) Note that even if an argument does not comment on the right to remain silent, the same comment may improperly imply that the accused has the burden of proof (see paragraph 5 below).

c) *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990). Trial counsel's use of rhetorical questions in argument which focused on "unanswered questions" was improper indirect comment on accused's failure to testify and failure to produce witnesses. These comments essentially amounted to a rhetorical cross-examination of a mute accused.

d) *United States v. Harris*, 14 M.J. 728 (A.F.C.M.R. 1982). Trial counsel's comment that case before court was "one-on-one" and that government case was uncontroverted was impermissible comment on accused's election not to testify.

e) *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009). Military judge ruled that trial counsel's comments in opening improperly referenced the accused's election of rights. The military judge issued curative instructions and polled the members. These corrective actions kept error harmless beyond a reasonable doubt.

3. If the accused does speak at trial, then the trial counsel can make certain comments.

a) Accused elects to testify on the merits.

(1) If the accused elects to testify on the merits regarding an offense charged, and during that testimony, the accused does not deny or explain specific incrimination facts introduced by the government, the trial counsel may comment on that failure to explain those facts during closing argument on the findings. R.C.M. 919(b) discussion.

(2) The "mendacious accused."

(a) If the accused elects to testify, the trial counsel may comment on the fact that the accused's merits testimony differed from the ultimate findings. Here, the accused has testified on his own behalf on the merits and then the factfinder has found him guilty contrary to that testimony. Can the trial counsel state that the accused's testimony was a lie and that he should get a greater sentence for lying?

(b) Courts have held that the answer is yes, but only as an indication of the accused's rehabilitative potential and

with a limiting instruction. Any over-emphasis by the trial counsel may be inflammatory argument. *United States v. Warren*, 13 M.J. 278 (C.M.A. 1982).

(c) The "mendacious accused" instruction is found in the Military Judge's Benchbook in paras. 2-5-23 and 2-6-1, and for capital cases at para. 8-3-38.

(d) Military judges should act with caution when giving this instruction *sua sponte* over defense objection, but to do so is not error. *United States v. Ryan*, 21 M.J. 627 (A.C.M.R. 1985)

(e) Trial counsel may should avoid language like "hasn't accepted responsibility for his actions" and "hasn't' faced up to what he did" because that comes dangerously close to improper comment on accused's exercise of fundamental rights. *United States v. Standifer*, 31 M.J. 742 (A.F.C.M.R. 1990). *See also United States v. Jenkins*, 54 M.J. 12 (C.A.A.F. 2000).

b) Accused makes an unsworn statement.

(1) If the accused elects to make an unsworn statement during the presentencing proceeding, trial counsel may comment on the *nature* of an accused's unsworn statement. Trial counsel can point out that the unsworn statement has less evidentiary value than a sworn statement but cannot ask the court to draw an adverse inference against the accused for making an unsworn rather than a sworn statement. *United States v. Breese*, 11 M.J. 17 (C.M.A. 1981). *See also United States v. Marsh*, __ M.J. __ (C.A.A.F. 2011).

4. In-court demeanor and lack of remorse.

a) If the accused elects to speak at trial, trial counsel may comment on the accused's demeanor and lack of remorse.

(1) Don't confuse this type of demeanor (in-court physical responses to questioning) with the type of demeanor (out-of-court physical responses to questioning) described in *United States v. Clark*, 69 M.J. 438 (C.A.A.F. 2011).

(2) Trial counsel may comment on the accused's lack of remorse provided the trial counsel can do so without commenting on the accused's exercise of a fundamental right. The argument must come from evidence that is before the court-martial and not arise because the accused did not do something while exercising a fundamental right. *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992). *See also United States v. Garren*, 53 M.J. 142 (C.A.A.F. 2000).

(3) The proper foundation for commenting on an accused's lack of remorse is: the accused has either testified or made an unsworn statement, and has either expressed no remorse or his expressions of remorse can be arguably construed to be shallow,

artificial, or contrived. *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992).

(4) *United States v. Toro*, 37 M.J. 313 (C.M.A. 1993). Trial counsel's comment that the accused did not "acknowledge [the] finding of guilty" in his unsworn statement was not plain error. Such argument may be a proper comment on the accused's lack of remorse.

(5) *United States v. Carroll*, 34 M.J. 843 (A.C.M.R. 1992). Demeanor of an accused who does testify is evidence.

b) However, the demeanor of non-testifying accused is not evidence.

(1) *United States v. Kirks*, 34 M.J. 646 (A.C.M.R. 1992). Trial counsel improperly referred to accused as the "iceman." Commenting on the demeanor of a non-testifying accused can violate the rules against arguing facts not in evidence, the rules against using character evidence, and the rules against commenting on a fundamental right. Defense counsel should object on all grounds.

(2) *See also United States v. Paxton*, 64 M.J. 484 (C.A.A.F. 2007) (when the accused does not testify or give an unsworn statement, a lack of remorse argument must be based on other evidence in the record); *see generally United States v. Cook*, 48 M.J. 64 (C.A.A.F. 1998).

C. Right to remain silent during the investigation.

1. Trial counsel (or a government witness) cannot comment that an accused affirmatively invoked his rights during the investigation

a) The fact that the accused during official questioning and in the exercise of rights under the Fifth Amendment or Article 31 remained silent, refused to answer certain questions, or requested counsel is inadmissible against the accused. M.R.E. 301(f)(3); *United States v. Frentz*, 21 M.J. 813 (N.M.C.M.R. 1985); *United States v. Palumbo*, 27 M.J. 565 (A.C.M.R. 1988).

2. Non-verbal communication and silence.

a) Trial counsel may not comment on pre-trial silence and physical responses to official questioning. Trial counsel may comment on out-of-court, non-verbal communication that is not in response to official questioning.

b) The primary case in this area is *United States v. Clark*, 69 M.J. 438 (C.A.A.F. 2011). Clark established this framework:

(1) Decide what type of “demeanor” is at issue. (Don’t confuse this with “in-court demeanor,” which is the response to questioning in the courtroom. That is discussed above.)

(a) “Testimonial demeanor” is essentially pre-trial silence and physical responses to official questioning. This type of “demeanor” may not be commented on.

(i) A person's failure to deny an accusation of wrongdoing concerning an offense for which at the time of the alleged failure the person was under official investigation or was in confinement, arrest, or custody does not support an inference of an admission of the truth of the accusation. M.R.E. 304(h)(3).

(ii) "A lack of response or reaction to an accusation is not 'demeanor' evidence, but a failure to speak." *United States v. Alameda*, 57 M.J. 190 (C.A.A.F. 2002). After an investigator informed the accused that he was going to be apprehended, the accused did not say anything and stared straight ahead. The investigator testified about that at trial and the trial counsel argued that this lack of response reflected his consciousness of guilt. The admission of the testimony and the argument was error. *But see United States v. Pope*, 69 M.J. 328 (C.A.A.F. 2011).

(b) "Non-testimonial demeanor" is essentially out-of-court, non-verbal communication that is not in response to official questioning. Provided this evidence is otherwise admissible, trial counsel may comment on it.

c) *See also United States v. Moran*, 65 M.J. 178 (C.A.A.F. 2007) (without deciding error, the court found that comments on the accused's invocation of rights was harmless beyond a reasonable doubt); *United States v. Flores*, 69 M.J. 366 (C.A.A.F. 2011) (commenting that an accused has not been forthcoming of her version of the facts during the investigation, when the accused does not testify, is fraught with danger); *see generally* Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little, Reassessing the Probative Value of Silence*, U. Louisville L. Rev. 21 (2008).

3. Trial counsel may not comment on the failure of the defense to call witnesses or testify at the Article 32. R.C.M. 919(b) discussion.

4. Trial counsel can comment on whether the accused makes inconsistent statements to investigators.

a) If the accused makes inconsistent statements to investigators, the trial counsel may be able to argue that those statements show that the accused has not accepted responsibility for his actions. *United States v. Garren*, 53 M.J. 142 (2000).

D. Right to silence before the investigation.

1. A defendant's silence before an arrest and rights warning does not violation the Constitution when used to impeach the defendant's testimony. *Jenkins v. Anderson*, 447 U.S. 231 (1980).

E. Comments that shift the burden of proof.

1. An improper implication that the accused carries the burden of proof on an issue of guilt violates due process. *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004).

2. Use of the words "uncontradicted," "uncontroverted," and "unrebutted."

   a) These words can improperly imply that the accused has an obligation to produce evidence and witnesses to contradict the government's case. These types of comments improperly imply that the burden has shifted to the defense. *United States v. Carter*, 61 M.J. 30, 34 (C.A.A.F. 2005).

3. Pointing out that the defense did not call witnesses or produce evidence.

   a) Counsel cannot comment on the an accused's failure to call witnesses. *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990); *United States v. Swoape*, 21 M.J. 414 (C.M.A. 1986).

   b) *United States v. Turner*, 30 M.J. 1183 (A.F.C.M.R. 1990). During argument trial counsel presented a list of facts court would have to find before the panel could find the accused innocent. This was erroneous statement that shifted the burden of proof to the accused but was not prejudicial.

4. Counsel may want to look to the framework for commenting on the right not to testify before making these types of comments. If the defense has not presented *any* evidence (similar to not speaking at trial), then the trial counsel should not make any "unrebutted evidence" comments. If the defense has put on *some* evidence (similar to speaking at trial), then the trial counsel can comment on the failure to present other evidence along with any other weaknesses in the defense case. *See generally United States v. Paige*, 67 M.J. 442 (C.A.A.F. 2009).

F. Right to counsel.

1. The fact that the accused during official questioning and in the exercise of rights under the Fifth Amendment or Article 31 remained silent, refused to answer certain questions, or requested counsel is inadmissible against the accused. M.R.E. 301(f)(3).

2. *United States v. Zaccheus*, 31 M.J. 766 (A.C.M.R. 1990). Trial counsel improperly commented on accused's invocation of right to counsel.

G. Right to plead not guilty.

1. *United States v. Jones*, 30 M.J. 898 (A.F.C.M.R. 1990). It was impermissible for trial counsel to argue that accused should not be considered for rehabilitation because he had failed to admit his responsibility by pleading not guilty. *See also United States v. Turner*, 30 M.J. 1183 (A.F.C.M.R. 1990).

H. Right to confront witnesses.

1. *United States v. Carr*, 25 M.J. 637 (A.C.M.R. 1987). Trial counsel may not argue the adverse impact flowing from the accused's exercise of his constitutional rights to confront and cross-examine witnesses against him.

2. However, it may be permissible to elicit "a brief reference to the effect of the entire proceeding (including, but not limited to, the trial) on Appellant's victim." *United States v. Stephens*, 67 M.J. 233 (C.A.A.F. 2009).

I. Defense opens the door – the "invited response" or "invited reply."

1. If the defense says in opening statement that the accused will testify or produce certain evidence or call certain witnesses, places the issue before the members, or gives a disingenuous argument, the defense opens the door to government comment. *See generally United States v. Robinson*, 485 U.S. 25 (1988).

2. *United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001). The defense counsel defense counsel brought up the issue of why an interview with investigators ended and argued that it ended because the contents of the written statement were false. In fairness, the government was allowed to argue that the accused never saw the contents of the statement to even know if the contents were false and did not sign the statement because he invoked his right to counsel. The court was still troubled by the government's repeated references to the invocation of rights.

3. *United States v. Espronceda*, 36 M.J. 535 (A.F.C.M.R. 1992). When defense counsel proffers anticipated testimony of a potential witness and then does not call that witness, the defense opens the door to a proper government response.

4. *United States v. Webb*, 38 M.J. 62 (C.M.A. 1993). Trial counsel properly commented that defense counsel did not live up to the promise he made during his opening statement to present an alibi witness.

5. *United States v. Haney*, 64 M.J. 101 (C.A.A.F. 2006). Not plain error when government commented on accused's invocation of right to silence and failure to seek counsel when those facts were introduced by the defense and integral to the defense theory.

6. *See also United States v. Carter*, 61 M.J. 30, 34 (C.A.A.F. 2005); *United States v. Lewis*, 69 M.J. 379 (C.A.A.F. 2011); *see generally United States v. Turner*, 30 M.J. 1183, 1184 (A.F.C.M.R. 1990); *Jenkins v. Anderson*, 447 U.S. 231 (1980).

J. Standard of review. *United States v. Clark*, 69 M.J. 438 (C.A.A.F. 2011).

1. Whether there has been an improper reference to the exercise of a constitutional right is a question of law that is reviewed *de novo*.

2. If the defense counsel objected at trial, the test for prejudice is harmless beyond a reasonable doubt.

3. If the defense counsel did not object at trial, apply plain error analysis. *United States v. Clark*, 69 M.J. 438 (C.A.A.F. 2011). To find plain error, the appellant must show:

a) Error;

b) The error was plain or obvious; and

c) The error material prejudiced the accused's substantial rights.

VI. Inflaming Passions Rather Than Hard But Fair Blows

A. Counsel should not make arguments that are calculated to inflame passions.

1. R.C.M. 919(b) discussion. The line between that and hard but fair blows is not always easy to see.

B. Counsel may not refer to accused or witnesses in *unduly* demeaning terms.

1. *United States v. Erickson*, 65 M.J. 221 (C.A.A.F. 2007). Trial counsel erred by comparing the accused with Hitler, Saddam Hussein, and Osama bin Laden, and described the accused as a demon belonging in hell. Defense counsel did not

object at trial, however, so the court tested for plain error under prosecutorial misconduct standards and under that high standard found no prejudice.

2. *United States v. Quarles*, 25 M.J. 761 (N.M.C.M.R. 1987). During findings argument, trial counsel characterized the accused as a prurient sex fiend and a deviant pervert. This improperly urged the members to cast aside reason and to impermissibly convict based on the accused alleged deviant character.

3. *United States v. Waldrup*, 30 M.J. 1126 (N.M.C.M.R. 1989). Portraying accused as a "despicable and disgusting" man who took advantage of the "sacred" relationship between a mother and child was improper.

4. *United States v. Barrazamartinez*, 58 M.J. 173 (C.A.A.F. 2003). The appellant pled guilty to wrongfully importing marijuana into the United States across the border from Mexico. At sentencing, the trial counsel argued that the appellant's actions were abhorrent because the United States was engaged in a war on drugs. He also argued that the appellant was "almost a traitor" because he brought drugs into the country when the nation was trying to stop drugs from coming into the country. Although the trial counsel's use of the word "traitor" was a matter of concern, it did not rise to the level of unduly inflaming the passions or prejudices of the panel members.

5. *United States v. McPhaul*, 22 M.J. 808 (A.C.M.R. 1986). Trial counsel's argument that accused was a degenerate scum and miserable human being was properly based on evidence in the record.

6. Comparing a defense witness to Hitler was improper. *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975).

C. Asking the panel to "imagine" or "Golden Rule" arguments.

1. Counsel may not ask members to place themselves in position of victim's relative when determining punishment. *United States v. Shamberger*, 1 M.J. 377 (C.M.A. 1976).

2. Counsel may not ask the panel to place themselves in the position of the victim, as in, use the word "imagine." *United States v. Baer*, 53 M.J. 235 (C.A.A.F. 2000). Trial counsel to asked the members to "imagine being [the victim] sitting there as these people are beating him," and "imagine the pain and agony . . . you can't move. You're being taped and bound almost like a mummy. Imagine as you sit there as they start binding." The court stated that such "Golden Rule arguments" are impermissible and improper. The court also warned that "trial counsel who make impermissible Golden Rule arguments and military judges who do not sustain proper objections based upon them are risking reversal." *See also United States v. McClary*, 68 M.J. 606 (C.G. Ct. Crim. App. 2010) (error to ask the panel to imagine what it would be like to have your neck squeezed while being choked). *But see United States v. Edmonds*, 36 M.J. 791 (A.C.M.R. 1993); *United States v. Melbourne*, 58 M.J. 682 (N-M. Ct. Crim. App. 2003).

3. However, counsel can ask the members to *consider* the fear and pain of the victim. *United States v. Baer*, 53 M.J. 235 (C.A.A.F. 2000).

D. Arguing that if the accused stays in the service, then the accused might cause them future, personal harm (potential future victim).

1. Counsel cannot a panel full of aviators to put themselves in an aircraft that might hypothetically be repaired in the future by the accused and then instill the fear in

them that that hypothetical aircraft would crash. *United States v. Marsh*, __ M.J. __ (C.A.A.F. 2011).

E. Arguing that an acquittal would have a negative impact on the command.

1. *United States v. Causey*, 37 M.J. 308 (C.M.A. 1993). In urinalysis case, trial counsel argued that if members accepted accused's innocent ingestion defense they would "hear it a million times again" in their units. Court held this improperly inflamed members with fear that urinalysis program would break down.

F. Appealing to personal interests of sentencing authority.

1. *United States v. Nellum*, 21 M.J. 700 (A.C.M.R. 1985). It was improper for trial counsel to ask the military judge if he wanted the accused walking the streets of the judge's neighborhood.

VII. Clearly Impermissible Argument

A. Counsel may not make racist comments.

1. Counsel should not make arguments that are calculated to inflame prejudices. R.C.M. 919(b) discussion.

2. *United States v. Lawrence*, 47 M.J. 572 (N.M. Ct. Crim. App. 1997). Trial counsel'' rebuttal argument referring to testimony by the accused and his "Jamaican brothers" was plain error and was unmistakenly pejorative, even if trial counsel did not intend to evoke racial animus.

3. *United States v. Thompson*, 37 M.J. 1023 (A.C.M.R. 1993). Trial counsel improperly argued that accused dealt drugs because of the "stereotypic view of what the good life is, Boyz in the Hood - drug dealing - sorry to say, the black male and the black population. But nevertheless, it is that look, it is that gold chain, it is that nice car that epitomizes a successful individual."

4. *United States v. Rodriguez*, 60 M.J. 87 (C.A.A.F. 2004). In a case involving a Latino accused, the prosecutor made a passing reference to a "Latin movie" during closing argument. The court declined to adopt a *per se* prejudice test for statements about race, but it did caution that improper racial comments could deny an accused a fair trial.

5. The trial counsel's use of the phrase "chilling with his boy" in describing a defense witness's association with the appellant was at the least insensitive sarcasm and could have been racist. *United States v. Walker*, 50 M.J. 749 (N-M. Ct. Crim. App. 1999).

B. Counsel may not argue a personal opinion or belief.

1. Counsel should not express a personal belief or opinion as to the truth or falsity of any testimony or evidence. R.C.M. 919(b) discussion; *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983).

a) Counsel should not phrase argument in personal terms. *United States v. Horn*, 9 M.J. 429 (C.M.A. 1980) (trial counsel's repeated use of term "I think" during argument was improper); *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005).

b) Telling the panel members that a witness testified truthfully and using the word "clearly" is not improper. *United States v. McClary*, 68 M.J. 606 (C.G. Ct. Crim. App. 2010).

c) Counsel may not express personal opinion as to guilt of accused. *United States v. Knickerbocker*, 2 M.J. 128 (C.M.A. 1977); *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005).

d) *United States v. Terlep*, 57 M.J. 344 (C.A.A.F. 2002). Appellant, charged with burglary and rape, pled to LIOs of the unlawful entry and battery. In his argument, trial counsel noted that the victim had to undergo a rape protocol kit at the hospital and suffer the feelings of being "violated" and "contaminated" on the night the appellant entered her home. In rebuttal, the trial counsel stated: "[the victim] has weathered the storm of this whole incident with dignity and with a courageous spirit to get up there and tell you what happened that night, to tell you the truth." On appeal, the court found that the trial counsel's argument did not constitute plain error. The court noted that the argument did not personally vouch for the victim's credibility in general or with respect to her allegation of rape.

2. Expression of personal opinion by defense counsel does not confer license on trial counsel to respond in kind. *United States v. Young*, 470 U.S. 1 (1985).

C. Counsel may not disparage or malign the other counsel.

1. *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005).

D. Trial counsel may not to refer to the convening authority or argue command policies.

1. R.C.M. 1001(g).

2. *United States v. Thomas*, 44 M.J. 667 (N-M. Ct. Crim. App. 1996). Trial counsel argued in drug case that "the CNO . . . has a zero tolerance policy for anyone who uses any kinds of drugs." Court found TC reference improper, and noted, "references to command or departmental policies have no place in the determination of an appropriate sentence in a trial by court-martial." Error for military judge not to give instruction even though defense counsel failed to object.

3. *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983). Military judge had *sua sponte* duty to correct counsel's improper comments on Strategic Air Command policies on drugs.

4. *United States v. Sparrow*, 33 M.J. 139 (C.M.A. 1991). It was improper for the trial counsel to mention the convening authority by name and then to tell the members to "do the right thing."

5. *United States v. Simpson*, 12 M.J. 732 (A.F.C.M.R. 1981). It was error for trial counsel to argue that referral to special court-martial was exercise of clemency by convening authority.

6. *United States v. Fortner*, 48 M.J. 882 (N-M. Ct. Crim. App. 1998). Trial counsel's reference in closing argument to Navy core values did not constitute improper reference to higher authority, as prohibited in RCM 1001(g). Such values are aspirational concepts that do not require specific punishment for failure to comply.

E. Counsel may not make misleading arguments.

1. *United States v. Cassity*, 36 M.J. 759 (N.M.C.M.R. 1992) (finding error in government's disingenuous argument for leniency as to confinement which was designed to enhance punishment by operation of the pretrial agreement). Trial counsel may not argue for a quantum of punishment greater than that court-martial may adjudge. R.C.M. 1001(g).

2. *United States v. Martinez*, 30 M.J. 1194 (A.F.C.M.R. 1990). Where the government allowed an accused to plead guilty as an aider and abettor in providing the gun to actual shooter, it could not then argue that the accused pulled the trigger.

VIII. Effect Of Failure to Object to Improper Argument

A. The Waiver Rule.

1. Failure to object to improper argument constitutes waiver. *United States v. McPhaul*, 22 M.J. 808 (A.C.M.R. 1986).

a) If the defense counsel does not object, appellate courts will infer that the argument is not that offensive; if it was, the defense counsel would have objected. *See United States v. Jenkins*, 54 M.J. 12 (C.A.A.F. 2000).

b) *United States v. Kirks*, 34 M.J. 646 (A.C.M.R. 1992). Where three possible objections to argument existed and defense counsel only made one, other two were waived.

c) An objection by opposing counsel is the most appropriate response to an erroneous argument. *See United States v. Espronceda*, 36 M.J. 535 (A.F.C.M.R. 1992).

d) *United States v. Desiderio*, 30 M.J. 894 (A.F.C.M.R. 1990). Defense counsel's failure to object during trial counsel's argument constituted waiver, even though defense counsel stated in his argument, "Now I didn't say anything during [trial counsel's] argument as he stood up and talked about the impact of drug use on the mission and that kind of thing. It probably was objectionable."

2. Findings. Failure to object to improper argument before the military judge begins to instruct the members on findings shall constitute waiver of the objection. R.C.M. 919(c).

3. Sentencing. Failure to object to improper argument before the military judge begins to instruct the members on sentencing shall constitute waiver of the objection. R.C.M. 1001(g).

B. The Plain Error Exception.

1. Failure to object does not waive plain error. *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986); *United States v. Williams*, 23 M.J. 776 (A.C.M.R. 1987). *See also United States v. Young*, 470 U.S. 1 (1985).

2. In order to constitute plain error, the error must:

a) Be obvious and substantial; and

b) Have had an unfair prejudicial impact.

3. In some circumstances, prejudice is not necessary. *United States v. Thompson*, 37 M.J. 1023, (A.C.M.R. 1993). Trial counsel's racist sentencing argument was found to be plain error, despite the fact that it did not prejudice the accused's sentence.

Chapter 37

I. Introduction.

A. Rule 101.

1. Scope. The Military Rules of Evidence are applicable to courts-martial, including summary courts-martial, to the extent and exceptions stated in Rule 1101.

2. Rule 1101.

Rule 1101. Applicability of rules

(a) Rules applicable. Except as otherwise provided in this Manual, these rules apply generally to all courts-martial, including summary courts-martial; to proceedings pursuant to Article 39(a); to limited fact-finding proceedings ordered on review; to proceedings in revision; and to contempt proceedings except those in which the judge may act summarily.

(b) Rules of privilege. The rules with respect to privileges in Section III and V apply to all stages of all actions, cases, and proceedings.

(c) Rules relaxed. The application of these rules may be relaxed in sentencing proceedings as provided under R.C.M. 1001 and otherwise as provided in this manual.

(d) Rules inapplicable. These rules (other than with respect to privileges and MRE 412) do not apply in investigative hearings pursuant to Article 32; proceedings for vacation of suspension of sentence pursuant to Article 72; proceedings for search authorizations; proceedings involving pretrial restraint; and in other proceedings authorized under the code or this Manual and not listed in subdivision (a).

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3. Secondary Sources. Rule 101 (b). If not otherwise prescribed in the Manual or rules, courts-martial will first apply the rules of evidence recognized in the trial of criminal cases in the United States district courts; and secondly, the rules of evidence at common law. *United States v. Toy*, 65 M.J. 405, 410 (2008).

B. Rule 103. Rulings on Evidence.

1. Rulings on Evidence. This rule imposes significant responsibility on counsel to raise and preserve evidentiary questions for review.

Rule 103. Ruling on Evidence

(a) Effect of Erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record; stating the specific ground of objection, if the specific ground was not apparent from the context;

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked. <u>Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal</u>. The standard provided in this subdivision does not apply to errors involving requirements imposed by the Constitution of the United Sates as applied to members of the armed forces except insofar as the error arises under these rules and this subdivision provides a standard that is more advantageous to the accused than the constitutional standard

(d) Plain error. Nothing in these rules precludes taking notice of plain errors that materially prejudice substantial rights although they were not brought to the attention of the military judge.

2. Objections to evidence. Rule 103(a)(1): Failure to make specific (correct), timely (meaning at the earliest possible time) objection at trial waives issue for appeal, absent a "plain error;"

3. Preserving Issues. Counsel are not required to cite evidentiary rules by number in order to adequately preserve objections for later appellate review. So long as counsel makes sufficient arguments to make the issue known to the military judge, the issue will be preserved. *United States v. Datz*, 61 M.J. 37 (2005). While MRE 103 does not require the moving party to present every argument in support of an objection, it does require argument sufficient to make the military judge aware of the specific ground for objection. MRE 103 should be applied in a practical rather than a formulaic manner. *United States v. Reynoso*, 66 M.J. 208 (2008).

4. Where the witness' answer is objectionable, but it has been heard by the panel, the opponent must seek a curative instruction (to disregard the testimony) or a mistrial. Declaration of a mistrial lies within the sound discretion of the judge, *United States v. McGeeney*, 41 M.J. 544 (N-M. Ct. Crim. App. 1994), and should only be granted where circumstances demonstrate the necessity to prevent a manifest injustice to the accused. *United States v. Dancy*, 38 M.J. 1 (C.M.A. 1993).

5. Offer of Proof. Rule 103(a)(2): If the military judge sustains an objection to the tender of evidence, the proponent generally must make an offer to preserve the issue for appeal. The offer should include the substance of the proffered evidence, the affected issue, and how the issue is affected by the judge's ruling. *United States v. Means*, 24 M.J. 160 (C.M.A. 1987) and *United States v. Viola*, 26 M.J. 822 (A.C.M.R. 1988).

6. Repeating Objections. Counsel do not have to repeat objections during trial if they first obtain unconditional, unfavorable ruling from the military judge in out-of-court session. *United States v. Sheridan*, 43 M.J. 682 (A.F. Ct. Crim. App. 1995). However, a preliminary, tentative ruling may require a subsequent objection to preserve the issue for appeal. *United States v. Jones*, 43 M.J. 708 (A.F. Ct. Crim. App. 1995). Rule 103 also applies at sentencing to the admission of documents from the accused's personnel records. *See United States v. Kahmann*, 59 M.J. 309 (2004) (holding that where defense counsel failed to object, the military judge did not commit plain error in admitting a summary court-martial conviction record that did not indicate on its face whether the accused had received *Booker* counseling or whether mandatory review of the conviction had taken place under Art. 64).

C. Rule 105. Limited Admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the military judge, upon request, shall restrict the evidence to its proper scope and instruct the members accordingly.

1. A limiting instruction may be an appropriate alternative to exclusion of evidence. *See, e.g., United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983) (exclusion of Rule 412 evidence); *United States v. Ureta*, 44 M.J. 290 (1996), *cert. denied*, 117 S.

Ct. 692 (1997) (prior inconsistent statements offered for impeachment); *United States v. Barrow*, 42 M.J. 655 (A.F. Ct. Crim. App. 1995) (uncharged misconduct).

2. The rule embodies the view that, as a general rule, evidence should be received if it is admissible for any purpose. The rule places the major responsibility for the limiting instruction upon counsel. Counsel should state the grounds for limiting the evidence outside the hearing of the members. Counsel should offer, and the court may request, the specific language to use. The limiting instruction may be given at the time the evidence is received or as part of the general instructions, or at both times.

D. Rule 106. Remainder of or Related Writings or Recorded Statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

1. In *United States v. Rodriquez*, 56 M.J. 336 (2002), the CAAF held that in the military there are two distinct rules of completeness, Rule 106 and Rule 304(h)(2). CAAF held that Rule 106 applies when fairness demands that the rest of the evidence be considered contemporaneously with the portions of the evidence offered by the opposing side. They adopted a standard regarding Rule 304(h)(2) that allows for admissibility of statements made by the accused when the defense introduces the remainder of a statement or statements that are explanatory or relevant to the confession or admission of the accused previously offered by the government. This is allowed even if the statements the defense seeks to admit are otherwise inadmissible hearsay. CAAF requires a case-by-case determination when the defense attempts to admit a series of statements as part of the original confession or admission in order to determine if they are part of an ongoing statement or a separate transaction or course of action.

2. In the context of a confession or an admission, read this rule in connection with Rule 304(h)(2) (where only part of the alleged admission or confession is introduced, the defense may introduce other portions). Other portions admitted by the defense do not need to overcome a hearsay objection. *United States v. Benton*, 54 M.J. 717 (A. Ct. Crim. App. 2001). However, note that this has the potential to open the door to an accused's character – the *Goldwire* trap. In *United States v. Goldwire*, 55 M.J. 139 (2001), the CAAF held that when defense counsel uses the rule of completeness to admit portions of their client's statements into evidence through cross examination of a government witness they open the door to reputation and opinion testimony regarding the truthfulness of the accused. CAAF analyzed the potential application of the rule of completeness under both the federal and military rules, as well as the common law doctrine of completeness.

3. Supplementary Statements. In *United States v. Foisy*, 69 M.J. 562 (N.M. Ct. Crim. App. 2010), the accused gave a sworn statement to an NCIS agents admitting that he had sex with the victim, but insisting that it was consensual. He also described his interactions with the victim which led him to believe that it was consensual. Another NCIS agent took a second statement from the accused which was labeled as a "supplementary statement." The facts in supplementary statement began immediately before appellant penetrated the victim. At trial, the

government admitted only the supplementary statement. The defense attempted to admit the first statement under the rule of completeness. The government objected and the military judge sustained the objection. The Navy-Marine Court of Criminal Appeals held that under MRE 304(h)(2), "where the Government links two statements by constructing them as a statement and a 'supplement' to that statement, the Government may not deconstruct those statements for the purposes of trial where the admission of the second statement standing alone would create a misimpression on the part of the fact finder as to an accused's actual admissions." The military judge erred in not allowing the defense to introduce the first statement.

II. RELEVANCY AND ITS LIMITS

A. Rule 401: Definition of "Relevant Evidence"

Rule 401. Definition of "Relevant Evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

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1. Establishing Relevancy - A basic tenet of American jurisprudence is that finders of fact may consider only relevant evidence. Military Rule of Evidence 401 is taken without change from the Federal Rule and adopts a logical approach to relevance. Rule 401 permits both circumstantial and direct evidence to satisfy the relevancy criteria. The logical starting place when evaluating any issue at trial is the concept of relevance. Almost every issue in evidence law involves the idea of relevance. In fact, a relevancy objection, although often overlooked, is frequently the most valid objection available to counsel. Military courts have used Rule 401 to expand the amount of information available to the members. *See*, e.g., *United States v. Tomlinson*, 20 M.J. 897 (A.C.M.R. 1985) (Rule 401 was "intended to broaden the admissibility" of most evidence.)

2. Requirements of Counsel. When a counsel seeks to have evidence admitted, she must be able to specify what issue it relates to and show how it rationally advances the inquiry about that issue. Counsel should be prepared to articulate why certain requested evidence is relevant by doing the following:

   a) describe the evidence;

   b) explain its nexus to the consequential issue in the case; and

   c) indicate how the offered evidence will establish the fact in question.

3. Standard of "Any Tendency" – is the lowest possible standard for relevancy. This standard shifts the emphasis from admissibility to weight. The test for logical relevance (as opposed to legal relevance discussed later in this outline) is whether the item of evidence has any tendency whatsoever to affect the balance of probabilities of the existence of a fact of consequence.

   a) *United States v. Huet-Vaughn*, 43 M.J. 105 (1995). Army reserve physician's motives and reasons for refusing to support Desert Shield and views about the lawfulness of her deployment orders irrelevant to charge of desertion with intent to avoid hazardous duty.

   b) *United States v. Schlamer*, 52 M.J. 80 (1999). Accused was charged with the premeditated murder of a female. Victim was found with her

throat cut. At trial, the government introduced pictures and writings seized from the accused. In these documents, the accused set out in graphic detail his desires to kill women and have sex with them and commit other violent acts. These writings did not mirror the actual crime, and defense claimed that they were not relevant. The military judge admitted the evidence over the defense objection. The CAAF held Rule 401 is a low standard and since the defense was trying to portray the accused as a docile person, this evidence had some tendency to show the darker side that was consistent with his confession.

c) *United States v. Berry*, 61 M.J. 91 (2005) Relevant evidence under Rule 401 is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evidence of a prior uncharged sexual assault by an accused involving a younger victim satisfied the relevance prong of the threshold test for the admission of uncharged sexual assault in a case where the accused was charged with forcible sodomy of a victim who was drunk, as it has some tendency to make it more probable that the accused committed a nonconsensual act against a vulnerable person.

4. Relationship between Rule 401 and the Due Process Clause. In *United States v. Brewer*, 61 M.J. 425 (2005), the CAAF held that in a urinalysis case, the defense was entitled to introduce a "mosaic alibi" defense to counter the permissive inference of wrongful use, even though such evidence would violate Rules 404 and 405.

5. The Main Relevancy Provisions

a) The Military Rules of Evidence have three main relevance provisions: Rules 401, 402, and 403. Rule 401 defines what is relevant. Rule 402 require that evidence be relevant in order to be admitted and that irrelevant evidence be excluded. Finally, Rule 403 allows the military judge to use discretion to avoid admitting otherwise relevant evidence due to concerns about unfair prejudice, confusion of issues, misleading the panel, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

b) Justification for the Main Relevancy Provisions: Relevancy requirements help save time, narrow the topics the parties have to develop in preparation for trial, and increase the perceived legitimacy of courts-martial by ensuring that outcomes will be based on information most people would believe have something to do with the issues at trial.

c) Discussion of Rule 402 and 403: A more detailed discussion of Rules 402 and 403 are contained within this outline.

B. Relationship of Rules 401 and 104.

1. Preliminary Questions. The military judge decides questions of admissibility of evidence under Rule 104. They are determined solely by the military judge, not the "court" and the judge is not bound by the rules of evidence, except those with respect to privileges. Because relevancy is a condition for admissibility, it is one of the issues the military judge is intended to decide.

2. When faced with deciding a relevancy objection, the military judge has four basic choices with respect to ruling on the issue:

   a) exclude the evidence;

   b) admit all the evidence;

   c) admit all the evidence subject to a limiting instruction; or

   d) admit part of the evidence and exclude part.

3. Threshold. Although the primary responsibility for showing the relevancy of a particular piece of evidence rests with the proponent, it is a very low hurdle to overcome. All that the military judge is required to determine in order to rule a piece of evidence is relevant, is that a rational member could be influenced by the evidence in deciding the existence of a fact of consequence. The evidence only has to be capable of making determination of the fact more or less probable than it would be without the evidence.

4. Relevancy Conditioned Upon Proof of a Predicate Fact. Rule 104(b) deals with the situation where the relevancy of a piece of evidence is conditioned upon proof of a predicate fact. *United States v. Bins*, 43 M.J. 79 (1995). The military judge's responsibility in these cases is not to decide whether she believes the evidence or she believes the government has proven the predicate fact. Instead, the judge only decides whether counsel has introduced enough evidence so that the panel could reasonably conclude the existence of the conditional fact. In other words, the judge decides only if there is a sufficient factual predicate for admissibility of the evidence; weight and credibility of the evidence are matters for the members. *United States v. Kelly*, 45 M.J. 275 (1996). *Huddleston v. United States*, 485 U.S. 681 (1988) (holding that neither FRE 104 nor 404(b) requires the trial judge to determine by a preponderance of the evidence that a 'similar act' was committed; the trial judge is only required to consider all of the evidence offered and decide whether the jury could reasonably find the similar act was committed).

   a) The military judge should ask the following questions:

      (1) Will the members find it helpful in deciding the case accurately? If NO, then the judge excludes the evidence. If YES, then the judge asks another question;

      (2) Is there sufficient evidence to warrant a reasonable member in believing the evidence? If NO, then the judge excludes the evidence. If YES, then the judge admits the evidence.

C. Relationship of Rules 401 and 402.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

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1. Exclusion of relevant evidence:

   a) The Rule states all relevant evidence is admissible except evidence which falls into any one of the following five categories:

(1) evidence that violates the Constitution;

(2) evidence that violates the Uniform Code of Military Justice;

(3) evidence that violates the Manual for Courts-Martial;

(4) evidence that violates the Military Rules of Evidence; and

(5) evidence that violates any Congressional limitation which might specifically concern courts-martial.

b) Other relevant evidence may be excluded under Rule 403.

2. Applying Rule 402. Irrelevant evidence is never admissible. It is not admissible because it does not assist the trier of fact in reaching an accurate and fair result. The Rule requires the court to address three separate questions before admitting evidence.

a) Does the evidence qualify under Rule 401's definition?

b) Does the evidence violate any of the five prohibitions listed in Rule 402?

c) Does the evidence satisfy any provision requiring a Rule 403 related judicial assessment of the probative value of the evidence? See, e.g., Rules 403, 412, 413, 414, 803(6), 804(b)(5), 807, and 1003.

D. Relationship of Rules 401 and 403.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

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1. Unfair Prejudice. Evidence is subject to exclusion if the opposing counsel can successfully convince the military judge that the risk of unfair prejudice substantially outweighs it probative value. Rule 403 is one of the most often cited rules by counsel. The rule is particularly important in the law of evidence since it is a rule that empowers the military judge to exclude probative evidence if it can be said to be unfairly prejudicial.

a) Standard. In a sense, all evidence that either the government or defense seeks to introduce is intended to prejudice the opponent. If it didn't prejudice the opponent, one could reasonably question the value of seeking to admit the evidence. The question under Rule 403 is really one that addresses how the factfinder will view the evidence. It is only when a factfinder might react to the proffered evidence in a way (usually emotional) that is not supposed to be part of the evaluative process that the reaction is considered unfairly prejudicial. *United States v. Owens*, 16 M.J. 999 (A.C.M.R. 1983) (describing unfair prejudice as existing "if the evidence is used for something other than its logical, probative force").

(1) PROPER PREJUDICE EXAMPLE: SPC Smiffy is charged with assault upon PVT Jones. The government seeks to introduce evidence from CPT Honest who will testify he heard SPC Smiffy say "the next time I see PVT Jones he is a dead man." The defense might try to keep the testimony out under a

number of justifications, but under Rule 403, although the evidence is prejudicial and a member may use it to determine that SPC Smiffy likely assaulted PVT Jones, this type of prejudice is proper because it comes from the member's belief that the accused committed the charged offense.

(2) IMPROPER PREJUDICE EXAMPLE: Same facts as above except CPT Honest is going to testify he heard SPC Smiffy say "the next time I see PVT Jones he is a dead man, because I belong to the "bare knuckles gang" that encourages members to beat people up." Under Rule 403, the defense would have a much better argument to keep out the portion of the statement regarding SPC Smiffy's gang membership. The risk of admitting the entire statement is that the members may develop a negative feeling about SPC Smiffy based upon their feelings about individuals that belong to a gang. Those impressions would be an example of unfair prejudice since they are unrelated to the probative value the gang information has with respect to the charged offense. Instead, they flow from the members' reactions to information about the accused that would cause loathing whether or not it was linked to the events of the alleged offense. The risk of the members believing the accused is a wretch that deserves punishment no matter what the evidence is regarding the assault is an example of unfair prejudice under Rule 403.

b) Legal Relevance. The probative value of any evidence cannot be substantially outweighed by any attendant or incidental probative dangers. Among the factors specifically mentioned in the rule are "the danger of unfair prejudice, confusion of the issues, or misleading the members." To determine whether the risk of unfair prejudice substantially outweighs the probative value of evidence, the military judge is required to do some kind of weighing. Although there is not a clear test for the military judge to follow, some factors the military judge might consider include:

(1) the strength of the probative value of the evidence (i.e., a high degree of similarity);

(2) the importance of the fact to be proven;

(3) whether there are alternative means of accomplishing the same evidentiary goal (consider in connection with defense concessions to 404(b) uncharged misconduct); and

(4) the ability of the panel to adhere to a limiting instruction.

(5) Berry Factors - *United States v. Berry*, 61 M.J. 91 (2005). When conducting a Rule 403 balancing test, a military judge should consider the following factors: the strength of the proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the factfinder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts;

the presence of any intervening circumstances; and the relationship between the parties.

c) Rule 403 favors admissibility. A military judge will exclude evidence on a legal relevance theory only when the probative values is "substantially outweighed" by the accompanying probative dangers. *United States v. Teeter*, 12 M.J. 716 (A.C.M.R. 1981) (stating that striking a balance between probative value and prejudicial effect is left to the trial judge and that the balance "should be struck in favor of admission"). The passive voice suggests that it is the opponent who must persuade that the prejudicial dangers overcome the probative value. *United States v. Leiker*, 37 M.J. 418 (C.M.A. 1993) (cautioning defense counsel that failure to make a satisfactory offer of proof prohibits an appellate court from weighing the evidence's probative value against its possibility for causing undue delay or waste of time).

d) Rule 403 codifies judicial discretion. It is the rule by which the legal relevance is ascertained. Saltzburg, Schinasi & Schleuter state that while Rule 403 has broad application throughout the Military Rules of Evidence, "its greatest value may be in resolving Rule 404(b) issues" because of the low threshold of proof required to establish extrinsic events. *See* Editorial Comment, Rule 403, Military Rules of Evidence at Section 403.03[7], at 4-30 (5th ed. 2003).

e) Rule 403 and special findings. The military judge should always make special findings when resolving a Rule 403 objection, even without a request to do so by counsel. *United States v. Bins*, 43 M.J. 79 (1995) (criticizing the military judge for stating that he had performed the balancing test required by Rule 403, when all he really did was recite the Rule's language). Special findings are beneficial for at least two reasons:

(1) Appellate courts will be able to evaluate the criteria and thought process used by the military judge. This will reduced the likelihood of reversal for abuse of discretion. *United States v. Hursey*, 55 M.J. 34 (2001) (describing that when a military judge conducts a proper Rule 403 balancing test, the evidence ruling will not be overturned unless there is a clear abuse of discretion).

(2) Special findings provide counsel with an opportunity to correct erroneous determinations by the military judge at the trial level, instead of waiting months or years later to do the same on appeal.

III. Character evidence

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes

(a) *Character evidence generally*. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of the accused*. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a pertinent trait of character of the alleged victim of the crime is offered by an accused and admitted under Mil. R. Evid. 404(a)(2), evidence of the same trait of character, if relevant, of the accused offered by the prosecution.

(2) *Character of the alleged victim*. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide or assault case to rebut evidence that the alleged victim was an aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Mil. R. Evid. 607, 608, and 609.

A. Rule 404. Character Evidence.

1. Common Sense: If you wanted to hire someone to clean your house, would you pay attention to information about the person's trustworthiness? If you knew an applicant had a conviction for theft, selling stolen items, or burglary, would that affect your hiring decision?

2. Basic Rule: Evidence of a person's character may NOT be introduced to support an inference that the person acted on a specific occasion in conformity with that character.

3. "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt…. The State may not show the defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime." *Michelson v. United States*, 335 U.S. 469, 475 (1948) (footnotes omitted) (citation omitted).

4. Prohibited Propensity Inference – you cannot use a person's character to suggest that the person did something because of a propensity to do such things. PROHIBITED: SPC Smiffy has sold stolen items in the past — therefore he must have sold stolen items in the current court-martial. Rule 404(a).

B. Permissible Propensity Inference

1. In certain situations you can use propensity evidence to show a person acted in conformity with their character. It is important to master these exceptions in order to avoid confusion.

a) Pertinent Character Traits Offered by the Accused – the accused may

offer any pertinent character trait which makes it unlikely that she committed the charged offense (Rule 404(a)(1)). In other words, this is circumstantial evidence of conduct. "Pertinent" in 404(a) means the same thing as "relevant" as that term is defined in 401.

(1) When submitting the request for reputation or opinion witnesses, the proffer should include the following foundational elements: the name of the witness, whether the witness belongs to the same community or unit as the accused, how long the witness has known the accused, whether he knows him in a professional or social capacity, the character trait known, and a summary of the expected testimony. *United States v. Breeding*, 44 M.J. 345 (1996).

(2) The formula could be applied in the following scenarios:

	Pertinent
Offense	**Character Trait**
Larceny	Trustworthiness or Honesty
Drunkenness	Sobriety

(3) An accused's general good military character is a pertinent character trait if there is a nexus, however strained or slight, between the crime circumstances and the military. The defense, in virtually every case, and certainly in every "military" offense prosecution, may attempt a "good soldier defense" by presenting the accused's good military character evidence. *United States v. Wilson*, 28 M.J. 48 (C.M.A. 1989). Consider the impact of *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994) (service discrediting behavior or conduct prejudicial to good order inherent in all enumerated offenses).

(4) Rebuttal by Government of Good Character of Accused – if an accused introduces good character evidence (or any other pertinent character trait), the government is allowed to rebut this with bad character evidence to suggest that the accused is guilty. NOTE: If a defense counsel loses a motion in limine to preclude the government from cross-examining character witnesses regarding accused's bad acts, a tactical election not to present good character case probably will bar review. *United States v. Gee*, 39 M.J. 311 (C.M.A. 1994).

(5) Rebuttal by the government is proper when the accused claims that he or she is not the sort of person who would do such a thing. "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." *Michelson v. United States*, 335 U.S. 469, 479 (1948); *United States v. Johnson*, 46 M.J. 8 (1997).

(a) But see, *United States v. Trimper*, 28 M.J. 460 (C.M.A.) cert. denied, 493 U.S. 965 (1989). Even if the accused

opens the door to uncharged misconduct (here by claiming to have never used cocaine), the judge must decide whether the unfair prejudicial effect of the rebuttal evidence substantially outweighs its probative value. Rule 403. See also, *United States v. Graham*, 50 M.J. 56 (1999). CAAF held it was reversible error to allow trial counsel to question accused about prior positive urinalysis, even though the accused testified he was surprised when he tested positive for THC.

(b) *United States v. Goldwire*, 55 M.J. 139 (2001), the CAAF held that when defense counsel attempt to develop their theory of the case through the cross examination of government witnesses, they may open the door to reputation and opinion testimony regarding truthfulness of the accused. In *Goldwire*, the trial defense counsel cross-examined the CID agent on exculpatory statements made by the accused during the interview conducted by the CID agent. The appellant argued on appeal that this cross-examination was allowed under the rule of completeness and that it did not open the door to reputation and opinion testimony concerning the accused. The CAAF disagreed.

(6) Accused's Sexual Propensities – proof of an accused's sexual propensities in sex offense courts-martial is specifically allowed. Rules 413 and 414 (treated in greater detail later in this outline).

b) Character of Victim – an accused is allowed to offer evidence of a pertinent character trait of an alleged victim in order to show that it makes it likely the victim acted in a certain way on a specific occasion. Rule 404(a)(1) and (2). For example, the accused is permitted, when relevant, to show that the victim was the aggressor by introducing evidence of the victim's character for violence. *United States v. Rodriguez*, 28 M.J. 1016 (A.F.C.M.R. 1989).

(1) Rebuttal by Government of Character of Victim – the government is allowed to rebut with character evidence about the victim in any of the following situations:

(2) In situations where the accused offers a pertinent character trait of the alleged victim, the government may rebut the accused's evidence with their own character evidence of the victim. Rule 404(a)(2).

(3) Additionally, in situations where the accused offers a pertinent character trait of the alleged victim, that opens the door for the government to offer evidence of the same character trait, if relevant, of the accused (even without the accused first bringing his or her character into evidence). Rule 404(a)(1). (June 2002 Amendment)

(4) ALSO, in homicide and assault cases, the government may introduce character evidence to prove the peaceful character of

the victim in order to rebut a claim made in any way that the victim was an aggressor. Rule 404(a)(2), *United States v. Pearson*, 13 M.J. 922 (N.M.C.M.R. 1992) (victim's character for peacefulness relevant after accused introduces evidence that victim was the aggressor).

c) Impeachment of a Witness – when an issue is whether a witness testified truthfully, evidence about that witness's character for truth-telling is permitted to support an inference that the witness has acted at trial in conformity with the witness's usual respect for truth. Rules 405(a) and 608.

2. Character Evidence for Nonpropensity Purpose – If the evidence has relevance independent of propensity, it may be admissible. For example, evidence that someone charged with an offense has committed similar offenses in the past could lead a trier of fact to conclude the person is a bad person and criminally inclined. If this were the only purpose for the evidence given by the government, it would not be a permissible use of character evidence. If, however, the evidence were offered to prove the accused possessed the knowledge necessary to commit the charged offense in the current court-martial, then admissibility would be possible. Rule 404(b) (treated in greater detail later in this outline).

IV. Uncharged misconduct

Rule 404(b). Other crimes, wrongs, or acts

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution shall provide reasonable notice in advance of trial or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

A. Rule 404(b). Uncharged Misconduct.

1. Understanding the Rule: Although proof of an individual's character through evidence of other crimes, wrongs, or acts to show action in conformity (propensity) with that character on a specific occasion is not allowed (except in sexual offense cases and certain other limited circumstances), it can be admitted if it is introduced for a nonpropensity purpose. Nonpropensity evidence (uncharged misconduct) is not offered to prove that an individual acted in conformity with that individual's character on a particular occasion. Nonpropensity evidence is offered to prove such things as **K**nowledge, **I**ntent, **P**lan, **P**reparation, **O**pportunity, **M**otive, **I**dentity, and **A**bsence of Mistake (KIPPOMIA). The list in Rule 404(b) is NOT exhaustive: The "sole test" for admissibility of uncharged misconduct is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime and therefore to suggest that the factfinder infer that he is guilty, as charged, because he is predisposed to commit similar offenses. It is unnecessary that relevant evidence fit snugly into a pigeon hole provided by Rule 404(b). *United States v. Castillo*, 29 M.J. 145, 150 (C.M.A. 1989).

2. Two Main justifications for the prohibition on propensity:

a) Propensity evidence may lead to the wrong outcome in a court-martial.

b) Propensity evidence almost always carries a significant risk of unfair prejudice.

3. Rule 404(b) is an "inclusive rule" which permits admission of extrinsic evidence unless the sole purpose is to show criminal disposition. If the proponent can articulate a nonpropensity theory of logical relevance for the uncharged misconduct evidence, the military judge will have discretion to admit or exclude the evidence.

4. Some Nonpropensity Theories of Relevance.

a) Motive. Motive supplies the reason that nudges the will and prods the mind to indulge in criminal intent. Such evidence may be offered to prove that the act was committed, or to prove the identity of the actor, or to prove the requisite mental state.

(1) Two inferences are required: first, the act(s) must support an inference of some mental state AND second, the mental state must be causally related to an issue in the case. This is an area which is difficult to distinguish, analytically, from propensity.

(2) Some examples:

(a) *United States v. Watkins*, 21 M.J. 224, 225 (C.M.A. 1986) (motive evidence relevant to show a person's action as an outlet for emotions. Prior acts of conduct must be of a type which reasonably could be viewed as the expression and effect of the existing internal emotion, and same motive must exist at time of subsequently charged acts).

(b) *United States v. Phillips*, 52 M.J. 268 (2000). Accused charged with BAQ fraud and entering into a sham marriage in order to collect BAQ payments. Court held that evidence of the accused's homosexual relationship was admissible under Rule 404(b) to show motive and intent.

b) Intent: Negates accident, inadvertence or casualty. Intent differs from other named Rule 404(b) exceptions because, typically, it is an ultimate issue in the case. When considering whether uncharged misconduct constitutes admissible evidence of intent under Rule 404(b), a military judge should consider "whether … [the accused's] state of mind in the commission of both the charged and uncharged acts was sufficiently similar to make the evidence of the prior acts relevant on the intent element of the charged offenses." *United States v. McDonald*, 59 M.J. 426, 430 (2004). According to the CAAF, the relevancy of the other crime is derived from the accused's possession of the same state of mind in the commission of both offenses. The state of mind does not have to be identical, but must be sufficiently similar to make the evidence of the prior acts relevant on the intent element of the charged offenses. The link between the charged and uncharged misconduct must permit meaningful comparison.

(1) The "doctrine of chances." *United States v. Merriweather*, 22 M.J. 657, 661 (A.C.M.R. 1986) ("[T]he sheer number of injuries suffered by the victim over a relatively short period of time would have led common persons to conclude that the charged injury was less likely to have been accidental, thus rebutting the inference of possible accident which arose from the testimony elicited by the defense counsel").

(2) *United States v. Sweeny*, 48 M.J. 117 (1998). Accused charged with stalking his current wife. Court allowed evidence that accused stalked former wife in a similar manner. Court said uncharged misconduct was probative of intent to inflict emotional distress.

(3) *United States v. Henry*, 53 M.J. 108 (2000). At his trial for rape of his stepdaughters, evidence was introduced that the accused made her watch pornographic videos with him. No videos were found in the home, but magazines containing video order forms were found and introduced at trial under Rule 404(b). The CAAF affirmed holding that this evidence was relevant to show intent and that the accused may have groomed his victim. The court also said this evidence was relevant to impeach the victim's in-court testimony because she was now recanting her allegations of rape.

(4) *United States v. Hays*, 62 M.J. 158 (2005), the CAAF affirmed a military judge's decision to admit the appellant's uncharged acts as evidence of intent. The appellant was charged with solicitation to commit the rape of a minor, and the government introduced numerous items of child pornography and explicit e-mails from the appellant's computer to demonstrate intent to commit the offense.

(5) *United States v. Harrow*, 65 M.J. 190 (2007). Appellant was charged with the unpremeditated murder of her five-month-old daughter. The military judge permitted three witnesses to testify about previous incidents where the appellant was abusive to her daughter. The military judge correctly applied the three-part test found in *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989) to determine admissibility of previous incidents of flicking, thumping, and biting reflected a state of mind indicating that the appellant responded to her daughter's irritating, yet normal, behavior with deliberate, inappropriate physical force under M.R.E. 404(b).1 The CAAF determined that the evidence was relevant to show both absence of mistake and intent. Although the appellant did not argue accident, evidence produced at trial by the appellant supported an argument that the injuries might have been accidentally inflicted. The government was entitled to rebut this argument. Likewise, although the

[1] The three-part test of *Reynolds* is: (1) Does the evidence reasonably support a finding by the court members that the appellant committed the prior crimes, wrongs, or acts?; (2) What fact of consequence is made more or less probable by the existence of this evidence?; AND (3) Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice?

appellant did not defend on the ground of either lack of requisite intent or accident, the CAAF held that "evidence of intent and lack of accident may be admitted regardless of whether a defendant argues lack of intent because every element of a crime must be proven by the prosecution." *Id*. at 202.

c) Plan: Connotes a prior mental resolve to commit a criminal act, and implies preparation, and working out the particulars (time, place, manner, means, and so forth). Plan may prove identity, intent or the actual criminal act. Evidence of plan must actually establish a plan. The CAAF will examine the relationship between the victims and the appellant, ages of victims, nature of the acts, situs of the acts, circumstances of the acts, and time span. If the CAAF finds the dissimilarities too great to support a common plan theory, it will not support admitting the uncharged misconduct.

(1) Some decisions have been quite liberal in admitting uncharged misconduct evidence under the rubric of plan. See, *United States v. Munoz*, 32 M.J. 359 (C.M.A.), cert. denied, 502 U.S. 967 (1991) (where the "age of the victim, the situs of the offense, the circumstances surrounding their commission, and the fondling nature of the misconduct" were similar to sexual misconduct of the accused 12 years earlier, the evidence was admissible to show a plan to sexually abuse his children (per Judge Sullivan).

(2) The CAAF may be applying the brakes to the practice of using old acts of uncharged misconduct to prove plan under Rule 404(b). See, *United States v. McDonald*, 59 M.J. 426, 430 (2004) (holding that a military judge abused his discretion in admitting 20-year-old acts of uncharged misconduct committed when the appellant was 13 years old to establish a common plan to commit charged acts of sexual misconduct against the appellant's daughter.

d) Identity: The government may use modus operandi evidence to establish the identity of the accused.

(1) A high degree of similarity between the extrinsic act and the charged offense is required, so similar as to constitute "a signature marking the offense as the handiwork of the accused." *United States v. Gamble*, 27 M.J. 298, 305 (C.M.A. 1988).

e) Consciousness of Guilt.

(1) In *United States v. Rhodes*, 61 M.J. 445 (2005), the military judge admitted evidence of a meeting between a key government witness and the appellant to show the appellant's consciousness of guilt. Shortly after the meeting, the witness manifested a sudden memory loss pertaining to his potential testimony. The CAAF held that the evidence could have been admitted to evaluate the truthfulness of the witness's claim of memory loss, but not to show appellant's consciousness of guilt. But see *United States v. Staton*, 68 M.J. 569 (A.F. Ct. Crim. App. 2010) (holding that evidence of the accused's attempt to intimidate a

former trial counsel by driving his car at at her at a high rate of speed could be admitted under 404(b) as evidence of his consciousness of guilt in his trial for assault consummated by battery upon a child under 16 years of age).

(2) *United States v. Staton*, 69 M.J. 228 (C.A.A.F. 2010), the court held that prosecutor intimidation, where the accused drove his car aggressively towards the trial counsel in the commissary parking lot, is probative of consciousness of guilt and a carefully tailored instruction appropriately mitigated the dangers that defense articulated, that the evidence would be used for the wrong purpose. The Court used the *Reynolds* test to determine admissibility.

B. *Reynolds* 3-Part Test for Admissibility of Rule 404(b) Evidence.

1. The CAAF follows the 3-pronged test set out in *United States v Reynolds* when reviewing whether a military judge abused her discretion in admitting uncharged acts under Rule 404(b). 29 M.J. 105 (C.M.A. 1989). FIRST: ***Does the evidence reasonably support a finding that the appellant committed the prior crimes, wrongs, or acts?***

a) Identify the "other act" and show who did it. This is a question of conditional relevancy, and governed by Rule 104(b). The judge is required only to consider the evidence offered and decide whether the panel reasonably could find that the "similar act" was committed by the accused.

b) In determining whether the government has introduced enough evidence, the trial court neither weighs credibility nor makes a finding that the government has proven the conditional fact by a preponderance of the evidence.The court simply examines all the evidence in the case and decides whether the panel members could reasonably find the conditional fact. See, *Huddleston v. United States*, 485 U.S. 681 (1988) (preliminary finding by the court that the government has proven the act by a preponderance of the evidence is not required by FRE 104(a); *United States v. Castillo*, 29 M.J. 145, 151 (C.M.A. 1989).

2. ***Does the evidence make a fact of consequence in the case more or less probable?*** What inferences and conclusions can be drawn from the evidence? If the inference intended includes one's character as a necessary link, the past bad act evidence is excluded.

3. ***Is the evidence's probative value substantially outweighed by the danger of unfair prejudice?***

C. The *Reynolds'* Analysis

1. In *United States v. Diaz*, 59 M.J. 79 (2003), the government introduced evidenced of several other injuries the appellant had allegedly inflicted on his daughter to establish a "pattern of abuse" that would help establish that the death of his daughter was a homicide and appellant was the perpetrator. The CAAF applied the *Reynolds* test and concluded that the uncharged misconduct was improperly admitted: (1) The government failed to establish that the accused had inflicted the other injuries on his daughter; (2) the evidence did not make a fact

of consequence more or less probable because the accused's defense was a general denial and a claim that the death was due to unknown causes; and (3) when viewed in the light of improper opinion testimony that was also admitted at trial, the evidence was substantially more prejudicial than probative.

2. *United States v. McDonald*, 59 M.J. 426 (2004). In applying the second prong of *Reynolds*, the CAAF held that evidence of appellant's uncharged acts was not logically relevant to show either a common plan or appellant's intent. The CAAF concluded that the military judge abused his discretion in admitting the uncharged acts to establish a common plan due to how dissimilar the uncharged acts were to the charged offenses. The CAAF focused on the fact the appellant was 13 years of age at the time of the uncharged acts, rather than a 33-year-old adult; the uncharged acts were committed in the home of his stepsister, where he was visiting, while the charged acts occurred where he was the head of the household; the uncharged acts were with a stepsister who was about five years younger, rather than with a young stepchild under his parental control, who was about 20 years younger. The CAAF also held the uncharged acts were not relevant to show intent. The CAAF focused on the fact the appellant was a 13-year-old child at the time of the uncharged acts, and a 33-year-old married adult at the time of the charged acts. Absent evidence of that 13-year-old adolescent's mental and emotional state, sufficient to permit meaningful comparison with appellant's state of mind as an adult 20 years later, the CAAF held that the military judge's determination of relevance on the issue of intent was "fanciful and clearly unreasonable."

3. *United States v. Rhodes*, 61 M.J. 445 (2005). The CAAF reversed the affected findings and sentence after holding that the military judge abused his discretion in applying the third prong of the *Reynolds* test. The case involved a government witness who suddenly lost his memory after speaking with the appellant shortly before trial. The witness had given a confession implicating himself and the appellant in drug offenses. The trial counsel wanted to offer evidence of the previous meeting to argue the appellant had intimidated the witness. The CAAF determined that the military judge did not err by allowing the government to enter evidence about the meeting between the appellant and the government witness. The Court concluded this evidence placed the memory loss in its proper context. However, the military judge did err when he instructed the members that they could use the evidence to prove consciousness of guilt on the appellant's part. The CAAF believed the military judge's instruction erroneously allowed the Government to suggest that the Appellant was at fault for a key government witness's memory loss (other factors could have contributed to the memory loss, such as the significant time between the confession and trial). "When evidence is admitted under Rule 404(b), the [members] must be clearly, simply, and correctly instructed concerning the narrow and limited purpose for which the evidence may be considered."

4. *United States v. Bresnahan*, 62 M.J. 137 (2005). Military judge abused his discretion by admitting uncharged misconduct evidence. Although not expressly stated in the opinion, the military judge's decision failed the first prong of the *Reynolds* test. The CAAF determined that the admission was harmless. When a military judge erroneously admits uncharged misconduct, that decision will not be overturned "unless the error materially prejudices the substantial rights of the accused." UCMJ, art. 59(a). The harmlessness of the error will be evaluated by

"'weighing: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.'" *McDonald*, 59 M.J. at 430, citing *United States v. Kerr*, 51 M.J. 401, 405 (1999).

5. *United States v. Hays*, 62 M.J. 158 (2005). The Appellant was convicted possessing child porn and soliciting the rape of a child. The issue on appeal was whether the solicitation conviction was tainted by improper introduction of uncharged misconduct. The evidence at issue included emails and pictures from the appellant discussing and showing children and adults engaging in sexual activity. The defense objected under Rules 401 and 403. The CAAF focused on the third *Reynolds* prong. Although the pictures and language in the e-mails were offensive, the CAAF believed that this was the nature of much of the evidence in cases involving child pornography. See *United States v. Garot*, 801 F.2d 1241, 1247 (10th Cir. 1986) (noting that defendants in child pornography cases unavoidably risk the introduction of evidence that would offend an average juror). The CAAF determined that in light of the nature of the offense and the other evidence admitted, the prejudicial impact of the admitted exhibits did not substantially outweigh their probative value in demonstrating appellant's intent and motive to solicit sex with a child. See *United States v. Acton*, 38 M.J. 330, 334 (C.M.A. 1993) (explaining that any prejudicial impact due to the "shocking nature" of a pornographic video depicting incest was diminished because the same conduct was already before the court members).

6. *United States v. Harrow*, 62 M.J. 649 (A.F. Ct. Crim. App. 2006). The important aspect of this case is not that the *Reynolds* analysis was done, but the fact it was done in such detail. This fact is explained by the AFCCA in the opinion when they state: "Before leaving this issue, however, we note that, generally speaking, Rule 404(b) is interpreted more restrictively in military jurisprudence than its counterpart in other federal courts. In applying this jurisprudence, it is clear that military decisions are very fact specific, often based upon the totality of the circumstances, rather than granting the military judge broad discretion." *Harrow*, 62 M.J. at 660; See e.g., *Hays*, 62 M.J. 158 (2005); *Bresnahan*, 62 M.J. 137 (2005); *Rhodes*, 61 M.J. 445 (2005); and *Diaz* 59 M.J. at 79 (2003). The AFCCA opinion contained interesting dicta on the difference between M.R.E. 404(b) and F.R.E. 404(b). However, the CAAF elected to ignore the AFCCA dicta and instead concentrate on the second prong of the Reynolds' test regarding whether the evidence was relevant to show the appellant's intent or absence of mistake. *United States v. Harrow*, 65 M.J. 190 (2007).

7. *United States v. Booker*, 62 M.J. 703 (A.F. Ct. Crim. App. 2006). May evidence be admitted under M.R.E. 404(b) to show an accused's consciousness of guilt? Yes. Evidence may be admitted under M.R.E. 404(b) to show an accused's consciousness of guilt. The relevant evidence need not fit exactly into one of the pigeon holes described under M.R.E. 404(b) so long as the evidence is offered for a purpose other than to show the accused's predisposition to commit the crime.

8. *United States v. Thompson*, 63 M.J. 228 (2006). The Appellant was convicted of wrongful use, possession and distribution of marijuana. The issue on appeal was whether the military judge erred in admitting evidence of uncharged misconduct. The uncharged misconduct involved two pretrial statements by the Appellant that contained information about his preservice drug use. The appellant maintained

the uncharged misconduct served no legitimate purpose and merely painted him as a habitual drug user. The CAAF focused on the second *Reynolds* prong. The Court found that Thompson did not raise the issues of lack of knowledge or mistake of fact regarding marijuana. Although the defense counsel referred to the Appellant as "naïve" and "young" in his opening statement, this description was never tied to marijuana or tied to anything that caused the Appellant to misapprehend any fact of consequence. Because the military judge admitted the uncharged acts evidence for the purpose of disproving lack of knowledge or mistake of fact, that evidence served no relevant purpose. Since it was not relevant, the evidence failed the second prong of the *Reynolds* analysis. The evidence did not make a fact of consequence more or less probable by the existence of the evidence.

D. Limiting the Admissibility of 404(b) Evidence

1. Admissibility of Post-Offense Misconduct. Evidence of an accused's crack-related activities occurring after the charged offense was admissible to show intent and knowledge as to earlier offense. *United States v. Latney*, 108 F.3d 1446 (D.C. Cir. 1997). *But see*, *United States v. Matthews*, 53 M.J. 465 (2000) (holding that evidence of a hot urinalysis that occurred after the charged wrongful use could not be used to show knowing use on the date of the charged offense).

2. Defense Concessions. *United States v. Crowder*, 141 F.3d 1202 (D.C. Cir. 1998). Case remanded from the Supreme Court in light of *Old Chief v. United States*, 519 U.S. 172 (1997). In an en banc reversal, a majority of the court held that the defense could not stipulate to uncharged misconduct in an effort to preclude the government from introducing evidence under Rule 404(b). The D.C. Circuit said that the evidence was relevant under Rule 401 even though there may have been other forms of evidence available. The defense cannot force the government to stipulate, and if the evidence fits an exception under Rule 404(b) and is not unduly prejudicial under Rule 403, then it is admissible in the form the government wants. Stipulations are not the same as other evidence and government is not required to sacrifice the context and richness of the evidence through stipulations. Unless, as in *Old Chief*, the stipulation deals with the legal status of the accused and the stipulation gives the government everything they otherwise would want through use of the evidence. *See also United States v. McCrimmon*, 60 MJ 145 (2004) (assuming no overreaching by the government, evidence of uncharged misconduct, otherwise inadmissible evidence, may be presented to the court by stipulation and may be considered by the court).

3. Uncharged Acts During Sentencing: Admissibility of uncharged misconduct during presentencing is controlled by Rule 1001(b)(4), not Rule 404(b). Rule 404(b) evidence which may have been admissible on the merits is not admissible during presentencing unless it constitutes aggravating circumstances within the purview of Rule 1001(b)(4).

4. Effect of an Acquittal on Admissibility of Rule 404(b): In *United States v. Mundell*, 40 M.J. 704 (A.C.M.R. 1994), the accused alleged error based on the admission of uncharged misconduct which had been the subject of a not guilty finding at a prior court martial. ACMR found the military judge properly applied Rule 404(b) and 403, noting that the COMA in *United States v. Hicks*, 24 M.J. 3 (C.M.A. 1987) and the Supreme Court in *Dowling v. United States*, 493 U.S. 342

(1990) already held that "collateral estoppel does not preclude using otherwise admissible evidence even though it was previously introduced on charges of which an accused has been acquitted."

V. Methods of Proving Character

Rule 405. Methods of proving character

(a) *Reputation or opinion*. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) *Specific instances of conduct*. In cases in which character or a trait of character of a person is an essential element of an offense or defense, proof may also be made of specific instances of the person's conduct.

(c) *Affidavits*. The defense may introduce affidavits or other written statements of persons other than the accused concerning the character of the accused. If the defense introduces affidavits or other written statements under this subdivision, the prosecution may, in rebuttal, also introduce affidavits or other written statements regarding the character of the accused. Evidence of this type may be introduced by the defense or prosecution only if, aside from being contained in an affidavit or other written statement, it would otherwise be admissible under these rules.

(d) *Definitions*. "Reputation" means the estimation in which a person generally is held in the community in which the person lives or pursues a business or profession. "Community" in the armed forces includes a post, camp, ship, station, or other military organization regardless of size.

A. Rule 405. Form of proof.

1. Rule 405 is best understood as a rule that governs "how" a proponent may prove character or a character trait, not "whether" they may prove a particular character or character trait. The rule applies in those situations where "character is in issue" (likely only entrapment cases) and in certain instance of allowable character evidence under Rule 404(a)(1) (character of the accused), Rule 404(a)(2) (character of the alleged victim) and Rule 608 (character of a witness).

2. Rule 405 DOES NOT APPLY to the following:

   a) Propensity Inferences under Rule 404(a). Since this use of character evidence is prohibited, there is no acceptable form of proof to introduce the character evidence.

   b) Nonpropensity purpose under Rule 404(b). If one of the stated purposes of introduction under Rule 404(b) (KIPPOMIA – Knowledge, Intent, Plan, Preparation, Opportunity, Motive, Identity, or Absence of mistake) or any other non-character basis is offered for introduction of the evidence, then Rule 405 does not apply. Under Rule 404(b), relevancy does not depend upon conclusions about a person's character.

   c) Habit under Rule 406. Habit evidence is not treated as character evidence and as such, is exempted from Rule 405.

   d) Evidence of victim's traits under Rule 412. This rule allows the government or defense, in specific relatively rare instances, to use character evidence. Rule 405 does not govern the method of proof.

Under Rule 412, if character evidence is allowed, it may only be proven by extrinsic specific acts.

e) Evidence of similar crimes under Rules 413 and 414. These rules are exempted from 405. Under Rules 413 and 414, the accused's sex-related traits in sex offense or child molestation cases may be proven by reputation, opinion, or extrinsic specific acts.

B. Rule 405. Methods of Proving Character.

1. Rule 405(a) limits a proponent of character evidence to proving it either through using reputation or opinion testimony. A proponent is generally not allowed to elicit testimony regarding specific instances of conduct (unless character is an essential element of an offense or defense – discussed in detail below).

a) Reputation evidence is information that a witness knows about an individual from having heard discussion about the individual in a specified community. Rule 405(d) lists several permissible examples of a "community." *See United States v. Reveles*, 41 M.J. 388 (1995) (for purposes of reputation testimony, "community" broadly defined to include patrons at officer's club bar).

b) Opinion evidence is a witness's personal opinion of an individual's character. From a practical standpoint, the impact of this evidence, depends greatly upon the individual giving it.

c) On cross-examination of a character witness, inquiry is allowable into relevant instances of conduct (discussed in greater detail below).

2. Mechanically, the proponent demonstrates reputation/opinion/specific instances character evidence by showing the following that an individual has a particular character trait; the witness has an opinion about the trait, or is familiar with the person's reputation concerning that particular trait, or can testify concerning specific acts relevant to the trait; AND the witness states an opinion, relates the reputation, or, under very limited circumstances, testifies about specific instances of conduct relevant to trait in issue.

3. Cross-Examining a Character Witness

a) The witness giving the reputation or opinion testimony is subject to impeachment by relevant specific instances of conduct. Rule 405(a). The rule in practice tends almost exclusively to be used by the government; however, it applies equally to both trial and defense counsel. This method is obviously a very effective way of testing a witness's opinion or reputation knowledge. If the witness admits hearing or knowing of the act, the trier of fact may discredit their testimony. If the witness denies having heard or knowing of the act, the trier of fact may question how well the witness knows the individual or the individual's reputation.

b) Counsel may inquire about specific instance of conduct by asking "Have you heard" or "Do you know" questions. Prior to asking any such question, however, the counsel must have a good faith belief. *United States v. Pruitt*, 43 M.J. 864 (A.F. Ct. Crim. App. 1996). The opponent to such inquiry may require the proponent to state their good faith belief by way of a motion in limine.

c) The witness either knows of the specific instances of conduct or they do not. The counsel asking the question is stuck with the witness's response. *United States v. Robertson*, 39 M.J. 211 (C.M.A. 1994), *cert. denied*, 115 S. Ct. 721 (1995). This is true since the purpose of the specific instance of conduct is to test the basis of the witness providing the character evidence.

d) When cross-examining on specific instances of conduct, the focus should be on the underlying conduct and not the government action taken in response to the underlying conduct. For example, counsel's questions should focus on the conduct which led to an article 15 and not the fact of the article 15 itself. *Robertson*, 39 M.J. at 214-15.

e) Timeliness of Acts – Rule 405(a) is concerned with character at the time of the charged offense. Under the rule, any cross-examination should be limited to acts that would have occurred prior to the offense charged, because the court wants to test character at that time. Thus, it is improper to ask a character witness whether the charges brought in the case have affected reputation or their opinion. *United States v. Brewer*, 43 M.J. 43 (1995) (although not objected to, the court held that counsel are not permitted to test the basis of a witness' character opinion by using the charged offense).

4. Under Rule 405(b), specific instances of conduct are allowed in cases where character or a trait of character of an individual is an essential element of an offense or defense. Character is rarely an essential element of an offense or defense. An example of when character would be an essential element of an offense or defense is in a court-martial where the defense to purchasing illegal drugs is entrapment. Either the government or defense would be permitted to offer character evidence regarding the predisposition to purchase illegal drugs. Such evidence escapes the general proscription against character evidence because it is not offered to prove conformity, but because of the significance of the trait in relation to the crime. Where character is "an essential element of the offense or defense," proof may be made by means of opinion or reputation evidence or specific instances of a person's conduct. Rule 405(a) and (b).

a) *United States v. Schelkle*, 47 M.J. 110 (1997) (character is not an essential element of good soldier defense such that proof may be made by reference to specific acts of conduct).

b) *United States v. Dobson*, 63 M.J. 1 (2006). May evidence of specific acts of violence by an alleged victim, known to the accused, be admitted into evidence on the issue of the accused's intent? Yes. Although the military judge correctly prevented the defense from using specific acts under Rule 405 to prove character of the accused, the military judge erred by not admitting the evidence to show the appellant's state of mind at the time of the victim's death. Under Rule 405, a relevant character trait may only be admitted by reputation or opinion testimony, unless the character trait is an essential element of an offense or defense. The military judge determined that although the victim's character for violence could be proved by opinion or reputation evidence, specific acts by the victim were not admissible because the character trait for violence was not an essential element of the self-defense claim. The CAAF held

the military judge erred when he did not address the question of whether evidence of specific acts of violence known to the appellant were admissible on the issue of the appellant's intent. Since the government lacked any direct evidence on premeditation, the prohibited testimony was material. With no direct evidence of intent, the panel could have accepted all of the government's evidence pointing to the appellant as the perpetrator of the murder, but still have a reasonable doubt as to whether she premeditated the murder in light of the impact of abuse on her intent. Under these circumstances, the CAAF could not be confident that the error of excluding the testimony of the defense's two witnesses was harmless on the issue of premeditation. The findings as to premeditated murder and sentence were reversed.

5. Rule 405(c) has no federal counterpart, and is made necessary by the worldwide disposition of the armed forces and the difficulty of securing witnesses, particularly in connection with brief statements concerning character. Rule 405(c) is based on prior military practice and permits the defense to use affidavits or other documentary evidence to establish the accused's character. The rule permits the government to make use of similar evidence in rebuttal.

a) This use may have Sixth Amendment difficulties under *Crawford v. Washington*, 541 U.S. 36 (2004).

b) *United States v. Lowe*, 56 M.J. 914 (N-M Ct. Crim. App. 2002), the service court held that the military judge erred in allowing opinion testimony through the introduction of hearsay documents containing a "litany" of uncharged misconduct. The court went on to note that while Rule 405(c) relaxes the rules of evidence regarding hearsay concerning the form of such testimony, it does not relax the rules of evidence concerning the substance of such evidence. While the government counsel could have presented a written opinion under Rule 405(c) rebutting the opinion offered by the defense, it couldn't use Rule 405(c) to admit extrinsic evidence of otherwise inadmissible uncharged misconduct to rebut the offered opinion.

VI. Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements.

(a) In general. Except as otherwise provided in this rule, evidence of the following is not admissible in any court-martial proceeding against the accused who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any judicial inquiry regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with the convening authority, staff judge advocate, trial counsel or other counsel for the Government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) 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, or (ii) in a court-martial proceeding for perjury or false statement if the statement was made by the accused under oath, on the record and in the presence of counsel.

(b) Definitions. A "statement made in the course of plea discussions" includes a statement made by the accused solely for the purpose of requesting disposition under an authorized procedure for administrative action in lieu of trial by court-martial; "on the record" include the written statements submitted by the accused in furtherance of such request.

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1. Rule 410. The rule aims to encourage legitimate plea bargaining by protecting open, candid discussions between the accused and the prosecution. *See* Notes of Advisory Committee to Federal Rule of Evidence 410 (1975); Standard 14-2.2, ABA Standards Relating to Pleas of Guilty (1986). *Mezzanatto v. United States*, 513 U.S. 196 (1995).

2. The Military Rule extends to pretrial agreements, or discussions of the same with the trial counsel, staff judge advocate, or convening authority **or other counsel for the Government**. The federal rule extends only to "an attorney for the prosecuting authority."

3. The following are inadmissible against an accused:

   a) A plea of guilty that is later withdrawn;

   b) Any statement made by the accused and defense counsel in the course of the providence inquiry concerning a plea of guilty that is later withdrawn;

   c) Any statement made by the accused and defense counsel in the course of plea discussions which do not ultimately result in a plea of guilty or which result in a plea of guilty that is later withdrawn.

4. *United States v. Vasquez*, 54 M.J. 303 (2001). Accused submitted a chapter 10 request admitting to a 212 day AWOL. That charge was not before the court. Government admitted that request in the sentencing case as part of the accused's service records. CAAF said that accused's statements were covered by Rule 410 in light of the court's long-standing precedent for avoiding an excessively formalistic application of the rule in favor of a broad application.

5. Rule 410 Examples.

   a) *United States v. Barunas*, 23 M.J. 71 (C.M.A. 1986) (accused's letter to commander requesting non-judicial disposition of use and possession of cocaine charges was inadmissible under Rule 410).

   b) *United States v. Brabant*, 29 M.J. 259, 264-65 (C.M.A. 1989) (accused's statement that he would do whatever it took to "make this right" was inadmissible).

   c) *United States v. Watkins*, 34 M.J. 344 (C.M.A. 1992) (accused's questions to investigator as to amount of likely prison sentence is not plea negotiation as CID not within enumerated exceptions of Rule 410).

   d) *United States v. Balagna*, 33 M.J. 54, (C.M.A. 1991). CSM testified concerning the accused's duty performance. CSM previously had spoken for the accused in an Article 15 hearing based on a positive urinalysis, but stated that because of a report he had read, he would not do so again. Court member asked about the report. The panel was told about a Chapter 10 request, and the judge instructed that the report had no relevance to the trial.

e) The Government may be able to introduce such evidence if it can establish that the same information was independently obtained or pursuant to other theories. *See United States v. Magee*, 821 F.2d 234 (5th Cir. 1987).

VII. The "Rape Shield" – Rule 412

Rule 412. Sex offense cases; relevance of alleged victim's sexual behavior or sexual predisposition

(a) *Evidence generally inadmissible*. The following evidence is not admissible in any proceedings involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.

(1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the accused.

A. Rule 412. Background History.

1. It was once not that uncommon for an accused to introduce the sexual history of an alleged victim in order to suggest that she was unchaste, and therefore likely not to be telling the truth when she testified or had consented to the sexual contact with the accused. This use of the alleged victim's sexual history by an accused came under criticism in the late 1970s. As a result, Congress passed the Privacy for Rape Victim Act of 1978, as Federal Rule of Evidence 412. Congress revised the rule as part of the Violent Crime Control and Law Enforcement Act of 1994. The military adopted Federal Rule of Evidence 412 under the provisions of Rule 1102 as Rule 412. The rule is intended to shield victims from personal questions about their sexual history that have little if any relevance in the court-martial.

2. Understanding the Rule: the logical premise behind the rule is that evidence of a person's past sexual conduct rarely is relevant to the question of how a person acted sexually on a specific occasion. This logical premise is in conflict with that advanced under Rules 413 and 414 (requiring admission of evidence of an accused's past sexual offenses as relevant to the question of an accused's sexual

conduct on a specific occasion).

3. Rule 412 makes specific instances of past sexual behavior of an alleged victim generally inadmissible. In specific, relatively rare instances, the government or the accused may offer specific acts of conduct by the alleged victim. However, reputation and opinion evidence of the past sexual behavior of an alleged victim of alleged sexual misconduct **appears**, under the rule, to be inadmissible. Rule 412(a) and (b). The Court of Military Appeals has stated, however, "we have grave doubts whether Rule 412(a) should be properly construed as an absolute bar to the admission of evidence of a prosecutrix' sexual reputation." *United States v. Elvine*, 16 M.J. 14 (C.M.A. 1983).

4. The rule's protections depend on the **status** and **presence** of a victim, rather than whether the offense is consensual. *United States v. Banker*, 60 M.J. 216 (2004). The 2007 Amendment clarifies that Rule 412 applies in all sexual offense cases where the evidence is offered against a person that can reasonably be characterized as a "victim of the alleged sexual offense." Hence, Rule 412 applies to nonconsensual as well as consensual offenses, sexual offenses specifically proscribed under the UCMJ, federal sexual offenses prosecutable under clause 3 of Article 134, and state sexual offenses prosecutable under the Federal Assimilative Crimes Act.

5. Under Rule 412, there are three stated exceptions to the general rule:

   a) *Someone else is the source of the evidence*: if the trial counsel has introduced evidence of semen, injury, or other physical evidence, the defense must be allowed to introduce the victim's past sexual behavior if relevant to show another was the source of the evidence. Rule 412(b)(1)(A).

   b) *Evidence of past accused-victim sexual behavior on the issue of consent*: this may be offered by the accused to prove consent or by the prosecution to prove lack of consent. Rule 412(b)(1)(B).

      (1) *United States v. Jensen*, 25 M.J. 284 (C.M.A. 1987). Includes acts and statements of intent to engage in intercourse.

      (2) *United States v. Kelly*, 33 M.J. 878 (A.C.M.R. 1991). The military judge erred in excluding evidence of an alleged rape victim's flirtatious and sexually provocative conduct. To admit evidence of past sexual behavior, the proponent must demonstrate that the evidence is relevant, material, and favorable to the defense. The prosecutrix's past sexual conduct met those requirements. The rape shield provisions aim to protect the victim from harassment and humiliation, but those ends are not served by excluding evidence of open, public displays of sexually suggestive conduct. Findings and sentence were set aside.

   c) *Evidence constitutionally required to be admitted*: Under Rule 412(b)(1)(C), the standard is that the evidence must be (1) relevant, (2) material, and (3) favorable (defined by case-law as "vital") to the defense. For all practical purposes, this is a test of necessity or vitality in military courts-martial. *United States v. Banker*, 60 M.J. 216 (2004).

(1) *United States v. Savala,*70 M.J. 70 (C.A.A.F. 2011). The military judge denied the accused's initial MRE 412(b)(1)(c) motion to cross examine the victim on a prior, unfounded rape allegation. During direct examination the government opened the door by using it to bolster her reason for delayed reporting the current allegation. The court found it error to deny the accused the ability to cross examine on it after the government opened the door. Denying the accused the right to confront the victim with her previous allegation of rape under MRE 412(b)(1)(c) after the government opened the door on direct examination in an effort to bolster her credibility denied the accused his right to confrontation despite the military judge's earlier ruling to exclude the evidence in pretrial motions. A key component of the Confrontation Clause is the crucible of cross-examination. *Davis v. Alaska*, 415 U.S. 308, 316-317 (1974). This right becomes even broader when the prosecution opens the door to impermissible evidence during their case in chief. A failure by the intermediate court was not recognizing that witness credibility is an issue for the fact finder.

(2) *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011). The C.A.A.F. held that the prior decision in *United States v. Banker*, see below, was wrong when it held that the victim's privacy interests should be balanced against an accused's constitutional rights when determining admissibility under MRE 412(b)(1)(c). While the balancing test itself is not per se unconstitutional, it can be applied in an unconstitutional manner. If evidence is constitutionally required, and it survives MRE 403, an accused will be allowed to confront his accuser with the same regardless of the level of invasive to a victim's privacy. Despite this holding, the facts of this case did not allow the accused to confront the victim with evidence under MRE 412. The accused in this case did not make a showing that the evidence found in e-mails alluding to the victim being sexually active was constitutionally required under MRE 412(b)(1)(c). The military judge did allow cross-examination on the e-mails without allowing questions into the content by using MRE 611. While an accused has a right to confront his accuser, that right is not without limitations. *Davis v. Alaska*, 415 U.S. 308, 316 (1974). The Confrontation Clause protects a person's rights to a fair cross-examination of a witness to establish bias or motive to lie. That cross-examination can be curtailed when the probative value is outweighed by the danger of unfair prejudice. These dangers of unfair prejudice include harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. in *Delaware v. Van Arsdall*, 475 U.S. 673, 678–79 (1986). Here, the judge had already determined that there was insufficient probative value in the e-mails to rise to the level of constitutionally required evidence. As such, he may be allowed an opportunity to expose her motive to lie, but not in every possible manner. The military

judge placed limits on the inquiry, and CAAF held that the judge had admitted sufficient evidence to establish TE's motive to lie. Excluding the sexual nature of the worrisome e-mails did not violate the constitutional rights of the accused. The court did not conduct any MRE 403 analysis.

(3) *United States v. Ellerbrock*, 70 M.J. 314 (C.A.A.F. 2011). The C.A.A.F. held that in an Article 120 case it was error for the military judge to exclude evidence that the victim had an extra marital affair two years prior. When she disclosed the earlier affair to her husband, he became enraged and kicked down the wife's lover's door. The court found that the military judge prevented Ellerbrock from presenting a theory that a previous affair made it more likely that CL would have lied in this case; that it was a fair inference that a second affair would be more damaging to CL's marriage than a single event; and there was evidence in the record to support this inference, particularly the evidence that the husband had had a prior violent reaction when learning about CL's affair. The court found that the proffered evidence had a direct and substantial link to CL's credibility, and her credibility was a material fact in the case. The probative value of the evidence was high because the other evidence in the case was so conflicting, and was not outweighed by other concerns. The court did not conduct any MRE 403 analysis.

(4) *United States v. Williams*, 37 M.J. 352 (C.M.A. 1993). The military judge denied the defense motion for a rehearing based on newly discovered evidence concerning the victim's credibility. The evidence suggested a motive to fabricate, and showed that the government expert based his opinion testimony on her "deceitful and misleading" information. Since the evidence was relevant, material and favorable to the defense, it was "constitutionally required to be admitted."

(5) *United States v. Greaves*, 40 M.J. 432 (C.M.A. 1994). The military judge properly prevented accused from testifying that he knew that rape victim was a hostess at a Japanese bar and dressed provocatively. The testimony was not relevant where the victim was semi-conscious and where the accused was allowed to testify about circumstances which allegedly led him to believe the victim consented.

(6) *United States v. Harris*, 41 M.J. 890 (A. Ct. Crim. App. 1995). Evidence of a victim's prior sexual activity as a prostitute was constitutionally required to be admitted where defense theory was that victim agreed to sexual intercourse in expectation of receiving money for a bus ticket to Cleveland, and was motivated to retaliate by alleging rape only after accused called her a "skank bitch." *See also United States v. Saipaia*, 24 M.J. 172 (C.M.A. 1987), cert. denied, 484 U.S. 1004 (1988).

(7) *United States v. Buenaventura*, 45 M.J. 72 (1996). Evidence of sexual abuse of an eight-year-old victim by the grandfather, and

expert testimony regarding "normalization" – replacing abusive person (grandfather) with friendly person (accused) in recalling the abuse – was constitutionally required to be admitted. *But see United States v. Gober*, 43 M.J. 52 (1995); *United States v. Pagel*, 45 M.J. 64 (1996).

d) The victim's past sexual history must be relevant to the defense's theory before it is admissible under a Constitutionally-required standard.

(1) *United States v. Velez*, 48 M.J. 220 (1998). Accused was convicted of rape. The CAAF noted that the defense theory of the case was that the contact never happened, so even if the victim was promiscuous, it didn't matter under the defense theory.

(2) *United States v. Datz*, 59 M.J. 510 (C.G. Ct. Crim. App. 2003). Affirming appellant's rape conviction, the court held that evidence of the victim's previous sexual encounters with another servicemember was too speculative and not commonly viewed as being relevant.

(3) *United States v. Banker*, 60 M.J. 216 (2004). **Abrogated by United States v. Gaddis,** 70 M.J. 248 (C.A.A.F. 2011) (holding that the prior decision in *United States v. Banker* was wrong when it held that the victim's privacy interests should be balanced against evidence determined to be constitutionally required before allowing it into evidence). In *Banker*, the C.A.A.F. held that evidence proffered under the constitutionally required exception to M.R.E. 412(a) is admissible only if the evidence is 1) relevant; 2) material; and 3) favorable to the defense **AND** it is not outweighed by the victim's privacy. This balancing test, applied in this manner, is unconstitutional under *United States v. Gaddis*. While other sections of *Banker* may be useful in helping counsel determine relevant and material, if evidence is found constitutional, the victim's privacy cannot be used to exclude it regardless of the significance.

B. Rule 412. Requirements for admission.

1. As a foundational matter the proponent must show: The act is relevant for one of the specified purposes in Rule 412(b); where the act occurred; when the act occurred; AND who was present;

2. Proponent (typically the defense) must show that its probative value outweighs the danger of unfair prejudice to the alleged victim's privacy.

a) *United States v. Sanchez*, 44 M.J. 174 (1996). As offer of proof failed to identify the significance and theory of admissibility of the victim's prior sexual behavior, accused was not entitled to hearing on the admissibility of Rule 412 evidence. Judge Everett claims that, where alleged motive is commonly understood and obvious from the facts, it is unnecessary for the defense to produce expert testimony. However, where the proffered motive is highly speculative and not commonly understood, expert

testimony is essential to understand the connection between the motive to lie and the prior consensual behavior.

b) *United States v. Banker*, 60 M.J. 216 (2004). In applying Rule 412, the military judge is not asked to determine if the proffered evidence is true. Rather, the military judge serves as a gatekeeper by deciding first whether the evidence is relevant and next whether it is admissible under the Rule. The members weigh the evidence and determine its veracity. While evidence of a motive to fabricate an accusation is generally constitutionally required to be admitted, the alleged motive must itself be articulated to the military judge in order for her to properly assess the threshold requirement of relevance.

c) *United States v. Zak*, 65 M.J. 786 (A. Ct. Crim. App. 2007). The military judge abused her discretion in excluding evidence of the victim's prior sexual behavior towards appellant (i.e., a mostly nude massage) because she did not believe that the incident occurred. Based on *Banker*, the ACCA reiterated that the military judge only determines whether the evidence is relevant and meets one of the exceptions under MRE 412 (b), not whether the evidence is true.

3. Evidence admissible under Rule 412 is still subject to challenge under Rule 403. (Note that the 2007 Amendment to 412 (c) specifically states, "Such evidence is still subject to challenge under Mil. R. Evid. 403.") Hence, evidence admissible under Rule 412 may nevertheless be excluded under Rule 403.

4. Procedural Requirements for admission. Rule 412(c) imposes procedural and notice requirements that must be implemented before a defense counsel may use one of the exceptions. The defense must file a written motion at least five days prior to entering a plea. The motion must specifically describe the desired evidence and the purpose for which it is being offered. The defense must serve the motion on the government, the military judge, and notify the alleged victim. The military judge, if necessary, conducts a closed Article 39(a) session. During this proceeding both parties may call witnesses, including the alleged victim and offer other evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. The defense is required to establish that its evidence satisfies one of the stated exceptions. The military judge must determine whether, on the basis of the hearing, the evidence the defense seeks to admit is relevant. Evidence admissible under Rule 412 is still subject to challenge under Rule 403.

VIII. evidence of similar CRIMES IN sexual assault CASES and child molestation CASES

Rule [413][414]. Evidence of Similar Crimes in [Sexual Assault][Child Molestation Cases]

(a) In a court-martial in which the accused is charged with an offense of [sexual assault][child molestation], evidence of the accused's commission of one or more offense of [sexual assault][child molestation] is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government intends to offer evidence under this rule, the Government shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 5 days before the scheduled date of trial, or at such later time as the military judge may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) [definitions of "offenses of sexual assault" and "child molestation"].

A. Rule 413/414.

1. Rule 413 states that "evidence of the accused's commission of one or more offenses of sexual assault is admissible." Rule 414 has similar language for child molestation. The rules were written to overcome perceived restrictive aspects of Rules 404(a) and (b). Rules 413 and 414 represent a rejection of the traditional prohibitions on propensity evidence. This rejection resulted from three main criticisms of Rule 404(b) in sex offense cases: Rule 404(b) requires trial counsel to articulate a nonpropensity purpose; the military judge always has discretion under Rule 403 to exclude the evidence; AND the limiting instruction from the military judge prohibited the government from using the evidence to show a propensity to commit sexual offenses.

2. Congressional Response: Rules 413 and 414 were enacted by Congress on 13 September 1994, as part of the Violent Crime Control and Enforcement Act of 1994. During the Congressional debate on these provisions, Representative Susan Molinari, the Rules' primary sponsor, said it was Congress' specific intention that the courts "must liberally construe" both Rules so that finders of fact can accurately assess a defendant's criminal propensities and probabilities in light of his past conduct.

B. Rule 413/414. Scope of the Rule.

1. In order to admit evidence under Rules 413 or 414, three threshold determinations must be made:

a) the accused is charged with an offense of sexual assault/child molestation;

b) the evidence proffered is evidence of the accused's commission of another offense of sexual assault/child molestation; and

c) the evidence is relevant under Rules 401 and 402. *United States v. Berry*, 61 M.J. 91 (2005).

2. Once the evidence meets the threshold requirements of Rule 413 or Rule 414, a military judge must apply the balancing test of Rule 403 under which the testimony may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members. A military judge must consider several nonexclusive factors in performing the required balancing of probative value and prejudicial effect. These include: strength of proof of the prior act--conviction versus gossip; probative weight of the evidence; potential for less prejudicial evidence; distraction of the factfinder; time needed for proof of prior conduct; temporal proximity; frequency of the acts; presence or lack of intervening circumstances; and relationship between the parties. *United States v. Wright*, 53 M.J. 476, 482

(2000).

a) *United States v. Green*, 51 M.J. 835 (A. Ct. Crim. App. 1999). Military judge erroneously believed Rule 413 "trumped" Rule 403, and that the Rule 403 balancing test did not need to be applied. The court stated that a military judge is required to conduct a Rule 403 balancing test prior to admitting evidence under either Rules 413 or 414.

b) *United States v. Wright*, 53 M.J. 476 (2000). The accused pled guilty to indecent assault of P in October of 1996. He pled not guilty, but was convicted of indecent assault of D in April of 1996, and housebreaking of P's room in October of 1996. The government admitted the offense that he pled guilty to under Rule 413 to prove propensity to commit indecent assault against D. The defense claimed that Rule 413 was unconstitutional. The CAAF rejected this argument, following the rationale of the Federal Circuit Courts on both due process and equal protection grounds.

c) *United States v. Henley*, 53 M.J. 488 (2000). Accused convicted of committing oral sodomy on his natural son and daughter. At trial, the government introduced incidents outside the statute of limitations under both Rules 414 and 404(b). The trial court admitted if for both purposes. The Air Force Court admitted it under Rule 404(b) and said that they did not need to address the Rule 414 issue. The CAAF agreed with the Air Force Court's approach and affirmed. The CAAF did go on to say, in light of their opinion in *Wright*, that Rule 414 is constitutional and this evidence would have been admissible under that rule as well.

d) *United States v. Bailey*, 55 M.J. 238 (2001). Appellant was convicted at a general court-martial of rape, forcible sodomy, aggravated assault, and other offenses. He argued on appeal that the military judge erred in admitting, over defense objection, evidence of prior acts of forcible sodomy through the testimony of the appellant's former wife and former girlfriend when the acts in question occurred up to a decade in time prior to the charged offenses. The military judge allowed the evidence under Rule 413, after performing a balancing test under Rule 403. The military judge also provided a limiting instruction to the panel concerning this evidence. The CAAF held that the balancing test conducted by the military judge, in conjunction with his limiting instruction, met the requirements for an appropriate balancing test outlined in *United States v. Wright*, even though the trial judge had not applied all of the non-exclusive factors outlined in the *Wright* decision. *See also United States v. Dewrell*, 55 M.J. 131 (2001).

e) *United States v. Berry*, 61 M.J. 91 (2005). Appellant was convicted of forcible sodomy involving another male soldier. At trial, the appellant's defense to the charge of forcible sodomy was that the alleged victim had consented to the oral sex incident. To counter this defense, the Government sought to introduce testimony from LS, who testified he had been the victim of a similar act by the appellant eight years earlier. The military judge found that the testimony was relevant and admissible under Rule 413. The ruling was affirmed by ACCA in an unpublished opinion. The CAAF found that although the testimony was relevant, the

military judge erred in admitting it because he failed to do an adequate balancing test under Rule 403 and that under a proper Rule 403 balancing test the testimony was inadmissible and prejudicial.

3. No Temporal Limit. *United States v. James*, 63 M.J. 217 (2006). The CAAF concluded that the clear language of Rule 414 does not limit the admission of other incidents of child molestation to those occurring before the charged offenses. This reading has equal application to Rule 413. Therefore, the fact that propensity evidence under Rule 413/414 occurs after the date of the charged offenses is not a barrier to its admission in the accused's court-martial.

4. No requirement that the acts admitted under MRE 413/414 be the exact same acts of molestation as the charged offenses. *United States v. Ediger*, 68 M.J. 243 (C.A.A.F. 2010).

5. ***ARMY MILITARY JUDGES, AFTER ADMITTING EVIDENCE UNDER RULE 413, HAVE A LIMITED SUA SPONTE DUTY TO INFORM MEMBERS OF THE FOLLOWING:***

a) The accused is not charged with this other sexual assault offense;

b) the Rule 413 evidence should have no bearing on their deliberations unless they determine the other offense occurred;

c) if they make that determination, they may consider the evidence for its bearing on any matter to which it is relevant in relation to the sexual assault offenses charged;

d) the Rule 413 evidence has no bearing on any other offense charged;

e) they may not convict the accused solely because they may believe the accused committed other sexual assault offenses or has a propensity or predisposition to commit sexual assault offenses;

f) they may not use Rule 413 evidence as substitute evidence to support findings of guilty or to overcome a failure of proof in the government's case, if any;

g) each offense must stand on its own and they must keep the evidence of each offense separate; and

h) the burden is on the prosecution to prove the accused's guilt beyond a reasonable doubt as to each and every element of the offenses charged. *United States v. Dacosta*, 63 M.J. 575 (Army Ct. Crim. App. 2006).

i) *United States v. Schroder*, 65 M.J. 49 (2007). This case highlights the need for a *Dacosta*-esque instruction. The military judge properly admitted the uncharged misconduct under M.R.E. 414, but failed to adequately instruct the members on its proper uses. The failure to properly instruct the members was harmless error. The CAAF determined that the military judge's instruction fell short of what was required when M.R.E. 414 evidence is admitted at trial. The CAAF noted that the military judge correctly instructed the members on the government's burden, but improperly qualified the statement by informing the members that they may "[h]owever . . . consider the similarities in the testimony" of the three alleged victims concerning the alleged rape and indecent acts. The CAAF believed the instruction was

"susceptible to unconstitutional interpretation." Namely that the similarities between the charged and uncharged misconduct could, standing alone, convict the appellant. The CAAF pointed to the Military Judges Benchbook, instruction 7-13-1, and also favorably cited the *Dacosta* opinion and its suggested instruction. While not mandating the *Dacosta* instruction, the CAAF stated the members "must be instructed that the introduction of such propensity evidence [under M.R.E. 414] does not relieve the government of its burden of proving every element of every offense charged. Moreover, the factfinder may not convict on the basis of propensity evidence alone." In this case, the CAAF was convinced beyond reasonable doubt that the error did not contribute to the appellant's conviction. As such, the court determined the error was harmless.

6. *United States v. Bare*, 65 M.J. 35 (2007). The appellant, a thirty-four-year-old E-5 with thirteen years of active service, was charged with sexually molesting his natural daughter, RB. At the time of the trial, RB was fourteen years old. However, the sodomy specification covered a period when RB was under the age of twelve. At trial, the government sought to admit the testimony of KB, the appellant's sister regarding his sexual molestation of her when she was between the ages of seven and eleven and the appellant was between the ages of fifteen and nineteen. The Government also sought to admit the testimony of TA, the appellant's stepdaughter. TA alleged the appellant had sexually molested her when she was about eleven years old. The government offered KB and TA's testimony under M.R.E. 414. The appellant did not challenge the admissibility of TA's testimony (since this occurred when he was an adult). However, the appellant did argue that the military judge erred in conducting the required M.R.E. 403 analysis. The appellant analogized his case to that of *United States v. Berry*, 61 M.J. 91 (2005) and *United States v. McDonald*, 59 M.J. 426 (2004). In both *Berry* and *McDonald*, the CAAF concluded the military judge erred in admitting evidence of uncharged adolescent sexual misconduct to prove the charged adult sexual misconduct. The appellant argued that, as in *Berry* and *McDonald*, the military judge failed to give adequate consideration to his young age at the time of the uncharged misconduct when conducting his M.R.E. 403 analysis. The CAAF considered, whether, in light of *Berry* and *McDonald*, the military judge error in admitting uncharged sexual acts between the appellant, when he was an adolescent, and his sister. The CAAF stated that a military judge must take care to meaningfully analyze the different phases of an accused's development when projecting on a child the mens rea of an adult or extrapolating an adult mens rea from the acts of a child. The CAAF cautioned military judges to not treat the different phases of the accused's development as being unaffected by time, experience, and maturity. In this case, however, the military judge did not abuse his discretion in admitting evidence of uncharged, but similar molestation. The CAAF was persuaded that the appellant's facts were distinguishable from those in *Berry*. Unlike *Berry*, the military judge conducted a meaningful MRE 403 balancing analysis which considered factors weighing both against and in favor of admission of the evidence; the misconduct occurred while the accused was an adult as well as an adolescent; the appellant was charged with an offense of child molestation (Berry was not); and the misconduct occurred regularly for a period of about two or three years. All of these factors, according to the CAAF, made KB's testimony more probative and less unfairly

prejudicial than the testimony admitted in *Berry*. As such, the military judge did not abuse his discretion in admitting the evidence under M.R.E. 414.

7. *United States v. Yammine*, 69 M.J. 70 (C.A.A.F. 2010). Over defense objection, the government admitted file names suggestive of homosexual acts with preteen and teenage boys under MRE 414 (and alternatively under MRE 404(b) against the accused who was charged with sodomizing a fourteen-year-old male. The CAAF held that the file names were not proper propensity evidence under MRE 414, nor were they admissible for any purpose under MRE 404(b).

a) In order to be admissible under MRE 414, the proffered propensity evidence must be evidence of the accused's commission of another offense of child molestation as defined by the rule. The military judge admitted the evidence under MRE 414(d)(5) and alternatively under section (d)(2). MRE 414(d)(5) allows evidence of an offense of child molestation that constitutes a crime under any Federal law that prohibits "deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child." MRE 414(d)(2) allows evidence of "any sexually explicit conduct with children" proscribed by the UCMJ, Federal, or State law. The court held that MRE 414(d)(5) could not include possession of just the file names suggestive of child pornography because, in the absence of the actual files, it was not possible to determine if the conduct depicted in the media fell within the parameters of MRE 414(d)(5). But see *United States v. Conrady*, 69 M.J. 714 (A. Ct. Crim. App. 2011) (holding that images clearly depicting a child in pain where the appellant saved them to his personal computer and admitted receiving sexual gratification from the images qualified under MRE 414(d)(5)).

b) The court further held that MRE 414(d)(2) did not apply because it requires that the qualifying "sexually explicit conduct" proscribed by Federal law be "with children." According to the court, under military law, "with children" means in the physical presence of children. *United States v. Miller*, 67 M.J. 87 (C.A.A.F. 2008).[2] As such, possession or attempted possession of child pornography would not qualify under MRE 414(d)(2) because the appellant himself was not physically present with the children depicted in the child pornography.

c) The court also held that the unassociated file names were not admissible under MRE 404(b) because the military judge failed to make a proper MRE 404(b) analysis. The court noted that the military judge specifically referenced "propensity" in making his MRE 404(b) determination. Propensity may be a relevant basis under MRE 413 and 414, but it is not a proper basis for admitting evidence under MRE 404(b). Accordingly, the military judged erred in alternatively admitting the unassociated file names under MRE 404(b). Additionally, the court independently determined that the probative value of the proffered evidence did not outweigh the danger of unfair prejudice.

[2] In *Miller*, CAAF held that an accused cannot be convicted of with indecent liberties with a child under Article 134 UCMJ, when the alleged indecent conduct takes place over a webcam rather than in the actual presence of the child. *United States v. Miller*, 67 M.J. 87, 90-91 (C.A.A.F. 2008).

d) Finally, the court held that admitting the unassociated file names was prejudicial and therefore set aside appellant's conviction for sodomy and indecent acts. The court also noted that the indecent acts charge was not subject to rehearing because the finding to that charge was reached as a lesser included offense of forcible sodomy under Article 125, UCMJ. Pursuant to *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010), indecent acts with a child is no longer a lesser included offense of sodomy.

8. *United States v. Conrady*, 69 M.J. 714 (A.C.C.A. 2011). The Appellant had a previous court-martial conviction for receiving child pornography through interstate commerce in violation Article 134, U.C.M.J. (charged as 18 U.S.C. §2252A(a)(2)(B)). The government sought to admit several items from the Appellant's prior court-martial, two of which were images of child pornography. The government argued that the images qualified under MRE 414 as a prior crime of child molestation under MRE 414(d)(1) and (2). PE 14 depicted a child, obviously in pain, engaged in sexual activity with two adults, while PE 18 contained an image of child pornography but no element of infliction of pain or injury.

a) While the military judge did error in admitting the PE 14 under MRE 414(d)(1) and (2), the error was harmless because PE 14 was admissible under MRE 414(d)(5). Possession, receipt or transport of an image of child pornography alone does not meet the definition of a sexual act or sexual conduct with children because it is not done in the presence of a child, which is required under MRE 414(d)(1) and (2). *United States v. Yammine*, 69 M.J. 70, 76 (C.A.A.F. 2010). However, this court's prior decision in *Yammine* did not rule out the possibility that child pornography could be a qualifying prior crime under MRE 414 in other circumstances. MRE 414(d)(5) does not refer to engaging in sexual contact and, as such, does not require the presence of a child. Instead, it focuses on "deriving pleasure . . . from the infliction of physical pain on a child," which the accused here did through receiving and viewing the photograph. PE 18's admission was err and it was not admissible under another section; however, based on the other evidence admitted, the error was harmless.

IX. RULES 501-513. Privileges.

A. Privileges generally.

1. Schlueter, Salztburg, Schinasi, and Imwinkelried, in Military Evidentiary Foundations, view the privilege analysis in the following manner: in certain proceedings, the holder has a privilege unless it is waived or there is an applicable exception. There are six considerations:

a) The proceedings to which the privileges apply: pursuant to Rule 1101, the Rules respecting privileges apply at all stages in virtually all proceedings conducted pursuant to the UCMJ, i.e., Article 32 hearings, Article 72 vacation proceedings, as well as search and seizure authorizations, and proceedings involving pretrial confinement.

b) The holder of the privilege: The original holder is the intended

beneficiary (e.g., the client, the penitent), although in certain cases, the holder's agent will have authority to assert the privilege.

c) The nature of the privilege: Encompasses three rights - to testify and refuse to disclose the privileged information; to prevent third parties from making disclosure; and the right to prevent counsel or the judge from commenting on the invocation of the privilege.

d) What is privileged? The confidential communication between properly related parties made incident to their relation.

(1) "Communication" is broadly defined.

(2) "Confidential" implies physical privacy and intent on the part of the holder to maintain secrecy.

e) Waiver of the privilege: Voluntary disclosure of the privileged matter, in-court or out-of-court, will waive the privilege.

f) Exceptions to the privilege: In the military, exceptions to a privilege (as well as the privilege itself) are expressly delineated. *See United States v. Custis*, 65 M.J. 366, 370-71 (2007) (stating that "whereas privileges evolve in other federal courts based on case law determinations, in the military system the privileges and their exceptions are expressly delineated.").

2. To claim a privilege, the elements of the foundation, in general, are: The privilege applies to this proceeding; the claimant is asserting the right type of privilege; the claimant is a proper holder of the privilege; and the information to be suppressed is privileged because it was a communication, it was confidential, it occurred between properly related parties, and it was incident to the relation.

B. Rule 501.

1. Rule 501 is the basic rule of privilege, recognizing privileges required by or provided for by the Constitution, acts of Congress, the Military Rules of Evidence, the MCM, and the privileges 'generally recognized in the trial of criminal cases in the United States district courts pursuant to FRE 501 to the extent that application of those principles to courts-martial is practicable. *United States v. Miller*, 32 M.J. 843 (N.M.C.M.R. 1991) (although it was unaware of any case applying 501(a)(4) to a privilege arising entirely from state law, here, accused did not even have standing to claim a statutory privilege for statements made by daughter to state social services officials).

2. Despite the express provisions of MRE 501 (a)(4), can military courts apply federal common law privileges? *See United States v. Custis*, 65 M.J. 366, 370-71 (2007) (stating that "whereas privileges evolve in other federal courts based on case law determinations, in the military system the privileges and their exceptions are expressly delineated.") *See also United States v. Wuterich*, 68 M.J. 511 (N-M. Ct. Crim. App. 2009) (refusing to recognize a "reporter's privilege," in part, because the privilege was not specifically delineated.)

C. Rule 502. Lawyer-Client Privilege.

1. An attorney-client relationship is created when an individual seeks and receives professional legal service from an attorney. In addition, there must be an acceptance of the attorney by the client and an acceptance of the client by the

attorney before the relationship is established.

2. This privilege may be claimed by the client, or the lawyer on the client's behalf. However, Rule 502(d)(1) removes the privilege with respect to future crimes, as does 502(d)(3) with regard to breach of duty by lawyer or client, etc. *United States v. Smith*, 33 M.J. 527 (A.C.M.R. 1991).

3. Waiver is examined strictly. In *United States v. Marcum*, 60 M.J. 198 (2004), the appellant went AWOL after findings but before sentencing. His defense counsel used a 20-page document the appellant had prepared for use at trial as an unsworn statement on sentencing. The document contained unflattering observations about several of the victims involved in the case, and the trial counsel capitalized on those observations in his sentencing argument. The CAAF held that the right to introduce an unsworn statement is personal to the accused, and in the absence of affirmative evidence of waiver, the evidence was admitted in violation of the attorney-client privilege.

4. Remedy for breach. In *United States v. Pinson*, 57 M.J. 489 (2002), the CAAF held that when the actions of the government breached the attorney-client relationship between the accused and the defense counsel it may warrant reversal if it impacted the attorney's performance or resulted in the disclosure of privileged information at the time of trial. The CAAF identified the following factors when making that determination: (1) whether an informant testified at the accused's trial as to the conversation between the accused and his attorney; (2) whether the prosecution's evidence originated in the conversations; (3) whether the overheard conversation was used in any other way to the substantial detriment of the accused; or (4) whether the prosecution learned from the informant the details of the conversations about trial preparations. Based upon these factors the court concluded no harm to the defense and affirmed the case.

D. Rule 503. Communications to Clergy.

1. This privilege protects communications made as a formal act of religion or conscience. The privilege may be claimed by the penitent or in the absence of contrary evidence, by the clergyman or his/her assistant. *United States v. Napoleon*, 46 M.J. 279 (1997). For privilege to apply, the communication must: be made either as a formal act of religion or as matter of conscience; be made to a clergyman in his or her capacity as a spiritual advisor or to a clergyman's assistant in his or her capacity as an assistant to a spiritual advisor; and be intended to be confidential. Note that the privilege was amended in 2007 to include communications made to a clergyman's assistant. "A 'clergyman's assistant' is a person employed by or assigned to assist a clergyman in his capacity as a spiritual advisor."

2. *United States v. Benner*, 57 MJ 210 (2002). The CAAF reversed the case, holding that when a chaplain meets with a penitent, Rule 503 allows the disclosing person to prevent the chaplain from disclosing the contents of the statement when it was made as a formal act of religion or as a matter of conscience. In this case the chaplain spoke with the accused and then informed him that army regulations would force the chaplain to disclose the confession of the accused. That was an erroneous statement of the Army's regulation governing chaplains. Based upon statements made by the chaplain the accused then made an involuntary confession to CID agents after the chaplain took him to the MP station. The CAAF held that the confession was involuntary, and under a totality

of the circumstances test could not be deemed admissible.

3. In *United States v. Shelton*, 64 M.J. 32 (C.A.A.F. 2006), the CAAF held that communications made to a civilian minister acting as a marital counselor were covered by the attorney-client privilege.

E. Rule 504. Husband-Wife Privilege.

1. Rule 504 reflects the Supreme Court's decision in *Trammel v. United States*, 445 U.S. 40 (1998), in which the Court held that the witness spouse alone has a privilege to refuse to testify adversely. The defendant spouse can only assert the privilege concerning confidential communications. Thus, one spouse may refuse to testify against the other. Confidential communications made during marriage are privileged, and that privilege may be asserted by the spouse who made the communication, or on his behalf by or the spouse to whom it was made during or after the marital relationship. *See United States v. Durbin*, 68 M.J. 271 (C.A.A.F. 2010) (allowing a witness spouse to testify concerning statements she made during a confidential marital communication so long as those statements did not repeat or reveal the accused spouse's privileged statements).

   The rule contains several exceptions to the privilege, most importantly: (1) when the accused is charged with a crime against the person or property of the spouse OR A CHILD OF EITHER; and (2) when, at the time of the testimony is to be given, the marriage has been terminated by divorce or annulment. To prevent unwarranted discrimination among child victims, the term "a child of either" was amended in 2007 to include "not only a biological child, adopted child, or ward of one of the spouses but also includes a child who is under the permanent or temporary physical custody of one of the spouses, regardless of the existence of a legal parent-child relationship. For purposes of this rule only, a child is: (i) an individual under the age of 18; or (ii) an individual with a mental handicap who functions under the age of 18." Prior to this amendment, there was no *de facto child* privilege in the military. *See United States v. McCollum*, 58 M.J. 323(2003) (holding that Rule 504(c)(2)(A) requires a lawful parental relationship, as opposed to a custodial relationship, to trigger the "child of either" exception).

2. Adultery. *United States v. Taylor*, 64 M.J. 416 (C.A.A.F. 2007). Adultery constitutes a crime "against the person or property of the other spouse." Thus, when one spouse is charged with adultery, the marital privilege, pursuant to M.R.E. 504(c)(2)(A) does not apply to communications involving the adultery.

3. Presumption of Confidentiality. In *United States v. McCollum*, 58 M.J. 323 (2003), the appellant raped his wife's 14-year-old sister, who was staying with the family for a summer visit. He made several statements to his wife about the incident. At trial, the military judge admitted two of the statements, claiming that the appellant did not establish the intent to hold the communications confidential. The CAAF reversed, holding that marital communications carry a presumption of confidentiality. Once the party asserting the privilege has established that the communication was made privately during a valid marriage, the burden shifts to the opposing party to overcome the presumption.

4. Joint-Participant Exception. Although civilian federal courts recognize the joint-participant exception to the marital privilege, the joint-participant exception does not apply in military cases. *See United States v. Custis*, 65 M.J. 366 (C.A.A.F.

2007). In *Custis*, the CAAF reasoned that unlike privileges in the federal civilian courts that evolve based on case law, privileges in the military system are specifically delineated. Hence, the only exceptions are those expressly authorized. Consequently, there is no joint-participant exception to the marital privilege. Note that the ACCA in *United States v. Davis*, 61 M.J. 530 (A. Ct. Crim. App. 2005) had previously recognized a joint-participant exception to marital communications privilege.

F. Rule 509. Deliberations of Courts and Juries.

1. Rule 509 preserves the sanctity of the factfinder's deliberative process. See Schlueter, Salztburg, Schinasi, and Imwinkelried, Military Evidentiary Foundations.

2. Rule 606(b) provides an exception and permits intrusion into the factfinder's deliberative process when there are questions concerning:

a) Whether extraneous prejudicial information was brought to bear upon any member;

b) Whether any outside influence was improperly brought to the member's attention; or

c) Whether there was unlawful command influence.

See also Schleuter, Salztburg, Schinasi, and Imwinkelried, Military Evidentiary Foundations.

3. Note that the deliberative process of military judges, like that of a panel, is protected from post-trial inquiry. *United States v. Matthews*, 68 M.J. 29 (C.A.A.F. 2009)

G. Rule 513. Psychotherapist Patient Privilege.

1. Rule 513 offers a limited privilege for communications to psychotherapists and counselors. The privilege only applies to actions arising under the UCMJ and it is not a broader doctor-patient privilege.

a) *United States v. Rodriguez*, 54 M.J. 156 (2000). The CAAF affirmed the Army Court's ruling that *Jaffee v. Redmond* did not create a psychotherapist-patient privilege in the military. *United States v. Paaluhi*, 54 M.J. 181 (2000). Consistent with *Rodriguez*, the court ruled that *Jaffe v. Redmond* did not create a psychotherapist-patient privilege in the military. The CAAF reversed the conviction, however, holding it was ineffective assistance for the defense counsel to tell the accused to talk to a Navy psychologist without first getting the psychologist appointed to the defense team.

2. Quasi psychotherapist-patient privilege also exists under limited circumstances:

a) Where psychiatrist or psychotherapist is detailed to assist the defense team, communications are protected as part of attorney-client confidentiality. *United States v. Tharpe*, 38 M.J. 8, 15 n.5 (C.M.A. 1993)

b) Communications made by an accused as part of a sanity inquiry under Rule 302. *United States v. Toledo*, 26 M.J. 104 (C.M.A.), *cert. denied*, 488 M.J. 889 (1988). Note that confidentiality privilege for statements

made during mental responsibility exams may not automatically apply retroactively to exams which the military judge deems as adequate substitute for court-ordered R.C.M. 706 examinations. *United States v. English*, 44 M.J. 612 (N-M. Ct. Crim. App. 1996), *rev'd on other grounds*, 47 M.J. 215 (1997).

X. WITNESSES.

A. Rule 601. Competency.

Rule 601. General rule of competency.

Every person is competent to be a witness except as otherwise provided in these rules.

1. The rule eliminates the categorized disabilities which existed at common law and under prior military law. *United States v. Morgan*, 31 M.J. 43 (C.M.A. 1990*), cert. denied*, 498 U.S. 1085 (1991). The very young (4 year old child here) are competent, even if hesitant, apprehensive, and afraid.

2. In the event that the competency of a witness is challenged, e.g., a child, the proponent of the witness must demonstrate that the witness has: capacity to observe; capacity to remember; capacity to relate; and recognition of the duty to tell the truth.

B. Rule 602. Personal Knowledge.

Rule 602. Lack of personal knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of MRE 703, relating to opinion testimony by expert witnesses.

1. As long as the panel could find that the witness perceived the event, the testimony should be admitted. Note, however, the term "sufficient," which affirms that the military judge retains power to reject evidence if it could not reasonably be believed.

2. To demonstrate personal knowledge, the proponent must show the witness was in a position to perceive the event, and did actually perceive it.

C. Rule 605. The military judge.

Rule 605. Competency of military judge as witness

(a) The military judge presiding at the court-martial may not testify in that court-martial as a witness. No objection need be made to preserve the point.

(b) This rule does not preclude the military judge from placing on the record matters concerning docketing of the case.

1. *United States v. Howard*, 33 M.J. 596 (A.C.M.R. 1991). Without any supporting evidence at trial, the military judge used his own specialized knowledge of drug use in Germany to conclude the accused used hashish instead of leaf marijuana, how a pipe was used in the process, and that the charged offense was not the accused's first use of marijuana. In doing so, the judge became a witness, was disqualified, and all actions from then on were void.

2. The rule is an exception to Rule 103 waiver rule. It does not apply to:

a) Subsequent proceedings concerning trial presided over; e.g., limited rehearing such as those ordered pursuant *to United States v. Dubay*, 37 C.M.R. 411 (1967).

b) Judicial notice under Rule 201.

D. Rule 607. Who May Impeach.

1. Under prior practice, the party calling a witness was said to "vouch" for the witness. Ordinarily, that meant the party could not attack the credibility of that witness. However, for purposes of impeachment, a witness need not be adverse.

2. Rule 607 provides that "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." The rule contemplates impeachment, however, not the attempted introduction of evidence which otherwise is hearsay. Put differently, the Government may not use impeachment by prior inconsistent statement as a "subterfuge" to avoid the hearsay rule. *United States v. Hogan*, 763 F.2d 697, 702 (5th Cir. 1985). *United States v. Ureta*, 44 M.J. 290 (1996), *cert. denied*, 117 S. Ct. 692 (1997).

E. Methods of Impeachment.

1. Attacks focused on: Defects in capacity to observe, remember or relate; untruthful character; bias, partiality, interest in the outcome; prior convictions; prior inconsistent statements; or delay in reporting abuse or subsequent recantation.

2. Defects in Capacity. Here the focus is on the witness's ability to observe, remember, and relate the information.

a) Observation. The common mode of attack is that the witness could not adequately see/hear the incident in question because of poor lighting, cross-racial identification problems, distance from the scene, etc.

b) Recall. Because of the witness's age, mental condition at the time of the incident or at the time of trial, time lapse between the incident and their in-court testimony, etc., the witness cannot accurately remember the incident.

c) Relate. Because of the witness's age, mental condition, lack of expertise, etc., the witness cannot accurately relate the information.

F. Rule 608. Untruthful Character.

1. Rule 608(a) and (b):

Rule 608. Evidence of character, conduct, and bias of witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instance of conduct. Specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in MRE 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if

probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning character of the witness for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by another witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to credibility.

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2. Once a witness testifies, including the accused or a hearsay declarant, his or her credibility becomes an issue. Evidence of character is then relevant. Rule 608(a) limits the relevance to truthfulness or untruthfulness. Methods of proving character are set out in Rule 405. Under 608(a), the character must be attacked before it may be rehabilitated. Thus, bolstering is prohibited by the rule. Once attacked, the witness' character for being truthful may be rehabilitated with opinion or reputation evidence. *See United States v. Jenkins*, 50 M.J. 577 (N. M. Ct. Crim. App. 1999), witness cannot comment directly about the credibility of another witness's testimony.

   a) The foundational elements:

      (1) Reputation witness must show he or she is a member of the same community as the witness to be attacked or rehabilitated and that he or she has lived or worked there long enough to have become familiar with the witness' reputation for truthfulness or the untruthfulness. *United States v. Toro*, 37 M.J. 313 (C.M.A. 1993).

      (2) Opinion witness must demonstrate that he or she is personally acquainted with witness and on that basis is able to have formed an opinion about the truthfulness or the lack thereof. *United States v. Perner*, 14 M.J. 181 (C.M.A. 1982).

   b) When cross-examination is conducted in such a manner as to induce the belief of untrustworthiness, rehabilitation is permitted. *United States v. Allard*, 19 M.J. 346 (C.M.A. 1985). Also, a "slashing cross-examination" will satisfy the "or otherwise" component of Rule 608(a). *United States v. Everage*, 19 M.J. 189 (C.M.A. 1985). Note, however, that merely introducing evidence that contradicts a witness's testimony or statement is not an "or otherwise" attack under Rule 608(a).

   c) Rule 608(b)(2) provides that a character witness can be asked questions about specific acts of the person whose credibility has been attacked or rehabilitated as a means of "testing" the character witness.

3. The questioner is precluded from introducing extrinsic evidence in support of his inquiry. This avoids a "trial within a trial." If witness denies knowledge of the specific acts, no extrinsic evidence of specific acts is permitted. You are "stuck with the answer." *United States v. Cerniglia*, 31 M.J. 804 (AFCMR 1991).

   a) Operation of the "Collateral Fact Rule." Under the rule, extrinsic evidence is inadmissible to impeach witnesses on collateral facts. The purpose of the rule is to prevent digression into unimportant matters, since the potential for wasting time and confusing the factfinder is particularly high when extrinsic evidence is used to impeach. It does not limit the cross-examiner's questioning a witness about collateral facts, subject to the general discretion of the court.

(1) The rule *applies* to: Impeachment under Rule 608(b) and the cross-examination of a character witness under Rule 405(a).

(2) When the rule does not apply, the cross-examiner may question the witness and offer extrinsic evidence. The rule does not apply to:

(a) Bias under Rule 608(c);

(b) Defects in capacity (*United States v. White*, 45 M.J. 345 (1996));

(c) Prior inconsistent statements under Rule 613 and 801(d)(1)(A);

(d) Impeachment by contradiction; or

(e) Impeachment under Mil.R.Evid 609.

b) "Human Lie Detector" Testimony. In *United States v. Kasper*, 58 M.J. 314 (2003), the CAAF held that "human lie detector" testimony by an OSI agent violates the limits on character evidence in Rule 608(a) because it offers an opinion of the declarant's truthfulness on a specific occasion. At trial, an OSI agent testified that her training had helped her to identify whether subjects were being truthful in interviews.

G. Rule 608. Bias.

Rule 608. Evidence of character, conduct, and bias of witness

(c) Evidence of bias. Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

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1. Ulterior motives are <u>never</u> collateral and may be proved extrinsically. The three categories under 608(c) are a representative list, not an exhaustive one.

2. Rules should be read to allow liberal admission of bias-type evidence. *United States v. Hunter*, 21 M.J. 240 (C.M.A.), *cert. denied*, 476 U.S. 1142 (1986). *See United States v. Aycock*, 39 M.J. 727 (N.M.C.M.R. 1993) (the military judge abused his discretion and committed prejudicial error in excluding extrinsic evidence of a government witness' bias and motive to testify falsely (anger and resentment toward the appellant through loss of $195 wager)). But See *United States v. Sullivan*, 70 M.J. 110 (C.A.A.F. 2011) (requiring a stronger showing other than the mere fact that a victim has undergone psychological counseling to inquire into a victim's medical history in order to attack victim's bias and credibility).

3. Constitutional dimensions:

a) *United States v. Bahr*, 33 M.J. 228 (C.M.A. 1991). 14 year-old prosecutrix testified concerning sodomy and indecent acts by her stepfather. Defense sought to introduce extracts from her diary showing a profound dislike of her mother and home life. The military judge ruled the extracts were inadmissible, and kept the defense from examining the prosecutrix concerning a prior false claim of rape, and alleged advice to her friends to turn in their family members for child sexual abuse. These rulings were evidentiary and constitutional error. Prosecutrix's hatred of her mother could be motive to hurt mother's husband.

b) *United States v. Moss*, 63 M.J. 233 (2006). Does the exclusion of evidence of bias under Rule 608(c) raise issues regarding an accused's Sixth Amendment right to confrontation? Yes. An accused's right under the Sixth Amendment to cross-examine witnesses is violated if the military judge precludes an accused from exploring an entire relevant area of cross-examination. The military judge erred when he excluded evidence that the accused sought in order to challenge the credibility of the alleged victim. It is the members' role to determine whether an alleged victim's testimony is credible or biased. As such, bias evidence, if logically and legally relevant, are matters properly presented to the members.

The test is to determine whether a limitation on the presentation of evidence of bias constitutes a Sixth Amendment violation is "whether '[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.'" *United States v. Collier*, 67 M.J. 347, 352 (C.A.A.F. 2009) .

H. Rule 609. Impeachment with a Prior Conviction.

Amended (2008) Rule 609. Impeachment by evidence of conviction of crime

(a) (a) *General rule.* For the purpose of attacking the credibility character for truthfulness of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Mil. R. Evid. 403, if the crime was punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the military judge determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

* * *

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The military judge, however, may allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the military judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

* * *

(f) Definition. For purposes of this rule, there is a "conviction" in a court-martial case when a sentence has been adjudged.

1. This method of impeachment can be done in cross-examination, with extrinsic evidence, or both. An important element in the analysis is the type of crime for which the witness was convicted.

2. Crimen falsi convictions are crimes such as perjury, false statement, fraud, or embezzlement, which involve deceitfulness or untruthfulness bearing on the witness's propensity to testify truthfully. For crimen falsi crimes, the maximum punishment is irrelevant and the military judge must admit proof of the conviction.

3. Non crimen falsi crimes involve convictions for offenses punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law of the prosecuting jurisdiction. The key is the maximum punishment the witness faced, not the actual punishment the witness received.

   a) Balancing test for witnesses: Admissibility of non crimen falsi convictions of witnesses is governed by Rule 403. The military judge can exclude this evidence if the probative value is substantially outweighed by unfair prejudice.

   b) Balancing test for the accused witness: Admissibility of non crimen falsi convictions of the accused is more restrictive than Rule 403. Convictions are only admissible if the military judge determines the probative value outweighs the prejudicial effect. See *United States v. Ross*, 44 M.J. 534 (A.F. Ct. Crim. App. 1996).

4. Time Limit. Conviction generally inadmissible if more than 10 years old. May be admitted if: Interests of justice require; probative value substantially outweighs prejudicial effect; proponent provides other party with notice. Although not specifically stated in the rule, most commentators believe the ten year limitation applies to crimen falsi as well as non crimen falsi convictions.

5. Juvenile Adjudications. Generally not admissible unless necessary to a fair resolution of the case, and evidence would have been admissible if witness previously had been tried as an adult. Juvenile proceedings may be used against an accused in rebuttal when he testifies that his record is clean. *See United States v Kindler*, 34 CMR 174 (C.M.A. 1964).

6. Summary courts-martial are allowed only if the accused was represented by counsel or representation was affirmatively waived. *United States v. Rogers*, 17 M.J.990 (A.C.M.R. 1984)

I. Rule 613. Impeachment with Prior Statements.

Rule 613. Prior statements of witnesses

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness

thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in MRE 801(d)(2).

1. Evidence that on a previous occasion a witness made a statement inconsistent with his or her present testimony is "probably the most effective and most frequently employed" attack on witness credibility. Saying one thing on the stand and something different previously raises a doubt as to the truthfulness of both statements. A prior inconsistent statement (PIS) casts doubt on the general credibility of the declarant. Such evidence is considered only for purposes of credibility, not to establish the truth of the contents (avoiding a hearsay issue). Thus, a limiting instruction would be appropriate.

2. A witness may be impeached with competent evidence to show that he or she made a previous statement, oral or written, inconsistent with his or her in-court testimony. The evidence may be:

   a) Intrinsic: controlled by 613(a), involving interrogation of the witness concerning the prior statement, or

   b) Extrinsic: controlled by 613(b), involving extrinsic proof (testimony or documents) of the inconsistent statement.

3. Impeachment, however, is not the only possible use of a prior inconsistent statement. Pursuant to Rule 801(d)(1)(A), such statements are admissible substantively, and may be considered by the fact-finder for the truth of the matter asserted, as an exemption to the rule against hearsay when three requirements are met: The statement is inconsistent with the declarant's testimony; the declarant made the statement under oath subject to the penalty of perjury; and the statement was made at a trial, hearing, or other proceeding, or in a deposition.

J. Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by the military judge. The military judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The military judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, or a witness identified with an adverse party, interrogation may be by leading questions.

1. This rule is the basic source of the military judge's authority to control proceedings at court-martial.

2. Scope of examination.

   a) *United States v. Stavely*, 33 M.J. 92 (1992). When cross-examination goes to witness credibility, military judge should afford counsel wide latitude.

   b) *United States v. Barnard*, 32 M.J. 530 (A.F.C.M.R. 1990). An accused who chooses to testify on the merits is subject to same cross-examination

as any other witness. Here, TC did not impermissibly comment on right to counsel when he asked accused if he saw a lawyer before making a pretrial statement.

c) Controlling examination to avoid constitutional problems. In *United States v. Mason*, 59 M.J. 416 (2004), the CAAF held that it was error to permit a trial counsel to ask on re-direct whether the accused had ever requested a re-test of the DNA evidence in his case, because the question tended to improperly shift the burden of proof in the case to the defense.

d) Alternatives to in-court testimony. The 1995 Amendments to Drafter's Analysis provides that "when a witness is unable to testify due to intimidation by the proceedings, fear of the accused, emotional trauma, or mental or other infirmity, alternatives to live in-court testimony may be appropriate.

K. Rule 612. Refreshing Recollection.

Rule 612. Writing used to refresh memory

If a witness uses a writing to refresh his or her memory for the purpose of testifying, either (1) while testifying, or (2) before testifying, if the military judge determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains privileged information or matters not related to the subject matter of the testimony, the military judge shall examine the writing in camera, excise any privileged information or portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be attached to the record of trial as an appellate exhibit. If a writing is not produced or delivered pursuant to order under this rule, 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, if in the discretion of the military judge it is determined that the interests of justice so required, declaring a mistrial. This rule does not preclude disclosure of information required to be disclosed under other provisions of these rules or this Manual.

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1. This is **NOT** Rule 803(5), the recorded recollection hearsay exception.

2. Foundation and Procedure. Show the memory of the witness has failed; show there is some means available which will refresh the recollection of the witness; have the witness read/examine the refreshing document silently; recover the refreshing document; proceed with questioning; make the refreshing document an appellate exhibit and append it to the record of trial; protect privileged matters contained in the writing; nothing is read into the record. Refreshing document need not be admissible; and opposing counsel may inspect the writing, use it in cross examination, and introduce it into evidence.

XI. EXPERTS AND SCIENTIFIC EVIDENCE

Rule 702. Testimony by experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, <u>if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case</u>.

A. Rule 702. Expert Witnesses

1. Trial judges decide preliminary questions concerning the relevance, propriety and necessity of expert testimony, the qualification of expert witnesses, and the admissibility of his or her testimony. *See* Rule 104(a).

a) *United States v. Warner*, 62 M.J. 114 (2005), the CAAF held "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." Where the government provides itself with a top expert, it must provide a reasonably comparable expert to the defense.

b) *United States v. Lee*, 64 M.J. 213 (2006), commenting on *Warner* and Article 46, CAAF held the playing field is even more 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. Arguably, *Warner* and *Lee* can be read together to give the defense a much stronger argument for not only the need for an expert witness (especially if the government has an expert), but the need for a particular expert witness (or one comparable to the government's expert).

c.) *United States v. McAllister*, 64 M.J. 248 (2007), the issue on appeal was: Whether the appellant's right to present his defense was violated when he was prevented from employing and utilizing a necessary DNA expert at his trial? The CAAF answered the question in the affirmative. Had the military judge granted the defense request for a PCR expert, the members would have heard testimony about the discovery of DNA from three previously unidentified individuals. The defense could have used this evidence to attack not only the thoroughness of the original test, but the weight that the members should have given to the government's expert testimony. Additionally, the CAAF believed the new evidence would have changed the evidentiary posture of the case. At trial, the defense had nothing to contradict the character of the government's DNA evidence which excluded all known suspects other that the appellant. The DNA evidence, according to the CAAF, was the linchpin of the government's case. The additional evidence from TAI was hard evidence that someone other than the appellant, or any other known suspect, was in physical contact with the victim at or near the time of her death. It was error for the military judge to have denied the defense request for an additional expert and retesting of the government's sample. The CAAF concluded that this evidence could have raised a reasonable doubt as to guilt. As such, the CAAF held that the appellant was deprived of his constitutional right to a fair hearing as required by the Due Process Clause. The error in denying the defense request for expert assistance was not harmless beyond a reasonable doubt. As such, the findings of guilt with regards to the unpremeditated murder and the sentence were set aside.

2. In *United States v. Houser*, 36 M.J. 392 (1993) the CAAF set out six factors that a judge should use to determine the admissibility of expert testimony. Although *Houser* is a pre-*Daubert* case, it is consistent with *Daubert*, and the CAAF continues to follow it. *See United States v. Griffin*, 50 M.J. 278, 284 (1999) and

United States v. Billings, 61 M.J. 163 (2005). They are:

a) Qualified Expert. To give expert testimony, a witness must qualify as an expert by virtue of his or her "knowledge, skill, experience, training, or education." *See* Rule 702

b) Proper Subject Matter. Expert testimony is appropriate if it would be "helpful" to the trier of fact. It is essential if the trier of fact could not otherwise be expected to understand the issues and rationally resolve them. *See* Rule 702.

c) Proper Basis. The expert's opinion may be based on admissible evidence "perceived by or made known to the expert at or before the hearing" or inadmissible hearsay if it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. . . ." The expert's opinion must have an adequate factual basis and cannot be simply a bare opinion. *See* Rule 702 and 703.

d) Relevant. Expert Testimony must be relevant. *See* Rule 402.

e) Reliable. The expert's methodology and conclusions must be reliable. *See* Rule 702.

f) Probative Value. The probative value of the expert's opinion, and the information comprising the basis of the opinion must not be substantially outweighed by any unfair prejudice that could result from the expert's testimony. *See* Rule 403.

B. Rule 702. The Expert's Qualification to Form an Opinion.

Rule 702. Testimony by experts

. . . a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

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1. Knowledge, Training, and Education Foundation. Show degrees attained from educational institutions; show other specialized training in the field; show the witness is licensed to practice in the field and has done so (if applicable) for a long period of time; show teaching experience in the field; show the witness' publications; and show membership in professional organizations, honors or prizes received, previous expert testimony.

2. Skill and Experience Foundation. An expert due to specialized knowledge. *See United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986).

a) *United States v. Banks*, 36 M.J. 150 (C.M.A. 1992). Military judge erred when he refused to allow defense clinical psychologist to testify about the relevance of specific measurements for a normal prepubertal vagina, solely because the psychologist was not a medical doctor. As the court noted, testimony from a qualified expert, not proffered as a medical doctor, would have assisted the panel in understanding the government's evidence.

b) *United States v. Harris*, 46 M.J. 221 (1997). Military judge did not err in qualifying a highway patrolman who investigated over 1500 accidents, as an expert in accident reconstruction.

c) *United States v. McElhaney*, 54 M.J. 120 (2000). During the sentencing

phase, the government called an expert on future dangerousness of the accused. The expert said he could not diagnose the accused because he had not interviewed him nor had he reviewed his medical records. In spite of this and objections by defense counsel, the expert did testify about pedophilia and made a strong inference that the accused was a pedophile who had little hope of rehabilitation. The CAAF held that it was error for the judge to admit this evidence. Citing *Houser*, the court noted that the expert lacked the proper foundation for this testimony, as noted by his own statements that he could not perform a diagnosis because of his lack of contact with the accused.

d) *United States v. Billings*, 61 M.J. 163 (2005). To link the appellant to a stolen (and never recovered) Cartier Tank Francaise watch, the Government called a local jeweler as an expert witness in Cartier watch identification to testify that a watch the appellant was wearing in a photograph had similar characteristics as a Tank Francaise watch. Although the jeweler had never actually seen a Tank Francaise watch, his twenty-five years of experience and general familiarity with the characteristics of Cartier watches qualified him as a technical expert.

C. Proper Subject Matter ("Will Assist")

1. Helpfulness. Expert testimony is admissible if it will assist the fact finder. There are two primary ways an expert's testimony may assist.

a) Complex Testimony. Experts can explain complex matters such as scientific evidence or extremely technical information that the fact finders could not understand without expert assistance.

b) Unusual Applications. Experts can also help explain apparently ordinary evidence that may have unusual applications. Without the expert's assistance, the fact finders may misinterpret the evidence. *See, United States v. Rivers*, 49 M.J. 434 (1998); *United States v. Brown*, 49 M.J. 448 (1998).

2. *United States v. Traum*, 60 M.J. 226 (2004). To answer the question of why a parent would kill her child, the government called a forensic pediatrician, who testified to the following matters: (1) overwhelmingly, the most likely person to kill a child would be his or her biological parent; (2) the most common cause of trauma death for children under four is child maltreatment; (3) for 80% of child abuse fatalities, there are no prior instances of reported abuse; (4) Caitlyn died of non-accidental asphyxiation. The CAAF held that there was no error in admitting "victim profile" evidence regarding the most common cause of trauma death in children under four and the fact that most child abuse deaths involve first-time abuse reports for that child. The CAAF held that the military judge erred in admitting evidence that overwhelmingly, the most likely person to kill a child is its biological parent. In context, however, the error was harmless because the government already had admitted the appellant's confession.

3. *United States v. Cendejas*, 62 M.J. 334 (2006). Do you need expert testimony in a child pornography prosecution based upon the Child Pornography Prevention Act (CPPA), to prove actual children were used to produce the images? No. A factfinder can make a determination as to whether actual children were used to produce the images based upon a review of the images alone, without expert

testimony. *See also United States v. Wolford*, 62 M.J. 418 (2006).

D. Form of the Opinion.

1. The foundation consists of no more than determining that the witness has formed an opinion, and of what that opinion consists.

2. Rule 704.

Rule 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

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a) The current standard is whether the testimony assists the trier of fact, not whether it embraces an "ultimate issue" so as to usurp the panel's function. At the same time, ultimate-issue opinion testimony is not automatically admissible. Opinion must be relevant and helpful as determined through Rules 401-403 and 702.

b) In *United States v. Diaz*, 59 M.J. 79 (2003), the CAAF held that it was improper for an expert to testify that the death of appellant's child was a homicide and that the appellant was the perpetrator, when the cause of death and identity of the perpetrator were the primary issues at trial.

c) One recurring problem is that an expert should not opine that a certain witness's rendition of events is believable or not. *See, e.g., United States v. Petersen*, 24 M.J. 283, 284 (C.M.A. 1987) ("We are skeptical about whether any witness could be qualified to opine as to the credibility of another.") The expert may not become a "human lie detector." *United States v. Palmer*, 33 M.J. 7, 12 (C.M.A. 1991); *see also United States v. Brooks*, 64 M.J. 325 (2007) (discussing that in a child sexual abuse case, where the government expert's testimony suggested that there was better than a ninety-eight percent probability that the victim was telling the truth, such testimony was the functional equivalent of vouching for the credibility or truthfulness of the victim, and implicates the very concerns underlying the prohibition against human lie detector testimony.

(1) Questions such as whether the expert believes the victim was raped, or whether the victim is telling the truth when she claimed to have been raped (i.e. was the witness truthful?) are impermissible.

(2) However, the expert **may** opine that a victim's testimony or history is consistent with what the expert's examination found, and whether the behavior at issue is **typical** of victims of such crimes. Focus on symptoms, not conclusions concerning veracity. *See United States v. Birdsall*, 47 M.J. 404 (1998) (expert's focus should be on whether children exhibit behavior and symptoms consistent with abuse; reversible error to allow social worker and doctor to testify that the child-victims were telling the truth and were the victims of sexual abuse). Example: An expert may testify as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited these symptoms. *United States v.*

Harrison, 31 M.J. 330, 332 (C.M.A. 1990).

E. Rule 703. Basis For the Expert's Testimony.

1. Rule 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert, at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

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2. The language of the rule is broad enough to allow three types of bases: facts personally observed by the expert; facts posed in a hypothetical question; and hearsay reports from third parties. *United States v. Reveles*, 42 M.J. 388 (1995), expert testimony must be based on the facts of the case.

a) Hypothetical questions (no longer required). No need to assume facts in evidence, but, if used, must be reasonable in light of the evidence. *United States v. Breuer*, 14 M.J. 723 (A.F.C.M.R. 1982). The proponent may specify historical facts for the expert to assume as true, or may have the expert assume the truth of another witness or witnesses.

b) Personal Perception. *United States v. Hammond*, 17 M.J. 218 (C.M.A. 1984). The fact that expert did not interview or counsel victim did not render expert unqualified to arrive at an opinion concerning rape trauma syndrome. *United States v. Snodgrass*, 22 M.J. 866 (A.C.M.R. 1986*; United States v. Raya*, 45 M.J. 251 (1996). Defense objected to social worker's opinion that victim was exhibiting symptoms consistent with rape trauma accommodation syndrome and suffered from PTSD on basis that opinion was based solely on observing victim in court, reading reports of others and assuming facts as alleged by victim were true. Objection went to weight to be given expert opinion, not admissibility. The foundational elements include: Where and when the witness observed the fact; who was present; how the witness observed the fact; and a description of the observed fact.

c) Facts presented out-of-court (non-record facts), if "of a type reasonably relied upon by experts in the particular field" (even if inadmissible). "The rationale in favor of admissibility of expert testimony based on hearsay is that the expert is fully capable of judging for himself what is, or is not, a reliable basis for his opinion. This relates directly to one of the functions of the expert witness, namely to lend his special expertise to the issue before him." *United States v. Sims*, 514 F.2d 147, 149 (9th Cir.), *cert. denied*, 423 U.S. 845 (1975). There is a potential problem of smuggling in otherwise inadmissible evidence.

(1) *United States v. Neeley*, 25 M.J. 105 (C.M.A. 1987), *cert. denied*, 484 U.S. 1011 (1988). Psychiatrist's testimony that she consulted with other psychologists in reaching her conclusion that accused had inflated results of psychiatric tests and her opinion was the consensus among these people was hearsay and inadmissible. Military judge may conduct a 403 balancing to determine if the probative value of this foundation evidence is outweighed by unfair prejudice.

(2) *United States v. Hartford*, 50 M.J. 402 (1999). Defense was not allowed to cross-examine the government expert about contrary opinions from two colleges. The defense did not call the two as witnesses and there was no evidence that the government expert relied on the opinions of these colleges. The CAAF held the MJ did not err in excluding this questioning as impermissible smuggling under Rule 703.

(3) The elements of the foundation for this basis include: The source of the third party report; the facts or data in the report; if the facts are inadmissible, a showing that they are nonetheless of the type reasonably relied upon by experts in the particular field. In *United States v. Traum*, 60 M.J. 226 (2004), the CAAF emphasized that the key to evaluating the expert's basis for her testimony is the type of evidence relied on by other experts in the field.

(4) *United States v. Ellis*, 68 M.J. 341 (C.A.A.F. 2010). Over defense objection, the government's expert testified that the accused had a moderately high risk of recidivism without having personally interviewed the accused. The expert had reviewed the accused's records, the charges and specifications, the stipulation of fact, chat logs, and the expert had listened to the accused's providency inquiry. The CAAF found that the military judge had not abused his discretion, stating that "[t]here can be no hard and fast rule as to what constitutes 'sufficient information and knowledge about the accused' necessary for an expert's opinion as to an accused's rehabilitation potential."

(5) *United States v. Mullins*, 69 M.J. 113 (C.A.A.F. 2010). Appellant was charged with sexually abusing his daughters who were seven and nine years old. The girls testified to sexual abuse that included rape, oral and anal sex, and masturbation. The Government called a forensic child interviewer as an expert witness. On redirect, the expert witness testified that the frequency of children lying about sexual abuse was less than 1 out of 100 or 1 out of 200. Defense counsel did not object. The CAAF held that it was error to allow the expert testimony which impermissibly invaded the province of the panel.

F. Relevance.

1. Expert testimony, like any other testimony must be relevant to an issue at trial. *See* Rule 401, 402; *Daubert, v. Merrell Dow Pharmaceuticals, Inc*. 509 U.S. 579 (1993).

2. If the expert testimony is not relevant, it is de facto not helpful to the trier of fact.

G. Reliability.

1. The Test for Scientific Evidence. In *Daubert v. Merrell Dow Pharmaceuticals Inc*., 509 U.S. 579 (1993), the Supreme Court held that nothing in the Federal Rules indicates that "general acceptance" is a precondition to admission of scientific evidence. The rules assign the task to the judge to ensure that expert testimony rests on a reliable basis and is relevant. The judge assesses the

principles and methodologies of such evidence pursuant to Rule 104(a).

a) The role of the judge as a "gatekeeper" leads to a determination of whether the evidence is based on a methodology that is "scientific," and therefore reliable. The judgment is made before the evidence is admitted, and entails "a preliminary assessment of whether the reasoning or methodology is scientifically valid." Trial court possessed with broad discretion in admitting expert testimony; rulings tested only for abuse of discretion. *General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997). *See also United States v. Kaspers*, 47 M.J. 176 (1997); *United States v. Sanchez*, 65 M.J. 145 (2007).

b) Factors. The Supreme Court discussed a nonexclusive list of factors to consider in admitting scientific evidence, which included the *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) test as a separate consideration:

(1) whether the theory or technique can be and has been tested;

(2) whether the theory or technique has been subjected to peer review and publication;

(3) whether the known or potential rate of error is acceptable;

(4) whether the theory/technique enjoys widespread acceptance.

2. Non-Scientific Evidence. The Supreme Court resolved whether the judge's gatekeeping function and the *Daubert* factors apply to non-scientific evidence. In *Kumho Tire v. Carmichael*, 119 S. Ct. 1167 (1999), the Court held that the trial judge's gatekeeping responsibility applies to all types of expert evidence. The Court also held that to the extent the *Daubert* factors apply, they can be used to evaluate the reliability of this evidence. Finally, the Court ruled that factors other than those announced in *Daubert* can also be used to evaluate the reliability of non-scientific expert evidence.

3. Other Factors. Other factors courts have considered to evaluate the reliability of scientific and non-scientific testimony include:

a) Was the information developed for the purpose of litigation?

b) Did the expert unjustifiably extrapolate facts to support conclusions?

c) Are there alternative explanations?

d) Is the expert being as careful as they would be in their regular professional work outside paid litigation?

e) Is there a well-accepted body of learning in this area?

f) How much practical experience does the expert have and is there a close fit between the experience and the testimony?

g) Is the testimony based on objective observations and standards?

H. Probative Value

1. The probative value of the expert's opinion, and the information comprising the basis of the opinion must not be substantially outweighed any unfair prejudice that could result from the expert's testimony.

2. This is a standard Rule 403 balancing.

XII. HEARSAY.

A. The Rule Against Hearsay.

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by any Act of Congress applicable in trials by court-martial.

B. The Necessary Definitions.

Rule 801. Definitions

The following definitions apply under this section:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(c) "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

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1. Under the Rule, a statement may be oral, written, or nonverbal conduct intended as an assertion, not made at trial, offered to prove the truth of the matter asserted.

2. Under Rule 801(b), the declarant is a "person" who makes a statement, not a computer or a bloodhound. Although the data entered into a computer may be a statement of a person.

3. Out-of-court means that at the time the person made the statement, the person was not in the courtroom, unless it satisfies the requirements of Rule 801(d).

4. Proving the Truth of the Matter Asserted: This is the definitional prong that addresses the advocate's need to cross-examine the declarant. The proponent must offer the statement to prove the truth of an assertion contained in the statement. If the statement is logically relevant to another theory, it is non-hearsay. In other words, the value of the statement lies in the fact that it was made. For example, an uttered statement that constitutes an element of an offense is not hearsay, but may be called an operative fact or a verbal act, e.g.: disrespectful language; swearing, provoking language, threats, etc. Other common non-hearsay uses include using the statement as circumstantial evidence of the declarant's state of mind (e.g, premeditation), using the statement to show its effect on the state of mind of the hearer or reader.

C. Exemptions From Hearsay.

Rule 801(d) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person;

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1. A prior statement of identification of a person made after perceiving the person is admissible as substantive evidence of guilt. Rule 801(d)(1)(c). The foundation

includes: The witness is on the stand subject to cross-examination; the testifying witness made a prior out-of-court identification of a person; where and when the identification occurred; and who was present.

2. Admissions of a Party-Opponent. Rule 801(d)(2)(A).

Rule 801(d)(2). A statement is not hearsay if . . . [t]he statement is offered against a party and is (A) the party's own statement in either the party's individual or representative capacity, or (B) a statement of which the party has manifested the party's adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment of the agent or servant, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

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a) The logical underpinning of the admissions doctrine derives from the simple fact that a party cannot be heard to complain that it should have an opportunity to cross-examine itself. There are three kinds of admissions: personal, adoptive, and vicarious.

b) Personal admissions are statements by the party, and should not be confused with statements against interest in Rule 804(b)(3). The latter derives its guarantee of reliability from the fact that it was against the declarant's interest when made. No similar rule is imposed on the admission, although for the accused there frequently will be constitutional and statutory rights that must be protected. The proponent must show: The declarant, identified by the witness as the accused, made a statement; if rights warning necessary, the accused was warned of his or her rights and waived them; the oral or written statement was voluntary; and the statement is offered against the accused.

c) Adoptive admissions. *See, e.g., United States v. Potter*, 14 M.J. 978 (N.M.C.M.R. 1982) (accused adopted another's statement when he introduced it at his own magistrate's hearing). *See also United States v. Datz*, 61 M.J. 37 (2005) (holding that a nod in response to equivocal and confusing compound questions was not an adoptive admission). The doctrine requires proof that the declarant made a statement in the party's presence; the party heard, read, or understood the statement; the party made a statement which expressed agreement with the declarant's statement; and the statement is offered against the party. Where a "tacit admission" is averred, that is, an adoption by silence, the critical inquiry is whether the accused was faced with self-incrimination issues (i.e., official questioning). If not, the proponent must show the accused had the opportunity to deny the statement, that a reasonable innocent person would have denied it, and that the accused did not do so. While this exemption can cover authorized spokespersons or agents, the most common use is the co-conspirator's statement: the proponent must show a conspiracy existed; the declarant was part of the conspiracy at time of statement; the statement was made in furtherance of the conspiracy; and the statement was offered against the accused.

D. Common Hearsay Exceptions.

1. Present Sense Impressions and Excited Utterances.

Rule 803. Hearsay exceptions; availability of declarant immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while declarant was perceiving the event or condition or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

a) Present sense impression, unlike excited utterance, does not require the perceived event to be a startling one. It does, however, apply only to statements made at the time the event is "perceived" or "immediately thereafter." The proponent must show: an event occurred; the declarant had personal knowledge of the event; the declarant made the statement soon after the event; and the statement "describes or explains" an event.

b) The excited utterance requires a showing that the event occurred; was startling; the declarant was acting under the stress of excitement cause by the event; and statement "relates" to a startling event. The time element or factor may determine whether the declarant was acting under the stress of excitement. *See United States v. Arnold*, 25 M.J. 129 (C.M.A. 1987), *cert. denied*, 484 U.S. 1060 (1988) (12 hours until first opportunity*); United States v. Le Mere*, 22 M.J. 61 (C.M.A. 1986) (3 year-old victim after 16 hours*); United States v. Armstrong*, 30 M.J. 769 (A.C.M.R. 1990) (4 to 5 days too long for an excited utterance), *rev'd*, 36 M.J. 311 (1993); *United States v. Knox*, 46 M.J. 688 (N.M. Ct. Crim 1996). App. 1997) (one year too long). *See also United States v. Miller*, 32 M.J. 843 (N.M.C.M.R. 1991), *aff'd*, 36 M.J. 124 (C.M.A. 1992). Spontaneous statement by crying, upset student to teacher concerning her father's sexual molestation 18 hours earlier held admissible. Focus is not on lapse of time since the exciting incident, but whether declarant is under stress of excitement so as to lack opportunity to reflect and to fabricate an untruthful statement. *See also United States v. Morgan*, 40 M.J. 405 (C.M.A. 1994), *cert. denied*, 115 S. Ct. 907 (1995) (textbook example of excited utterance). The proponent must show: A startling or stressful event occurred; the declarant had personal knowledge of the event; the declarant made a statement about the event; and the declarant made the statement while he or she was in a state of nervous excitement.

c) *United States v. Grant*, 42 M. J. 340 (1995). Accused charged with various sexual offenses against his seven-year-old stepdaughter. Trial counsel offered victim's statements made to family friend 36-48 hours after one of the alleged incidents, both as excited utterance and residual hearsay. MJ admits as excited utterance but rejects as residual hearsay. While passage of time is not dispositive, CAAF concluded the requirements of 803(2) were not met where, as here, statements were the product of sad reflection and not made under the stress or excitement of the event. The statement was, however, admissible under the residual exception based on its spontaneity, lack of suggestiveness, corroboration,

the non-threatening home environment, and its general similarity to an excited utterance. Case demonstrates the importance of using alternative theories for admissibility of evidence.

d) In *United States v. Feltham*, 58 M.J. 470 (2003), the CAAF held that a military judge did not abuse his discretion in admitting the statements a male sailor made to his roommate approximately one hour after appellant forcibly orally sodomized him. The military judge specifically found that the victim was still under the stress of a startling event; therefore, the lapse of time was not dispositive.

e) In *United States v. Donaldson*, 58 M.J. 477 (2003), the CAAF upheld the admission as an excited utterance of a 3-year-old sexual assault victim's statements to her mother 12 hours after the incident. Although the girl had spent the entire day with her mother, they had always been in the company of others. Her statement represented the first opportunity she had to be alone with and speak to a trusted adult.

2. Statements for purposes of medical diagnosis or treatment.

Rule 803. Hearsay exceptions; availability of declarant immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

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a) Proponent must show declarant had some expectation of promoting well being (and thus incentive to be truthful), and statement was made for purposes of medical diagnosis or treatment. As small children typically cannot articulate that they expected some benefit from treatment, it is important that someone, like a mother or father, explain to them why they are going to the doctor, the importance of the treatment, and they need to tell what happened to feel better. CAAF also recommends the caretakers identify themselves, as such and engage in activity which could be construed as treatment by the child. *United States v. Siroky*, 44 M.J. 394 (1996).

b) If statement is in response to questioning, the questioning must be of medical necessity. *United States v. Haner*, 49 M.J. 72 (1998). *United States v. Armstrong*, 36 M.J. 311 (C.M.A. 1993) (statement made to TC was in preparation for trial, and repetition to the psychologist several days later did not "change the character of the statements.") *See United States v. Henry*, 42 M.J. 593 (A. Ct. Crim. App. 1995). Statements made to medical personnel not made with expectation of receiving medical benefits but instead for the purpose of facilitating collection of evidence. NOTE: 803(4) not limited to patient-declarants. *United States v. Yazzie*, 59 F.3d 807 (9th Cir. 1995) (mother's statements to docs ok). *United States v. Austin*, 32 M.J. 757 (A.C.M.R. 1991) (child's mom to social services).

c) *United States v. Rodriguez-Rivera*, 63 M.J. 372 (2006). Referral of a victim to a medical professional by trial counsel "is not a critical factor

in deciding whether the medical exception applies to the statements she gave to those treating her. The critical question is whether she had some expectation of treatment when she talked to the caregivers." *United States v. Haner*, 49 M.J. 72, 76 (1998). Under the circumstances of this case, the fact the trial counsel initiated the examination of JK by Dr. Craig is not a sufficient reason to hold that the military judge erred by concluding the medical exception applied. The military judge's findings that Dr. Craig saw JK for the purpose of medical diagnosis and treatment, and that JK expected to receive medical treatment when she saw Dr. Craig, support his decision to admit the statement made by JK to Dr. Craig under Rule 803(4). As such, the military judge's decision was not an abuse of discretion.

3. Recorded Recollection.

Rule 803. Hearsay exceptions; availability of declarant immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence, but may not itself by received as an exhibit unless offered by an adverse party.

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a) Foundation and Procedure: Attempt refreshing memory; establish that the memory of the witness cannot be refreshed; establish that this witness made a record when the matter was fresh in the memory of this witness; establish that the record made accurately reflects the knowledge of the witness at the time of the making; then have the witness read the recorded recollection into evidence.

b) Note: The record could be marked as a prosecution or defense exhibit for identification, or as an appellate exhibit. It should not be admitted unless offered by the adverse party. Attach it to the record of trial. It should not go to the deliberation room unless offered by the adverse party. *United States v. Gans*, 32 M.J. 412 (C.M.A. 1991). Excellent case detailing the differences between using writings to refresh memory under Rule 613 and writings used to establish past recollection recorded under Rule 803(5).

4. Records of Regularly Conducted Activities (Business Records).

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(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes the armed forces, a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Among those memoranda, reports, records, or data compilations normally admissible pursuant to this paragraph are enlistment papers, physical examination papers, outline-figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel

accountability documents, service records, officer and enlisted qualification records, logs, unit personnel diaries, individual equipment records, daily strength records of prisoners, and rosters of prisoners.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

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a) Bank Records. Must lay the foundation specified in the Rule: Timely recording by a regularly conducted business activity in accordance with a regular practice of recording. When laying the business records foundation, witness familiarity with the records-keeping system must be sufficient to explain the system and establish the reliability of the documents. Witnesses need not be those who made the actual entries or even the records custodian. *United States v. Garces*, 32 M.J. 345 (C.M.A. 1991) *and United States v. Tebsherany*, 32 M.J. 351 (C.M.A. 1991). *United States v. Brandell*, 35 M.J. 369 (C.M.A. 1992). Bank records not admissible under this provision unless a custodian or other qualified person testifies.

b) NCIC Reports. *United States v. Littles*: 35 M.J. 644 (N.M.C.M.R. 1992): NIS agent testified that he saw a National Crime Information Center (NCIC) report showing criminal activity and conviction of, the accused's father. The report was hearsay, and based upon the evidence presented, did not qualify for admission under Rule 803(6) or 803(8) (*i.e.*, not shown to have been made at or near the time by a person with knowledge; the testifying agent was not the custodian of the record, nor did he show familiarity with the records-keeping system; the "rap" sheet was not a record or report of the activities of NCIC).

c) Lab Reports. *United States v. Schoolfield*, 36 M.J. 545 (A.C.M.R. 1992), *aff'd*, 40 M.J. 132 (CMA 1994): The accused alleged error in the admission of blood sample medical records (4 serology reports and a Western Blot test result) pursuant to Rule 803(6). He argued the records were not kept in the ordinary course of business, no chain of custody was established, and that errors called into question the reliability of the records. ACMR disagreed, finding no abuse of discretion by the military judge. The medical director of WRAMC Institute of Research was qualified to testify as to the record keeping system and maintenance of records. Lab reports and chain of custody documents are admissible. *United States v. Vietor*, 10 M.J. 69 (C.M.A. 1980); *United States v. Robinson*, 14 M.J. 903 (N.M.C.M.R. 1982). Admission under the rule does not preclude the defense from calling the lab technicians to attack the report. *United States v. Magyari*, 63 M.J. 123 (2006). Is data in a lab report a testimonial statement giving an accused the right to confront the makers of those statements pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004)? MAYBE. In the context of random urinalysis screening, where the lab technicians do not equate specific samples with particular individuals or outcomes, and the sample is not tested in furtherance of a particular law enforcement investigation, the data entries of the technicians are not "testimonial" in nature. IF, however, the lab

reports were prepared at the behest of law enforcement in anticipation of a prosecution, the reports may become "testimonial." *See United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008) (finding lab reports to be testimonial since law enforcement requested the report).

d) Computer Phone Records. *United States v. Casey*, 45 M.J. 623 (N.M. Ct. Crim. App. 1996). Computer system does not have to be foolproof, or even the best available, to produce records of adequate reliability.

e) VHS Videotapes. Rule 803(6) Business records. *U.S. v. Harris*, 55 M.J. 433 (2001). The CAAF adopted the prevailing view of state and federal courts regarding the "silent witness" theory of admissibility vis-à-vis videotapes. The court noted that over the last 25 years, the "silent witness" theory of authentication has developed in almost all jurisdictions to allow photographs to substantively "speak for themselves" after being authenticated by evidence that supports the reliability of the process or system that produced the photographs. The court adopted the silent witness theory, noting that "any doubts about the general reliability of the video cassette recording technology had gone the way of the beta tape". The court also addressed when a witness could meet the requirements of 803(6). They noted that in order for a witness to meet the qualification requirements of 803(6) they must be "generally familiar" with the process.

5. Public Records and Reports. Rule 803(8).

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(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public office or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other personnel acting in a law enforcement capacity, or (C) against the government, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. Notwithstanding (B), the following are admissible under this paragraph as a record of a fact or event if made by a person within the scope of the person's official duties and those duties included a duty to know or to ascertain through appropriate and trustworthy channels of information the truth of the fact or event and to record such fact or event: enlistment papers, physical examination papers, outline figure and fingerprint cards, <u>forensic laboratory reports, chain of custody documents</u>, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, records of court-martial convictions, logs, unit personnel diaries, individual equipment records, guard reports, daily strength records of prisoners, and rosters of prisoners.

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a) Permits introduction of evidence from public office or agency where the data and source of information are indicative of trustworthiness and set forth (a) the activities of the office; or (b) matters observed pursuant to a duty imposed by law; or (c) (against the Government) factual findings resulting from an investigation made pursuant to authority granted by law. Presumption of regularity. Substantial compliance with regulation is sufficient. Irregularities material to the execution preclude admissibility. *United States v. Anderson*, 12 M.J. 527 (N.M.C.M.R. 1981). Excludes matters observed by police or personnel acting in a law enforcement capacity, if offered by the Government. Defense can admit police reports under Rule 803(8)(c). Purely ministerial recordings of police may be admissible. *United States v. Yeoman*, 22 M.J. 762

(N.M.C.M.R. 1986), *aff'd*, 25 M.J. 1 (C.M.A. 1987) (the reporting of a filed complaint).

b) In *United States v. Taylor*, 61 M.J. 157 (2005), the CAAF held that a military judge erred by admitting a document with undecipherable content under the public records exception; the custodian could not explain the origin or meaning of the undecipherable content. The CAAF further held that any underlying documents used to create a public record must satisfy a hearsay exception to satisfy Rule 805.

c) *United States v. Rankin*, 64 M.J. 243 (2007). Are service record entries documenting an accused's period of unauthorized absence "testimonial" for purposes of the Confrontation Clause? No. Service records documenting absence are not prepared by law enforcement or any prosecutorial agency, rather, they are routine personnel documents that chronicle the relevant dates, times, and locations of the accused. Additionally, at the time the documents are created, an objective witness would not reasonably believe the statement would be available for use at a later trial. *But see Whorton v. Bockting*, 127 S. Ct. 1173 (2007) (changing the analysis of nontestimonal statements under the Confrontation Clause, "Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.")

6. Contents of Learned Treatises.

Rule 803. Hearsay exceptions; availability of declarant immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(18) Learned treatises. To the extent called to the attention of an expert where established as reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

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a) Main requirement for using the exception, whether on direct or cross-examination, is the establishment of the treatise, periodical, or pamphlet as reliable authority. *See generally* David F. Binder, *Hearsay Handbook*, ch. 7 §19.01 at 337 (3d ed. 1991). The proponent of the evidence accomplishes this task either by obtaining an admission from an expert witness concerning the reliability or authority of the statement. The provision concerning calling the treatise to the attention of the expert in cross-examination, or having the expert rely upon the treatise on direct examination "is designed to ensure that the materials are used only under the sponsorship of an expert who can assist the fact finder and explain how to apply the materials." 2 C. McCormick, *McCormick on Evidence* ch. 34, §321 at 352 (4th ed. 1992) Another method is through judicial notice. "Given the requirements for judicial notice, Rule 201, and the nature and importance of the item to be authenticated, the likelihood of judicial notice being taken that a particular published authority other than the most commonly used treatises is reliable is not great." Michael H. Graham, *Federal Practice and Procedure-Evidence* §6769 at 714, note 4

(1992).

b) As is the case with the hearsay exception for recorded recollections, Rule 803(18) provides that statements from the learned treatise are read into evidence; the learned treatise itself does not become an exhibit.

7. Residual Hearsay Rule - The "Catchall". Rule 803(24) and 804(b)(5). **Transferred to rule 807 which reads**

807. A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

a) The proponent must demonstrate "equivalent circumstantial guarantees of trustworthiness";

(1) Inherent Reliability. *Idaho v. Wright*, 497 U.S. 805 (1990) (admissibility of child's statement to doctor regarding abuse pursuant to residual hearsay rule requires a showing of indicia of reliability at the time statement made, not through corroborating evidence.)

(2) *United States v. Morgan*, 40 M.J. 405 (CMA 1994), *cert. denied*, 115 S. Ct. 907 (1995): Military judge properly admitted sworn statement of rape complainant under residual exception. The statement was made near to the time of the attack and was consistent with earlier excited utterances.

b) Establish the evidence is offered to prove a material fact in issue;

c) Show evidence offered is more probative of the point than any other evidence reasonably available.

(1) All the prerequisites for use must be met, including the requirement that it be more probative than any other evidence on the point for which it is offered. *United States v. Pablo*, 50 M.J. 658 (A. Ct. Crim. App. 1999), testimony of school counselor inadmissible hearsay because victim testified on the same issues and counselor's testimony did not shed any new light on the issue.

(2) *United States v. Czachorowski*, 66 M.J. 432 (2008). The military judge ruled that the alleged child-victim was unavailable based on the trial counsel's proffer that the child had forgotten the alleged instances of abuse. The military judge admitted the child's statements of the alleged incident to both the mother and the grandparents as residual hearsay. The CAAF found that the government failed to meet its burden that it could not obtain more probative evidence despite "reasonable efforts." The

government offered nothing to corroborate its assertions that the child had forgotten the alleged incident, and the military judge relied solely on government's assertions without seeking any corroboration before declaring the child unavailable. Because the residual hearsay exception should be rarely used, "Absent personal observation or a hearing, there must be some specific evidence of reasonable efforts to obtain other probative evidence."

d) Demonstrate that admission fosters fairness in the administration of justice; and

e) Provide notice of intended use.

(1) *United States v. Holt*, 58 M.J. 227 (2003). During the sentencing phase of appellant's court-martial for writing bad checks, the military judge admitted a letter from one of the victims to show victim impact and the full circumstances of the offenses. The letter was not admitted for the truth of the matters asserted therein. On appeal, the AFCCA held that the contents of the letter were admissible as residual hearsay under Rule 807. The CAAF reversed, holding that the AFCCA failed to apply the notice and foundational requirements of Rule 807. In order to admit evidence under Rule 807, the appellant must be afforded sufficient notice in advance of the trial or hearing to prepare to meet the evidence; this requirement applies equally to trial and appellate proceedings.

(2) *United States v. Czachorowski*, 66 M.J. 432 (2008). The CAAF took a flexible approach and found that the advance notice requirement applies to the statements and not the means that the proponent intended to use to seek admission of the statements. While the trial counsel gave no formal notice, the defense counsel knew about the statements and the trial counsel's intent to offer the statements. Notice was satisfied.

f) Harmless Error Test. In *United States v. Lovett*, 59 M.J. 230 (2004), the appellant was convicted of raping his 5-year-old daughter. The daughter testified at trial. The Government also introduced several hearsay statements of the victim through written statements by her mother and the testimony of a family friend. The CAAF refused to rule as to whether admission of these items was error, holding instead that any errors in admitting the evidence were harmless because the statements were cumulative to and consistent with the victim's in-court testimony, and some of the statements were contained in another Government exhibit that was entered into evidence without defense objection.

E. Rule 804. Common Hearsay Exceptions - Unavailability.

Rule 804. Hearsay exceptions; declarant unavailable

(a) Definitions of unavailability. "Unavailability as a witness" includes situations in which the declarant-

(1) is exempted by ruling of the military judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the military judge to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means; or

(6) is unavailable within the meaning of Article 49(d)(2).

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

1. 804(a)(1): Claim of privilege (which cannot be remedied by grant of testimonial immunity). *United States v. Robinson*, 16 M.J. 766 (A.C.M.R. 1983).

2. 804(a)(4): Death, Physical Inability, Mental Incapacity, or Intimidation. *United States v. Arruza*, 26 M.J. 234 (C.M.A. 1988), *cert. denied*, 489 U.S. 1011 (1989) (child intimidated); *United States v. Ferdinand*, 29 M.J. 164 (C.M.A. 1989), *cert. denied*, 493 U.S. 1044 (1990) (A child victim may become unavailable if testifying would be too traumatic). *But see United States v. Harjak*, 33 M.J. 577 (N.M.C.M.R. 1991) (notwithstanding judge's empathetic concerns for child, unauthenticated medical reports detailing victim's physical and psychological condition to demonstrate unavailability irrelevant as reports did not discuss her current condition).

3. 804(a)(5): Absence. Inability to locate or procure attendance or testimony through good faith, major efforts: *United States v. Hampton*, 33 M.J. 21 (C.M.A. 1991). The victim refused to return for the trial and the military judge had no means to compel the victim's attendance. She properly was determined to be unavailable under Rule 804(a)(5). Under these circumstances, the pretrial deposition was admissible.

4. *United States v. Gardinier*, 63 M.J. 531 (A. Ct. Crim. App. 2006). Military judge erred when he determined a child-witness was unavailable within the meaning of Rule 804(a). Even though a child-witness may not provide any "helpful" information, this is not a valid basis for a finding of unavailability. The Confrontation Clause guarantees only an opportunity for effective cross-examination, not necessarily effective cross-examination.

F. Rule 804(b). Former Testimony.

Rule 804(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

(1) Former testimony. Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. A record of testimony given before courts-martial, courts of inquiry, military commissions, other military tribunals, and before proceedings pursuant to or equivalent to those required by Article 32 is admissible under this subdivision if such a record is a verbatim record. This paragraph is subject to the limitations set forth in Articles 49 and 50.

1. The foundational requirements are: The first hearing was a fair one; the witness testified under oath at the first hearing; the opponent was a party in the first hearing; the opponent had an opportunity to develop the witness' testimony; the opponent had a motive to develop the witness' testimony at the first hearing; the witness is unavailable; and there is a verbatim transcript of the first hearing.

2. Despite wording of Rule 804(b)(1), admissibility of Article 32 testimony under former testimony exception depends on opponent's opportunity to cross-exam, not whether cross-examination actually occurred or the intent of the cross-examiner. *United States v. Connor*, 27 M.J. 378 (C.M.A. 1989); *United States v. Hubbard*, 28 M.J. 27 (C.M.A.), *cert. denied*, 493 U.S. 847 (1989). *United States v. Austin*, 35 M.J. 271 (C.M.A. 1992): UCMJ art. 32 testimony was admitted under Rule 801(d)(1)(A) and 804(b)(1). After the testimony was read to the members, they were permitted to take it into deliberations, over defense objection. Analogizing to a deposition, which is not taken into deliberations (*See* R.C.M. 702(a), Discussion), COMA concluded the verbatim Article 32 testimony was <u>not</u> an "exhibit" within the meaning of R.C.M. 921(b). *See also United States v. Montgomery*, CM 9201238, (A.C.M.R. 28 July 1994) (*per curiam*) (unpub.), the A.C.M.R. applied a similar analysis to a verbatim transcript of a prior trial.

G. Rule 804(b)(3). Statement Against Pecuniary, Proprietary, or Penal Interests.

Rule 804(b)(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

1. The foundational requirements include: The declarant is unavailable; the declarant previously made a statement; the declarant subjectively believed that the statement was contrary to his or her interest; the interest was of a recognized type; and if the defense offers a statement which tends to expose the declarant to criminal liability, to exculpate the accused, there must be corroboration to show the statement is trustworthy. *United States v. Perner*, 14 M.J. 181 (C.M.A. 1982).

H. Rule 804(b)(6). Forfeiture by wrongdoing.

Rule 804(b)(6) *Forfeiture by wrongdoing*. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

1. *Giles v. California*, 128 S. Ct. 2678 (2008) (holding that before finding that a defendant forfeited his right to confrontation by his wrongdoing, the government must prove that the defendant intended to prevent a witness from testifying.)

2. *United States v. Marchesano*, 67 M.J. 535 (A. Ct. App. 2008) (adopting a four-part test for determining whether a party "acquiesced in the wrongdoing." (1) Whether "the witness was unavailable through the actions of another;" (2) whether "the act of another was wrongful in procuring the unavailability of the witness;" (3) whether "the accused expressly or tacitly accepted the wrongful actions of another;" and (4) whether "the accused did so with the intent that the witness be unavailable."

I. Rule 805 and 806. Hearsay within Hearsay; Attacking and Supporting Credibility of Declarant.

1. Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule. *United States v. Little*, 35 M.J. 644 (N.M.C.M.R. 1992).

2. When a hearsay statement, or a statement defined in rule 801(d)(2)(c), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness.

XIII. MISCELLANEOUS RULES.

A. Rule 1101. Applicability of Rules.

Rule 1101. Applicability of rules

(a) Rules applicable. Except as otherwise provided in this Manual, these rules apply generally to all courts-martial, including summary courts-martial; to proceedings pursuant to Article 39(a); to limited fact-finding proceedings ordered on review; to proceedings in revision; and to contempt proceedings except those in which the judge may act summarily.

(b) Rules of privilege. The rules with respect to privileges in Section III and V apply at all stages of all actions, cases, and proceedings.

(c) Rules relaxed. The application of these rules may be relaxed in sentencing proceedings as provided under R.C.M. 1001 and otherwise as provided in this Manual.

(d) Rules inapplicable. These rules (other than with respect to privileges and MRE 412) do not apply in investigative hearings pursuant to Article 32; proceedings for vacation of suspension of sentence pursuant to Article 72; proceedings for search authorizations; proceedings involving pretrial restraint; and in other proceedings authorized under the code or this Manual and not listed in subdivision (a).

1. The Military Rules apply generally to all courts-martial, including summary courts-martial; to proceedings pursuant to Article 39(a); to limited fact-finding proceedings ordered on review; to proceedings in revision; and to contempt proceedings except those in which the judge may act summarily.

2. The application of the rules may be relaxed in sentencing proceedings.

3. The Military Rules do not apply in investigative hearings pursuant to Article 32;

proceedings for vacation of suspension of sentence pursuant to Article 72; proceedings for search authorizations; proceedings involving pretrial restraint; and in other proceedings authorized under the Uniform Code of Military Justice or the MCM and not listed in rule 1101(a).

B. Rule 1102. Amendments.

1. The Rule provides that "Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments unless action to the contrary is taken by the President."

XIV. Conclusion

Classified Evidence Procedures

XV. Essential References

A. U.S. Dep't of the Navy, Office of the Judge Advocate General, National Security and Intelligence Law Division (Code 17), The Judge Advocate's Handbook for Litigating National Security Cases: Prosecuting, Defending and Adjudicating National Security Cases (2002) [hereinafter Code 17 Handbook].

B. Primer for Litigating Classified Information Cases: Prosecuting, Defending, and Adjudicating Cases Involving Classified Information, Dec. 2007, U.S. Dep't of the Navy, Office of the Judge Advocate General, National Security and Intelligence Law Division (Code 17).

C. Executive Order (EO) No. 13526, "Classified National Security Information," December 29, 2009, 3 C.F.R. 298 (2009).

D. Order of the President of the United States, dated Oct. 13, 1995, 60 Fed. Reg. 53485, designating original classification authorities, reprinted at 50 U.S.C. § 435 note.

E. DoD Directive 5200.1, DoD Information Security Program, 13 Dec 96.

F. DoD 5200.1-R, DoD Information Security Program Regulation, 14 Jan 97.

G. U.S. Dep't of the Army, Reg. 380-67, Personnel Security Program, 9 Sep 88.

H. U.S. Dep't of the Army, Reg. 27-10, Military Justice, 3 Oct 11.

I. Classified Information Procedures Act (CIPA), 18 U.S.C. appx. III, §§ 1-16 and interpretative caselaw.

J. Military Rule of Evidence (MRE) 505, Classified Information.

XVI. National Security prosecutions and graymail

A. "Graymail" occurs when a criminal defendant, whether for legitimate reasons or otherwise, threatens to disclose classified information during the course of a trial hoping that the government will forego prosecution rather than see the information disclosed.

B. There are two competing values at play in every prosecution involving classified or national security information:

1. The accused's right to a fair trial;

2. The government's need to protect from disclosure national security information that might be required for the trial.

C. Classified information is potentially relevant at trial under three primary circumstances:

1. The charges are related to the improper handling of classified information. Examples of such charges include the following:

a) Art. 92, Failure to Obey Order or Regulation. This would apply to instances of mishandling classified information. *See, e.g.*, U.S. Dep't of Army, Reg. 380-5, Department of the Army Information Security Program para. 1-21 (29 Sep. 2000).

b) Art. 92, Dereliction of Duty.

c) Art. 106a, Espionage.

d) Art. 134, The General Article. Would pertain to violations of federal statutes not specifically contained in the UCMJ. For examples of these statutes and sample specifications, see U.S. Dep't of the Navy, Office of the Judge Advocate General, National Security and Intelligence Law Division (Code 17), The Judge Advocate's Handbook for Litigating National Security Cases: Prosecuting, Defending and Adjudicating National Security Cases, Chapter 8 (2002) [hereinafter Code 17 Handbook].

e) Art. 104, Aiding the Enemy.

f) Art. 106, Spies.

2. The classified information may be essential in establishing an element of or defense to a charge or specification. For instance, in *United States v. Schmidt*, 60 M.J. 1 (2004), the appellant was charged with dereliction of duty for failing to exercise appropriate flight discipline and to comply with rules of engagement and special instructions in an air-to-ground bombing incident that caused the deaths of several Canadian soldiers in Afghanistan. The appellant was privy to classified information pertaining to his case. The military judge ruled, and the Air Force Court of Criminal Appeals affirmed, that the appellant could not discuss the classified aspects of his case with his civilian defense counsel (who eventually obtained an interim security clearance) without submitting a request through the trial counsel. The CAAF vacated the AFCCA opinion and reversed the ruling of the military judge, holding that MRE 505 does not require an accused to engage in adversarial litigation with the government as a precondition to discussing potentially relevant information pertaining to the case that is already in the appellant's knowledge or possession.

3. Classified evidence is somehow relevant to the discovery process.

XVII. key concepts and definitions3

A. Key Definitions. E.O. 13526, Part 6.

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3 Unless otherwise noted, the information in this section comes from EO 13526.

1. National Security. Pertaining to the national defense or foreign relations of the United States. E.O. 13526, § 6.1(cc).

2. Information. Any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government.

3. Classified National Security Information (aka Classified Information). Information that has been determined pursuant to this order or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form. E.O. 13526, § 6.1(i). Classified information falls into eight main subject-matter categories. E.O. 13526, § 1.4.

   a) Military plans, weapons systems, or operations;

   b) Foreign government information;

   c) Intelligence activities (including special activities), intelligence sources or methods, or cryptology;

   d) Foreign relations or foreign activities of the United States, including confidential sources;

   e) Scientific, technological, or economic matters relating to the national security;

   f) United States Government programs for safeguarding nuclear materials or facilities;

   g) Vulnerabilities or capabilities of systems, installations, projects or plans relating to the national security;

   h) The development, production, or use of weapons of mass destruction.

4. Classification. The act or process by which information is determined to be classified information. E.O. 13526 § 1.1(f).

5. Restricted Data. All data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy. *See* Code 17 Handbook, Chapter 1.

6. Original Classification Authority (OCA): An individual authorized in writing, either by the President, or by agency heads or other officials designated by the President, to classify information in the first instance. The only OCAs are the President, agency heads and officials designated by the President in the Federal Register, and certain Government officials. E.O. 13526 § 6.1(gg).

7. Derivative Classification. Incorporating, paraphrasing, restating, or generating in a new form information that is already classified and marking the new material consistently with the classification markings of the source information. Duplication or reproduction of classified information is not derivative classification. E.O. 13526 § 6.1(o).

8. Levels of Classification. E.O. 13526 § 1.2.

a) Top Secret. Information, the unauthorized disclosure of which reasonably could be expected to cause **exceptionally grave damage to the national security** *that the OCA is able to identify or describe*.

b) Secret. Information, the unauthorized disclosure of which reasonably could be expected to cause **serious damage to the national security** *that the OCA is able to identify or describe*.

c) Confidential. Information, the unauthorized disclosure of which reasonably could be expected to cause **damage to the national security** *that the OCA is able to identify or describe*.

9. Compartmented Information. Information within a formal system which strictly controls the dissemination, handling and storage of a specific class of classified information. Another name for compartmented information is "codeword information." *See* Code 17 Handbook, Chapter 2. There are two categories of compartmented information:

a) Special Access Program (SAP). A program established safeguarding and access requirements that exceed those normally required for information at the same classification level. A person must obtain authorized access to SAP information by completing personnel security requirements unique to the SAP and signing a SAP nondisclosure agreement. Furthermore, the person may not disclose SAP information to anyone without verifying that the other person has access to the SAP and a verified need-to-know the information.

b) Sensitive Compartmented Information (SCI). Classified information concerning or derived from intelligence sources, methods, or analytical processes that is required to be handled exclusively within formal access control systems established by the Director of Central Intelligence.

10. "Need to Know." A determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function. E.O. 13526, § 6.1(dd). In order to gain access to classified information, a person must satisfy two requirements: (1) The appropriate authority must deem the person suitable for receiving classified materials; and (2) the person must have a "need-to-know" the classified material. *See Schmidt v. Boone*, 59 M.J. 841, 852 (A.F. Ct. Crim. App. 2004), *rev'd on other grounds sub nom.*, *United States v. Schmidt*, 60 M.J. 1 (2004).

B. The Classification Process.

1. Scope. Approximately 4,000 federal employees have the authority to classify information, and in 2003, more than 14 million new classified documents were produced. *See* Eileen Sullivan, *Too Much Secrecy: Overclassification Hampers Cooperation*, Federal Times, Sep. 13, 2004, at 1.

2. Process.

a) All 4 of the following conditions must be met:

(1) An OCA must classify the information;

(2) Information must be owned by, produced by or for, or be under the control of the United States Government;

(3) Information must fall within one of the 7 categories of national security information; and

(4) OCA must make two determinations:

(a) Unauthorized disclosure of the information reasonably could be expected to result in damage to the national security;

(b) The OCA can identify or describe the potential damage.

b) OCA must determine appropriate classification level. Doubts should be resolved in favor of a lower classification level.

c) When an employee, contractor, licensee, certified holder, or grantee of an agency that does not have OCA originates information believed by that person to require classification, the information will be protected as if it is classified within the meaning of EO 13526. The information will be promptly transmitted to an agency with OCA and subject matter interest. A decision must be made within 30 days.

3. Duration. OCA will attempt to establish a specific date or event for declassification, subject to the following guidelines:

a) If an earlier date or event cannot be identified, the default position is 10 years from date of original decision.

b) OCA may extend duration of classification for successive time periods not to exceed 10 years per period.

c) Under the following circumstances, an OCA can exempt from declassification information beyond the 10-year limit, if release would:

(1) Reveal an intelligence source, method, or activity, or cryptologic system or activity;

(2) Reveal information that would assist in the development or use of WMD;

(3) Reveal information that would impair the development or use of technology within a United States weapon system;

(4) Reveal foreign government information;

(5) Damage relations between the United States and a foreign government, reveal a confidential source, or seriously undermine diplomatic activities that are reasonably expected to be ongoing for longer than 10 years;

(6) Impair the ability of United States government officials to protect the President, Vice President, or other individuals for whom protection services in the interest of national security are authorized;

(7) Violate a statute, treaty, or international agreement.

4. Information Not Subject to Classification.

a) Sec. 1.7 of EO 13526 provides that information shall not be classified in order to:

(1) Conceal violations of law, inefficiency, or administrative error;

(2) Prevent embarrassment to a person, organization, or agency;

(3) Restrain competition; or

(4) Prevent or delay the release of information that does not require classification in the interest of national security

b) Basic scientific information not clearly related to national security may not be classified;

c) Information may not be reclassified after it has been declassified and released to the public under the proper authority.

5. Classification Challenges. Authorized holders of information who believe in good faith that the classification status of information is improper are expected to challenge the status.

a) Agency heads or officials shall establish procedures for challenge.

b) The procedures shall ensure:

(1) Individuals are not subject to retribution for bringing an action;

(2) An impartial official or panel will review the information;

(3) Individuals may appeal agency decisions to an Interagency Security Classification Appeals Panel.

C. Document Marking.

1. The following information is required on classified documents or other classified media:

a) Classification level;

b) Identity, by name or personal identifier or position, of the OCA

c) Agency and office of origin;

d) Declassification instructions;

e) Concise reason for classification, unless it would reveal additional classified information.

2. Classification authorities, should, where practicable, use a classified addendum if

the classified information forms a small portion of an otherwise unclassified document.

3. Information that has been classified does not become unclassified merely because a document has either been improperly marked or not marked at all.

D. Declassification.

1. Definition. An authorized change in the status of information from classified to unclassified information.

2. Authority. The official who authorized the original classification (if still serving in that position); the official's successor in function; a supervisor of either; or individuals who have been delegated this authority by an agency head or senior agency official.

3. Types:

a) Automatic. Declassification based solely on the occurrence of a specific date or event as determined by the OCA, or expiration of a maximum time frame for duration of classification.

b) Systematic. Review for declassification of classified information contained in records that have been determined by the Archivist of the United States to have permanent historical value.

c) Mandatory. A review for declassification that occurs in response to a request for declassification. Information can be declassified if the public's interest in disclosure outweighs the need to protect the information. Procedures:

(1) Request for review must describe the document or material specifically enough to enable the agency to locate with reasonable effort;

(2) Agency heads will develop procedures for handling requests and reviews, appeal procedures, and procedures to notify requestors of their right to appeal a final agency decision to the Interagency Security Classification Appeals Panel.

(3) When an agency receives a request for review of information in its custody that was originally classified by another agency, it will refer the documents to the original agency for processing. Depending on the type of information in a document, there can be multiple OCAs for the information contained therein.

E. Classification Review.[4]

1. The classification review is a key litigation support function in national security cases.

2. The review should be coordinated with higher technical supervisory channels as

4 The classification review is described in Code 17 Handbook, Chapter 3.

soon as possible. The CR should occur prior to action under the UCMJ and/or discovery.

3. What the classification review accomplishes:

a) Verifies the current classification level for the information and its duration;

b) Verifies the classification level of information when subjected to compromise;

c) Determines whether another command requires review of the information; and

d) Provides a general description of the impact on affected operations.

F. Basic Information Security Requirements.

XVIII. classified evidence and privileges

A. Common Law Government Secrets Privilege.

1. Nature of the Privilege. An absolute privilege to prohibit the disclosure of information pertaining to military or diplomatic secrets. The Supreme Court discussed the privilege in *United States v. Reynolds*, 345 U.S. 1 (1952). In *Reynolds*, an Air Force B-29 bomber on a mission to test secret electronic equipment caught on fire and crashed. Widows of three of the deceased brought suit against the United States and moved for discovery of the official accident investigation. The Secretary of the Air Force claimed privilege. The Supreme Court recognized a common law privilege protecting military and state secrets. *Id.* at 7-8. This is different from the so-called "executive privilege," a qualified privilege pertaining to the deliberative processes of the executive branch. In *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court held that the President does not have an absolute unqualified privilege in a criminal case to protect tape recordings and documents from disclosure. In *Cheney v. United States District Court for the District of Columbia*, 124 S.Ct. 2576 (2004), the Supreme Court held that the D.C. Circuit Court of Appeals read *Nixon* too broadly in requiring the Vice President to make a claim of executive privilege with specificity in a civil case.

2. Claiming the Privilege. The privilege must be claimed formally by the head of a department after personal consideration by that officer. It cannot be claimed or waived by a private party. *Reynolds*, 345 U.S. at 8-9. There is no privilege until a formal claim of privilege has been made.

B. Classified Information Procedures Act.

1. Nature of the "Privilege." CIPA establishes procedures for the protection of classified national security information at all stages of a proceeding, to include discovery. CIPA does not, however, create an evidentiary privilege; indeed, the legislative history of CIPA indicates that it was not intended to alter existing standards for determining relevance and admissibility. *See United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985) (favorably quoting a lower court for the

proposition that CIPA is merely a procedural tool requiring a pretrial court ruling on the admissibility of classified evidence).

a) Much broader than the state secrets privilege.

b) Recognizes the power of the executive branch to determine that public disclosure of classified evidence will not be made in a criminal trial.

c) Outlines procedures to protect against threat of disclosure or unnecessary disclosure.

d) Requires the defendant to give notice of intent to reveal classified information as part of the defense.

e) Gives several options to government:

(1) Seek a ruling that some or all of the information is immaterial.

(2) Move for substitution of non-sensitive summary information.

(3) Move for redaction of sensitive information.

(4) Admit facts sought to be proven.

f) If government is unwilling or unable to disclose, court may dismiss charges or provide appropriate relief.

2. Claiming the Privilege. CIPA contains a number of specific sections for determining whether classified evidence or substitutes are relevant and admissible at trial. If a court concludes under CIPA that classified evidence is relevant at trial, the government may still be able to claim a privilege and withhold the evidence. For example, in *United States v. Smith*, the defendant was charged with several counts of espionage that occurred when he worked for the Army Intelligence Security Command (INSCOM). In his defense, he argued that he had turned material over to the Russians under the direction of two men whom he believed to be CIA agents as part of a double-agent operation. At trial, he wanted to introduce classified evidence to support his claim. The district court found the evidence admissible, but the 4th Circuit reversed, holding that the district court should have applied a qualified privilege similar to the common law informer's privilege recognized in *Roviaro v. United States*, 353 U.S. 53. *Smith*, 780 F.2d at 1106-07. The key is that CIPA now permits the government to claim its privilege prior to trial. *See Smith*, 780 F.2d at 1109.

C. Military Rule of Evidence 505

1. Nature of the Privilege. MRE 505 is based upon CIPA, the common law government secrets privilege discussed in *United States v. Reynolds*, and the executive privilege discussed in *United States v. Nixon.* Manual for Courts-Martial, United States, Mil. R. Evid. 505 analysis, at A22-40 (2002). It establishes a privilege prohibiting disclosure of classified information if disclosure would be detrimental to national security. It applies at all stages of the proceedings. MRE 505(a). In many respects, such as the requirement for the defendant to provide notice of intent to disclose classified information and the evidentiary substitution procedures, MRE 505 essentially mirrors CIPA.

2. Claiming the Privilege. The head of the executive or military department or government agency may claim the privilege based upon a finding that the information is properly classified and that disclosure would be detrimental to the national security. A witness or trial counsel is presumed to have the authority to claim the privilege on behalf of the holder of the privilege in the absence of evidence to the contrary. MRE 505(c). However, case law makes it clear that trial counsel should not claim the privilege in the absence of direction to do so by the appropriate agency head. In *United States v. Flannigan*, 28 M.J. 988 (AFCMR 1998), the Air Force Court of Military Review dismissed a charge because the trial counsel claimed the privilege at the direction of OSI personnel but did not coordinate with the Secretary of the Air Force.

XIX. classified information procedures at courts-martial

A. Pre-preferral. At this stage of the proceeding, the government should comply as closely as possible with the procedures outlined in the Navy Code 17 publication, The Judge Advocate's Handbook for Litigating National Security Cases. In particular, the government should:

1. Notify higher headquarters. AR 27-10, para. 2-7*a* requires an SJA to coordinate with OTJAG, Criminal Law Division and OTJAG, Operational Law Division prior to *preferral* of charges in cases that have national security implications.

2. Request a classification review of the evidence.

3. Contact the OCA (and often, multiple OCAs) for a determination as to what evidence may be disclosed at trial.

4. Establish security procedures, identify security assistance personnel, and plan all aspects of a trial involving classified evidence.

5. Make charging decisions based on OCA willingness to disclose certain information.

6. Note that speedy trial implications still exist in classified information cases. The discussion to RCM 707(c) indicates that a military judge can grant delays in order to give counsel time to prepare for complex cases, to obtain appropriate security clearances or gain time to declassify evidence. However, the reasonableness standard applies, and it is worth noting that the convictions of the accused in the "Yellow Fruit" cases were all overturned on appeal for speedy trial violations. *See United States v. Longhofer*, 29 M.J. 22 (CMA 1989) (rejecting proposed rule that speedy trial clock doesn't start in classified cases until all participants have security clearances and applying instead a reasonableness test for measuring the delay); *United States v. Duncan*, 34 M.J. 1232 (ACMR 1992) (holding that complex prosecution involving coordinated efforts between DOJ and DOD did not render reasonable the 303 days of pretrial delay for one set of charges and 176 days for another); *United States v. Byard*, 29 M.J. 803 (ACMR 1989) (holding that the government did not exercise due diligence in obtaining the accused's financial records and therefore could not exclude the time it took to obtain them).

B. From Preferral through Trial: A Quick Trip Through MRE 505

1. Counsel Security Clearance Requirements and the 6th Amendment.

   a) The Sixth Amendment does not promise a defendant his choice of counsel, but rather guarantees that he receive an effective advocate. *United States v. Bin Laden*, 58 F. Supp. 2d 113, 118-19 (S.D.N.Y. 1999) (quoting *Wheat v. United States*, 486 U.S. 153 (1988). Thus, the government may require counsel to obtain a proper security clearance in order to have access to classified information. *Bin Laden*, 58 F. Supp. 2d at 119-20.

   b) Under DoD and individual service regulations, counsel must have a proper security clearance in order to have access to classified information. In the alternative, an agency may conduct a streamlined background check and provide specific items of classified evidence to the attorney. *See, e.g.*, 59 M.J. 841, 852 (A.F. Ct. Crim. App. 2004), *rev'd on other grounds sub nom.*, *United States v. Schmidt*, 60 M.J. 1 (2004) (discussing in exhaustive detail the process of obtaining a security clearance for civilian counsel).

2. Article 32 Investigation. As a rule of privilege, MRE 505 applies to proceedings held under Art. 32. MRE 505(d) provides that a convening authority may do any of the following to protect classified information prior to referral of charges:

   a) Delete specified items of classified evidence from documents made available to the accused;

   b) Substitute a portion or summary of the information for the classified documents;

   c) Substitute a statement admitting relevant facts the classified evidence would tend to prove.

   d) Provide documents subject to conditions that will guard against compromise of information;

   e) Withhold disclosure if necessary to protect national security.

3. Discovery. MRE 505(e) provides for a pretrial Art. 39(a) session any time after referral of charges but before arraignment to settle discovery issues and ensure compliance with the procedures of MRE 505. The normal "open discovery" system provided under UCMJ Art. 46 and RCM 703 simply does not exist for classified information. According to the Navy Code 17 publication, the government must make the following determinations prior to permitting discovery of classified information:

   a) The accused has a "need to know" the classified information. Disagreements must be resolved by the convening authority prior to referral under MRE 505(d) or by the military judge after referral under MRE 505(g).

   b) Government must obtain permission from the originating agency of the classified information. This requires a classification review.

c) It may be necessary to dismiss some charges rather than permit discovery of classified information.

d) In *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992), the COMA held that under MRE 505, the appellant did not have to know the true identity of an intelligence agent in order to properly prepare for cross-examination. The COMA cited a federal case, *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), in which the Court of Appeals held that the District Court erred in ordering production of transcripts of taped conversations between the appellant and an informant. The Court held that the transcripts were not sufficiently material to the appellant's defense to overcome the classified information privilege.

4. Post-Referral Convening Authority Options. Once a convening authority becomes aware that classified information is relevant and necessary to an element of the offense or a legally cognizable defense (and is otherwise admissible in evidence), MRE 505(f) provides that the CA may do any of the following:

a) Institute action to obtain the classified information so the military judge can make an appropriate *in camera* determination under MRE 505(i) concerning the proper use of the evidence;

b) Dismiss the charges;

c) Dismiss the charges or specifications or both to which the information relates;

d) Take such other actions as may be required in the interests of justice.

5. Post-Referral Military Judge Options. If, after a reasonable period of time, information is not provided to the military judge and the absence of that information would materially prejudice a substantial right of the accused, the military judge shall dismiss the charges or specifications or both to which the classified information relates. MRE 505(f).

6. Protective Order. If the government agrees to disclose classified information to the accused, the military judge can enter a protective order to guard against improper disclosure of the information. MRE 505(g)(1) provides for a protective order that is quite broad and sweeping in its scope. The protective order may:

a) Prohibit unauthorized disclosure of information;

b) Require storage of material in a manner appropriate to its classification level;

c) Require controlled access to material during business hours and other hours at reasonable notice;

d) Require cooperation of all persons who need security clearances with investigatory personnel;

e) Require maintenance of logs regarding access by authorized personnel to the classified information;

f) Regulate the making and handling of notes taken from classified information;

g) Request the CA to authorize assignment of government security personnel and provision of government storage facilities.

7. Limited Disclosure/Substitutes. MRE 505(g)(2) permits the military judge to authorize the limited disclosure of classified information following an *in camera* review by the military judge, unless the military judge determines that the classified information itself is necessary to enable the accused to prepare for trial. Courts construing substitution issues under CIPA have held that proper substitutes for classified evidence do not hamper the accused's ability to present a defense. *See, e.g.*, *United States v. Rezaq*, 134 F.3d 1121, 1142-43 (D.C. Cir. 1998), *cert. denied* 525 U.S. 384 (1998) (holding that the district court's CIPA substitutions "protected Rezaq's rights very effectively"); *United States v. Collins*, 603 F. Supp. 301, 303 (S.D. Fla. 1985) (ruling that CIPA's substitution provisions do not unconstitutionally interfere with the accused's Sixth Amendment right to the compulsory process of witnesses). Limited disclosure and substitutes include:

a) Deletion of specific items of classified information from documents to be made available to an accused;

b) Substitution of a portion or summary of the information for such documents;

c) Substitution of a statement admitting relevant facts, unless the judge determines that the classified information itself is necessary.

d) In *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), the appellant filed a writ of habeas corpus *ad testificandum* to obtain the trial testimony of enemy combatant witnesses being held overseas by the United States. While agreeing with the appellant that the witnesses were necessary and material to his defense, the court held that it was possible to craft adequate substitutes for their testimony that would balance the government's national security interests with the appellant's constitutional rights. The court recommended a process in which the defense would identify substitutions, the government would object and propose additional information, and the district court would then compile an appropriate set of substitutions.

8. Requirement for Accused to Provide Notice of Intent to Disclose. MRE 505(h) requires the accused to provide notice of his intent to disclose or cause the disclosure in any manner of classified information as follows:

a) Notice must be in writing and shall include a brief description of the classified information;

b) The accused has a continuing duty to notify;

c) The accused may not disclose any information until notice has been given;

d) If the accused fails to comply, the judge may preclude disclosure of the information or may prohibit the examination by the accused of any witness respecting such information.

9. Classified Information and the Attorney-Client Privilege. In *United States v. Schmidt*, 60 M.J. 1 (2004), the CAAF held that MRE 505(h)(1), which requires the accused to give notice to the trial counsel of an intention to disclose classified information, applies only when the defense is *seeking* classified information from the Government or when it reasonably expects to disclose classified information during a proceeding. MRE 505(h)(1) does not require an accused to engage in adversarial litigation with the opposing side as a precondition to discussing with a defense counsel who has a security clearance classified information *already known to the accused* because of previous proper access. The MJ must balance the government's interest in protecting national security information with the accused's right to effective assistance of counsel in preparing a defense and the attorney-client privilege.

10. *In-Camera* Proceedings. MRE 505(i) contains the procedures for an *in-camera* review of classified evidence in an Article 39(a) session closed to the public. Similar procedures have been validated under CIPA. *See United States v. Sarkissian*, 841 F.2d 959, 965-66 (9th Cir. 1988). The following procedures apply:

a) Government must make motion for *in-camera* proceeding;

b) Government must submit classified evidence and an affidavit *ex parte* for the consideration of the military judge only. Affidavit must demonstrate that disclosure of the information reasonably could be expected to cause damage to the national security.

c) At the *in-camera* proceeding, the Government will provide the accused with notice of the information that will be discussed. If the information has previously been made available to the accused, it will be identified; if not, it will be described in generic form as approved by the military judge.

d) Information will not be disclosed at trial unless it is:

(1) Relevant and necessary to an element of the offense or a legally cognizable defense;

(2) Is otherwise admissible in evidence.

e) The military judge can permit alternatives to full disclosure of the evidence unless the classified information itself is necessary to afford the accused a fair trial.

f) If the MJ determines that the information is necessary for a fair trial but the government continues to object to disclosure, the MJ may employ sanctions as follows:

(1) Striking or precluding the testimony of a witness;

(2) Declaring a mistrial;

(3) Finding against the government on issues to which the evidence is relevant and material to the defense;

(4) Dismissing charges, with or without prejudice;

(5) Dismissing charges or specification or both to which the information pertains.

11. Admitting Classified Information at Trial. MRE 505(j).

a) Evidence may be admitted without change in its classification status;

b) MJ may order admission of only part of a writing, recording, or photograph to prevent unnecessary disclosure of classified information;

c) MJ may permit proof of the contents of a writing, recording, or photograph that contains classified information without requiring admission of the original or a duplicate;

d) During the taking of testimony, MJ will take suitable actions to ensure that questions or lines of inquiry that may require a witness to disclose classified information not previously found relevant and necessary do not result in the improper compromise of classified information.

12. MJ may order closed sessions of the court-martial that discuss classified material.

XX. Checklist for classified case in an ideal world5

A. The Beginning Stages:

1. A Crime regarding Classified Information is discovered.

2. The classified information is protected and the breach in security is closed.

3. Special Security Officer is informed of the possible breach (Navy--notifies Det. 17 and NCIS).

4. Law Enforcement begins to investigate.

5. The suspected classified information is sent to the various “equity holders.”

6. The “equity holders” screen the information to determine potential level of classification.

7. The information that is suspected of being classified undergoes a classification review.

8. Once the review is completed the OCA verifies the findings of the review and determines whether release should be permitted.

9. In instances where the privilege under MRE 505 is to be invoked memos from

5 This journey through the stages of handling a classified case in an ideal world is courtesy of LTC Timothy MacDonnell, formerly of the U.S. Army Trial Counsel Assistance Program (TCAP).

OCAs articulating the danger of release of the classified information are produced.

B. Preferral

1. Charges are preferred.
2. Panel is reviewed for security clearances.
3. Government secures an interim security clearance for accused and clearances for defense counsel.

C. Article 32

1. An investigation security officer (ISO) and subject matter expert (SE) is assigned to the Article 32 IO.
2. Convening Authority issues a protective order to defense.
3. Article 32 begins with a Grunden hearing (to determine whether the Art. 32 should be open or closed).
4. 32 completed.
5. Charges are referred.

D. Trial.

1. Court has Court Security Officer and a Subject Matter Expert regarding classified information assigned. Note: you should consider appointing a security expert to the defense team.
2. Government or defense moves under MRE 505 for a 39a session to address issues regarding classified material.
3. Court Security Officer insures that the courtroom is prepared should a closed session be necessary-Judge, counsel, accused, bailiff, escorts have clearances; courtroom is appropriate for the presentation of evidence; etc. (Court Reporter may want to use a different machine for recording).
4. Trial has a Grunden hearing.
5. The Court makes specific findings regarding classified issues.

E. The Navy Code 17 publication contains extremely thorough and useful checklists for the SJA, trial counsel, and military judge. **Read it!**

XXI. Conclusion

A. Classified cases are not easy, but early coordination and planning will help you set the conditions for success.

B. Do not be intimidated by MRE 505 or CIPA: they are your (obnoxious) friends.

C. Remember: the OCA controls the information, and if you can’t gain release, you may have to dismiss in the interests of justice.

Chapter 38

I. Introduction

A. General

1. The Sixth Amendment to the Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him…." U.S. Const. amend. VI.

2. The protections of the Sixth Amendment's Confrontation Clause apply in prosecutions of members of the armed forces. *United States v. Jacoby*, 29 C.M.R. 244, 246-247 (C.M.A. 1960) (Overruling *United States v. Sutton*, 11 C.M.R.220 (C.M.A. 1953) and *United States v. Parrish*, 22 C.M.R. 127 (C.M.A. 1956)

B. Organization of Outline

1. Part II discusses satisfying the Confrontation Clause through witness production, waiver, and forfeiture by wrongdoing.

2. Parts III and IV discuss two broad categories of Confrontation Clause cases. **Part III** discusses the law involving **restrictions imposed by law** or by a court on the scope of cross-examination. **Part IV** discusses the law involving the **admissibility of out-of-court statements** and reflecting the right to **literally confront** a witness at trial. [Note: the classification of cases in Part IV is modeled in part on the organizing principles of the National District Attorney Association's "*Crawford* Outline."]

3. Part V discusses the appellate review issues for Confrontation Clause cases.

4. Part VI is a Confrontation Clause analysis chart.

II. Satisfying the Confrontation Clause Through Opportunity to Cross-Examine, Waiver, and Forfeiture

A. Opportunity to Cross Examine.

1. Producing the witness will satisfy the Confrontation Clause even if the witness cannot be cross-examined effectively. The Confrontation Clause guarantees only an *opportunity* to cross-examine witnesses. There is no right to meaningful cross-examination. Generally speaking, an opportunity to cross-examine a forgetful witness satisfies the confrontation clause. If, however, a witness is unable or refuses to testify (even though the witness is on the witness stand), it follows that the witness cannot be cross-examined.

2. *Delaware v. Fensterer*, 474 U.S. 15 (1985) (per curiam). The Court held that an expert witness' inability to recall what scientific test he had used did not violate the Confrontation Clause even though it frustrated the defense counsel's attempt to cross-examine him. "[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the fact finder the reasons for giving scant weight to the witness' testimony."

3. *United States v. Owens*, 484 U.S. 554 (1988). While in the. hospital, the victim identified the accused to an FBI agent. At trial, due to his injuries, which affected his memory, the victim could only remember that he earlier identified the accused, but not the reason for the identification. The victim was under oath and subject to cross-examination; the Confrontation Clause was satisfied.

4. *United States v. Rhodes*, 61 M.J. 445 (2005). Witness against accused testified but claimed a lack of memory. The previous confession of the witness, implicating accused, was admitted against appellant with certain conditions. The defense argued that the appellant's confrontation rights were violated because the witness did not "defend or explain" his statement as required by *Crawford v. Washington*. The court ruled that the Supreme Court's previous case of *United States v. Owens* was not overruled by *Crawford*. By presenting the witness, the government met the confrontational requirements of the Sixth Amendment.

5. *United States v. Gans*, 32 M.J. 412 (C.M.A. 1991). The military judge admitted a sexual abuse victim's statement given thirty months earlier to MPs as past recollection recorded (MRE 803(5)). At trial, victim could not remember details of sexual abuse incidents. Appellant claimed that because the daughter's recollection was limited, his opportunity to cross-examine was also limited. The Court of Military Appeals disagreed, relying on the *Fensterer* and *Owens* decisions that there is no right to meaningful cross-examination**.**

B. Waiver.

1. Affirmative waiver of confrontation by the accused will satisfy the Sixth Amendment. Waiver cases generally arise when the defense makes a tactical decision not to cross-examine a witness, then asserts a Confrontation Clause violation.

2. *United States v. Martindale*, 40 M.J. 348 (C.M.A. 1994). During a deposition and again at an Article 39(a) session, a 12-year-old boy could not or would not remember acts of alleged sexual abuse. The military judge specifically offered the defense the opportunity to put the boy on the stand, but defense declined. Confrontation was waived and the boy's out-of-court statements were admissible.

3. *United States v. McGrath*, 39 M.J. 158 (C.M.A. 1994). Government produced the 14-year-old daughter of the accused in a child sex abuse case. The girl refused to answer the trial counsel's initial questions, but conceded that she had made a previous statement and had not lied in the previous statement. The military judge questioned the witness, and the defense declined cross-examination. The judge did not err in admitting this prior statement as residual hearsay.

4. *United States v. Bridges*, 55 M.J. 60 (2001). The Court of Appeals for the Armed Forces (CAAF) held that the Confrontation Clause was satisfied when the declarant took the stand, refused to answer questions, and was never cross-examined by defense counsel. The military judge admitted the declarant's hearsay statements into evidence. While a true effort by the defense counsel to cross-examine the declarant may have resulted in a different issue, the defense's clear waiver of cross-examination in this case satisfied the Confrontation Clause. Once the Clause was satisfied, it was appropriate for the military judge to consider factors outside the making of the statement to establish its reliability and to admit it during the government case-in-chief under the residual hearsay exception.

C. Forfeiture by Wrongdoing.

1. An accused may forfeit his right to confront a witness if he engaged in wrongdoing that was intended to, and did, procure the unavailability of the witness.

2. *Crawford v. Washington*, 541 U.S. 36, 62 (2004). "[T]he rule of forfeiture by wrongdoing…extinguishes confrontation claims on essentially equitable grounds."

3. *Giles v. California*, 128 S. Ct. 2678 (2008). The doctrine of forfeiture by wrongdoing requires the government to show that the accused intended to make the witness unavailable when he committed the act that rendered the witness unavailable. This is consistent with the Federal and identical Military Rule of Evidence 804(b)(6). It is not enough to simply show that the accused's conduct caused the unavailability.

4. *United States v. Clark*, 35 M.J. 98 (C.M.A. 1992). Accused's misconduct in concealing the location of the victim and her mother waived any constitutional right the accused had to object to the military judge's ruling that the victim was "unavailable" as a witness.

5. Forfeiture of hearsay rights versus confrontation rights. The constitutional doctrine of forfeiture and the codification of that doctrine in the evidentiary hearsay rules are related, but functionally separate, concepts.

   a. Military Rule of Evidence 804(b)(6) provides that "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" is not excluded by the hearsay rule if the declarant is unavailable. The overwhelming majority of federal courts apply a preponderance of the evidence standard to determine whether an accused engaged or acquiesced in wrongdoing. 2 Stephen A. Saltzburg, Lee D. Schinasi, and David A. Schlueter, Military Rules of Evidence Manual 804.05[3][f] (2003).

   b. *Giles v. California*, 128 S. Ct. 2678, 2686 (2008). "No case or treatise that we have found…suggested that a defendant who committed wrongdoing forfeited his confrontation rights but not his hearsay rights."

   c. *United States v. Marchesano*, 67 M.J. 535 (Army Ct. Crim. App. 2008). Indicates that an accused could forfeit his hearsay rights under MRE 804(b)(6) through wrongdoing *by acquiescence* but perhaps not his confrontation rights (confrontation forfeiture requires some intent or design on the behalf of the accused).

   d. Standard of proof at trial for judge's determination of forfeiture: Preponderance of evidence. *United States v. Marchesano*, 67 M.J. 535, 544 (Army Ct. Crim. App. 2008).

III. Restrictions on Confrontation Imposed by Law

A. Limitations on Cross-Examination

1. Cross-examination is an important part of the right to confront witnesses. The right to confrontation, however, is not absolute. The courts balance the competing state interest(s) inherent in rules limiting cross-examination with the accused's right to confrontation.

   a) "The right of cross-examination is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.'" *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

b) Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

c) "[W]e have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability – even if the defendant would prefer to see that evidence admitted." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

d) "[T]he right to confront and cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers*, 410 U.S. at 295.

e) "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

f) Although a criminal defendant waived his rights under the Confrontation Clause to object to the admission of hearsay statements because of his misconduct in intimidating a witness, he did not also forfeit his right to cross-examine that same witness. *Cotto v. Herbert*, 331 F.3d 217 (2d Cir. 2003).

2. **Juvenile Convictions of Key Prosecution Witness.** *Davis v. Alaska*, 415 U.S. 308 (1974). The exposure of a witness's motivation is a proper and important function of cross-examination, notwithstanding state statutory policy of protecting the anonymity of juvenile offenders.

3. **Voucher Rule.** *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). The defendant was deprived of a fair trial when he was not allowed to cross-examine a witness who had confessed on numerous occasions that he committed the murder. The Court observed that "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined (citations omitted).

4. **Ability to remember.** *United States v. Williams*, 40 M.J. 216 (C.M.A. 1994). Judge erred in precluding defense from cross-examining government witness (and accomplice) to robbery about drug use the night of the robbery.

5. **Bias**.

a) *United States v. George*, 40 M.J. 540 (A.C.M.R. 1994). Judge improperly restricted defense cross-examination of government toxicology expert who owned stock in the lab that tested accused's urine sample pursuant to a government contract. Questions about the expert's

salary were relevant to explore bias. Judge also erred in preventing defense from asking the defense expert about possible sources of contamination of the urine sample.

b) *United States v. Gray,* 40 M.J. 77 (C.M.A. 1994). Accused was charged with indecent acts with nine-year-old daughter of SGT M and sodomy and adultery with SGT M's wife. Evidence that DHS had investigated the "victim's" family was improperly excluded. Mrs. M. could have accused Gray of the offenses to divert attention away from her dysfunctional family and the evidence would have corroborated Gray's claim that he visited Mrs. M's home in response to requests for help. This violated accused's right to present a defense.

6. **Motive to lie.** *United States. v. Everett,* 41 M.J. 847 (A.F.C.M.R. 1994). The military judge improperly prevented the defense counsel from cross-examining a rape victim about her husband's infidelity and his physical abuse of her.

7. **Discrepancy in Laboratory Tests**. *United States v. Israel*, 60 M.J. 485 (2005). In a urinalysis case, the military judge limited the defense ability to cross-examine witnesses regarding the possibility of error in the testing process by precluding the defense from confronting expert witnesses with material impeachment evidence. The CAAF held that the military judge abused his discretion in limiting the ability of the defense to cross-exam the government experts, and that the error was not harmless beyond a reasonable doubt.

8. **M.R.E. 403**.

a) *United States v. Carruthers*, 64 M.J. 340 (2007). Appellant was convicted of stealing over a million dollars worth of military property from the Defense Reutilization and Marketing Office (DRMO) at Fort Bragg over a three year period. At trial, one of his coconspirators, SFC Rafferty, testified for the government in return for an agreement to plead guilty in federal court to one count of larceny of government property valued over one thousand dollars. Appellant's civilian defense counsel cross-examined SFC Rafferty at length about his agreement with the government, however the government objected when the defense counsel attempted to delve further into the possible punishments SFC Raferty might receive at his federal trial. The military judge sustained the objection. The issue was whether appellant was denied his Sixth Amendment right to confrontation when the military judge limited cross-examination of a key government witness regarding the possible sentence under the witness's plea agreement. (There were two issues granted, the other involved instructions given by the military judge) The holding was: No, sufficient cross-examination was permitted, and the military judge properly identified and weighed the danger of misleading the members under M.R.E. 403. The military judge in this case had already allowed plenty of inquiry into the witness's bias as a result of his agreement with the government, and merely limited the defense from further questioning on another aspect of the agreement. Since sufficient cross-examination into bias as a result of the plea agreement was permitted, appellant's Sixth Amendment right to Confrontation was not violated by the military judge's limitation.

b) *United States v. James*, 61 M.J. 132 (2005). Before members, appellant pleaded guilty to using and distributing ecstasy. During the sentencing phase of the trial, appellant sought to cross-exam a witness whom the appellant argued had convinced him to try ecstasy. Specifically, appellant sought to cross-examine the witness concerning the specific terms of the witness' pretrial agreement with the government. The purpose of the cross-examination into the quantum of the agreement would be to establish that the friend had a reason to lie given the benefit of the deal afforded to him (his agreement was for eighteen months confinement from a maximum of fifty-two years). The military judge precluded cross-examination of the specifics of the agreement, but allowed the defense to cross-examine the witness on the existence and general nature of the agreement, the order by the convening authority to the witness to testify, the grant of immunity to the witness, and the considerations of pending clemency. The court found that that military judge did not err by reasonably limiting the scope of cross-examination to avoid the confusion of the issues.

9. **Rule 412.**

a) *United States v. Savala,*70 M.J. 70 (C.A.A.F. 2011). The military judge denied the accused's initial MRE 412 motion to cross examine the victim on a prior, unfounded rape allegation. During direct examination the government opened the door by using it to bolster her reason for delayed reporting the current allegation. The court found it error to deny the accused the ability to cross examine on it after the government opened the door. Denying the accused the right to confront the victim with her previous allegation of rape under MRE 412(b)(1)(c) after the government opened the door on direct examination in an effort to bolster her credibility denied the accused his right to confrontation despite the military judge's earlier ruling to exclude the evidence in pretrial motions. A key component of the Confrontation Clause is the crucible of cross-examination. *Davis v. Alaska*, 415 U.S. 308, 316-317 (1974). This right becomes even broader when the prosecution opens the door to impermissible evidence during their case in chief. A failure by the intermediate court was not recognizing that witness credibility is an issue for the fact finder.

b) *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011). The C.A.A.F. held that the prior decision in *United States v. Banker*, see below, was wrong when it held that the victim's privacy interests should be balanced against an accused's constitutional rights when determining admissibility under MRE 412. While the balancing test itself is not per se unconstitutional, it can be applied in an unconstitutional manner. If evidence is constitutionally required, and it survives MRE 403, an accused will be allowed to confront his accuser with the same regardless of the level of invasive to a victim's privacy. Despite this holding, the facts of this case did not allow the accused to confront the victim with evidence under MRE 412. The accused in this case did not make a showing that the evidence found in e-mails alluding to the victim being sexually active was constitutionally required under MRE 412(b)(1)(c).

The military judge did allow cross-examination on the e-mails without allowing questions into the content by using MRE 611 MRE 611. While an accused has a right to confront his accuser, that right is not without limitations. *Davis v. Alaska*, 415 U.S. 308, 316 (1974). The Confrontation Clause protects a person's rights to a fair cross-examination of a witness to establish bias or motive to lie. That cross-examination can be curtailed when the probative value is outweighed by the danger of unfair prejudice. These dangers of unfair prejudice include harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. in *Delaware v. Van Arsdall*, 475 U.S. 673, 678–79 (1986). Here, the judge had already determined that there was insufficient probative value in the e-mails to rise to the level of constitutionally required evidence. As such, he may be allowed an opportunity to expose her motive to lie, but not in every possible manner. The military judge placed limits on the inquiry, and CAAF held that the judge had admitted sufficient evidence to establish TE's motive to lie. Excluding the sexual nature of the worrisome e-mails did not violate the constitutional rights of the accused. The court did not conduct any MRE 403 analysis.

c) *United States v. Ellerbrock*, 70 M.J. 314 (C.A.A.F. 2011). The C.A.A.F. held that in an Article 120 case it was error for the military judge to exclude evidence that the victim had an extra marital affair two years prior. When she disclosed the earlier affair to her husband, he became enraged and kicked down the wife's lover's door. The court found that the military judge prevented Ellerbrock from presenting a theory that a previous affair made it more likely that CL would have lied in this case; that it was a fair inference that a second affair would be more damaging to CL's marriage than a single event; and there was evidence in the record to support this inference, particularly the evidence that the husband had had a prior violent reaction when learning about CL's affair. The court found that the proffered evidence had a direct and substantial link to CL's credibility, and her credibility was a material fact in the case. The probative value of the evidence was high because the other evidence in the case was so conflicting, and was not outweighed by other concerns. The court did not conduct any MRE 403 analysis.

d) *United States v. Banker*, 60 M.J. 216 (C.A.A.F. 2004). ***Abrogated by United States v. Gaddis,*** 70 M.J. 248 (C.A.A.F. 2011). The C.A.A.F. held that evidence proffered under the constitutionally required exception to M.R.E. 412(a) is admissible only if the evidence is 1) relevant; 2) material; and 3) favorable to the defense **AND** it is not out weighed by the victim's privacy. This balancing test, applied in this manner, is unconstitutional under *United States v. Gaddis*. While other sections of *Banker* may be useful in helping counsel determine relevant and material, if evidence is found constitutional, the victim's privacy cannot be used to exclude it regardless of the significance.

e) *United States v. Roberts*, 69 M.J. 23 (C.A.A.F. 2010). In a marital rape and assault case, the CAAF held that the trial judge's exclusion of evidence of an alleged sexual relationship between the Accused's wife and another man did not violate the accused's constitutional right to confrontation. *See also, United States v. Smith*, 68 M.J. 445 (C.A.A.F. 2010)

B. Limits on Face-To-Face Confrontation (Remote & Screened Testimony)

1. The issue in remote and screened testimony is balancing confrontation rights against state's interest in protecting certain witnesses. Arguably, this section could also fit under the category of "Literal Confrontation: The Admissibilty of Out-of-Court Statements"at Part IV, *Supra*. *See*, *Maryland v. Craig*, 497 U.S. 836 (1990) (Scalia, J. , joined by Brennan, J., Marshall, J., and Stevens, J., dissenting).

2. The Supreme Court.

a) *Maryland v. Craig*, 497 U.S. 836 (1990). The child victim testified by one-way closed circuit television with a defense counsel and a prosecutor present. The testimony was seen in the courtroom by the accused, jury, judge, and other counsel.

(1) The preference for face-to-face confrontation may give way if it is necessary to further an important public policy, but only where the reliability of the testimony can otherwise be assured.

(2) Necessity. Before allowing a child victim to testify in the absence of face-to-face confrontation with the accused, the government must make a case specific showing that:

(a) the procedure proposed is necessary to protect the child victim,

(b) The child victim would be traumatized by the presence of the accused, and

(c) the emotional distress would be more than de minimus. What does de minimus mean? What's the constitutional minimum required? See *Marx v. Texas*, 987 S.W.2d 577 (Tex.). See also *United States v. McCollum*, 58 M.J. 323 (2003).

(3) Important Public Policy. The state's interest in "protecting child witnesses from the trauma of testifying in a child abuse case" is an important state interest.

(4) Reliability Assured. The Court stated that confrontation has four component parts that assure reliability. You preserve reliability by preserving as many of these component parts as possible in the proposed procedure.

(a) Physical presence;

(b) Oath;

(c) Cross-examination;

(d) Observation of the witness by the fact finder.

3. Military Cases.

a) *United States v. Pack*, 65 M.J. 381 (2008). Remote live testimony by a child victim witness. The CAAF held that the Supreme Court opinion in *Crawford* did not effect its earlier opinion in *Maryland v. Craig*, which laid out the standards for remote live testimony of child abuse victims. In so holding, the CAAF acknowledged that *Crawford* appeared inconsistent with *Craig*, but, because the Supreme Court did not expressly overrule *Craig*, the CAAF would continue to apply the *Craig* standard.

b) *United States v. Anderson*, 51 M.J. 145 (1999). The court approved the government's repositioning of two child victims such that they did not face the accused and the government's use of a screen and closed circuit television. Closed circuit television was used so the military judge, counsel, and the reporter could all see the testimony.

c) *United States v. McCollum*, 58 M.J. 323 (2003). The CAAF approved the military judge's decision to permit a 12-year-old child victim to testify via two-way closed circuit television after finding the witness would be traumatized if required to testify in open court in the presence of the accused and that the witness would be unable to testify in open court in the accused's presence because of her fear that the accused would beat her. Accused absented from the courtroom himself UP R.C.M. 804(c). The military judge found that the victim would be unable to testify in the accused's presence because of both fear and trauma, linking the two concepts. CAAF noted that MIL. R. EVID. 611(d)(3)(A) and (B) are sufficient independent of each of each other, meaning that military judge must find that a witness will be unable to testify reasonably because of fear or trauma caused by the accused's presence. Further, as long as the finding of necessity is based on the fear or trauma caused by the accused's presence alone, "it is irrelevant whether the child would also suffer some fear or trauma from testifying generally." The CAAF also determined that a military judge is not required under the Sixth Amendment nor MIL. R. EVID. 611(d) to interview or observe a child witness before making a necessity ruling. Further, the fear of a witness need not be fear of imminent harm nor need it be reasonable. Rather, the fear required under the rule must "be of such a nature that it prevents the child from being able to testify in the accused's presence."

4. Options. Several ways have been tried and approved by courts. They include:

a) One-way closed circuit television. *Maryland v. Craig*, 497 U.S. 836 (1990); *U.S. v. Longstreath*, 45 M.J. 366 (1996).

b) Two-way closed circuit television. R.C.M. 914A; 18 U.S.C. § 3509.

c) A partition. *United States v. Batten*, 31 M.J. 205 (C.M.A. 1990). An elaborate courtroom arrangement to protect the child victim, which included screens and closed circuit television. Testimony by a psychologist to show the impact conventional testimony would have on the witness. Special findings by the military judge (judge alone trial) that he relied on the child's excited utterance and not on her courtroom

testimony. Harmless error analysis by CMA as allowed by US Supreme Court in *Coy* and *Craig*. Case affirmed.

d) Witness testifying with her back to the accused but facing the judge, and counsel. *United States v. Thompson*, 31 M.J. 168 (C.M.A. 1990). The child victims testified at a judge alone court-martial with their backs to the accused. The military judge, defense counsel, and trial counsel could see them. A psychologist testified for the government in support of the courtroom arrangement.

e) Profile to the accused. *United States v. Williams*, 37 M.J. 289 (C.M.A. 1993). Child victim testified from a chair in the center of the courtroom, facing the military judge with the defense table to the immediate left of her chair. The accused was not deprived of his right to confrontation even though he could not look into the witness' eyes. The witness testified in the accused's presence and he could see her face and demeanor.

f) Whisper Method. *United States v. Romey*, 32 M.J. 180 (C.M.A.). The child victim whispered her answers to her mother who repeated the answers in open court. The mother was certified as an interpreter. *Craig* was satisfied when "[t]he judge impliedly made a necessity finding in this case" (emphasis added). The military judge relied on representations made about the Article 32 testimony; trial counsel's pretrial discussions with the child witness; and the military judge's observations of the child at an Article 39(a) session in the accused's presence. The Court also held that the child victim was available for cross-examination, and the accused's due process rights were not violated.

5. Article 32 Investigation. *United States v. Bramel*, 29 M.J. 958 (A.C.M.R. 1990). The child victim testified behind a partition at the Article 32 ivestigation. Accused could hear but not see the victim, but the defense counsel cross-examined him. The child testified at the court-martial without the partition. Held: (1) right to face-to-face confrontation is a trial right; (2) Article 32, UCMJ, only provides for the right of cross-examination, not confrontation; (3) an Article 32 investigation is not a critical stage of the trial; (4) *Bramel* is comparable to *Kentucky v. Stincer*, 482 U.S. 730 (1987) (defendant excluded from competency hearing of child witness); and (5) the accused did not have the right to proceed pro se at the Article 32 investigation.

6. Do not remove the accused from courtroom. See *United States v. Daulton*, 45 M.J. 212 (1996) (accused watched testimony of daughter over closed circuit television; confrontation rights violated); *United States v. Rembert*, 43 M.J. 837 (Army Ct. Crim. App. 1996) (accused watched testimony of 13-year-old carnal knowledge victim via two-way television in the deliberation room; without ruling on Sixth Amendment, the Army court agreed that accused's due process rights were violated). The accused may, under R.C.M. 804(c), voluntarily leave the courtroom to preclude the use of the procedures outlined in R.C.M. 914A.

7. Can witnesses who are not victims use remote procedures? Yes. Federal courts have interpreted 18 U.S.C. § 3509 to allow non-victim child witnesses to testify remotely. *United States v. Moses*, 137 F.3d 894 (6th Cir. 1998); *United States v. Quintero*, 21 F.3d 885 (9th Cir. 1994). Both cases interpret *Maryland v. Craig*. Both cases focus on the Court's approval of the state interest: "the state interest

in protecting child witnesses from the trauma of testifying in a child abuse case." The courts do not comment on the fact that the four witnesses in *Craig* who testified remotely were all victims.

8. Other issues in remote testimony.

a) *United States v. Yates*, 2006 U.S. App. LEXIS 3433 (11th Cir. 2006). Prosecution witnesses living in Australia declined to travel to the United States for trial. The witnesses testified at trial via live, two-way video conference. The Eleventh Circuit, following an en banc hearing, held that this arrangement violated the defendants' Sixth Amendment right to confront witnesses against them. Citing to *Maryland v. Craig* as the controlling case, the court found that the prosecutor's need for the video conference testimony to make a case and expeditiously resolve it were not the type of public policies that were important enough to outweigh defendants' rights to confront their accusers face-to-face. The court further found that the prosecution had failed to establish the necessity for the use of remote testimony when another viable option, deposition under the Federal Rules for Criminal Procedure, was available to the government.

b) *Harrell v. Butterworth*, 251 F.3d 926 (11th Cir. 2001). Appellant was convicted of robbing an Argentinean couple. At trial, the victims were unavailable to testify in person because of illness and unwillingness to return to the United States. The trial judge agreed to allow testimony via satellite over defense objection. Citing to *Maryland v. Craig*, the Florida Supreme Court pointed out that the Confrontation Clause does not guarantee an absolute right to a face-to-face meeting between a defendant and witnesses; rather, the underlying purpose is to ensure the reliability of trial testimony. In this case, *Maryland v. Craig* was satisfied because (1) public policy considerations justified an exception to face-to-face confrontation, given the state interest "to expeditiously and justly resolve criminal matters that are pending in the state court system;" (2) the remote testimony was necessary, given the fact that the witnesses were absolutely essential to the government case and lived beyond the court's subpoena power; and (3) the testimony was reliable because the witnesses were able to see the jury and the defendant, they were sworn by the clerk of court, the jury and the defendant were able to observe the witnesses testifying, and they were subject to cross-examination. On habeas review, the 11th Circuit concluded that Florida Supreme Court's decision was not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court.

c) *United States. v. McDonald*, 55 M.J. 173 (2001). Shortly before the presentencing portion of the court-martial, the government's only witness was notified of a unit deployment to the Middle East. He was at Fort Stewart, some distance from the trial location and was scheduled to report to the terminal at midnight that night for a departure at 0600 hours the next morning. Over defense objection, the military judge allowed the witness to testify by telephone. On appeal, the issue was whether the Sixth Amendment's Confrontation Clause applies to the presentencing portion of a court-martial. Agreeing with the Navy-Marine Corps Court of Criminal Appeals, the CAAF held that the Confrontation Clause does

not apply to non-capital presentencing proceedings. However, the Due Process Clause of the Fifth Amendment requires that the evidence introduced in sentencing meet minimum standards of reliability. The Court pointed out that while the safeguards in the rules of evidence applied to the prosecution's sentencing evidence, the language of RCM 1001(e)(2)(D) allowed relaxation of the evidence rules and did not specifically prohibit telephonic testimony. The CAAF also emphasized that this was an unusual situation causing the military judge to "craft a creative solution," lest the testimony be temporarily lost.

d) *United States v. Shabazz*, 52 M.J. 585 (N-M. Ct. Crim. App. 1999). The military judge allowed a government witness to testify via video teleconference (VTC). The trial was in Japan; the witness testified from California. The Navy-Marine Corps Court found a violation of the right to confrontation because the trial judge did not do enough to control the remote location.

e) *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999). The U.S. government asserted that Gigante was the boss of the Genovese crime family and supervised its criminal activity. Gigante was convicted of racketeering, criminal conspiracy under the RICO statute, conspiracy to commit murder, and a labor payoff conspiracy. The government proved its case with six former members of the Mafia, including Peter Savino. Savino was allowed to testify via closed circuit television because he was in the Federal Witness Protection Program and was in the final stages of an inoperable, fatal cancer. The Court held the trial judge did not violate Gigante's right to confront Savino. See also *Minnesota v. Sewell*, 595 N.W.2d 207 (Minn. App. 1999).

9. Testimony in disguise. *Romero v. State*, 136 S.W.3d 680 (Tex. Ct. App. 2004). A state's witness testified wearing dark sunglasses, a baseball cap pulled low over his eyes, and a jacket with an upturned collar, leaving visible only his ears. The trial court made no finding of necessity to justify the witness's appearance. The court held that the defendant's right to confrontation was violated.

C. Right To Be Present at Trial

1. General Rule. The accused has a right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder v. Commonwealth*, 291 U.S. 97, 105-6 (1933).

2. Disruptive Accused.

a) In *Illinois v. Allen*, 397 U.S. 337 (1970), the Court held that a disruptive defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can be reclaimed if the defendant is willing to conduct himself consistently with the decorum and respect inherent in judicial proceedings.

b) RCM 804. A military judge faced with a disorderly and disruptive accused has 3 constitutionally permissible responses:

(1) bind and gag the accused as a last resort, thereby keeping him present;

(2) cite the accused for criminal contempt;

(3) remove the accused from the courtroom until he promises to conduct himself properly.

3. Intentionally absent accused. Trial may continue in the absence of the accused when the accused voluntarily absents himself from trial. R.C.M. 804(b) and *United States v McCollum*, 56 M.J. 837 (A.F. Ct. Crim. App. 2002), *aff'd*, 58 M.J. 323, (2003) (accused voluntarily absented himself so that child-victim could testify in the courtroom).

D. Comment on Exercising Sixth Amendment Rights

1. *United States v. Kirt*, 52 M.J. 699 (N-M. Ct. Crim. App. 2000). The accused testified at trial and was asked during cross-examination, "Do you admit here today that you are the only witness in this court who has heard the testimony of every other witness?" On appeal, the accused argued that this question improperly invited the members to infer guilt from the appellant's exercise of his constitutional right to testify and confront the witnesses against him. The Court held that the question did not constitute error, but if it did, it was waived and did not constitute plain error.

2. *Portuondo v. Agard*, 529 U.S. 61 (2000). In summation, the prosecutor commented that the defendant had the benefit of getting to listen to all other witnesses before testifying, giving the defendant a "big advantage." The defendant argued that the prosecutor's comments on his presence and ability to fabricate unlawfully burdened his Sixth Amendment right to be present at trial and to be confronted with witnesses against him and his Fifth and Sixth Amendment right to testify on his own behalf. The Court rejected the defendant's arguments distinguishing comments that suggest exercise of a right is evidence of guilt and comments that concern credibility as a witness.

IV. Literal Face-to-Face Confrontation: The Admissibility of Out-of-Court Statements

A. Introduction

1. **The *Crawford* Rule**: Under *Crawford v. Washington*, 541 U.S. 36 (2004) **"testimonial" statements are admissible only if the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant**. *Crawford* overturned the *Ohio v. Roberts*, 448 U.S. 56 (1980) decision, under which judges determined the substantive reliability of out-of-court statements. *Crawford* returned to the historical roots of the Confrontation Clause, which is a procedural guarantee "not that evidence be reliable, but that reliability be assessed in a particular manner; by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61.

2. **What is Testimonial?** The *Crawford* Court declined to provide a comprehensive definition of "testimonial." The definition has been the subject of thousands of judicial decisions since the Court decided *Crawford*, and is discussed in Part IV.B., below.

3. Witness Present at Trial. "[W]hen the declarant appears for cross-examination at trial the Confrontation Clause places no constraints at all on the use of his prior testimonial statements….The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Crawford*, 541 U.S. at 59.

4. **Hearsay and the Confrontation Clause.**

a) It is important to remember that issues regarding evidentiary hearsay rules and issues regarding Confrontation Clause are separate and require a **separate analysis**. "Although the hearsay rules and the Confrontation Clause are generally designed to protect similar values, they do not completely overlap. Thus, a statement properly admitted under a hearsay exception may violate confrontational rights. Similarly, a violation of the hearsay rules may not infringe upon the Sixth Amendment." *United States v. Russell*, 66 M.J. 597, 602 (A.Ct.Crim.App. 2008) (internal quotations omitted).

b) Application of the Confrontation Clause to Non-Hearsay. "The Clause…does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 59.

5. **Problem-solving**. A Confrontation Clause analysis chart is provided at Part VI., below.

B. What Statements are "Testimonial"?

1. U.S. Supreme Court Cases.

a) *Crawford v. Washington*, 541 U.S. 36 (2004).

(1) Articulated **three categories of testimonial statements** that defined the Confrontation Clause's "coverage at various levels of abstraction." The Court held that statements that fell within one or more of these three categories were testimonial. These categories, or "formulations," were

(a) "**Ex parte in-court testimony or its functional equivalent**—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially…"

(b) "**Extrajudicial statements** . . . contained in **formalized** testimonial materials, such as affidavits, depositions, prior testimony, or confessions…"

(c) "Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

(2) At a minimum, the term "testimonial" applies to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *But see*, *Davis v. Washington*, 547

U.S. 813 (2006) (statement given in response to police interrogation is nontestimonial where primary purpose of police is meeting an ongoing emergency).

b) *Davis v. Washington*, 547 U.S. 813 (2006) (companion case with *Hammon v. Indiana*, 547 U.S. 813 (2006)).

(1) *Davis* and *Hammon* are cases that dealt with statements made to government officials after domestic violence situations. The Court held that statements made to the police at the scene of a domestic dispute, but after the actual incident, were testimonial and could not be admitted where the victim did not testify at trial, but that statements made in response to questions from a 911 operator immediately after the domestic assault occurred (and assailant had just left the premises) were nontestimonial, and thus could be admitted at trial even though the victim did not testify.

(2) "Statements are **nontestimonial** when made in the course of **police interrogation** under circumstances objectively indicating that the **primary purpose** of the interrogation is to enable police assistance to meet an **ongoing emergency**. They are **testimonial** when the circumstances objectively indicate that there is no such ongoing emergency and that the **primary purpose** of the interrogation is to **establish or prove past events** potentially relevant to later criminal prosecution."

c) *Michigan v. Bryant*, 562 U.S. ___, 131 S.Ct. 1143 (2011) (The Emergency Exception Doctrine)

(1) Procedural History: A jury convicted the defendant of second degree murder, possession of a firearm by a felon, and possession of a firearm during commission of a felony. The Michigan Court of Appeals affirmed, the Michigan Supreme Court returned the case for reconsideration. The appellate court then affirmed again. The Michigan Supreme Court reversed and SCOTUS granted certiorari.

(2) Facts: Police were dispatched to a local gas station following a shooting. The victim lay in the parking lot with mortal gunshot wounds. Police spoke with him and he told them that the suspect, Bryant, had shot him when he was outside of Bryant's house and then he drove himself to the gas station. Once medical services arrived, the police called for backup and went in search of Bryant, though they did not find him that day. The victim died at the hospital.

(3) At trial, the victim's statements were admitted through the police officer. The trial occurred pre-*Crawford*. The case was reversed on appeal, post-*Crawford*, when the statements were found testimonial.

(4) Issues: Whether preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are nontestimonial because they were "made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual??

(5) Holding: Yes. The objective circumstances of the victim's statement indicate the "primary purpose" of the interrogation was to assist in an ongoing emergency.

(6) Discussion: This case expands the usual emergency exception doctrine because it looks to the totality of the circumstances, not just the emergency itself. The victim's statements do not focus on the threat to the immediate environment, usually a domestic situation or an individual, but rather the public at large and for a longer period of time. Further, the victim went into greater detail about the circumstances of what happened. Despite this, court relied on an objective analysis of the encounter between the two individuals. First, it occurred at a crime scene rather than a formal, station house setting. Second, the existence of an emergency of Bryant's at large status was a threat to the public even if the threat to the current victim had passed. Finally, while the analysis is objective, the court does look at the victim's condition to determine the purpose in providing information to police.

(7) Dissent: Justice Scalia, as the author and torch-bearer of *Crawford*, provides interesting and entertaining reading in his dissent, which begins "[t]oday's tale . . ." continues assuming a fantasy in the majority's decision. Whether it takes a hardline on *Crawford* or just a hard jab the majority's lack of understanding about the distinction between investigating and responding to an emergency, it's certainly an effort to keep the court closer to the *Crawford* line of cases as he sees the majority decision as looking at reliability factors, something we abandoned when we left the *Ohio v. Roberts* sinking ship in 2004.

d) *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009).

(1) Facts. Accused was convicted on drug charges. Police sent cocaine connected to the accused to state forensic lab for analysis. The lab analysts issued three sworn "certificates of analysis" attesting to the results of their analysis. In accordance with state law, the certificates were introduced at trial as "prima facie evidence of the composition, quality, and the net weight of the narcotic…analyzed." The analysts who wrote the statements did not testify at trial. Melendez-Diaz objected to the admission of the statements as a violation of his right of confrontation, citing *Crawford*.

(2) Procedural History. The Appeals Court of Massachusetts affirmed the conviction, rejecting Melendez-Diaz's Sixth Amendment claim under *Crawford*. In doing so the court relied on the Massachusetts Supreme Judicial Court's decision in *Commonwealth v. Verde*. The *Verde* court concluded that a drug analysis certificate is "akin to a business or official record" and was thus not testimonial under *Crawford*. After the Massachusetts Supreme Judicial Court denied review without comment, Melendez-Diaz appealed to the U.S. Supreme Court, arguing that the *Verde* holding was in conflict with the *Crawford* decision. The Supreme Court granted certiorari and the case was argued in November 2008.

(3) Issue. Whether affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to a defendant was cocaine were "testimonial," rendering the affiants "witnesses" subject to the defendant's right of confrontation under the Sixth Amendment.

(4) Holding. Justice Scalia, writing for the majority and joined by Justices Stevens, Souter, Thomas, and Ginsberg, held: The affidavits were "testimonial" statements, and the affiants were "witnesses" for purposes of the Sixth Amendment; admission of the affidavits violated the defendant's right to confrontation.

(5) Analysis.

(a) The Court found that the affidavits fell within the "core class of testimonial statements" under *Crawford.* Noting that its description of the core class mentioned affidavits twice, the Court found that a "certificate of analysis" was an "affidavit," because it was a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" (Citing *Crawford*, 541 U.S. at 51 (quoting 2 N. Webster, An American Dictionary of the English Language (1828))).

(b) In addition to being "affidavits", the Court found that the certificates of analysis were also "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (Citing *Crawford*, 541 U.S. at 52). As evidence, the Court pointed out that, according to Massachusetts law, the "*sole purpose*" of the certificates was to provide "prima facie evidence" about the tested substance. The Court surmised that the analysts who prepared the certificates must have been aware of this purpose, as it was reprinted on the certificates.

(6) Chain of custody evidence. The Court, in a footnote, made clear that it did not hold "that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device must appear in person."

The Court reasoned that "gaps in the chain of custody go to weight, not admissibility" but also held that any chain of custody evidence presented must be presented live.

e) *Briscoe v. Virginia*, 130 S.Ct. 1316 (2010). In accordance with Virginia law, the prosecution introduced a certificate of a forensic laboratory analysis without presenting the testimony of the analyst who prepared the certificate. Under the law, the accused has a right to call the analyst as his own witness. In a per curiam opinion, the Court vacated the judgment of the Virginia Supreme Court and remanded the case (along with a companion case, Cypress) for further proceedings not inconsistent with the U.S. Supreme Court's opinion in *Melendez-Diaz v. Massachusetts*, 557 U.S. ----, 129 S.Ct. 2527 (2009).

f) *Bullcoming v. New Mexico*, 562 U.S. ___, 131 S.Ct. 2705 (2011)

(1) Procedural History: Defendant was convicted of Driving while Under the Influence of Intoxicating Liquor (DWI). The New Mexico Court of Appeals and New Mexico Supreme Court affirmed. SCOTUS granted certiorari.

(2) Facts: Following his arrest for DWI, police collected a blood sample from the defendant. An analyst named Caylor tested the sample at New Mexico's state lab. At trial, the government did not call Caylor because he was on unpaid leave. Defense objected (they did not have prior notice of this change). Government offered a surrogate witness, Razatos, who had neither certified, performed nor observed the testing on the defendant's sample. The court overruled the objection and admitted the entire report as a business record. The report contained statements about proper procedures being followed, results of the testing, the state of the sample upon receipt, the validity of the process, etc.

(3) *Melendiz-Diaz v. Massachusetts* came down during this appeal, holding that forensic reports affidavits were testimonial. The New Mexico Supreme Court recognized this decision and found the certificate testimonial but that it did not violate the Confrontation Clause because Caylor, the testing analyst was merely a "scrivener" who wrote down machine generated results and Razatos, the surrogate witness, was more than qualified as an expert to testify about how the machines work.

(4) Issue: Does the Confrontation Clause permit the prosecution to introduce a forensic laboratory report containing a testimonial certification through the in-court testimony of a scientist who did not sign the certification or perform or observe the test?

(5) Holding: No. Surrogate testimony does not satisfy the Confrontation Clause. The accused has a right to confront the witness who made the certification. If he or she is unavailable, there must have been a prior opportunity for cross-examination.

(6) Discussion: *Bullcoming* answers an unanswered question for military courts, one that C.A.A.F. is seeking answers to, "are

statements in documents and certifications that all procedures were properly followed, such as on specimen custody documents, testimonial?" *Bullcoming* tells us, "yes." The declarant is necessary for these types of statements. Everything the analyst does to get the sample from the first step into the testing machine is ripe for cross-examination. They go beyond machine generated data. They are assertions you cannot get from a surrogate witness or a document. This question is not quite reached in the cases we've had before our courts. *Bullcoming* does tell us that the C.A.A.F. was ahead of its time in *Blazier II* by confirming the general holding that an expert may "consistent with the Confrontation Clause and Rules of Evidence, rely on, but not repeat, testimonial hearsay that is otherwise an appropriate basis for an expert opinion, so long as the expert opinion arrived at is the expert's own."

Justice Sotomayor writes a concurrence that provides food for thought. While *Blazier II's* general holding stands, she suggest that not every situation might work this way and gives several hypothetical situations that might change the outcome. One situation that military practitioners should concern themselves with is ensuring your expert is relying on far more than testimonial hearsay. You may face an impossible battle under MRE 703 presenting a surrogate expert and saying he formed his own opinion if he relied solely on testimonial hearsay. The machine generated date is still your "key to freedom" where non-declarant experts are concerned in this area of the law.

g) Williams v. Illinois, 132 S.Ct. 2221 (2012)

(1) Procedural History: Williams is tried for sexual assault in Illinois state court. The government uses DNA evidence at his trial presented through a state lab analysis who did not conduct either test. Defense alleges a Confrontation Clause violation, which the trial judge overrules. The appellate court concurs and SCOTUS grants certiorari.

(2) Facts**:** DNA is collected during a sexual assault examination. That DNA sample (semen sample) is tested by a private lab though there is no suspect for comparison at the time of the assault. The lab produces a document for the profile and returns it to the state. A few months after the assault, Williams is arrested on unrelated charges. Because of that arrest, his DNA is taken and entered into the state crime computer by the state crime lab. Shortly thereafter, an analyst at the state crime lab runs the DNA profile from the private lab's semen sample against the state crime computer. She gets a match to Williams DNA sample taken from his unrelated crime. At a judge alone trial, the government calls the state crime lab personnel as their expert. She testifies about running the samples and getting a match and explains, as an expert, how the samples compare and the DNA profile is a match. During her testimony, she refers to the DNA profile generated by the private lab and its origin from

the semen sample taken from the victim during the sexual assault exam. She testifies that she used this profile to form her opinion that the samples matched. The government did not admit the private lab's report.

(3) Issue: Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause.

(4) Holding: No. In a plurality opinion, the court found that this testimony did not violate the confrontation clause. The report was not admitted and the testimony that the expert gave referring to the DNA report done by the private lab was used for a non-hearsay purpose-to show how she formed her opinion-and not for its truth. The court reasoned that this type of testimony has been allowed by experts under FRE 703 (or the state equivalent rule).

(5) Discussion: The Justices dissent greatly in not only the holding but even the reasoning within the plurality opinion. This case follows series of cases that prohibit use of the report and reading its results when the analyst who performed, supervised, observed or certified the results is not the testifying witness. Here, the plurality made a distinction, possibly without a difference, but a distinction under the law just the same. Because this witness testified as an expert, she is allowed to comment on what she used to form her opinion, Under our own rule 703, an expert can refer to evidence that is otherwise inadmissible hearsay to let the fact-finder know what they used to form their opinion. This goes to the weight to be given the experts opinion. The hearsay evidence itself is not admitted as a document or generally read from, in most cases. The dissent strongly urges that this practice, under this scenario, bypasses the Constitution by allowing the government to smuggle in a report and its results that they could otherwise not admit without the proper witness. Even within those who join the plurality decision, some Justices disagree with the idea that this is permissible in this case; however, they agree that that the testimony did not violate the Confrontation Clause because when the DNA profile was created from the semen sample, there was no suspect, he was still at large and it was not a formalized report or affidavit. This reasoning relies on the type of reasoning we see in the Emergency Expcetion/Primary Purposes cases like *Hammon, Davis and Michigan v. Bryant*.

(6) Practice Point: The reach of MRE 703 is broad. An expert can often smuggle in hearsay where you have another purpose for offering it, that you could not get in through documents or lay witnesses. However, keep in mind that this decision is based on a judge alone trial and a rule that permitted such testimony in judge alone cases. Where your fact finder is a panel, who is not trained to separate "truth of the matter" from other purposes, this

holding may prove no more helpful than *Bullcoming* and its predecessors for admitting expert testimony.

2. Military Cases

a) **Tests for Determining if a Statement is "Testimonial".** *United States v. Rankin*, 64 M.J. 348 (C.A.A.F. 2007).Military courts use the following analytical framework to analyze statements falling within the *Crawford* third category of potential testimonial statements (the "objective witness" category): "First, was the statement at issue elicited by or made in response to a law enforcement or prosecutorial inquiry? Second, did the "statement" involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial?" *See also*, *United States v. Foerster*, 65 M.J. 120 (C.A.A.F. 2007); *United States v. Gardinier*, 65 M.J. 60 (C.A.A.F. 2007).

b) **Affidavits**. *United States v. Foerster*, 65 M.J. 120 (2007). SGT Porter was deployed when he discovered somebody was using his identity to cash checks in his name. When he returned to home station he went to the bank and filled out a "forgery affidavit" containing the facts of his situation. Specifically, the sworn affidavit contained the check numbers and amounts he believed were false. This document was required by the bank in order for SGT Porter to get his money back. When the time came for trial, SGT Porter was already deployed again, and thus not available to testify. The government admitted the affidavit over defense objection in the place of SGT Porter's live witness testimony. The granted issue was whether an affidavit filled out by a victim of check fraud pursuant to internal bank procedures and without law enforcement involvement in the creation of the document is admissible as a nontestionial business record in light of *Crawford v. Washington* and *Washington v. Davis*. The court held that the affidavit was nontestimonial and properly admissible under the business records exception. The CAAF used the three factors previously identified in *Rankin* to analyze whether the bank affidavit in this case was testimonial. First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Here there was no governmental involvement in the making of the affidavit at all. The affidavit was made out before appellant had even been identified as the forger, long before there was any request aimed at preparation for trial. Second, did the "statement" involve more than a routine and objective cataloging of unambiguous factual matters? The information contained in the affidavit merely cataloged objective facts, specifically the check numbers and amounts, and SGT Porter's signature. Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial? Looking at the context in which the affidavit was made, it is clear that the purpose of the document was to protect the bank from being defrauded by an account holder. The CAAF acknowledged that the Supreme Court opinion in *Crawford* uses the term "affidavit" several times to describe documents considered testimonial hearsay, however the CAAF does not believe the Court intended for every

document titled affidavit to be considered testimonial. If there is no governmental involvement in the making of a statement, then it is unlikely to be considered testimonial.

c) **Statements made to a Sexual Assault Nurse Examiner (SANE).** *United States v. Gardinier*, 65 M.J. 60 (2007). Appellant was convicted of indecent acts and indecent liberties with a child under age 16 and the convening authority approved the sentence to a BCD, three years confinement, and reduction to E-1. The victim was appellant's five-year-old daughter, KG. KG received a medical exam the day she reported the acts. She was then interviewed a couple days later by a detective and a social worker, followed by a second interview with a sexual assault nurse examiner (SANE). The military judge admitted the "forensic medical form" completed by the SANE and also allowed her to testify about what KG had told her during the exam. The granted issue was whether statements KG made to the SANE were testimonial under *Crawford*. (There were three granted issues, but only this one implicated the Confrontation Clause. Of the other two issues, one involved Article 31 rights and the other admission of a videotaped statement.) The CAAF held KG's statements to the SANE were testimonial hearsay and their admission into evidence at the court-martial was error. The CAAF used the three factors previously identified in its opinion in *United States v. Rankin*, 64 M.J. 348 (2007) for distinguishing between testimonial and nontestimonial hearsay to analyze the statements KG made to the SANE. Taking the first and third *Rankin* factors together, the CAAF reasoned that on balance the statements were made in response to government questioning designed to produce evidence for trial. The SANE testified at trial that she conducts examinations for treatment, however the form itself is called a "forensic" medical examination form. She also asked questions beyond what might be necessary for mere treatment, including questions about what KG had told the police investigators. Also, the examination was arranged and paid for by the local sheriff's department. The totality of the circumstances indicated the statements made to the SANE were testimonial.

d) Alcohol, Urine and Drug Analysis Results

(1) **Random Urinalysis.** *United States v. Magyari*, 63 M.J. 123 (2006). ***overruled* by *United States v. Sweeney*,** 70 M.J. 296 (C.A.A.F. 2011), *infra*, (holding that the test for testimonial does not turn on random or non-random urinalysis procedures). The CAAF granted on the following issue: Whether, in light of *Crawford v. Washington*, appellant was denied his Sixth Amendment right to confront the witnesses against him where the government's case consisted solely of appellant's positive urinalysis. Holding: "in the context of random urinalysis screening, where the lab technicians do not equate specific samples with particular individuals or outcomes, and the sample is not tested in furtherance of a particular law enforcement investigation, the data entries of the technicians are not "testimonial" in nature."

(2) **Urinalysis Based on Individualized Suspicion.** *United States v. Harris*, 65 M.J. 594 (N-M Ct. Crim. App. 2007). Appellant was arrested for trespassing by local police after he was discovered digging in his neighbor's yard in the pouring rain, wearing only a pair of muddy shorts. One of his explanations for his unusual behavior was that he was "digging for diamonds." After he admitted to using crystal methamphetamine, he was ordered to undergo a command directed urinalysis based on probable cause. His urinalysis result came back positive, and was introduced against him at trial. The issue was whether the Navy Drug Lab Report on a command directed urinalysis admitted against appellant testimonial hearsay. (There were five assignments of error, however only one implicated the Sixth Amendment.) The holding was: No, the lab report was nontestimonial, and its admission did not violate appellant's Confrontation rights under the Sixth Amendment. Although the CAAF opinion in *Magyari* was limited to cases of random urinalysis, the result is the same here in the case of a command directed urinalysis because the lab procedures are the same regardless of the origin of the sample. More specifically, urinalysis samples are processed by the Navy lab in batches of 100, and given a separate identification number, such that there is no way for any lab technician to know which sample is being tested. The lab employees don't know whether prosecution is anticipated or whether the sample is from a random urinalysis. Therefore, urinalysis lab reports from testing processed in the way it is done at the Navy lab, are nontestimonial hearsay admissible under the business records exception. ***But see, Blazier I & II, infra.***

(3) **Physical Evidence Sent to Lab Post-Arrest.** *United States v. Williamson*, 65 M.J. 706 (Army Ct. Crim. App. 2007). Appellant was convicted of wrongful possession with intent to distribute over three pounds of marijuana, based on his possession of a FedEx package containing three bundles of marijuana he mailed to himself on leave in New Orleans. He mailed the package from El Paso, where it was detected by DEA agents using a drug dog. Agents effected a controlled delivery to the address on the package in New Orleans, and executed a search warrant fifteen minutes later. After seizing the package, it was sent to the United States Army Criminal Investigation Laboratory (USACIL), where the substance contained in the three bundles was confirmed to be marijuana. At trial, the government admitted the lab report over defense objection. The military judge admitted the lab report under the business records exception to the hearsay rules. The issue was whether the forensic lab report produced by USACIL at the request of the government after appellant had been arrested constitutes testimonial hearsay. The holding was: Yes, the forensic lab report does constitute testimonial hearsay where the lab report was requested after local police had arrested appellant. The court first briefly reviewed Supreme Court and CAAF caselaw

on the Confrontation right since *Crawford*, before analyzing the facts of this case primarily using the three factors the CAAF enunciated in *Rankin*. First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Second, did the "statement" involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial? Clearly the testing was done and the report produced in response to a specific request by law enforcement. The lab report was limited to the identity and amount of the tested substance, however, the purpose of the testing was to produce incriminating evidence for use at trial. The court pointed out that this circumstance was described by the CAAF in *Magyari* as a situation where a lab report would likely be considered testimonial, i.e. prepared at the request of the government, while appellant was already under investigation, for the purpose of discovering incriminating evidence. Critical to the court's reasoning was the fact that the testing was done after appellant had been arrested and charges had been preferred.

(4) **Physical Evidence Sent to Lab Post-Arrest.** *United States v. Harcrow*, 66 M.J. 154 (2008). Appellant was found guilty of use and manufacture of various illegal drugs among other offenses. NCIS and local law enforcement officials arrested him at his house in Stafford County, Virginia, pursuant to a warrant issued on probable cause that he was manufacturing methamphetamine at his residence. While searching the house, plastic bags and metal spoons were seized as evidence consistent with the manufacture of methamphetamine. The plastic bags and spoons were subsequently tested by the Virginia forensic science lab and found to contain heroin and cocaine residue. The government introduced the lab reports against appellant at trial. The Confrontation issue was whether the forensic lab reports constituted testimonial hearsay prohibited by the Sixth Amendment. CAAF used its three factors from *Rankin* along with its reasoning in *Magyari* to conclude the lab reports were testimonial. The case is important as the first CAAF case to find a lab report inadmissible as a testimonial statement rather than admissible as a nontestimonial business record.

(5) **Urinalysis.** *United States v. Blazier (Blazier I)*, 68 M.J. 439 (C.A.A.F. 2010).

(a) Accused convicted of wrongful use of controlled substances based on a random and a consent urinalysis. The command requested "the drug testing reports and specimen bottles" from the lab, stating that they "needed for court-martial use." The lab sent the command two Drug Testing Reports (DTR) consisting of 1) a cover memo that described and summarized the tests and the results; 2) attached records that included, among other

things, the underlying testing data, chain of custody documents, and some handwritten annotations of employees of the lab. The cover memos were signed by the "Results Reporting Assistants" and contained a signed, sworn declaration by Dr. Vincent Papa, the lab's forensic toxicologist and "Laboratory Certifying Official." Dr. Papa's declaration confirmed the authenticity of the records and stated that they were "made and kept in the course of the regular conducted activity" at the lab.

(b) Held: The portions of the drug testing report cover memoranda which summarized and set forth the "accusation" that certain substances were confirmed present in Blazier's urine at concentrations above the DOD cutoff level were testimonial.

(c) The court declined to decide the entire question before it, and instead ordered additional briefings from the parties on the following issues not previously raised by the parties: While the record establishes that the drug testing reports, as introduced into evidence by the prosecution, contained testimonial evidence (the cover memoranda of August 16), and the defense did not have the opportunity at trial to cross-examine the declarants of such testimonial evidence, (a) was the Confrontation Clause nevertheless satisfied by testimony from Dr. Papa?; or (b) if Dr. Papa's testimony did not itself satisfy the Confrontation Clause, was the introduction of testimonial evidence nevertheless harmless beyond a reasonable doubt under the circumstances of this case if he was qualified as, and testified as, an expert under M.R.E. 703 (noting that "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data [upon which the expert relied] need not be admissible in evidence in order for the opinion or inference to be admitted")? *See, Blazier II, infra.*

(6) **Urinalysis.** *United States v. Blazier (Blazier II)*, 69 M.J. 218 (C.A.A.F. 2010).

(a) Held: "Cross-examination of Dr. Papa was not sufficient to satisfy the right to confront [the lab personnel who prepared the testimonial portions of the cover memoranda], and the introduction of their testimonial statements as prosecution exhibits violated the Confrontation Clause."

(b) Held: "[W]here testimonial hearsay is admitted, the Confrontation Clause is satisfied only if the declarant of that hearsay is either (1) subject to cross-examination at trial, or (2) unavailable and subject to previous cross

examination. We further hold that an expert may, consistent with the Confrontation Clause and the rules of evidence, (1) rely on, repeat, or interpret admissible and nonhearsay machine-generated printouts of machine-generated data…, and/or (2) rely on, but not repeat, testimonial hearsay that is otherwise an appropriate basis for an expert opinion, so long as the expert opinion arrived at is the expert's own…. However, the Confrontation Clause may not be circumvented by an expert's repetition of otherwise inadmissible testimonial hearsay of another."

(c) The court reversed the Air Force court's decision and remanded the case for the lower court to conduct a harmlessness analysis.

(7) *United States v. Dollar,* 69 M.J. 411 (C.A.A.F. 2011)

(a) Procedural History: Appellant was convicted of adultery and wrongful use of cocaine in violation of Articles 134 and 112a, U.C.M.J. The Air Force Court of Criminal Appeals initially affirmed, but reconsidered its decision following *Blazier II.* Upon reconsideration, the AFCCA found harmless error in the admission of testimonial hearsay of a laboratory cover memorandum and surrogate witness. The C.A.A.F. granted review.

(b) Facts: The Appellant tested positive for cocaine through random urinalysis. At trial, over defense objection, the government preadmitted, the lab report including the cover memorandum. Further, they called a witness from the lab who was not involved in the testing who provided an expert opinion that included testifying verbatim from portions of the report that were not machine generated.

(c) Issue**:** Whether the lower court erred after finding that the testimonial evidence was improperly admitted at trial, then concluding that the Appellants Confrontation rights were satisfied by a surrogate witness, or that it was harmless error beyond a reasonable doubt.

(d) Holding: No. The Appellant's rights were not satisfied by a surrogate witness and the lower court's factual findings used to support harmless error were incorrect.

(e) Discussion: While *Dollar* does not add much to Confrontation jurisprudence, it reaffirms that surrogate witnesses, while able to rely on non-testimonial hearsay to reach conclusions, cannot smuggle in testimonial hearsay. More importantly, *Dollar* was the first case to take a step in the direction of questioning *Untied States v. Magyari,* 63 M.J. 123 (C.A.A.F. 2006), which drew a

distinction between random urinalysis reports and those generated for law enforcement purposes.

(8) *United States v. Cavitt*, 69 M.J. 413 (C.A.A.F. 2011)

(a) Procedural History: The Appellant was convicted of wrongful use of marijuana and assault in violation of Articles 112a and 128, U.C.M.J. The Air Force Court of Criminal Appeals found error in admission of the laboratory cover memorandum but found the error harmless. C.A.A.F. granted review.

(b) Facts: Appellant consented to a drug tested following a period of unauthorized absence. The lab report, containing a cover memorandum, custody document, confirmation intervention log, quality control memorandum, chain of custody documents and machine generated data were admitted at trial over defense objection. The AFCCA found error in the memorandum but found the remainder of the report admissible as a business record.

(c) Issue: Did the military judge abuse his discretion when he allowed the lab expert to testify using testimonial hearsay and did admission of the report without the declarant who conducted the testing being present violate the Appellant's Sixth Amendment's Confrontation right?

(d) Holding: The case was reversed and remanded for reconsideration in light of *Blazier II.*

(e) Discussion: The court explained that the AFCCA incorrectly relied on the business records exception as a firmly rooted exception for lab reports based on *Ohio v. Roberts*, 448 U.S. 56 (1980) . This does not satisfy the Confrontation Clause. Even without *Blazier II*, AFCCA should have identified this problem relying solely on *Crawford v. Washington*, 541 U.S. 36 (2004). The question before the court was not one of hearsay, rather one of Confrontation and the landscape changed in 2004 from *Roberts* to *Crawford*. Beyond that, the court pointed out that the military judge failed to address the issue of the expert repeating testimonial hearsay during his testimony. Again in this case, *Magyari* raises its ugly head on the issue of random vs. non-random urinalysis.

(9) *United States v. Lusk*, 70 M.J. 248 (C.A.A.F. 2011)

(a) Procedural History: An officer panel convicted the Appellant of wrongful use of cocaine in violation of Article 112a, U.C.M.J. The Air Force Court of Criminal Appeal found harmless error in failure to give an instruction and affirmed. C.A.A.F. granted review.

(b) Facts: Appellant provided a urine sample during a unit inspection. On request by trial counsel, Appellant's sample was tested by both the AFDTL and AFIP. Both yielded positive results. In pretrial motions, the military judge excluded the AFIP reported stating it violated the accused's Sixth Amendment Confrontation rights. He reserved ruling on whether it could be used later, in rebuttal. During cross-examination of government's expert witness, defense counsel challenged the validity and reliability of the AFDTL report. The prosecution moved to use the AFIP report to rebut the attack. The military judge ruled that the government's expert could testify about his reliance on the AFIP report to form his opinion under MRE 703, but that the report would not be admitted into evidence. The judge stated he would give an instruction that the report or results could not be used for the truth but only to show how the expert reached his conclusions. However, after extensive cross-examination by defense counsel, the judge determined he would not give the instruction.

(c) Issue: Did the military judge error in admitting the testimonial hearsay of the AFIP report in violation of the accused's Sixth Amendment Confrontation rights through the surrogate expert and then further error by failing to give a limiting instruction that such information could only be used to show how the expert formed his opinion? If it was error, was the error harmless?

(d) Holding: The intermediate court erred in not considering how unrestricted use of inadmissible testimonial hearsay, admitted through a surrogate witness in violation of the Sixth Amendment, influenced the conviction. The court held the failure to give the limiting instruction, regardless of how both sides used the information, was error. As such, the findings of the intermediate court are set aside and the case is remanded for a review.

(e) Discussion: *Lusk* tells us that the court intends to closely follow its holding in *Blazier II* where the government attempts to "smuggle" in testimonial hearsay through anyone other than the declarant from the testing laboratory. Government counsel should proceed with caution even when using a surrogate expert who will give an opinion based on reviewing a report. Carefully form questions to ensure that no testimonial hearsay is repeated. While the counsel in this case were obviously over the line, it is easy to see how C.A.A.F. is scrutinizing records to ensure that only machine generated data and nontestimonial hearsay is repeated by

surrogate experts and requiring limiting instructions even where defense counsel have used the evidence themselves during cross-examination.

(10) *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011)

(a) Procedural History: Appellant was convicted of several offenses, to include one specification of wrongful use of cocaine in violation of Article 112a. This case was tried prior to *Melendez Diaz v. Massachusetts*, et. al. The Navy-Marine Corps Court of Criminal Appeals found no error and affirmed. C.A.A.F. granted review.

(b) Facts: The government called an expert witness from the lab who neither tested, observed nor signed the cover memorandum for the urinalysis sample. The expert was the FLCO (final lab certifying official) who reviews all the data after the fact and essentially says everything was conducted IAW DoD procedures. The court admitted the lab report, which included a cover memorandum as well as a specimen custody document containing notations about the test results and procedures.

The NMCCA, relying heavily on *Magyari*, found no error. That court reasoned that the lab report was not generated for court-martial use and as such, could not be testimonial in nature. Therefore, the court found the report admissible as a business record using the reliability test from *Ohio v. Roberts*, 448 U.S. 56 (1980).

(c) Issues: Whether, in light of the U.S. Supreme Court's ruling in *Melendez-Diaz v. Massachusetts*, the admission of the laboratory documents violated the appellant's Sixth Amendment right to confrontation.

Whether defense counsel's objection to the laboratory report constituted a valid *Crawford* objection and, if not, whether the objection was waived or forfeited. If it was forfeited, did admission constitute plain error?

(d) Holding: Admitting the cover memorandum was error (consistent with previous decisions); however, admitting the specimen custody document without the testimony of the certifying/testing parties was plain and obvious error. Defense counsel had no "colorable objection" under the law at the time of this trial so he did not forfeit the Appellant's rights. The NMCCA decision is reversed and remanded for a decision on HBRD.

(e) Discussion: The newest development in this line of cases is the specimen custody document. The court found it contained testimonial hearsay and violated the Confrontation clause being admitted and/or discussed by anyone other than the declarant. This ruling is seen by many as a long time coming and is consistent with the

recent ruling in *Bullcoming v. New Mexico*, 564 U.S. ___ (2011). While the cover memorandum is understood as testimonial, prior decisions have never ruled out the possibility that other parts of the lab report could contain testimonial hearsay. In this case, it happens to be that notations were made on the specimen custody document certifying the results and quality of the procedures. Such notations could just have easily been found on other pages of the report as well.

In taking on the second issue, the court finally reapproached *United States v. Magyari* and declared it a dead letter. In *Magyari*, the court focused the testimonial determination on the initial purpose of the sample being collected for testing, the technicians having no reason to know which sample belonged to an accused, and the lab being under no pressure to reach a particular conclusion. *Sweeney* recognizes the error in this logic. Once an accused's sample tests positive in an initial screening, an analyst must "reasonably understand themselves to be assisting in the production of evidence when they perform re-screens . . . and subsequently make formal certifications." *Sweeny* confirms that the testimonial determination should turn on the purpose for which the statements in the report are made. If not for use later as evidence, why make a certification at all? There would be no need for any type of formal verification; administrative proceedings require much less formality, due process and would not trigger Sixth Amendment Confrontation rights. Additionally, certifications are requested after a decision to court-martial is made, leaving no question what the purpose is for.

Finally, the lower court reliance on the business records exception is outdated. *Crawford's* testimonial determination, not *Ohio v. Roberts* reliability test is the controlling law for Confrontation.

(f) Dissent: The dissent, written by Judge Baker and joined by Judge Stucky, disagrees with the majority's reasoning concerning the specimen custody document. The dissents focuses on the primary purpose behind the military's testing program, arguing that it is not for court-martial and is a command program for readiness and fitness for duty.

(g) Note: Practitioners should not read *Sweeney* as necessitating the testing official to prove every urinalysis case; however, it should be read as requiring greater scrutiny in what documents are used if you do not have the declarant. Moreover, understanding the limitations of what your surrogate witness can testify about. What

remains of your case may be a testifying expert that can't give you the testimony you need about the quality of the procedures followed (See *Bullcoming*). That does not mean there won't be cases where issues arise that require the actual declarant (see *Bullcoming*) because of issues with testing, etc. Upcoming cases may further define the limits of *Blazier, Sweeney* and *Bullcoming.*

e) Casual Remarks / Statements to Family, Friends, Co-Workers, or Fellow Prisoners

(1) **Statements by child to parents.** *United States v. Coulter*, 62 M.J. 520 (N-M. Ct. Crim. App. 2005). Two-year old sex abuse victim tells parents that "he touched me here" pointing to vaginal area. Statement admitted under residual hearsay exception (with an alternative theory of present sense impression). Agreeing with trial court, the Navy-Marine Corps court found the statement was nontestimonial as there was no expectation that the statement would be use prosecutorially nor was there any government involvement.

(2) **Statements to co-workers.** United States v. Scheurer, 62 M.J. 100 (2005). The accused and his wife were charged with various drug related offenses. Prior to the charges and over a period of months, the accused's wife engaged in a number of conversations in which she told her friend about the drug use of both herself and the accused. The friend eventually contacted OSI who in turn asked the friend to wear a wire and engage the wife in further conversations about the accused's drug use. Several inculpatory statements were obtained, some of which implicated the wife, some the accused, and some both the accused and the wife. At the accused's trial, the wife invoked spousal privilege and was thus declared unavailable. The trial court then admitted the statements of wife to her friend against the accused. Citing *United States v. Hicks*, 395 F.3d 173 (3d Cir. 2005), the court first determined that the statements taken covertly were not "testimonial" in nature. Such statements, the court reasoned, did not implicate the specified definitions of testimonial as enumerated in *Crawford*. Further, the court found that such statements would be nontestimonial when the declarant did not contemplate the use of those statements at a later trial.

f) **Personnel Records.** *United States v. Rankin*, 64 M.J. 348 (2007). The CAAF affirmed the lower court holding that service record entries for a period of unauthorized absences were not testimonial for the purposes of the Confrontation Clause. The CAAF found that three of the four documents introduced by the government were nontestimonial, and that although the fourth may have qualified as testimonial, the information it contained was cumulative with information in the other three. In analyzing the four documents, **the CAAF conducted a three factor analysis, looking first at prosecution involvement in the making of the statement. Second, the court asked whether the reports merely catalogued unambiguous factual matters. And third, the court used**

a primary purpose analysis derived from *Davis v. Washington*. After using the three steps to find that three of the four documents were nontestimonial, the court went on to conduct the confrontation analysis in *Roberts v. Ohio* and conclude that the documents were properly admitted under the business records exception to the hearsay rules.

C. What Constitutes "Unavailability"?

1. A witness who is present in the witness box and responds (provides responsive answers) to questions is available for Confrontation Clause purposes, regardless of the content of the witness's answers. A witness will usually be considered "unavailable" for Confrontation Clause purposes if the witness is unavailable under M.R.E. 804(a), except regarding lack of memory (M.R.E. 804(a)(3)). *See, e.g*, *United States v. Owens*, 484 U.S. 554 (1988), *supra at* II.A.

2. *United States v. Lyons*, 36 M.J. 183 (C.M.A. 1992). Appellant convicted of raping the deaf, mute, mentally retarded, 17-year-old daughter of another service member. The victim appeared at trial, but her responses during her testimony were "largely substantively unintelligible" because of her infirmities. In light of her inability, the government moved to admit a videotaped re-enactment by the victim of the crime. The military judge admitted the videotape as residual hearsay over defense objection. Appellant asserted that his right to confrontation was denied because the daughter's disabilities prevented him from effectively cross-examining her. The lead opinion assumed that the victim was unavailable and decided the case on the basis of the admission of a videotaped re-enactment. Chief Judge Sullivan, Judges Cox and Crawford did not perceive a confrontation clause issue because the victim testified. *See also*, *United States v. Russell*, 66 M.J. 597, 601-602 (Army Ct.Crim.App. 2008) (implicitly accepting trial judge's ruling that a child victim who was "too young and too frightened to be subject to a thorough direct or cross-examination" was unavailable).

3. The Government must first make a "good faith" effort to produce a witness in order for that witness to be "unavailable" for Sixth Amendment purposes. *United States v. Cabrera-Frattini*, 65 M.J. 241, 245-246 (C.A.A.F. 2007). *See also*, *Ohio v. Roberts*, 448 U.S. 56, 74-75 ("The law does not require the doing of a futile act….[b]ut if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation."); *United States v. Crockett*, 21 M.J. 423 (C.M.A. 1986) (good faith does not extend to changing venue from Germany to Florida).

D. Nontestimonial Statements and the Confrontation Clause

1. Does the Confrontation Clause Apply to Nontestimonial Statements?

a) Generally

(1) It is uncertain whether military courts are required to apply a Confrontation Clause analysis to nontestimonial statements. Unless and until the CAAF clarifies the law in this regard, prudent practitioners should apply the *Ohio v. Roberts* test to nontestimonial statements.

(2) The *Crawford* Court did not decide whether the Confrontation Clause was implicated by nontestimonial statements, stating "[w]here nontestimonial hearsay is at issue, it is wholly

consistent with the Framers' design to affor the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Crawford*, 541 U.S. at 68. Three years later, however, the Court unambiguously held that the admission of nontestimonial statements do not violate an accused's Sixth Amendment right to confrontation. *Whorton v. Bockting*, 127 S.Ct. 1173 (2007). [Note: Military courts are not necessarily bound by this Supreme Court precedent. *See*, H.F. "Sparky" Gierke, *The Use of Article III Case Law in Military Jurisprudence*, Army Lawyer, Aug. 2005.]

(3) It seems likely that military courts will align their holdings with the Supreme Court regarding nontestimonial statements. As a logical proposition, it does not make sense to apply the Confrontation Clause to nontestimonial statements given the *Crawford* Court's explanation that the phrase "witnesses" in the Sixth Amendment only describes those who "bear testimony." In other words, a person is only a witness if he makes a "testimonial" statement.

b) Supreme Court Cases

(1) *Whorton v. Bockting*, 127 S. Ct. 1173 (2007). "Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability."

(2) *Davis v. Washington*, 547 U.S. 813, 823-824 (2006). "We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay; and, if so, whether the recording of a 911 call qualifies. The answer to the first question was suggested in *Crawford*, even if not explicitly held: "The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to 'witnesses' against the accused—in other words, those who 'bear testimony.' 'Testimony,' in turn, is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter."

c) Military Cases

(1) *United States v. Rankin*, 64 M.J. 348 (2007). "The *Ohio v. Roberts* requirement for particularized guarantees of trustworthiness continues to govern confrontation analysis for nontestimonial statements." (Citing *United States v. Scheurer*, 62 M.J. 100, 106 (2005)). *But see*, *United States v. Czachorowski*,

66 M.J. 432 at n.3 (C.A.A.F. 2008) (citing, in dicta, *Whorton v. Bockting* for the proposition that "…the Confrontation Clause has no application to [nontestimonial] statements and therefore permits their admission even if they lack indicia of reliability…."); *United States v. Cucuzzella*, 66 M.J. 57 (C.A.A.F. 2008) (the Confrontation Clause is not implicated by nontestimonial statements) (Stucky, J., concurring); *United States v. Foerster*, 65 M.J. 120 (C.A.A.F. 2007) (Holding that admission of a nontestimonial statement did not violate the accused's confrontation rights while neglecting, without explanation, to apply *Ohio v. Roberts* to the statement. One possible explanation for this decision is that the statement at issue qualified as a "firmly rooted" hearsay exception under *Roberts*, and the Confrontation Clause and evidentiary analyses are identical for such statements).

(2) *United States v. Russell*, 66 M.J. 597, 604 (Army Ct. Crim. App. 2008). Held that the admission of nontestimonial statements do not violate a military accused's confrontation rights. However, the court applied a constitutional standard for determining prejudice because of **"the continuing uncertainty regarding the application of *Ohio v. Roberts.*"**See also, *United States v. Crudup*, 65 M.J. 907, 909 (Army Ct. Crim. App. 2008); *United States v. Diamond*, 65 M.J. 876, 883 (Army Ct. Crim. App. 2007).

2. Application of *Ohio v. Roberts* to Nontestimonial Statements

a) Under *Roberts*, a nontestimonial hearsay statement can be admitted if the proponent can show that it possessed adequate indicia of reliability. Indicia of reliability can be shown in one of two ways. First, if the statement fits within a firmly rooted hearsay exception, it satisfies the Confrontation Clause. If it doesn't fit within a firmly rooted hearsay exception, it can nevertheless satisfy the Confrontation Clause and be admitted if it possessed particularized guarantees of trustworthiness.

b) Particularized guarantees of trustworthiness could be shown using a nonexclusive list of factors such as mental state or motive of the declarant, consistent repetition, or use of inappropriate terminology. *See, e.g., Idaho v. Wright*, 497 U.S. 805, 821 (1990) (providing factors for use in analyzing the reliability of hearsay statements made by child witnesses in child sexual abuse cases); *United States v. Ureta*, 44 M.J. 290, 296 (1996) (giving examples of factors to consider when looking at the circumstances surrounding the making of a hearsay statement when the declarant is unavailable).

c) When analyzing particularized guarantees of trustworthiness, the proponent is limited to considering only the circumstances surrounding the making of the statement, i.e. extrinsic evidence was not permitted. *Idaho v. Wright*, 497 U.S. 805, 819-24 (1990). This can be confusing, since this limit on extrinsic evidence only applied to the Confrontation Clause analysis. Once a statement meets the Confrontation Clause hurdle, extrinsic evidence is perfectly acceptable for analysis under the

hearsay rules. Another source of confusion in military caselaw is the fact that the CAAF has stretched the meaning of circumstances surrounding the making of the statement to include statements made close in time, yet before the actual making of a particular statement in at least one case. *See United States v. Ureta*, 44 M.J. 290 (1996).

d) *Idaho v. Wright*, 497 U.S. 805, 821 (1990). "Because evidence possessing 'particularized guarantees of trustworthiness' must be **at least as reliable as evidence admitted under a firmly rooted hearsay exception**, . . . we think that evidence admitted under the former requirement must similarly be so trustworthy that adversarial testing would add little to its reliability."

e) The Confrontation Clause analysis chart at Part VI, below, provides a list of hearsay exceptions that are generally considered to be "firmly rooted".

V. Appellate Review

A. Standard of Review

1. Appellate courts review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Clayton*, 67 M.J. 283, 286 (C.A.A.F. 2009).

2. When an error is not objected to at trial, appellate courts apply a plain error analysis. If the accused meets his burden to show plain error, "the burden shifts to the Government to prove that any constitutional error was harmless beyond a reasonable doubt." *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006)

3. Whether statements are testimonial under *Crawford* is a question of law that is reviewed *de novo*. *United States v. Clayton*, 67 M.J. 283, 286 (C.A.A.F. 2009).

4. Availability of witnesses and the "good faith" of government efforts to procure witnesses is reviewed for an abuse of discretion. *United States v. Cabrera-Frattini*, 65 M.J. 241, 245 (C.A.A.F. 2007).

5. Harmlessness analysis

a) Any evidence admitted in violation of the Confrontation Clause is reversible unless it is harmless beyond a reasonable doubt. *United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009)

b) "In assessing harmlessness in the constitutional context…[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009) (*citing Chapman v. California*, 386 U.S. 18 (1967)).

c) The C.A.A.F. "frequently looks to the factors set forth in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), to assess whether an error is harmless beyond a reasonable doubt." *United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009).

d) The *Van Arsdall* factors include: "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and…the overall strength of

the prosecution's case." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)

B. Retroactive Effect of *Crawford v. Washington*.

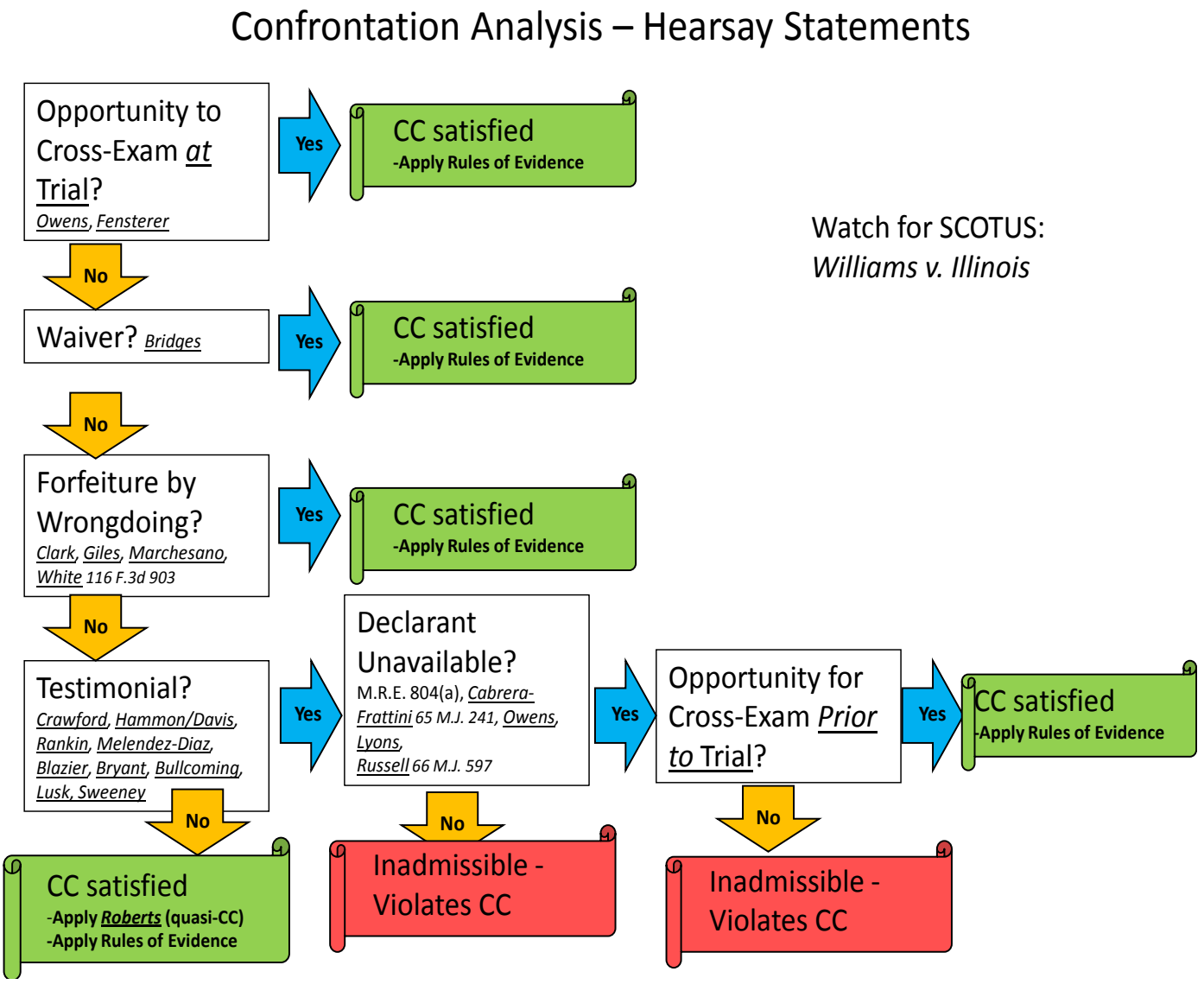
1. *Crawford* is a "new rule of law" for the conduct of criminal prosecutions and must be applied retroactively for all cases that are still pending on direct review. *United States v. Cabrera-Frattini*, 65 M.J. 241, 245 (C.A.A.F. 2007).

2. *Whorton v. Bockting*, 127 S. Ct. 1173 (2007).

a) Issue: Whether the decision in *Crawford* is retroactive to cases already final on direct review (in other words, can *Crawford* be used to collaterally attack cases already final after direct review).

b) Held: *Crawford* is not retroactive to cases already final on direct review because its impact on criminal procedure is equivocal. *Crawford* results in the admission of fewer testimonial statements, while exempting nontestimonial statements from confrontation analysis entirely. Thus, it is not clear that in the absence of *Crawford* the likelihood of an accurate conviction was seriously diminished under the *Roberts* analysis. Since the *Crawford* rule did not significantly alter the fundamental fairness of criminal proceedings, it is not a watershed rule requiring retroactive effect on cases already final on direct review.

VI. Confrontation Clause Analysis Chart



Ohio v. Roberts "Quasi-Confrontation" Analysis – **Nontestimonial** Statements

Is the Hearsay Exception "Firmly Rooted"?

See, 4 Federal Evidence § 8:31 (3d ed.)

Firmly rooted (generally):

- 801(d)(2)(E) – Co-conspirator statement
- 803(1) – Present sense impression
- 803(2) - Excited utterance
- 803(3) – Then existing mental, emotional, or physical condition
- 803(4) - Medical diagnosis & treatment
- 803(5) – Recorded recollection
- 803(6) – Records of regularly conducted activity*
- 803(8) – Public records and reports*
- 804(b)(1) – Former testimony
- 804(b)(2) – Statement under belief of impending death

Not firmly rooted:

- 804(b)(3) – Statement against interest
- 807 – Residual exception

Yes → "CC" satisfied

No ↓

Does the Statement Show "Particularized Guarantees of Trustworthiness?

[Shown from the totality of circumstances surrounding the making of the statement *Idaho v. Wright*, 497 U.S. 805 (1990)]

Yes → "CC" satisfied

No ↓

Inadmissible - Violates "CC"

Chapter 39

"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.

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. Scaff*, 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.

Id. at 96.

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 prejudgment"). *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), <u>but not</u> the new R.C.M. 1106. Under the new R.C.M. 1106(d)(1), the SJA "*<u>shall</u>* use the record of trial in preparation of the recommendation, and *<u>may</u>* 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 maters) 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 proferred 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-Cintron*, 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. Ralbovsky*, 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 re-hearing.

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 the 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. 5-32*a*, 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. 5-32*a* 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. 5-46*b*, 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. 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.

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[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 and 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).

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. Ribaudo*, 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*.

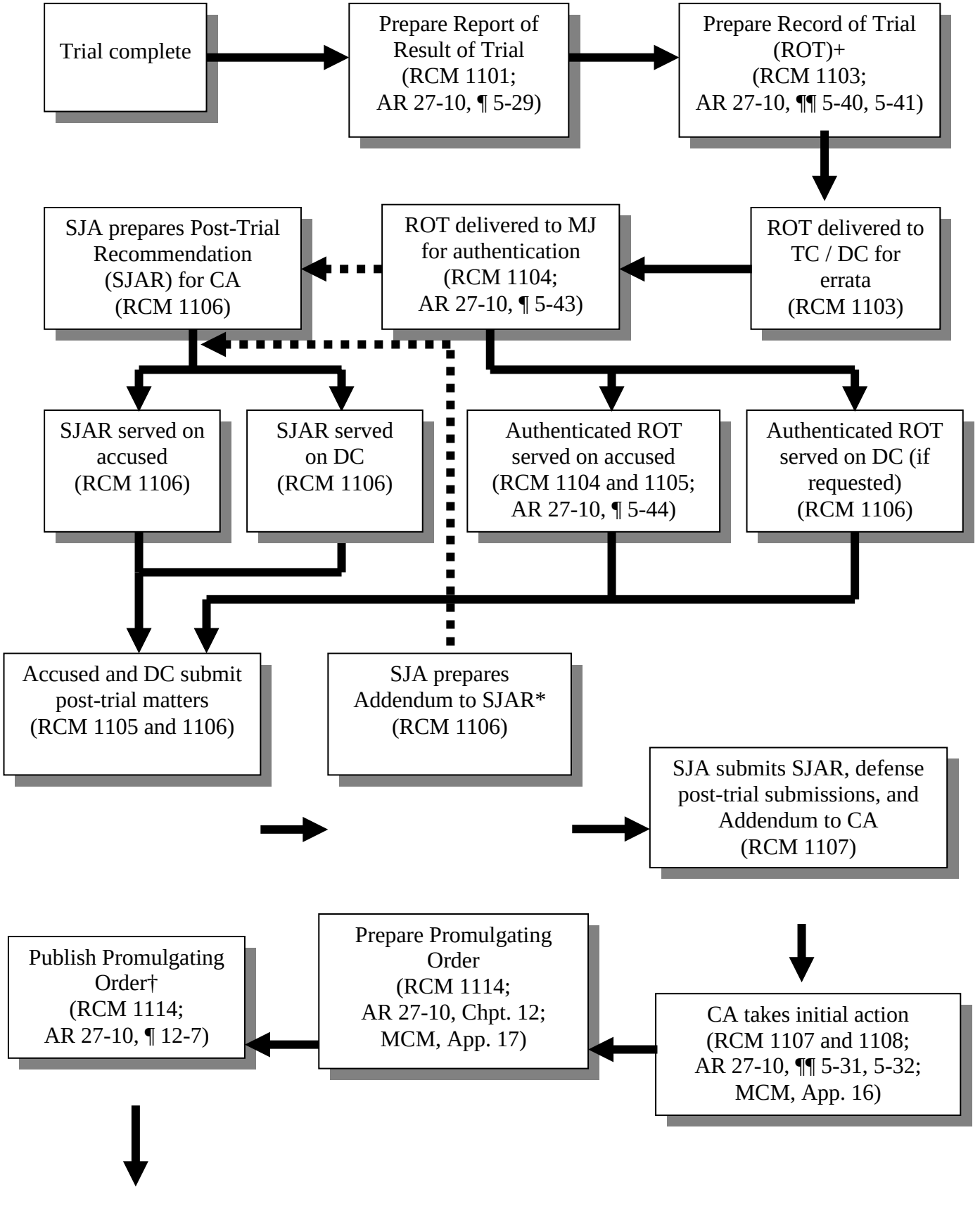
A. *Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990). Moore successfully appealed his rape convictions before NMCMR and sought release from confinement pending the government's appeal to the C.M.A. Held:

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



Case mailed for appellate review‡ (RCM 1111 and 1201; AR 27-10, ¶¶ 5-45, 5-46, 5-47)

+Verbatim or Summarized, depending on the sentence. See RCM 1103(b)(2)(B) and (C).
*The SJA is not required to prepare an Addendum unless the defense raises legal error in their post-trial submissions. RCM 1106(d)(4). If the Addendum contains new matter, it must be served on the defense. RCM 1106(f)(7).
†Until publication or official notification to the accused, the GCMCA can recall and modify his initial action, even if less favorable to the accused. RCM 1107(f)(2).
‡Until this point, the GCMCA can recall and modify his initial action, so long as the modification is no less favorable to the accused. RCM 1107(f)(2).

Chapter 40

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 in appropriate.

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.

1. Nature and circumstances of offenses.

2. Civilian and military history.

3. Confinement record.

4. Personal characteristics, such as age, education, marital and family status, and psychological profile.

5. Victim impact.

6. Protection and welfare of society.

7. Need for good order and discipline.

8. Other matters as appropriate.

E. Conditions for parole release.

1. 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.”

Chapter 41

"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.

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. Scaff*, 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.

Id. at 96.

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 prejudgment"). *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), <u>but not</u> the new R.C.M. 1106. Under the new R.C.M. 1106(d)(1), the SJA "*<u>shall</u>* use the record of trial in preparation of the recommendation, and *<u>may</u>* 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 maters) 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 proferred 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-Cintron*, 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. Ralbovsky*, 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 re-hearing.

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 the 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. 5-32*a*, 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. 5-32*a* 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. 5-46*b*, 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. 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.

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[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 and 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).

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. Ribaudo*, 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*.

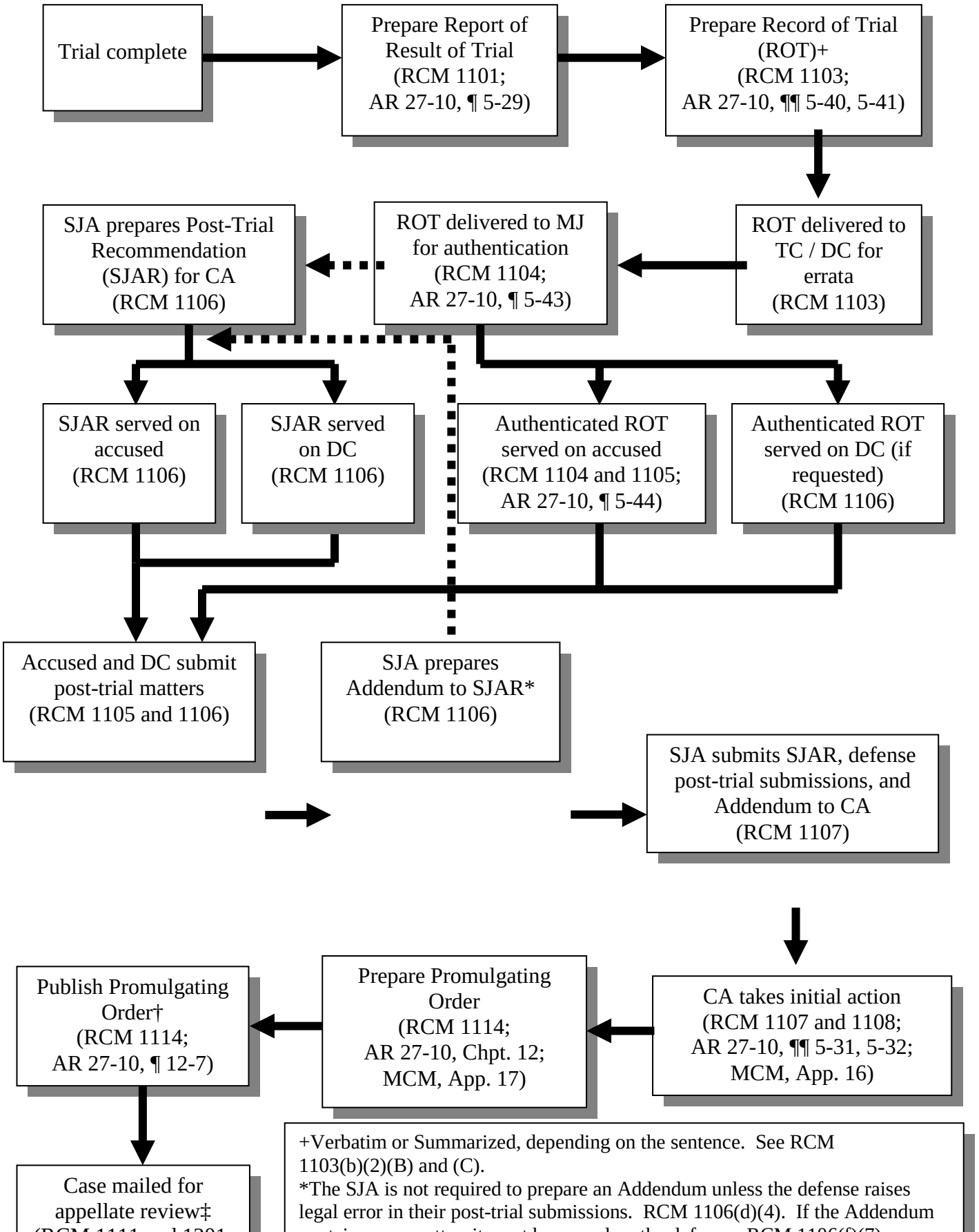
A. *Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990). Moore successfully appealed his rape convictions before NMCMR and sought release from confinement pending the government's appeal to the C.M.A. Held:

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



Chapter 42

I. Introduction

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-marital 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).

Chapter 43

Chapter 43
Professional Responsibility

I. Introduction.

II. 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

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 "predominent 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 predominent 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, <u>and</u>

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 <u>knows</u> to be false is provided by a person who is not the client, the lawyer <u>must</u> refuse to offer it regardless of the client's wishes (Army Rule 3.3).

b. "A lawyer <u>may</u> refuse to offer evidence that the lawyer <u>reasonably</u> <u>believes</u> 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. Diffoot*, 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.

Chapter 44

I. Introduction.

A. References.

1. U.S. Dep't of Def., Dir. 1010.1, Military Personnel Drug Abuse Testing Program (9 Dec. 1994) (C1, 11 Jan. 1999).

2. U.S. Dep't of Def., Instr. 1010.16, Technical Procedures for the Military Personnel Drug Abuse Testing Program (9 Dec. 1994).

3. U.S. Dep't of Army, Reg. 600-85, The Army Substance Abuse Program (2 Feb. 2009) (Rapid Action Revision, 2 Dec. 2009) [hereinafter AR 600-85].

4. Army Center for Substance Abuse Programs, Drug Testing Branch, Alexandria, VA. http://www.acsap.army.mil/. Telephone: (703) 681-5566.

II. SCIENTIFIC ASPECTS OF URINALYSIS PROGRAM.

A. What Urinalysis Test Proves.

1. Urine test proves only past use; it proves that drug or drug metabolites (waste products) are in the urine.

2. Urine test does not prove:

a. Impairment.

b. Single or multiple usages.

c. Method of ingestion.

d. Knowing ingestion. In the past ten years, there have been dramatic changes regarding the use of the permissive inference for proof of "knowing" ingestion. Previously, the presence of an amount of drug metabolite allowed a permissible inference that the accused knowingly consumed a particular drug. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988). The government's burden was made considerably heavier (to raise the permissible inference) after *United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999), *supplemented on reconsideration*, 52 M.J. 386 (C.A.A.F. 2000). The CAAF later backed off of this heavier burden in *United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001). In *Green*, the CAAF emphasized the importance of the Military Judge as the "gatekeeper to determine whether . . . expert testimony has established an adequate foundation with respect to reliability and relevance." *Id*. at 80. Some of the more troubling "factors" announced by the court in *Campbell* are not mandatory but may still be applicable in urinalysis cases dealing with novel testing methods or procedures. *Id*. at 80.

B. Drugs Tested.

1. Marijuana (THC metabolite)

2. Cocaine (BZE metabolite)

3. Other drugs tested (some only upon request):

a. LSD – removed from the testing program in 2006. Still periodically screened for under the "prevalence program."

b. Opiates (morphine, codeine, 6-MAM metabolite of heroin)

c. PCP

d. Amphetamines; including designer amphetamines MDMA, MDA, MDEA

e. Oxymorphone/Oxycodone

f. Anabolic steroids – testing only done by UCLA.

C. Drug Metabolites.

1. Marijuana.

a. Main psychoactive ingredient is delta 9-tetrahydrocannabinol (short name: delta-9 THC).

b. Main metabolite (waste product) of delta-9 THC is delta 9-tetrahydrocannabinol-9-carboxylic acid (short name: 9-carboxyl THC). This is the metabolite tested for within DOD.

c. 9-carboxyl THC is not psychoactive, and is not the only metabolite. 10-90% percent of the total number of metabolites are 9-carboxyl THC.

d. 9-carboxyl THC is found in urine only when human body metabolizes marijuana; the human body cannot naturally produce 9-carboxyl THC.

2. Cocaine.

a. Main metabolite is benzoylecgonine (BZE).

(1) This is the metabolite tested for within DOD.

(2) BZE is found in urine when human body metabolizes cocaine; it cannot be naturally produced by human body, but can be produced by introducing cocaine directly into urine (no metabolizing needed).

b. Secondary metabolite is ecgonine methyl ester (EME).

(1) This metabolite is not tested for within DOD.

(2) EME dissipates from the body more quickly than BZE.

(3) EME is found in urine when human body metabolizes cocaine; it cannot be naturally produced by human body and cannot be produced by introducing cocaine directly into urine.

D. Army Testing Procedures. *See* AR 600-85, Appendix E for full procedures.

1. Unit Prevention Leader (UPL).

a. Prepares urine sample bottle by placing Soldier's social security number, Base Area Code (BAC), and date on bottle.

b. Prepares DD Form 2624 (chain of custody form) listing up to 12 samples on form.

c. Prepares urinalysis ledger listing all samples.

d. Directs the Soldier to verify his information on the bottle label, unit ledger, and DD form 2624. The Soldier will then initial the bottle label. His/her initials are verification.

e. Removes a new collection bottle from the box in front of the Soldier and replace it with the Soldier's military ID card. The UPL will then affix the label to the bottle, in full view of both the Soldier and the observer, and hand it to the Soldier.

2. Observer.

a. Directly observes Soldier provide a sample of at least 30 mL (approximately half the specimen bottle) and place cap on bottle. (The observer must see urine leaving the Soldier's body and entering the specimen bottle).

b. Return with the Soldier to the UPL's station. The observer will keep the bottle in sight at all times.

c. Observes Soldier return the bottle to UPL.

3. UPL/Observer/Soldier.

a. UPL affixes red tamper evident tape seal across the bottle cap and then initials the bottle label.

b. UPL places the specimen in the collection box, removing the Soldier's ID card.

c. Observer signs the unit ledger in front of both the observer and UPL and Soldier to verify he/she complied with the collection process and directly observed the Soldier provide the sample and maintained eye contact with the specimen until it was placed in the collection box.

d. Solider will then sign the unit ledger in front of the observer and UPL verifying that he/she provided the urine in the specimen bottle and that he/she observed the specimen being sealed with tamper evident tape and placed into the collection box.

e. UPL will return the Soldier's ID card and release him/her from testing.

f. Once the UPL accepts a completed sample the specimen chain of custody begins. The specimens are sent to the drug testing laboratory.

4. Drug Testing Coordinator.

a. Receives samples from UPL (usually the same day as the sample collection). Ensures samples and forms are in proper order and signs chain of custody form.

b. Ensures bottles are sealed and mails them to laboratory for testing.

E. Testing Facilities Used by Army.

1. Army Forensic Toxicology Drug Testing Laboratory, Tripler Medical Center, Honolulu, HI. Telephone: (808) 433-5176.

2. Army Forensic Toxicology Drug Testing Laboratory, Fort Meade, MD. Telephone: (301) 677-7085.

3. The Army also utilizes other DoD testing facilities.

F. Urinalysis Tests Used.

1. Laboratory tests:

a. Screening test: immunoassay (KIMS Technology) or "Enzyme Multiplied Immunoassay Technique" (E.M.I.T. - Syva Co.) depending on the drug being tested.

(1) Used at Army and Air Force laboratories. Civilian samples are tested at Fort Meade, MD.

(2) Test attaches chemical markers to metabolites and measures transmission of light through sample. Every positive screened twice.

(3) Test is not 100% accurate, but screens out most negatives.

b. Confirming test: gas chromatography/mass spectroscopy (GC/MS).

(1) Used at Army and Air Force laboratories.

(2) GC test measures period of time molecules in sample take to traverse a tube; drug metabolites traverse tube in characteristic period of time.

(3) MS test fragments molecules in sample and records the fragments on spectrum. Metabolite fragments are unique.

(4) Test is 100% accurate.

G. Cut-off Levels. DOD and urine testing laboratories have established "cut-off" levels. Samples which give test results below these cut-off levels are reported as negative. A sample is reported as positive only if it gives test results above the cut-off level during both the screening (every positive screened twice) and the confirming test. Source: DoD Standard Drug Testing Panel, *available at* http://tricare.mil/tma/ddrp/Program-Policy-Archives.aspx.

1. Cut-off levels for screening tests (EMIT and IA):

Drug	*ng/ml*
Marijuana (THC)	50
Cocaine (BZE)	150
Amphetamine/Methamphetamine	500
Designer Amphetamines (MDMA, MDA, MDEA)	500
Opiates	
Morphine/Codeine	2000
Oxycodone/Oxymorphone	100
6-monoacetylmorphine (heroin)	10

Phencyclidine (PCP)	25

2. Cut-off levels for GC/MS test:

Drug	*ng/ml*
Marijuana (THC)	15
Cocaine (BZE)	100
Amphetamine/Methamphetamine	100
Designer Amphetamines (MDMA, MDA, MDEA)	500
Opiates	
Morphine	4000
Codeine	2000
Oxycodone/Oxymorphone	100
6-monoacetylmorphine (heroin)	10
Phencyclidine (PCP)	25

H. Drug Detection Times.

1. Time periods which drugs and drug metabolites remain in the body at levels sufficient to detect are listed below. Source: U.S. Army Drug Oversight Agency & Technical Consultation Center, Syva Company, San Jose, California, telephone: 1-800-227-8994 (Syva).

Drug	*Approximate Retention Time*
Marijuana (THC) (Half-life 36 hours)	
Acute dosage (1-2 joints)	2-3 days
Marijuana (eaten)	1-5 days
Moderate smoker (4 times per week)	5 days
Heavy smoker (daily)	10 days
Chronic smoker	14-18 days (may exceed 20 days)

Cocaine (BZE) (Half-life 4 hours)	2-4 days
Amphetamines	1-2 days (2-4 days if heavy use)
Barbiturates	
Short-acting (e.g. Secobarbital)	1 day
Long-acting (e.g. Phenobarbital)	2-3 weeks
Opiates	2 days
Phencyclidine (PCP)	14 days

2. Factors which affect retention times:

   a. Drug metabolism and half-life.

   b. Donor's physical condition.

   c. Donor's fluid intake prior to test.

   d. Donor's method and frequency of ingestion of drug.

3. Detection times may affect:

   a. Probable cause. Information concerning past drug use may not provide probable cause to believe the Soldier's urine contains traces of drug metabolites, unless the alleged drug use was recent.

   b. Jurisdiction over reservists. Reservists may not be convicted at a court-martial for drug use unless use occurred while on federal duty. *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990) (urine sample testing positive for cocaine less than 36 hours after reservist entered active duty was insufficient to establish jurisdiction). *But see United States v. Lopez*, 37 M.J. 702 (A.C.M.R. 1993) (court, in dicta, questioned the validity of *Chodara* and stated that body continues to "use" drugs as long as they remain in the body).

III. COMMANDERS' OPTIONS.

A. Courts-Martial. Court-martial procedures are complex and the Military Rules of Evidence apply.

B. Nonjudicial Punishment.

1. Nonjudicial punishment procedures are relatively simple. *See* U.S. Dep't of Army, Reg. 27-10, Military Justice ch. 3 (3 Oct. 2011) [hereinafter AR 27-10].

   a. Military Rules of Evidence do not apply. AR 27-10, para. 3-18j.

   b. Burden of proof is beyond a reasonable doubt. AR 27-10, para. 3-18l.

2. Reservists. Reservists may not receive nonjudicial punishment under Article 15 for drug use unless use occurred while on federal duty. *See* Article 2(d)(2) (reserve component personnel may be involuntarily recalled to active duty for nonjudicial punishment only with respect to offenses committed while on federal duty) and *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990).

C. Administrative Separations.

1. All Soldiers who are identified as illegally abusing drugs will be **processed** for administrative separation. AR 600-85, para. 10-6. Mandatory processing does not mean mandatory separation. Commander may recommend retention if warranted.

2. Rules at administrative separations are simpler than at a courts-martial. *See* U.S. Dep't of Army, Reg. 15-6, Procedures for Investigating Officers and Boards of Officers (2 Oct. 2006) [hereinafter AR 15-6].

a. Military Rules of Evidence do not apply. AR 15-6, para. 3-7a.

b. Burden of proof is a preponderance of the evidence. AR 15-6, para. 3-10b.

3. Reservists. Reservists may be separated for drugs even though use did not occur while on federal duty. *See* U.S. Dep't of Army, Reg. 135-178, Enlisted Administrative Separations (13 Mar. 2007) (Rapid Action Revision, 13 Sept. 2011) and U.S. Dep't of Army, Reg. 135-175, Separation of Officers (28 Feb. 1987) (Rapid Action Revision, 4 Aug. 2011).

IV. CONSTITUTIONALITY OF URINALYSIS PROGRAM.

A. Probable Cause Urinalysis.

1. A urinalysis test is constitutional if based upon probable cause. Mil. R. Evid. 312(d) and 315.

2. A positive urinalysis provides probable cause to seize hair sample for drug testing. *United States v. Bethea*, 61 M.J. 184 (C.A.A.F. 2005).

3. A warrant or proper authorization may be required.

a. *Schmerber v. California*, 384 U.S. 757 (1966). Warrantless blood alcohol test was justified by exigent circumstances.

b. *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.

B. Inspections.

1. A urinalysis is constitutional if it is part of a valid random inspection. Mil. R. Evid. 313(b); *United States v. Gardner*, 41 M.J. 189 (C.M.A. 1994). The fact that the results of urinalysis inspections are made available to prosecutors did not make the inspection an unreasonable intrusion. (*Note*: This ruling has not been challenged since the U.S. Supreme Court's decision in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), which found a similar policy unconstitutional). *See also Skinner v. Railway Labor Executives*, 489 U.S. 602 (1989) (urine tests of train operators involved in accidents are reasonable searches) and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (urine testing of employees who apply to carry firearms or be involved in drug interdiction does not require a warrant). *Chandler v. Miller*, 520 U.S. 305 (1997) (to conduct urinalysis without probable cause, must show "special need").

2. Authority to order urinalysis inspections. *United States v. Evans*, 37 M.J. 867 (A.F.C.M.R. 1993). Commander of active duty squadron to which accused's reserve unit was assigned had authority to order urinalysis inspection. *But 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); *United States v. Miller*, 66 M.J. 306 (C.A.A.F. 2008) (where urinalysis which was the product of an order issued by a civilian Air Reserve Technician who did not have command authority to issue the order, and thus was not incident to command, was unlawful).

3. Subterfuge under Mil. R. Evid. 313(b).

   a. Report of Offense. *United States v. Shover*, 45 M.J. 119 (C.A.A.F. 1996). Marijuana was planted in an officer's briefcase. During the investigation to find the "planter," the commander ordered a urinalysis. The accused tested positive for methamphetamines. Although the test triggered the subterfuge rule of Mil. R. Evid. 313(b), the government met its clear and convincing burden. The primary purpose for the inspection was to end the finger pointing and hard feelings caused by the investigation. The judge ruled the primary purpose was to "resolve the questions raised by the incident, not to prosecute someone." The CAAF affirmed.

   b. Knowledge of subordinates.

      (1) *United States v. Taylor*, 41 M.J. 168 (C.M.A. 1994). Urinalysis test results were properly admitted, even though the urinalysis inspection followed reports that accused had used drugs and even though accused's section was volunteered for inspection on basis of reports. Commander who ordered inspection was ignorant of reports. *But see United States v. Willis*, No. 96-00192, 1997 WL 658748 (N-M. Ct. Crim. App. Feb. 21, 1997) (unpublished).

(2) *United States v. Campbell*, 41 M.J. 177 (C.M.A. 1994). Urinalysis test results were improperly admitted where urinalysis inspection was conducted because first sergeant heard rumors of drug use in unit and selected accused to be tested based on his suspicions. Judge erred in finding that government proved, by clear and convincing evidence, that inspection was not subterfuge for criminal search.

c. Primary Purpose. *United States v. Brown*, 52 M.J. 565 (A. Ct. Crim. App. 1999). Several members of unit allegedly were using drugs. Because of this, the commander ordered random 30% inspection. The commander's primary purpose was because he "wanted to do a large enough sampling to validate or not validate that there were drugs being used in his company, and he additionally was very concerned about the welfare, morale, and safety of the unit caused by drugs." This met the primary purpose test of Mil. R. Evid. 313(b).

4. Targeting Soldiers for inspection. *United States v. Moore*, 41 M.J. 812 (N-M. Ct. Crim. App. 1995). Military judge improperly excluded urinalysis results where accused was placed in nondeployable "legal" platoon after an Article 15, and regimental commander inspected accused's platoon more frequently than others. Commander did not target. More frequent tests were based on disciplinary problems.

C. Consent Urinalysis.

1. A urinalysis is constitutional if obtained with consent. Mil. R. Evid 314(e).

2. Consent must be voluntary under totality of the circumstances. *United States v. White*, 27 M.J. 264 (C.M.A. 1988).

a. Consent is involuntary if commander announces his intent to order the urine test should the accused refuse to consent. Mil. R. Evid. 314(e)(4).

b. Consent is voluntary if the commander does not indicate his "ace in the hole" (authority to order a urinalysis). *United States v. White*, 27 M.J. 264 (C.M.A. 1988). *See also United States v. Whipple*, 28 M.J. 314 (C.M.A. 1989). Consent was voluntary where accused never asked what options were and commander never intimated that he could order him to give a sample. *See also United States v. Vassar*, 52 M.J. 9 (C.A.A.F. 1999) (permissible to use trickery to obtain consent as long as consent was not coerced).

c. If Soldier asks "what if I do not consent?"

(1) *United States v. Radvansky*, 45 M.J. 226 (C.A.A.F. 1996). Totality of the circumstances, not a bright-line rule, controls consent to urinalysis in the face of a command request. Notwithstanding First Sergeant's comment that accused could "give a sample of his own free will or we could have the commander direct you to do so," accused voluntarily consented to urinalysis. The mere remark that a commander can authorize a search does not render all subsequent consent involuntary.

(2) *But see United States v. White*, 27 M.J. 264 (C.M.A. 1988). Consent is involuntary if commander replies that he or she will order urine test.

d. Consent is voluntary if commander meaningfully explains the consequences of a consent sample versus a fitness for duty or probable cause sample. *United States v. White*, 27 M.J. 264, 266 (C.M.A. 1988) (dicta). *See also United States v. McClain*, 31 M.J. 130 (C.M.A. 1990).

3. Probable cause may cure invalid consent. *United States v. McClain*, 31 M.J. 130 (C.M.A. 1990). Urinalysis was inadmissible where consent was obtained involuntarily even though commander had probable cause to order urinalysis. However, the Court stated that probable cause to order urine test may provide an alternative basis upon which to admit urine sample obtained through invalid consent where:

a. Commander deals directly with accused in requesting consent, and would have authorized seizure of urine based on probable cause but for belief that he or she had valid consent; or,

b. Commander actually orders urinalysis based on probable cause, but relaying official asks for consent (which later is found to be invalid).

4. Requesting consent is not interrogation under Article 31, UCMJ, or the Fifth Amendment. *United States v. Schroeder*, 39 M.J. 471 (C.M.A. 1994). Civilian police officer apprehended accused for suspected use of drugs and later asked if he would consent to a urinalysis. This question was not custodial interrogation under the Fifth Amendment.

5. Attenuation of taint from prior unwarned admissions. *United States v. Murphy*, 39 M.J. 486 (C.M.A. 1994). Accused's consent to urinalysis test was not tainted by prior admissions obtained prior to rights warnings. Prior questioning was not coercive and consent was given voluntarily.

6. *Consent.* It's OK to Trick. *United States v. Vassar*, 52 M.J. 9 (C.A.A.F. 1999). NCO told accused he needed to consent to urinalysis because of a head injury. Permissible to use trickery to obtain consent as long as it does not amount to coercion.

D. Medical Urinalysis. A urinalysis is constitutional if conducted for a valid medical purpose. Mil. R. Evid. 312(f).

1. *United States v. Fitten*, 42 M.J. 179 (C.A.A.F. 1995). Forced catheterization of accused did not violate the Fourth Amendment or Mil. R. Evid. 312(f) where it was medically necessary to test for dangerous drugs because of accused's unruly and abnormal behavior. Diversion of a part of the urine obtained from medical test to drug laboratory to build case against accused was permissible. *But see United States v. Stevenson*, 66 M.J. 15 (C.A.A.F. 2008), which overrules *Fitten* ". . . to the extent that [it] . . . stand[s] for the proposition that there is a *de minimus* exception to the Fourth Amendment or to Mil. R. Evid. 312."

2. In the Army, most medical tests may only be used for limited purposes. AR 600-85, para. 10-12, and Table 10-1.

E. Fitness for Duty Urinalysis.

1. A commander may order a urinalysis based upon reasonable suspicion to ensure a Soldier's fitness for duty even if the urinalysis is not a valid inspection and no probable cause exists. Results of such tests may only be used for limited purposes. *United States v. Bair*, 32 M.J. 404 (C.M.A. 1991). *See* AR 600-85, para. 10-12(a)(1).

2. Reasonable suspicion required for a fitness for duty urinalysis is the same as reasonable suspicion required for a "stop and frisk" under the Fourth Amendment. *United States v. Bair*, 32 M.J. 404 (C.M.A. 1991).

F. Use in Rebuttal.

1. *United States v. Graham*, 50 M.J. 56 (C.A.A.F. 1999). Military Judge erred in allowing single rebuttal question by trial counsel about a prior positive marijuana result four years earlier, of which accused was acquitted in court-martial, after accused stated he was "flabbergasted" at having tested positive. *Accord United States v. Roberts*, 52 M.J. 333 (C.A.A.F. 2000). *But see* United States v. Tyndale, 56 M.J. 209 (C.A.A.F. 2001).

2. *United States v. Matthews*, 53 M.J. 465 (C.A.A.F. 2000). The CAAF holds that extrinsic evidence may not be used to rebut good military character.

G. Results of Violation of Constitution.

1. Administrative Separations. Evidence obtained in violation of the Constitution is admissible, unless it was obtained in bad faith (*i.e.* the officials conducting the urinalysis knew it was unlawful). A urinalysis conducted in bad faith is admissible only if the evidence would inevitably have been discovered. AR 15-6, para. 3-7c(6).

2. Nonjudicial Punishment under Article 15. Evidence obtained in violation of the Constitution is admissible. AR 27-10, para. 3-18j. However, Soldier may demand trial by court-martial. AR 27-10, para. 3-18d.

3. Court-martial. Evidence obtained in violation of the Constitution is inadmissible. *See* Mil. R. Evid. 311.

V. LIMITED USE POLICY.

A. Limited Use.

1. Under the limited use policy, the results of the following tests may not be used as a basis for an Article 15 or court-martial or to determine the "character of service" in an administrative separation action. AR 600-85, para. 10-14c.

a. Competence for Duty Tests. AR 600-85, para. 10-12a(1).

b. Medical Tests. The limited use policy applies to tests obtained as a result of Soldier's emergency medical care for an actual or possible drug overdose, unless such treatment resulted from apprehension by military or civilian law enforcement officials. AR 600-85, para. 10-12a(3).

2. If drug use discovered during a limited use test is introduced during an administrative separation, the Soldier must receive an honorable discharge.

3. The limited use policy does not preclude use of limited use tests in rebuttal or initiation of disciplinary action based on independently derived evidence. AR 600-85, para. 10-12d(1).

4. A fitness for duty urinalysis or medical test may serve as the basis for administrative action, to include requesting a second urinalysis. In *United States v. Williams*, 35 M.J. 323 (C.M.A. 1992), the exclusionary rule did not preclude admission of accused's incriminating statements or consensual second urinalysis even though the questioning and the request for the second urinalysis were based upon prior positive fitness for duty urinalysis. The taint from the fitness for duty urinalysis was sufficiently attenuated.

B. Full Use. The limited use policy does not apply to the types of tests listed below. These tests may be used at courts-martial, Article 15 proceedings, and administrative separations:

1. Probable cause tests.

2. Inspections.

3. Consent tests. In *United States v. Avery*, 40 M.J. 325 (C.M.A. 1994), the accused was not entitled to protection of Air Force limited use policy, which precludes the use of certain evidence derived from a service member's voluntary self-identification as a drug abuser. The accused voluntarily consented to a urinalysis after his wife revealed his drug use to his chain of command. The accused never admitted using drugs.

4. Medical tests which are **not** covered by the limited use policy described above.

a. Obtained as a result of Soldier's emergency medical care for an actual or possible drug overdose, where the treatment resulted from apprehension by military or civilian law enforcement officials. AR 600-85, para. 10-12a(3).

b. Routine tests directed by a physician which are not the result of suspicion of drug use and not taken in conjunction with ASAP. AR 600-85, para. 10-12a(3).

C. Command Directed Tests. Be wary of the term "command directed" urinalysis. The ability or inability to use the test results for UCMJ or separation purposes depends on the type of test, not on whether or not it is labeled command directed. In *United States v. Streetman*, 43 M.J. 752 (A.F. Ct. Crim. App. 1995), the accused was convicted of marijuana use. The court held that the letter reissuing the original inspection order but labeled as "Commander Directed" (Air Force equivalent to fitness for duty) and ordering accused to submit to drug testing did not transform prior legitimate random urinalysis inspection into a fitness for duty test that would preclude the admission of drug test results.

VI. Prosecuting Urinalysis Cases.

A. Procedures for Taking Test.

1. Observation During Testing. *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989). Direct observation of female officer providing sample by female enlisted person at a distance of eighteen inches did not make collection of urine unreasonable.

2. Refusal to Provide Sample. *United States v. Turner*, 33 M.J. 40 (C.M.A. 1991). Accused's submission of toilet water as urine sample did not constitute obstruction of justice, but could have been charged as disobedience of an order.

3. Inspection of AWOL (UA) Personnel.

a. Soldiers who are absent without leave may be subjected to compulsory urinalysis testing pursuant to command policy to inspect the urine of such Soldiers. *Cf. United States v. Bickel*, 30 M.J. 277 (C.M.A. 1990) (compelling Soldiers who previously tested positive for drug use to submit to second urinalysis is a proper inspection).

b. Such an inspection must be conducted in accordance with command policy.

(1) *United States v. Daskam*, 31 M.J. 77 (C.M.A. 1990). Accused, who was late for duty, was not an unauthorized absentee within meaning of policy requiring unauthorized absentees to submit to urinalysis; test of accused's urine was not a proper inspection.

(2) *United States v. Patterson*, 39 M.J. 678 (N.M.C.M.R. 1993). Testing of Soldier returning from unauthorized absence was not a proper inspection because it was not conducted in accordance with instruction requiring such inspections. Commander who ordered test did so based on the "seriousness" of the absence, rather than on a random basis.

4. Retesting Soldiers. Requiring retesting, during next random urinalysis, of all Soldiers who tested positive during previous urinalysis is a proper inspection.

a. *United States v. Bickel*, 30 M.J. 277 (C.M.A. 1990). Commander's policy letter which required retesting of Soldiers who were positive on previous urinalysis was proper.

b. *United States v. Ayala*, 69 M.J. 63 (C.A.A.F. 2010). Commander's policy letter required "all members whose urine tests positive for illegal drugs to provide another sample for testing by the end of the first duty day following receipt of a positive test result." Despite the SJA's advice that stated the policy would "decrease litigation risks and costs, and potentially aid in swifter judicial action," the commander's stated intent of promoting "security, military fitness, and good order and discipline . . . and not a criminal investigative tool," showed that the policy was a proper inspection under Mil. R. Evid. 313.

5. Retesting Samples. Selection of negative samples for additional testing is improper unless done on a random basis. *United States v. Konieczka*, 31 M.J. 289 (C.M.A. 1990). Installation alcohol and drug control officer's decision to select urine sample which had pre-tested negative for further testing at drug laboratory based on belief that sample might test positive constituted unreasonable inspection.

6. Deviations in Procedures.

a. Deviations from regulations generally do not affect admissibility of test results. *United States v. Pollard*, 27 M.J. 376 (C.M.A. 1989); *United States v. Timoney*, 34 M.J. 1108 (A.C.M.R. 1992).

b. Gross deviations from urinalysis regulation may allow exclusion of positive test results. *United States v. Strozier*, 31 M.J. 283 (C.M.A. 1990).

c. Accused randomly selected by computer for urinalysis testing as allowed by the applicable Air Force Instruction. Method was proper even if there were minor administrative deviations. *United States v. Beckett*, 49 M.J. 354 (C.A.A.F. 1998).

B. Proving Knowing Ingestion of Drugs.

1. To be guilty of wrongful use of drugs the accused must know that (1) he or she consumed the relevant substance; and, (2) the substance was contraband. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988).

2. Presence of drug metabolite in urine permits permissible inference that accused knowingly used drug, and that use was wrongful. *United States v. Green*, 55 M.J. 76, 81 (C.A.A.F. 2001); *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988); *United States v. Alford*, 31 M.J. 814 (A.F.C.M.R. 1990).

3. Permissive inference of wrongfulness may be sufficient to support conviction despite defense evidence that ingestion was innocent. *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987) (permissive inference overcame accused's suggestion that wife may have planted marijuana in his food without his knowledge).

4. Ensure that the instruction on permissive inference as to knowledge and wrongfulness is not crafted in such a manner as to make it a mandatory presumption. A permissive inference is constitutional; a mandatory presumption is not. *United States v. Brewer*, 61 M.J. 425 (C.A.A.F. 2005) (instruction that military judge gave was confusing to the extent that it appeared to shift the burden to the accused to assert one of the three exceptions as to wrongfulness; findings and sentence set aside).

5. *United States v. Pope*, 69 M.J. 328 (C.A.A.F. 2011). Military Judge abused his discretion in admitting a green detoxification drink under the doctrine of similar physical evidence, and by not giving a limiting instruction that the exhibit was entered into evidence for illustrative purposes only. The appellant had these types of drinks in her possession prior to the urinalysis in question, but none were recovered from the appellant directly. Government investigators purchased a similar drink on the economy. The only difference between this drink and the drinks that the appellant previously possessed was that the appellant's drinks did not have a label. The trial counsel introduced the green drink as a demonstrative exhibit and also introduced expert testimony that these detoxification drinks, combined with drinking large volumes of water, can cause the metabolite concentrations to decrease, resulting in a negative urinalysis test.

C. Use of Expert Testimony.

1. Expert testimony required at court-martial. Expert testimony is required to prove wrongful use of drugs; results of test alone (paper case) are inadequate. *United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001); *United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999), *supplemented on reconsideration*, 52 M.J. 386 (C.A.A.F. 2000); *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987).

a. Expert testimony must establish not only that the drug or metabolite was in the accused's body but that the drug or metabolite is not naturally produced by the body or any other substance but the drug in question. *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986). In addition, for the permission inference of wrongfulness, the government may have to satisfy the three prongs of *United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999), *supplemented on reconsideration*, 52 M.J. 386 (C.A.A.F. 2000) (at least in cases where novel testing procedures or methods were used).

b. Judicial notice is generally an inadequate substitute for expert testimony. *United States v. Hunt*, 33 M.J. 345 (C.M.A. 1991). *But cf. United States v. Green*, 55 M.J. 76, 81 (C.A.A.F. 2001); *United States v. Phillips*, 53 M.J. 758, 763 (A.F. Ct. Crim. App. 2000) (Chief Judge Young, concurring, argues that military judges should be able to take judicial notice of certain adjudicative facts in urinalysis cases).

c. Stipulations may be an adequate substitute for expert testimony.

(1) *United States v. Ballew*, 38 M.J. 560 (A.F.C.M.R. 1993). A stipulation of expected testimony that expert would testify that accused ingested cocaine was not a confessional stipulation. No providency inquiry was required before the stipulation could be received.

(2) *United States v. Hill*, 39 M.J. 712 (N.M.C.M.R. 1993). Evidence was insufficient to support conviction of use of marijuana where stipulations of fact, documentary evidence, and testimony failed to link positive urine sample to accused.

d. Expert evidence other than that used to meet the three-prong standard needs to meet evidentiary requirements of reliability and relevance. *United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999), *supplemented on reconsideration*, 52 M.J. 386 (C.A.A.F. 2000), *citing Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 589 (1993); *Kumho Tire C., Ltd. v. Carmichael*, 526 U.S. 137, 153–55 (1999). Although the three-prong standard announced in *Campbell* was watered-down in *United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001), it may still be required in cases where novel testing methods or procedures were used.

2. Experts at counsel table. *United States v. Gordon*, 27 M.J. 331 (C.M.A. 1989). Government urinalysis expert may remain in courtroom to assist in explaining testimony while another government expert testifies about lab testing procedures.

3. "Non-expert" expert. *United States v. Smith*, 34 M.J. 200 (C.M.A. 1992). Allowing undercover agent to testify that he had never tested positive for drugs although he was often exposed to them was permissible to rebut accused's defense of passive inhalation.

4. Use and Choice of Experts. *United States v. Short*, 50 M.J. 370 (C.A.A.F. 1999). Defense counsel asked for an expert who was not employed by the DOD drug lab to assess chain of custody and procedures and to assist with scientific evidence. The defense also raised a passive inhalation defense. Military judge denied defense request to provide assistance. Defense failed to show that the case was not "the usual case." Accused is not entitled to independent, non-government expert unless there is a showing that the accused's case is not "the usual case." Available government expert from lab was sufficient to provide expert testimony on passive inhalation/innocent ingestion.

D. Sixth Amendment Confrontation Clause issue. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that a "testimonial" statement can only be admitted against an accused if the declarant is present at trial or there has been a prior opportunity for cross-examination. For further treatment of this issue, see Criminal Law Dep't, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Criminal Law Deskbook, Vol. III, Tab T, Sixth Amendment - Confrontation Clause (2012).

E. Negative Urinalysis Results. A urine sample containing drug metabolites in concentrations below the regulatory cut-off level for positive results will be declared negative, even though the sample may indicate drug use.

1. Negative test results are usually inadmissible. *United States v. Johnston*, 41 M.J. 13 (C.M.A. 1994). Judge did not abuse discretion by excluding defense evidence of urinalysis test which was negative for the presence of marijuana three days after last charged use of marijuana. Admission of results of a negative, defense conducted, radioimmunoassay (RIA) test would have been too confusing. The proper testing methodology was GC/MS, and the RIA test showed the presence of marijuana (but below the cut-off level). The C.M.A. stated that the Mil. R. Evid. should be used to determine if negative test results are admissible and overruled *United States v. Arguello*, 29 M.J. 198 (C.M.A. 1989) (which prevented the government from using negative test results because such use was contrary to regulation).

2. Use of negative test results is permitted in the Coast Guard. *United States v. Ryder*, 39 M.J. 454 (C.M.A. 1994), *rev'd on other grounds*, 515 U.S. 177 (1995). Government's introduction of "negative" test results, which showed presence of marijuana, but at amount below cut-off, was not plain error. Results were used to corroborate testimony of witnesses who saw accused smoke marijuana and Coast Guard Regulation did not prohibit use of such test results.

F. Using Positive Test Results as Rebuttal Evidence.

1. *United States v. Graham*, 50 M.J. 56 (C.A.A.F. 1999). Accused testified that he was "flabbergasted" at having tested positive. Military Judge erred in allowing single rebuttal question by trial counsel about a prior positive marijuana result four years earlier, of which accused was acquitted in court-martial. The CAAF held that the prior positive marijuana result was not logically relevant: statistical probability is unknown as to whether accused might test positive twice within four years and there is no necessary logical connection between testing positive twice and being flabbergasted. *Accord United States v. Roberts*, 52 M.J. 333 (C.A.A.F. 2000). *But see United States v. Tyndale*, 56 M.J. 209 (C.A.A.F. 2001).

2. *United States v. Matthews*, 53 M.J. 465 (C.A.A.F. 2000). Accused tested positive for marijuana and was later given a command-directed urinalysis. At trial, the accused raised a good military character defense. The CAAF set aside the findings and sentence. The appellant was found guilty of a single specification of wrongful use of marijuana (between 1 and 29 April 1996). She testified that she did not use marijuana and that she did not know why she tested positive. The government then asked to use a subsequent command-directed urinalysis (conducted on 21 May 1996) for impeachment. The trial judge admitted the evidence for impeachment and ruled it was also admissible under Mil. R. Evid. 404(b) to show her prior use was knowing and conscious. The lower court found that her testimony raised the issue of innocent ingestion, but that it did not directly contradict that she knowingly used marijuana during the charged period. However, the lower court did find that the second urinalysis was relevant to the appellant's credibility and to rebut evidence of her good military character. The CAAF disagreed, finding that extrinsic evidence may not be used to rebut good military character.

G. *See generally* Captain David E. Fitzkee, *Prosecuting a Urinalysis Case: A Primer*, Army Law., Sept. 1988, at 7, and Major R. Peter Masterton and Captain James R. Sturdivant, *Urinalysis Administrative Separation Boards in Reserve Components*, Army Law., Apr. 1995, at 3.

VII. DEFENDING URINALYSIS CASES.

A. Defenses.

1. Passive inhalation. For this defense to be successful, a Soldier generally must have been exposed to concentrated drug smoke in a small area for a significant period of time. *See* Major Wayne E. Anderson, *Judicial Notice in Urinalysis Cases*, Army Law., Sept. 1988, at 19.

2. Innocent ingestion.

a. *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987). Accused suggested wife planted marijuana in his food without his knowledge.

b. *United States v. Prince*, 24 M.J. 643 (A.F.C.M.R.1987). Accused's wife allegedly put cocaine in his drink without his knowledge to improve his sexual performance.

c. *United States v. Robertson*, 39 M.J. 211 (C.M.A. 1994). Accused's roommate testified that she put cocaine in beer which accused unwittingly drank. Government improperly cross-examined roommate on prior arrest for conspiracy and attempted burglary, but error was harmless.

3. Innocent inhalation.

a. *United States v. Perry*, 37 M.J. 363 (C.M.A. 1993). Accused's explanation that he unwittingly smoked a filtered cigarette laced with cocaine 28 hours before test was not credible, given expert's testimony that (1) accused would have to ingest an almost toxic dose of cocaine to achieve the 98,000 ng/ml test result his sample yielded, and (2) cocaine mixed with a cigarette would not work since cocaine will not vaporize or pass through a filter. Erroneous admission of evidence that accused acted as informant was harmless.

b. *United States v. Gilbert*, 40 M.J. 652 (N.M.C.M.R. 1994). Accused allegedly borrowed cigarettes from a civilian which, unknown to the accused, contained marijuana. At trial, the civilian refused to answer questions about what the cigarettes contained. Defense counsel was ineffective for not seeking to immunize the civilian.

4. Innocent absorption through contact with drugs on currency: unlikely to be a successful defense. *See* Mahmoud A. ElSohly, Ph.D., *Letter to the Editor: Urinalysis and Casual Handling of Marijuana and Cocaine*, 15 J. Analytical Toxicology 46 (1991).

5. Use of hemp related products. Hemp products come from the same plant as marijuana. *See* The Art of Trial Advocacy, *Tips in Hemp Product Cases*, Army Law., Dec. 1998, at 30. Note: AR 600-85, para. 4-2p, prohibits the ingestion of products containing hemp and hemp oil.

6. Switched Samples ("chain of custody" broken).

a. *United States v. Gonzales*, 37 M.J. 456 (C.M.A. 1993). Where observer had no recollection of how the urine was transferred from one container to another, but testified that the urine was never out of her sight, military judge properly overruled chain of custody objection.

b. *United States v. Montijo*, No. 30385, 1994 WL 379793 (A.F.C.M.R. June 28, 1994) (unpublished). Government was not required to establish chain of custody for sample bottle from the time of its manufacture until its use.

7. Laboratory Error.

a. *Unites States v. Manuel*, 43 M.J. 282 (C.A.A.F. 1995). Urinalysis test results were improperly admitted where laboratory failed to retain accused's positive urine sample after test was completed. Regulation requiring retention of sample conferred substantive right upon accused. Conviction set aside.

b. Problems at Fort Meade Laboratory. On 24 July 1995, the commander of the Fort Meade Forensic Toxicology Drug Testing Laboratory discovered that lab technicians had violated procedures by switching quality control samples. All positive test results were still scientifically supportable, since the GC/MS tests were not affected.

8. Good Military Character. *United States v. Vandelinder*, 20 M.J. 41, 47 (C.M.A. 1985). Good military character is pertinent to drug charges against an accused because it may generate reasonable doubt in the fact-finder's mind.

9. Specific Instances of Non-Drug Use to Rebut Permissive Inference. In *United States v. Brewer*, 61 M.J. 425 (C.A.A.F. 2005), the defense requested four witnesses to testify that they knew MSgt Brewer and that they had never seen MSgt Brewer smoke marijuana as part of the defense "mosaic" innocent ingestion defense. The military judge denied the proffered witness testimony ruling that this was improper character evidence under Mil. R. Evid. 405, as specific instances of conduct of non-use. The CAAF held that the military judge erred in denying the requested witnesses because it was relevant. Findings and sentence set aside.

B. Defense Requested Tests.

1. Tests for EME metabolite of cocaine.

   a. The government is not required to perform the test for EME metabolite when requested by defense if the sample tested positive for BZE and the chain of custody is not contested. *United States v. Metcalf*, 34 M.J. 1056 (A.F.C.M.R. 1992); *United States v. Pabon*, No. 29878, 1994 WL 108866 (A.F.C.M.R. Mar. 25, 1994) (unpublished), *aff'd*, 42 M.J. 404 (C.A.A.F. 1995).

   b. Positive test result for BZE (metabolite tested for within DOD) is sufficient to support conviction for wrongful use of cocaine; test for EME metabolite unnecessary. *United States v. Thompson*, 34 M.J. 287 (C.M.A. 1992).

   c. If tests for BZE and EME metabolites conflict, results may be insufficient to support conviction for wrongful use of cocaine. *United States v. Mack*, 33 M.J. 251 (C.M.A. 1991). Test results inadequate where test for BZE was positive and test for EME was negative.

2. Tests for contaminants. *United States v. Mosley*, 42 M.J. 300 (C.A.A.F. 1995). Military judge did not abuse his discretion by ordering retest of accused urine sample for BZE, EME, and raw cocaine. Such tests fall into a "middle ground" where military judges are not required to order such testing, but do not abuse their discretion if they do.

3. Blood tests and DNA tests. *United States v. Robinson*, 39 M.J. 88 (C.M.A. 1994). Military judge did not abuse discretion in denying defense request for "secretor test" to show accused was not source of positive sample where defense was unable to show discrepancies in collection or testing of sample.

4. Polygraphs. *United States v. Scheffer*, 523 U.S. 303 (1998). *Per se* rule against admission of polygraph evidence (Mil. R. Evid. 707) in court martial proceedings did not violate the Fifth or Sixth Amendment rights of accused to present a defense to charge that he had knowingly used methamphetamine. *Per se* rule serves several legitimate interests, such as ensuring that only reliable evidence is introduced at trial. *See also United States v. Williams*, 39 M.J. 555 (A.C.M.R. 1994) (Mil. R. Evid. 707 is unconstitutional), *set aside*, 43 M.J. 348 (C.A.A.F. 1995) (accused waived issue of admissibility of polygraph because he did not testify). *But see United States v. Wheeler*, 66 M.J. 590 (N-M. Ct. Crim. App. 2008).

5. Hair.

   a. *United States v. Bush*, 47 M.J. 305 (C.A.A.F. 1997). Accused was convicted of use of cocaine. The CAAF held that mass-spectrometry hair analysis evidence was sufficiently reliable to be admitted into evidence in court-martial to establish cocaine use, even though there was some disagreement between experts about the procedure. *See also United States v. Cravens*, 56 M.J. 370 (C.A.A.F. 2002).

b. *United States v. Nimmer*, 43 M.J. 252 (C.A.A.F. 1995). Military judge precluded defense from introducing negative hair test results, because the test would not have ruled out a one-time use of cocaine. Case remanded for re-litigation of this issue using the proper standard of *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987) and *Daubert v. Merrell Dow Pharmeceuticals, Inc.*, 509 U.S. 579 (1993).

c. *See* Major Keven Jay Kercher, *Time for Another Haircut: A Re-look at the Use of Hair Sample Testing for Drug Use in the Military*, 188 Mil. L. Rev. 38 (2006); Major Samuel J. Rob, *Drug Detection by Hair Analysis*, Army Law., Jan. 1991, at 10. *See also United States v. Adens*, 56 M.J. 724 (A. Ct. Crim. App. 2002); *United States v. Cravens*, 56 M.J. 370 (C.A.A.F. 2002).

C. Experts.

1. Defense consultants. *United States v. Kelly*, 39 M.J. 235 (C.M.A. 1994). Defense counsel did not demonstrate necessity of presence of defense urinalysis consultant at trial where he had telephonic access to expert consultant and did not identify any irregularity in test.

2. Expert witnesses. *United States v. George*, 40 M.J. 540 (A.C.M.R. 1994). Military judge improperly precluded defense expert from testifying that the presence of cocaine on everyday objects may have led to contamination of the urine sample.

3. Choice of Experts. *United States v. Short*, 50 M.J. 370 (C.A.A.F. 1999). Accused not entitled to independent, non-government expert unless there is a showing that the accused's case is not “the usual case.”

D. Use of Negative Urinalysis Results.

1. Negative test results are generally not admissible. *United States v. Johnston*, 41 M.J. 13 (C.M.A. 1994). The military judge did not abuse his discretion by excluding defense evidence of a urinalysis test which was negative for the presence of marijuana three days after the last charged use of marijuana. Admission of test results would have been too confusing.

2. The defense may use negative test results only if relevant to the charged use. *United States v. Baker*, No. 28887, 1993 WL 502185 (A.F.C.M.R. Nov. 30, 1993) (unpublished). The military judge properly excluded evidence that the accused gave a urine sample which tested negative for use of illegal drugs where the sample was given over a month outside the charged period. The defense failed to show the relevance of the negative test.

E. After *United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999), *supplemented on reconsideration*, 52 M.J. 386 (C.A.A.F. 2000), the best defense may be a good offense. Raising the bar for the government has opened the door for defense to be successful in attacking the government’s case primarily on the second prong of *Campbell*. *But see United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001) (stating that the three-prong standard in *Campbell* is not mandatory).

F. *See generally* Captain Joseph J. Impallaria, *An Outline Approach to Defending Urinalysis Cases*, Army Law., May 1988, at 27, and Major R. Peter Masterton and Captain James R. Sturdivant, *Urinalysis Administrative Separation Boards in Reserve Components*, Army Law., Apr. 1995, at 3.

Chapter 45

This document attempts to highlight issues that must be considered in the trial and defense of Article 120 adult sexual assault cases. Much of the information here applies to *all* complex trials, and readers are directed to specific areas of trial practice in the Combined Deskbook, Volume III. As with all trial practice pointers, the recommendations here are not rules but rather guidelines. Every trial is unique and flexibility is important in successful litigation.

I. The Investigation – of an assaultive crime

A. **First Responders** : train to: believe victim; gather only basic crime data, deferring to single forensic interview; know medical systems; support victim; seek SARC & VA & TC immediately

B. **Continuing investigation** : unified approach best (see SART, infra, II.e.); best is a single interview by trained interviewer with input from TC, CID, VA, SANE; more likely will be several interviews of victim;

- presume that you will interview everyone who knows victim, offender, or incident, but use common sense; extensive interviews may yield information that hurts your side of the case; will an interview advance your theory, explain behavior, or weaken the case of your opponent? If not, consider directing energy elsewhere.

C. **The crime scene** :

-- visit the scene. As soon as possible. Arrange notice from command/CID upon allegation of sexual assault; should allow arrival at actual scene; visit even if scene has been released; recall that CID owns the scene; JAG can only suggest area of investigation

--document everything;

-photos of all rooms, state of furniture, clothes; include all places of contact betw/ victim & offender, not only scene of the assault; take photos even if time has elapsed! [creates physical evidence for the panel to take into deliberations]

- diagram all relevant areas

- return to scenes with victim, if she is willing, post-interview (or as part of Cognitive Interview context reinstatement); her perspective is invaluable; verbal misunderstandings are often cleared by details of the scene;

- could others hear, or is it noisy? What were the sight lines? Is the area effectively remote from safety?

-scene visit provides an opportunity for wide range of sensory & visual cues to re-create at trial. Chance to photograph from exact viewpoint of victim. Taking witnesses to scene has same advantages.

D. **Physical evidence**

1. SAFE – encourage Sexual Assault Forensic Exam; don't insist; use at least 96 hours window for evidence; military hospitals give SAFE priority[1]

2. Clothing – seize, even if washed; remember bedding; no time limits

3. Photos – document everything & everywhere; external building photos (more pieces of evidence look like a better case), neutral locations where victim & offender met, spent time; work locations of v & o

4. Cellphone, facebook, computer photos of the crime; forensic analysis of computer for pornography, e-mail

[1] MEDCOM Reg. 40-36 (21 Jan. 2009), 6.b.(3); http://www.sapr.mil/media/pdf/directives/Policy_Army_MEDCOM40-36.pdf

5. Demonstrative evidence – *create* diagrams of all scenes; lists of items seized or tested; timelines

6. Offender – suspect sexual assault forensic examination kit and clothing by command authorization or consent to CID agent; document offender's room, even if no contact there (more information is always better)

E. **Scientific Evidence** :

1.DNA (USACIL has new staff dedicated to Sexual Assault); DNA can be found on buttons, clothing, belts, bedsheets, floor, sometimes even on door handles; consult or learn where it may be found; even late reports or washed clothing can yield DNA;

– insist on DNA testing where it is likely to exist,

--Corroborates that this accused had sex with the victim

--if TC relies on an admission by the accused, TC must put that statement in evidence, with its exculpatory story. Accused is much less likely to testify.

2. Trace Evidence: look for hairs, fibers: test them; {TC & DC: be aware of challenges to "trace evidence" contained in the "NAS report";2}

3. transfer of evidence goes both ways! – look for victim's DNA, hair, fibers on the offender; command authorization to search or consent to CID agent needed for suspect sexual assault forensic examination kit;

4. test the evidence (*consult* with USACIL, but *decide* for yourself what needs to be tested

--relying on an admission of the sexual act requires the government to introduce the exculpatory statement of the accused, which is usually bad trial tactics

--panels expect testing

--often corroborates the victim's report;

-- may be exculpatory & discoverable {DC: insist on testing in the right case}

--present even negative results (at least you tried! Avoids "the government could have tested that evidence, but they didn't")

F. **Behavioral Evidence** : how did victim & offender act after the event?

-- normal behavior? Delay, inconsistent or incomplete statements, fear, depression, trying to normalize life (cheerful, contact w/ offender, dating); denial, rationalization

-- changes in activity, eating, work performance

-- offender change in relationship to victim (if any relationship before crime)

-- "strange" behavior likely to support report of crime (why would she suddenly act like that?) – sleep problems; hypervigilance; outbursts of anger; unusual irritability; exaggerated startle response; inability to recall details of the event. NOTE: all of these are listed as possible symptoms of PTSD in DSM IV-R.

G. **Offender background:** focus on offender behavior with this victim, with other women (e.g.: regular harassment, in all forms, indicates an attitude toward women, relevant to claim of consent or mistake ("You think all women are objects not worthy of respect, and that colored your actions");

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[2] National Research Council of the National Academies of Science, *Strengthening Forensic Science in the United States*, 2009. https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf , pp. 155 (hair), 161 (fiber).

-get all discipline from all prior assignments; any harassment or SA complaints, pursued or otherwise; find & interview those complainants

-get OMPF, enlistment documents

-have CID run prior criminal record (some criminals are still allowed into military with waivers)

-ask unit mates, co-workers, friends how offender talks about women, about this victim, about sex (locker room talk);

-how did offender arrange to meet victim

-was there really a "relationship"?

-cellphone, facebook, twitter, chat room postings about women, or this victim

H. **Searches**

– suspect sexual assault forensic examination kit

-offender's home, bedroom: clothing worn at crime; evidence of "trophies" that victim may not realize were taken;

-- phone entries, social media pages

-- offender medicals

-- DNA sample

-- consider mental health records

II. THE VICTIM – the most important witness, but *never* the *only* witness

The victim is a primary source of information about any crime. In non-stranger sexual assaults, it is common that only two people were present for the sexual activity. The victim is a walking crime scene and eyewitness. Eliciting every possible detail from the victim, and forming a government case to communicate the events and make them believable requires sensitivity, careful interviewing and planning.

A. Interviewing – Listen. Develop Rapport. Never condescend. Elicit factual, emotional, and sensory detail. NEVER interview alone: have a "prover" with you;

-- establish a system with the command & CID to notify TC of a report of sexual assault; expect to go to hospital or CID to meet victim;

-- recognize that counsel is not the primary interviewer; advise CID, but do not invade their role;

--TC must establish a relationship with the victim as early as possible; she will likely have been interviewed before, perhaps many times.

- never condescend : treat victim like an intelligent, truthful adult; everyone recognizes condescension, and no one likes it;

- focus the first meeting on rapport-building/introduction; there will be multiple meetings with the victim; *inform* the victim about you and the criminal process before you ask; no need to ask for details which have likely already been given to law enforcement or the command; trust is crucial; a personal connection with the victim helps both before & during trial

- say you are "sorry this happened to you"; do not say "I understand how you feel" unless you have been a sexual assault victim;

-convey your belief in the victim & your intention to pursue justice;

- never lie to victim : gain & maintain trust; explain Military Justice system & victim role in it, early & often

-- explain Victim Witness Liaison and Victim Advocate roles; secure those services for the victim

- never make promise you cannot surely keep (e.g.: "conviction likely"; "you won't have to testify")

- explain actions taken & about to be taken; explain key decisions; know and follow Victim's Rights (AR27-10, Appendix D-1 *d.*)

--Trial Counsel must meet the victim immediately; first contact is a huge advantage; TC should know of assault long before DC, and solidify contact

- full interview often not needed immediately; create relationship,

-explain system; get only details missing from CID reports/interviews;

- never let DC be first to explain system to your victim; explain who DC is, the defense right to talk to the victim; she has right to have someone with her; she can record the interview;

- always emphasize to tell the truth, no matter what it's "cost" to the prosecution

{Defense Counsel: interview victim as soon as possible; if TC has not done so, you gain the advantage.

-a complete interview can establish inconsistencies, allowing challenge to later-remembered details, establish doubts about sequence and behavior; prepare your cross-examination by eliciting client-favorable details;

-confrontation is rarely helpful or necessary at this interview; save it for cross-examination

-explain the system (multiple hearings, delay, effect on the career of your client from defense perspective first may soften the victims resolve)}

-- In-depth interviewing

-Timing of the interview depends on quality of existing investigation; if thorough, sensitive interview by law enforcement or a forensic interviewer, defer until rapport established

-<u>LISTEN</u>! Allow the victim to report the experience in her own way. This report may not be linear or chronological; listen more than you talk; supply no information (e.g.:"I know that "X" happened. What happened next?"); assumptions misdirect victim, may lead to "compliant" response that is not accurate; let victim/witness report her own impressions & memories

- avoid repetitive factual interviews; victim is re-traumatized each time she must tell another stranger about this intimate and frightening event; multiple interviews may be needed if victim tires before entire incident is clear

- trauma victims remember new details over time; an interview late in process can be helpful

-- *Begin by believing* the victim's report; victims frequently abandon the investigation if they think that Trial Counsel, the command, or CID does not believe she was assaulted; the rare false reports will be exposed by investigation.

-follow with complete investigation

- quality investigation will reveal:

- corroborative details

- background of offender & victim

- victim recantation often is caused by insensitive or doubting interviews or perception that system not invested in case

-learn what other forces (pressure from family, unit, friend of the accused) may affect the victim's confidence, willingness to pursue the case;

- never cross-examine victim, unless real evidence of truly false (rather than incomplete) allegation

- lies or incomplete statement about collateral facts (underage drinking, drug use) are common; asking "what were you thinking (or feeling) when you said X?" is better than "why did you tell us a lie?"

-law enforcement reports are an opinion of the writer, unless direct quotes; never assume inconsistency only from a report; clarify with non-doubting questions

-Study and apply accepted interviewing methods

-FETI : Army CID's Forensic Experiential Trauma Interview:

-designed around scientific principles on formation & recall of traumatic memories;

-elicits great detail w/out confrontation

-elicits lots of sensory & emotional evidence

- Cognitive Interview is effective at eliciting details beyond a "who, what, when, where, and how." Uses "context reinstatement" among other techniques

-goal of victim interview: learn everything the victim is "able to remember" (a phrase which reduces pressure of recall, reducing guessing) about events before, during, and after the sexual act.

-feelings

-thoughts

-sensory impressions (smell, touch, taste, sounds)

-emotions of victim before, during, after

-the sensory and emotional aspects of the victim's experience are the strongest evidence of truth; they humanize the victim for decision-makers, and elicit information unlikely to be invented

-Unusual sounds, feelings, smells, sexual practices can improve credibility b/c not the "story" a liar would invent; [e.g.: tampon thrown on floor of otherwise immaculate house was not removed voluntarily]

-Expand time frame of the interview to include all interactions between the victim and the offender, before and *after* the assault. Some victims talk with, text or even date after the assault is a common "normalization" reaction of trauma victims

- learn victim's history; background in life, military; humanize her at trial

-ask about prior victimization

-ask about prior sexual assault complaints

- What sounds wrong? Explore statements that seem odd: victim will have explanation, or at least reason for activity or statement; "What you were thinking when . . ." is better than "Why did you do [say] that?"

- Understand the emotions, reactions, and motivations that caused the unexpected behavior. Convey them to the fact-finder.

-What sounds right? Why do you believe the victim's report? Be sure the fact-finder learns all those reasons.

--Collateral Misconduct: e.g.: underage drinking, drug use,

-no promises : commander's decision; explain parameters of CM;

- assure victim TC only interested in the sexual crime against her; encourage truthful disclosure of "wrong" or embarrassing facts

-Adultery is NEVER misconduct by a sexual assault victim !

- Deferral? : DoD suggests commanders defer CM until after SA trial.

-avoids the situation where the victim is punished, but the offender later avoids prosecution or punishment, BUT

-bad trial strategy: automatic impeachment ("she only claimed assault to avoid punishment for drinking"); discuss w/ victim resolving CM pre-trial (punishments usually are minimal); resolution pre-trial eliminates self-interest cross-examination, allows "*she* admitted her misconduct" argument;

{**Defense Counsel**: Interview the victim. Always.

-- "equal access" to witnesses (RCM 703)

--victim may refuse interview, or set limits/conditions; *U. S. v. Irwin*, 30 M.J. 87 (C.M.A. 1990);

-- judge *might* compel an interview. *U.S. v. Doyle,* 17 C.M.R. 615 (AFCMR 1954).

-- usually friendly, fact-gathering opportunity. Learn victim's intelligence, confidence, and how she will appear to a panel

--confrontational interview only rarely

-reveals cross-examination questions.

-alienates/terminates interview

--plan interview to elicit facts supporting defense theory

--Gain concessions for cross-examination

--lock in inconsistencies

--ask questions too dangerous to ask at trial: often get good answers

-ask for victim's feelings about the accused: neutral or favorable answer (often they were once friends) assists plea negotiations, sentencing.

--if the victim refuses to talk to the defense:

-can move for judicial order under equal access

-may be good cross-examination by itself}

B. Victimology: a sexual assault is a highly traumatic experience. It can be useful to think of it as an assault that has a sexual element. Military panels are familiar with the results of trauma. Use that knowledge to your advantage in fighting the assumptions the panel may bring to a case.

1. Reactions to Trauma: There are as many reactions to a traumatic event as there are victims (or observers) of that event. In the military, we have experience with varied reactions to battle trauma, ranging from stoic acceptance to emotional breakdown. Yet society has created rigid behavioral expectations for a sexual trauma victim, often called "rape myths," and military panels seem to share them. Victim behavior which differs from these expectations often affects how jurors assess victim credibility.3 Overcoming these normative expectations is a key trial skill for Trial Counsel. Both lay witnesses and experts can help with this task. Many explanations for counter-expectational behavior also make logical sense once they are explained. The explanation process begins with voir dire and continues through evidence and closing argument.

a. Victims Rarely Fight Back (or Scream):

-"Frozen fear" : also known as "tonic immobility"; common in trauma situations; manifested by passivity and silence

-includes: "fear" of the physical power of an attacker

- shock that a friend would assault (& *betray*) them,

-shock of sudden assault

-inability to focus on events

-mentally distancing themselves from what is happening

b. Victims rarely report assault immediately : Only 30% of military sexual assaults are reported to anyone.4 A majority are reported from hours to days later. Reasons (sensible if elicited carefully):

-Confusion (about what happened and whether it was illegal),

-guilt (self-blame if victim was drinking, engaging in flirting or prior sexual relations with the offender, or voluntarily travelled to an isolated place where the assault took place), or –

- concern that others will doubt account (including knowledge that police or the chain of command did not take other reports seriously)

-"don't be a snitch" mentality

-unit pressure

-repercussions of reporting on career,

-rank differential between offender & victim

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[3] These same normative misunderstandings of victim behavior also obviously affect appellate courts. The panel in *United States v. Lucas*, 2012 WL 3728017, NMCCA 201100372, 28 Aug. 2012, endorsed half a dozen rape myths in reversing a rape conviction.

[4] 2010 DoD *2010 Workplace and GenderRelations Survey of Active Duty Members*, p. 35. http://www.sapr.mil/media/pdf/research/DMDC_2010_WGRA_Overview_Report_of_Sexual_Assault.pdf

-belief that nothing will be done

-concern about cost of complaint to offender;

-rationalizing that assault was not criminal;

- perception that most sexual assault reports are false and if the victim reports, she will be viewed as a liar by others in the command, especially if victim behaved counterintuitively;

--[trial strategies: people believe that prompt report = credible; late report = normal;

--explain why the behavior is logical? If historically little command action/support, is that logical? If others were treated badly by unit, is that logical? Use the developed emotional reactions of your victim to explain the late report. Have her testify to her reasons. Even strange reasons can support credibility. Some explanation is mandatory.]

c. Not all victims cry

-trauma victims often become stoic, internalize to cope

-strength under pressure is a military value

-victims of sexual assault often react in ways similar to battle stress

-time passes before trial; human beings cope.

-any emotion possible at trial: tears, "flat affect (wooden, non-reactive), looking "normal."

2. Behavior outside of Normative Expectations (Rape Myths)

a. Myth: Only strangers rape : less prevalent now than in past, BUT

--corollary: non-stranger sexual assault is something *less than "rape"* & therefore not as important

-- civilian: 82% rapes of women, 85% rapes of men committed by non-strangers.5

--Military: 97% of violent sex crimes committed by acquaintances; [NOTE: only 21% by a family member or significant other (boyfriend, date).]6

b. Myth: Rapists always use weapons and cause physical injury :

-Few non-stranger sexual assaults leave visible injury.

-Weapon is a concept.

-most common weapon in military sexual assaults = *alcohol*

-offenders use least force necessary, often only a threat;

-often only an obvious difference in size and strength.

-- normative belief (myth): lack of physical resistance = implicit consent; *see* "Victims Fight Back (or Scream)", supra;

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[5] Centers for Disease Control, National Intimate Partner & Sexual Violence Survey, 2010. Further breakdown of female rapes: 51.1% Current or former intimate partner, 12.5% family member, 2.5% Person of Authority, 40.8% acquaintance (more than 100% due to multiple perpetrators in an incident.)

[6] Army Gold Book 2010, pp. 125-26. http://www.ria.army.mil/docs/GoldBook.pdf

[**trial strategy:** use statutory language: "Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent."7 Argue "when fear is in the room, consent is not."

c. Myth: Women *often* lie about being raped: this myth remains strong in the military; actual number of military false allegations untested, unknown; reliable civilian studies find *only* 2% to 10%.8

--frequent battleground issue: address in voir dire, by experts

d. Myth: Rape victims assume the risk of being raped ("asking for it") :

-drinking too much

- wearing revealing clothes,

-dancing like young people dance

-innocent flirting

-[**trial strategy:** "A current or previous dating or social or sexual relationship by itself or the manner of dress of the person . . . shall not constitute consent."9 Start here. Show that victim's behavior was the norm for her age & cohort; "nobody buys a 'rape dress' and nobody 'asks to be raped.'"]

--[**trial strategy:** address myths directly, in voir dire & in argument. Emphasize judicial instructions ("only facts of this case are relevant," "you will be violating your oath if you *assume* someone wanted forcible sex b/c of how they dress or dance")

3. Recantation/non-cooperation:

--criminal justice process:

- adds to victim trauma; studies suggest that the trial process may be more traumatic than the assault for some victims;

-demands time and energy

- is slow.

-delays recovery by focusing the victim on the event through interviews, Article 32 hearings, motion hearings, and trial preparation.

--expressions of doubt by investigators, trial counsel, the command or fellow soldiers may cause victim to "give up" the process, recant, or stop communicating.

--family, friends, others in military unit may add pressure

-financial concerns (in familial rape) may also result in recantation

-primary reason victims recant is fear (of further attack, effect on career)

4. Inconsistent statements – the *norm* in cases of trauma; seen by juries as indicator of falsity

-- truth-tellers more likely to be inconsistent than liars; liars consciously try to repeat same story; truth-tellers reconstruct the event for each statement, rarely in identical language;

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[7] Art. 120 – definition of consent
[8] Lisak, David, et. al., False Allegations of Sexual Assault: an Analysis of Ten Years of Reported Cases, 26(12) Violence Against Women 1318 (2010).
[9] Art. 120 – definition of consent

-- trauma victims rarely remember events chronologically

-- many trauma victims "normalize" -- try to make sense of the attack, explaining away the pain or severity of the incident; this can include continued contact w/ the offender, texting him, phone calls;

-- cognitive avoidance: damping down the worst part of the trauma

-- self-blame, or alternative explanations that make the betrayal less traumatic

--accounts shift as victim becomes more objective

5. Military victim profile : 95% female; 60% less than 1.5 years service; 68% age 18-22. Alcohol used by victim or offender in 63% of cases. Sixty percent of crimes committed on Friday, Saturday, Sunday.10

--Vulnerability – This military victim profile mirrors civilian college profile;

--Military victims often have limited support:

-"free" from parental control or guidance;

-limited time for close friendships in new place

- new and "alien" culture designed, in part, to reduce independence.

-lots of free time

-readily available alcohol

--offenders select vulnerable victims; *remind* panel of this logical fact

- consider post-crime vulnerabilities of trauma victims

-self-medication with alcohol or drugs

-further isolated by shock, fear, shame, and self-blame

-Victims cope with trauma in unexpected ways

C. **SHARP Program** – the Sexual Harassment and Assault Response Program provides extensive support services to victims, including expedited medical treatment, expedited transfer on request, referral to psychological treatment, access to a legal assistance attorney on request, and continuing Victim Advocate support. See Volume I, Tab-E.

D. **Victim Witness Liaison Officer** – Every SJA office has a Victim Witness Liaison Officer whose job is to guide victims and witnesses through the trial process. The VWLO is designed as Trial Counsel support, unavailable to Defense Counsel. See Victim Witness Assistance Program, Volume I – Tab D.

E. **Sexual Assault Response Teams** – Use of multi-disciplinary teams to investigate and prosecute sexual crimes has proven value. The military rarely creates, joins, or uses MDTs (called SARTs in the adult context).

--proven aid to investigation, prosecution and victim care

-- rarely formed or joined in military

-- minimum membership: prosecutor, SANE, DSS, medical, CID/police, VA

-- cross-training of needs/services available –

[10] Army Gold Book, supra, note 3, pp. 124-25.

-- trust among colleagues allows assessment of what each can offer prosecution and what additional information may be available or needed

-- requires active TC involvement; many civilian jurisdictions have established SART; TC should employ their expertise even if none on-base; TC has needed relationship with local prosecutor (on jurisdictional issues), can use that as an introduction to the SART

-- Sexual Assault Review Board required at installations: same composition, but historical review function; can easily be adjusted to preview cases; need to separate from command enough to avoid UCI, as SARB reports directly to installation commander.

III. Offenders --- 13% of new recruits have already committed sexual assault without being caught.[11]

A. **Motivation** – involves a "fulfillment of the offender's needs" – identify them for the panel.

--Deviant arousal: sexualizing typically non-sexual events, emotions or contexts ; interest in rape, not sexual relations

--Character trait motivation :

-narcissism

-lack of empathy, remorse, guilt (anti-social personality)

-beliefs of offender devalue rights of others (e.g.: devaluation of value of women in general, or in military)

--entitlement : above the rules of society

B. **Evidence of planning**

--there are no coincidences

-document & prove every step he took since first interaction with victim, however long ago

-how does activity with victim differ from activity w/ other friends

--What *choices* did offender make? How do they indicate lack of mistake?

--offenders pick vulnerable victims (lonely, young, drunk, isolated) : how did offender know that victim was vulnerable?

C. **Force** – how is it manifested? How was it applied?

--superior rank or authority

--physical size

--threat

--incapacitation; alcohol, drugs

D. **Manipulation :** How did offender manipulate the audience (i.e.: fellow soldiers, chain of command, law enforcement, jury panel). *"Nice is a behavior choice, not a character trait."* An offender knows that being "nice" makes it hard for people to believe he is a rapist.

--"nice" is not a character trait: therefore it cannot be subject of character testimony – but often is; argue for expert on offender behavior to rebut claim that MRE 404 allows character testimony about :

[11] Mc Whorter, et. al, "Reports of Rape Reperpetration by Newly Enlisted Male Navy Personnel", Naval Health Research Center Report No. 07-16 (2009); http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA519627

--popularity with women ("I wouldn't need to rape") – see Motivation, supra

--general kindness, willingness to help people – is this "societal grooming" to prepare for the day he is caught?

--show each "nice" act advanced the crime: nice to victim, nice to others in the bar, nice to bartenders (creating witnesses), even to police investigating

--argue that "nice" hides true character, which is manipulative, predatory, improperly motivated criminal

E. **Pretext phone call** (or e-mail or text) from victim to offender; be sensitive to emotional cost to victim; offender may acknowledge victim's incapacity, may apologize; plan carefully: what will call accomplish?

F. **Offender as witness**: *presume* he will testify; *prepare* cross-examination

--always interview; often admits sex, blames victim; lies may contradict provable facts; see pretext phone call, above [keep in mind legal and ethical limits to interviewing an accused (Art. 31, legal representation)

--obtain concessions

-wanted to have sex with victim;

-prepared to have sex

-intended to get her alone

-did she say "no"? how often?; what changed?

-did she say "yes"?; directly, or inferentially?

-from what did you infer "yes," rape myths?

-level of intox. (vomit?, needed assistance walking, removing clothes?),

--was she unconscious?

-who made first contact? Details; when did plan to have sex begin

-limits of prior interaction w/ victim; really a "date"? or just a pick-up; how well did they know each other

IV. Witnesses – someone knows what happened. Investigation is the key for DC & TC.

--*key* witness: first disclosure: all aspects of victim emotion, behavior, detail, reasons for delay; why choose this person (logical disclosure instead of police?)

--anyone who saw any part of the incident itself; interview all of them, even those favoring victim, or accused

--evidence limited only by your interviews; someone in unit knows the dirt, and probably the facts; use paralegals (properly trained) to discover friends & enemies of offender and of victim

- ask the victim; ask her friends who would know about the offender

-- ask the offender who would know about the victim

-- always ask at prior assignments. Misconduct? Sexual Harassment?

-- civilian record check on arrests even if no convictions;

-- former significant others are a great source; sex offenders frequently have personal violence history; take effort to track down these "ex-es."

V. Experts

A. **Medical**: most effective if a SART protocol is in place & followed: reduce victim trauma, keep actors within purpose of their roles; exchange information on how to conduct medical exam & interview, how to collect evidence; cross-train actors;

-- SANE : nurse first, with *training* in evidence collection; *primary purpose* is treatment of the patient, not agent of police; hospital protocols *require* sexual assault forensic examination upon request; *see*, TCAP sample SANE direct[12]

-- Medical hearsay: holistic treatment of patient's physical *and psychological* injuries is the norm; future treatment plan requires identity of threat; *how* med people testify makes difference for admission. Read U.S. v. Gardinier, 65 M.J. 60, 65-66 (CAAF, 2007) for how *not* to examine SANE; see TCAP direct exam of SANE: http://tinyurl.com/9mlkm8v ; *Gardiner* should be argued as limited to the specific testimony in that case; many courts have admitted forensic interviews as medical hearsay[13]

-- social work : treatment of mental health requires information on nature of assault and identity of offender;

--Medical records are discoverable. There is no medical records privilege in the MRE. But see psychiatrist-patient privilege, MRE 513. TC should protect victim & move to redact mental health records within the medical record.

B. **Trauma victim behavior** –

--"Rape Trauma Syndrome" – not in DSM IV-R, but recognized widely; *U.S. v. Houser*, 36 M.J. 392 (CMA 1993) : extensive explanation of "stages" of "rape trauma model"; expert need not meet or treat victim; use the cases as precedent, but avoid the label "rape trauma syndrome," because this phrase is easily attacked;

-- counter-normative behavior : ("counter-intuitive" behavior); congruence with issues in rape trauma syndrome, but without the label; many different professions can testify from experience w/ victims; need not meet or treat victim; a better way to explain victim behavior than rape trauma syndrome;

-- PTSD : many victims meet diagnosis; BUT many do not: DSM IV-R is vria, a useful listing of victim reactions to trauma;

-- explain delay – this is more common than not; self-blame, concern others will not believe, or will not act, or will protect the assailant; concern about repercussions with mutual friends of victim & offender (including in the military unit); not wanting to ruin "friend's" life; shame in society; being labeled as promiscuous;

-- explain inconsistency, explain newly remembered details

--who can testify to trauma behavior?:

--ER social worker – victim behavior (disjointed, incomplete account of things, remembering omitted details, reluctance to discuss, flat affect, all counter-normative behavior is typical of victim of trauma); cannot testify victim *is* trauma victim, but argue that consistency leads to no other conclusion; avoids attack on "special interest in sex

[12] Find the TCAP direct here: http://tinyurl.com/9mlkm8v
[13] *United States v. Lukashov*, No. 10-30348, 9th Cir. 2012;

crimes" for sexual assault counselors, SANEs, etc.; panel members know trauma, even if they do not think of sexual assault in same category; better if opinion NOT based on particular victim;

-- Psychologists/psychiatrists : see *U.S. v. Houser*, supra; may also testify re: PTSD; can be non-treating expert re: rape trauma; PTSD diagnosis needs treatment of this victim;

-- police officer with experience in sexual assault

-- rape crisis counselor with hundreds of experiences

-- rape crisis workers, counselors, administrators; be sure they know both experience & theory, or teach them; subject to bias claim, but have lots of experience, may have academic knowledge;

-- SANE: treatment, medical hearsay witness; can be expert on victim behavior; may confuse roles; if treated victim, cross-exam re: actions of this victim can be bad for government, good for DC; suggest using neutral, non-treating behaviors expert;

C. **Toxicology** – alcohol-related cases: what can they tell you? What can't they tell you? Limited by incomplete info re: amount, concentration of alcohol consumed. May open door to victims drinking experience, amount consumed, prior behavior when intoxicated? Who do you want to cross-examine the alcohol expert?

{**DC**: ask past behavior questions here or elsewhere; get toxicology to talk about blackout (memory loss fr/ alcohol, but ability to talk, consent) vs. pass-out (unconscious); past history of drinking or drug use may be relevant to *affect* of alcohol on victim on later crime date}

D. **Mental Health** : inquire of the victim about psych treatment, post-assault, and prior to assault; TC: get records if relevant (but if TC gets waiver of the privilege, it is waived for all purposes, & discoverable)

-- see, The Prosecutor's Guide to Mental Health Disorders, http://www.ndaa.org/pdf/the_voice_vol_1_no_10_2007.pdf

DC: seek mental health records in the appropriate case.

--MRE 513, Psychiatrist-patient privilege contains procedures for obtaining and protecting mental health records. *See* Combined Deskbook vol. 3-tab R,IX.G.

E. **Scientific evidence**

1. Melendez-Diaz: confrontation right requires government to call witnesses who tested materials, if results are to be used in evidence; *United States v. Blazier (Blazier II)*, 69 M.J. 218 (C.A.A.F. 2010).

-*experts may* testify to meaning of machine-generated results.

-(Complex and evolving area, *see* Confrontation Clause Outline, Combined Deskbook vol. 3-tab T, p. 15 et. seq.)

2. DNA: TC: if you have it, get it tested, use it. Juries expect it, like it; "why not?" defense if untested; argue "what did you expect him to say, with DNA proving sex?" Can avoid using offender statement to prove sexual act element (you want offender on the stand).

{**DC:** sometimes good for you. Never stipulate to it. Can be useful cross-exam witness: talk to examiner}

-- where was it?

-- other way to be there? Transfer during innocent visit?

-- any past sex w/ accused, that could explain it?

-- cannot tell age of DNA

-- tiny sample (5 cells) gives result

-- can not tell what biological source (body fluid or skin cells) yielded DNA14}

F. **"Good Soldier"**: An accused may present character evidence under MRE 404(a)(1) to demonstrate that his good military character raises a reasonable doubt about whether he committed the crime charged. Good soldier evidence in an Article 120 case is limited to reputation and opinion (no specific instances of conduct). MRE 405(a). "Good Soldier" evidence includes battlefield performance, dependability, leadership and initiative, performance and proficiency, and promptness.15 *See* Combined Deskbook, Volume 1 – Tab F – Defenses; *United States v. Brewer*, 43 M.J. 43 (C.A.A.F. 1995); *United States v. Brown*, 41 M.J. 1 (C.M.A. 1994).

VI. **Trial techniques: *read* Prosecuting Alcohol-Facilitated Sexual Assault,** http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf ; it contains a thorough exploration, with examples of approaches and examinations in these common cases

A. **Offender-focused prosecution**:

-do not let focus turn to the victim; use voir dire: victim not on trial, no one deserves to be raped, cannot presume sex from dress, drinking, dancing

-liabilities of victim are opportunities for offender; focus on what offender did, how offender exploited vulnerabilities of victim; how those vulnerabilities made her a victim, not someone who "deserved" the assault

-did offender cause or contribute to delayed report by direct or veiled threats of harm or affecting military status?;

-communicate to panel who offender appeared to be, then who he actually was

B. **Personalize the victim**:

-explanations more accepted when vulnerabilities understood;

-"Likeability" of victim irrelevant legally, but important to jury; practice w/ victim to enhance likeability; personal history helps; military demeanor crucial;

C. **Triple direct** (victim): elicit the key facts three times, none cumulative

-- just the facts

-- the facts as explaining real evidence (clothing, diagram)

-- the personal, emotional, and sensory reactions & feelings connected to and during the crime; this is the most persuasive and powerful evidence; it humanizes the victim, and provides sensory details that someone inventing the incident would never make up;

D. **Corroboration**

– Start with the victim/witness statements/testimony, sensory impressions, about the event.

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[14] TCAP sample DNA & Forensic Biology predicate questions: http://tinyurl.com/933ztz5

[15] Elizabeth Lutes Hillman, Note, *The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*, 108 Yale L. J. 879, 894-900 (1999).

- Prove everything, however small, that you can to show that fact was correct. The more of the witness' account is shown to be accurate, the more the rest of the account is believable.

-Examples: lighting – if the victim says there was a streetlight, prove that it was working through government records. If the victim says she walked with the offender by a certain route, find those who saw them on the route. If she says that the offender's car had a tree-shaped air freshener, prove that. If she says she heard a train whistle, get the schedule. Be creative!

-Argue: corroborative facts show that the rest of her testimony is true.

E. **What sounds strange?** What looks strange? The "un-normal" things in a case are often the most persuasive. If the victim's statement contains something that sounds odd, that fact can be the most persuasive. – Is there a sensory impression that has no connection with reality? "How could anyone make that up?" is the question to ask the jury. Accounts which sound like rape myths are questionable.

F. **Why do you believe the victim?** Craft your case to support those reasons, communicate them to jury; *act* like you believe: never look doubtful of victim statements; when explaining counter-normative behavior, present as normal, not an exception; do not use "he said-she said" – it suggests both stories are equal.

G. **Why do you doubt the victim?** Someone on jury will share concerns; craft case, including experts, to explain "problems" in logical, common-sense way; argue behavior of "trauma victims" rather than "sexual assault victims." Normalize the counter-normative facts.

H. **Protect the victim**:

-object as necessary; do not give up objecting to objectionable questions; plan (sometimes write a brief) for reasons your objection is valid

-MRE 412 : "Rape Shield" [*See* Combined Deskbook, Volume II, Tab R -section VII.]

-- TC: always file for protection of victim – MRE412 (even though DC's burden)

-- {**DC** : notice required for 412; use "constitutional right of the accused" for admissibility; *U.S. v. Gaddis*, 70 M.J. 248, 256 (2012).

--412 evidence may support Mistake of Fact defense, *if* the accused knew of the "other sexual behavior"}

I. **Attack the accused**:

-planning

-awareness of/ exploitation of victim vulnerabilities

-lack of remorse

-failure to support victim after event

-change in attitude toward victim (before complaint)

{-DC: "wouldn't you stop talking to (be mad at) her when she falsely accused you?"}

-seek out "similar crimes" for adult (MRE 413), child (MRE 414) cases;

-- if admitted, proof of any crime charged;

-- presumptive admissibility

--discover other misconduct, esp. sexual assault or harassment

J. **Victim Advocate privilege**: (new 2012) MRE 514 : [*See* Combined Deskbook, Volume II, Tab R, section IX.]

-- privilege lost if VA tells TC (or anyone else not a VA)

-- does not apply to VWLO; who is agent of TC; avoid disclosure that destroys the privilege

K. **Charging decisions** : [See Appendix A to this Tab – Analysis of 2012 Art. 120]

-- avoid decisions filtered through rape myths, recantation, inconsistency

-- actively consider prosecutorial discretion; charge the crime, not the personality of victim or offender

-- what crime? Know "sexual act" and "sexual contact"

- Rape: hardest elements to prove; panel "knows" what rape means, but usually wrong; necessarily invokes rape myths

- Sexual Assault : less colloquial; easier elements to prove; max. punishment still high;

- Agg. Sexual Contact – like "rape"; harder to meet elements

- Abusive Sexual Contact – lower max. punishment, but lesser culpability; easier elements to prove;

--Substantial incapacity : always hard to prove;

-if victim can describe sexual act (contact), charge SA bodily harm; - 2012: "knew or should have known"; rarely charge "knew;" "Should have known" = objective standard, eliminates "mistake" defense; "Knew" is subjective;

L. **Language**

-- "victim" : Art. 120 uses "person"

-DC should object to "victim" as conclusory of guilt; argue "willing participant"

-- "accused" is standard term; TC can try "offender," but also conclusory

-- "he said, she said"

--TC : NEVER; your case contains so much more than just 'she said', and you cannot know that "he" will say anything; emphasize all the corroboration you found in the investigation;

-- "date rape" sounds like some less important crime; panels see it that way; dispel this idea in voir dire, opening, evidence, closing; it's an assault, not a date; "I'm going on a date with a man who's going to rape me!"

M. **Voir Dire**

-- dispel rape myths : address each one, refer to MJ instructions

– You must get in the face of the panel members and tell them that they have normative beliefs that need to be jettisoned. If you don't they *will* rely on them.

--e.g.: "Everyone comes to a jury panel with ideas about what "rape" means, or how a rape victim should act, or what a rapist looks like. Do you agree that a rapist can look like anyone? Do you agree that being a good fighting soldier is not necessarily a predictor of personal behavior? Sometimes, people will rely on their own societal beliefs when deciding a case, rather than relying on the evidence, especially if the evidence is complicated. Can you promise that you will be totally objective and look only at proven facts, without making assumptions about behavior if they are unsupported by proven facts? Do you recognize that if you substitute your own ideas about rape or rape victims for the instructions the judge gives to you, that would be violation of your oath in this case?"

-e.g.:"some people think that if the victim does not immediately report a sexual assault, that she was not assaulted? If you learned that most victims do not report right away, would you be willing to consider that information objectively?"

e.g.: "Would you be less likely to convict someone of _____ if the victim and the accused knew each other (had dated each other, etc.)? Do you think that only strangers commit _____? If the Military Judge instructed you that a prior dating relationship was not a sign of consent to a later encounter, would you follow that instruction?"

--rape is NOT sex gone wrong; it is an act of power & control;

--unsympathetic victim:

-nobody deserves to be raped;

-e.g.: "can you be objective even if you don't like the victim or if you don't approve of her lifestyle?"

See, Educating Juries in Sexual Assault Cases, http://www.aequitasresource.org/EducatingJuriesInSexualAssaultCasesPart1.pdf

VI. **Defenses:**

A. **Consent:**

1. Element of pre-2007 Art. 120; government burden beyond a reasonable doubt

2.statutory defense to 2007 Art. 120 (Oct. 1, 2007);

-Benchbook position: government burden beyond a reasonable doubt; see *United States v. Prather*, 68 M.J. 338 (CAAF 2011) http://tinyurl.com/9426g6q;

3. NOT a statutory defense to 2012 Art. 120(f) (crimes after 28 June 2012)

-[see Offender as Witness, *supra*, obtain concessions]

-how did he know she "wanted him"?

-did he use force?

-"Rough sex" defense common & ridiculous ("sex is for pleasure or procreation. Getting strangled sounds like a lot of fun, huh?")

B. **Mistake Of Fact as to Consent:**

1. **RCM 916(j) defense** for crimes prior to 2007 and after 28 June 2012;

- in 2012 Art. 120, do not presume it applies[16]

2. Statutory defense for 2007 Art. 120(t)(15)

-requires *both* subjective and objective mistake; *U.S. v. Willis*, 41 M.J. 435, 437-38 (CAAF 1995)

-does he endorse rape myths? counter them on cross ("so everyone who wears a short dress wants to have sex with you?")

-"Mythcommunication" : society, and most TC, endorse the suggestion that men "just don't understand" a refusal that is not a clearly stated "No, I don't consent"; this is experientially false: in common social situations, "[p]eople issue rejections in softened language, and people hear rejections in softened language, and the notion that anything but a clear 'no' cannot be understood is just nonsense. . . . Rape results from a refusal to heed, rather than an inability to understand, a rejection."[17] Nearly any man who has been at a singles bar has heard a soft rejection, and understood it as such.

C. **Blackout/pass-out** :

in "substantial incapacity" alcohol cases, a defense that victim appeared able to consent, and did consent, but was unable to remember due to alcohol consumption (blackout), rather than unconsciousness (pass-out). Common defense is that victim initiated or consented, but does not remember.

-fragmentary blackout : events are encoded, but alcohol inhibits recall later : can be "fixed" with appropriate cues

-*en bloc* blackout : memories never encoded; can never be recalled

--response to defense: expert testimony is *irrelevant* unless someone can present evidence that victim *was* blacked out; absent detailed information on amount of alcohol, concentration, timing, eating, past experience of victim with alcohol, no expert can diagnose victim; lay people (e.g.: accused) cannot diagnose blackout;

-judges (& TC) routinely allow these experts w/out challenge; (one judge took judicial notice of blackout!); TC: file a motion to exclude; *see* discussion in Prosecuting Alcohol Facilitated Sexual Assault, infra.

D. Good Soldier:

- while MRE 404(a)(1)[18] states that Good Soldier evidence is admissible *only* for a relevant trait of military character, case law is mixed on what it admissible; *compare United States v. Benedict*, 27 M.J. 253 (C.M.A. 1988) and *United States v. Dewrell*, 55 M.J. 131 (CAAF 2001)(presuming good soldier could be presented in sexual case) with *United States v. Humphries*, 57 M.J. 83 (CAAF 2002) (emphasizing the relevance to military crimes); be careful with the defense: it opens up a variety of otherwise inadmissible character evidence; learn the admissibility rules on character to limit the rebuttal evidence.

VII. Sentencing – too often ignored; [For a thorough discussion of sentencing, *see* Combined Deskbook, Volume III, Tab Q]

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[16] *See* Jagcnet,/Criminal Law Dept./Sexual Assault Materials/Article 120 Analysis of Mistake of Fact; https://www.jagcnet2.army.mil/852577C10047F4D7

[17] Thomas MacCauley Miller, http://tinyurl.com/4868zp7 .
[18] See MCM, App. 22, Analysis of M.R.E.

-- prepare from early in the case; sentencing follows immediately after verdict; too late to prepare after the trial

-- **TC**: know RCM 1001

-RCM 1001(b)(4): impact on victim!;

- testimony by victim, close friends,

- psychologists/social workers/ academics, re: long term impact of sexual crimes *United States v. Hollingsworth, 44 M.J. 688 (C.G. Ct. Crim. App. 1996)* (child victim)

-- aggravation : other similar acts; sexual harassment, other crimes (esp. if while a soldier); *but see United States v. Lowe*, 56 M.J. 914 (N-M. Ct. Crim. App. 2002)(limiting past harassment of other victims)..

-- **DC :** know RCM 1001

-- mitigation : take cue from death cases – anything can mitigate; mom, dad;; church, civic deeds; imagine everything – interview client, friends

-GOOD SOLDIER book

- extenuation : confession? Cooperation? Imperfect self-defense;

- call witnesses : avoid relaxation of rules (RCM 1001(c)(3)) – it's a gift to TC; *read* RCM 1001(e)(2); ask for stipulations;

- consider dynamic of sworn or unsworn statement by accused

APPENDIX A

DSM-IV-R DEFINITION OF PTSD

[Note that in an individual case, these symptoms may not *all* be present, and a PTSD diagnosis does not fit. This information is included here only because many of the reactions listed are common reactions to traumatic events of any kind**]**

A. The person experiences a traumatic event in which both of the following were present:

1. the person experienced or witnessed or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others;
2. the person's response involved intense fear, helplessness, or horror.

B. The traumatic event is persistently re-experienced in any of the following ways:

1. recurrent and intrusive distressing recollections of the event, including images, thoughts or perceptions;
2. recurrent distressing dreams of the event;
3. acting or feeling as if the traumatic event were recurring (eg reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those on wakening or when intoxicated);
4. intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event;
5. physiological reactivity on exposure to internal or external cues that symbolise or resemble an aspect of the traumatic event.

C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma) as indicated by at least three of:

1. efforts to avoid thoughts, feelings or conversations associated with the trauma;
2. efforts to avoid activities, places or people that arouse recollections of this trauma;
3. inability to recall an important aspect of the trauma;
4. markedly diminished interest or participation in significant activities;
5. feeling of detachment or estrangement from others;
6. restricted range of affect (e.g. unable to have loving feelings);
7. sense of a foreshortened future (e.g. does not expect to have a career, marriage, children or a normal life span).

D. Persistent symptoms of increased arousal (not present before the trauma) as indicated by at least two of the following:

1. difficulty falling or staying asleep;
2. irritability or outbursts of anger;
3. difficulty concentrating;
4. hypervigilance;
5. exaggerated startle response.

E. The symptoms on Criteria B, C and D last for more than one month.

F. The disturbance causes clinically significant distress or impairment in social, occupational or other important areas of functioning.]

Chapter 46

I. References.

A. Army References.

1. Dep't of Army, Reg. 600-20, Personnel--General: Army Command Policy (18 Mar 2008). (Rapid Action Revision (RAR) Issue Date: 27 April 2010)
2. Manual for Courts-Martial, United States [hereinafter MCM].
3. Dep't of Army, Pam. 600-35, Personnel--General: Relationships Between Soldiers of Different Rank (21 Feb 2000).

B. Navy, Marine Corps, and Air Force References.

1. OPNAVINST 5370.2C, Navy Fraternization Policy (26 Apr 2007).
2. Marine Corps Manual 1100.4 (as amended by HQMC, ALMAR 185/96, 130800Z May 96, subject: Marine Corps Manual (MCM) Change 3) and MARCORMAN 1100.4 (13 May 96).
3. Department of Air Force Instruction 36-2909, Personnel: Professional and Unprofessional Relationships (13 Aug 2004, Incorporating Change 1, 8 July 2010).

II. Introduction.

A. Three Separate Concepts.

1. Improper Superior – Subordinate Relationships.
2. Fraternization.
3. Sexual Harassment.

B. A Spectrum of Misconduct.

III. IMPROPER SUPERIOR - SUBORDINATE RELATIONSHIPS.

A. **History**:

1. Task Force found disparate treatment between Services.
2. New policy announced by Secretary Cohen on 29 Jul 98.
3. Not effective immediately; gave Services 30 days to provide draft new policies to DoD. Essence of guidance now included within AR 600-20, paras 4-14 through 4-16.
4. Does NOT cover all senior / subordinate relationships.
5. Directs Service Secretaries to prohibit by policy:
   a. Personal relationships, such as dating, sharing living accommodations, engaging in intimate or sexual relations, business enterprises, commercial solicitations, gambling and borrowing between officer and enlisted regardless of their Service; and
   b. Personal relationships between recruiter and recruit, as well as between permanent party personnel and trainees.

B. **The Old Army Policy**. Previous AR 600-20 (30 Mar 88), para 4-14. Two Part Analysis:

1. Part One: "Army policy does not hold dating or most other relationships between soldiers (sic) [of different ranks] as improper, barring the adverse effects listed in AR 600-20." Old DA Pam 600-35, Para. 1-5(e). Therefore, Army policy did not prohibit dating (even between officers and enlisted Soldiers), *per se*.

2. Part Two:

   a. "Relationships between soldiers (sic) of different rank that involve, or give the appearance of, partiality, preferential treatment, or the improper use of rank or position for personal gain, are prejudicial to good order, discipline, and high unit morale. It is Army policy that such relationships will be avoided." Old AR 600-20, paragraph 4-14.

   b. "Commanders and supervisors will counsel those involved or take other action, as appropriate, if relationships between soldiers (sic) of different rank

      (1) Cause actual or perceived partiality or unfairness.

      (2) Involve the improper use of rank or position for personal gain.

      (3) Create an actual or clearly predictable adverse impact on discipline, authority or morale." Old AR 600-20, para 4-14a.

   Key Note: Old AR 600-20 was not a punitive regulation. The revised paragraphs ARE PUNITIVE.

C. **The Current Army Policy**. Changes to AR 600-20, paras 4-14, 4-15 and 4-16.

1. Now a **THREE** Part Analysis:

   a) Part 1: Is this a "strictly prohibited" category?

   b) Part 2: If not, are there any adverse effects?

   c) Part 3: If not "strictly prohibited" and there are no adverse effects, then the relationship is not prohibited.

2. Para 4-14: Relationships between military members of different rank.

   a. "Officer" includes commissioned and warrant officers.

   b. Applies to relationships between Soldiers, and between Soldiers and members of other services.

   c. Is gender-neutral.

   d. (THIS IS PARA 4-14b.) The following relationships between Soldiers of **different ranks** are prohibited:

      (1) Relationships that compromise or appear to compromise the integrity of supervisory authority or the chain of command;

      (2) Relationships that cause actual or perceived partiality or unfairness;

      (3) Relationships that involve or appear to involve the improper use or rank or position for personal gain;

      (4) Relationships that are, or are perceived to be, exploitative or coercive in nature; and

(5) Relationships that cause an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission.

NOTE: Subparagraphs (1) and (4) are new additions to the three adverse effects looked for under the old policy's analysis.

e. (THIS IS PARA 4-14c.) Certain types of personal relationships between **officers and enlisted** personnel are prohibited. Prohibited relationships include:

(1) Ongoing business relationships (including borrowing or lending money, commercial solicitations and any other on-going financial or business relationships), **except**:

(a) Landlord / tenant; and

(b) One time transactions (such as car or home sales).

(c) All ongoing business relationships existing on the effective date of this prohibition, that were otherwise in compliance with the former policy, were not prohibited until 1 Mar 00 ("grace period").

(d) This prohibition does not apply to USAR / ARNG Soldiers when the ongoing business relationship is due to the Soldiers' civilian occupation or employment.

(2) Personal relationships, such as dating, shared living accommodations (other than as directed by operational requirements), and intimate or sexual relationships.

(a) This prohibition does not affect marriages (change as of 13 May 2002)

(b) Otherwise prohibited relationships (dating, shared living accommodations [other than directed by operational requirements] and intimate or sexual relationships), existing on the effective date of this prohibition, that were not prohibited under prior policy, were not prohibited until 1 Mar 00.

(c) Relationships otherwise in compliance with this policy are prohibited under this policy solely because of the change in status of one party to the relationship (such as commissioning). The couple does have one year to either terminate the relationship or marry within one year of the actual **start date** of the program or before the change in status occurs, whichever is later.

(d) Reserve Component (RC)/RC exclusion when the personal relationship is primarily due to civilian acquaintanceship, unless on active duty (AD) or full-time National Guard duty (FTNGD) other than annual training (AT).

(e) AD/RC exclusion when the personal relationship is primarily due to civilian association, unless on AD or FTNGD other than AT.

(3) Gambling. NO EXCEPTIONS.

(a) An NCAA basketball pool with a monetary buy-in is prohibited when there is a mix of officer and enlisted personnel participants. There is no prohibition against gambling between officers.

(b) An NCAA bracket competition with a certificate or trophy to the winner even with officer and enlisted personnel participants is permissible.

(c) Remember the Joint Ethics Regulation (JER), § 2-302 also addresses gambling. While it may not be prohibited under AR 600-20, it may violate the JER.

(4) These prohibitions are not intended to preclude normal team-building associations between Soldiers, which occur in the context of activities such as community organizations, religious activities, family gatherings, unit social functions or athletic teams or events.

(5) All Soldiers bear responsibility for maintaining appropriate relationships between military members. The senior military member is usually in the best position to terminate or limit relationships that may be in violation of this paragraph, but all Soldiers involved may be held accountable for relationships in violation of this paragraph.

3. Para 4-15: Other Prohibited Relationships.

a. Trainee / Soldier. Any relationship between IET trainees and permanent party Soldiers (not defined) not required by the training mission is prohibited. This prohibition applies regardless of the unit of assignment of either the permanent party Soldier or the trainee.

b. Recruit / Recruiter. Any relationship between a permanent party Soldier assigned or attached to USAREC, and potential prospects, applicants, members of the Delayed Entry Program or members of the Delayed Training Program, not required by the recruiting mission, is prohibited. The prohibition applies regardless of the unit of assignment or attachment of the parties involved.

4. Para 4-16: Paragraphs 4-14b. 4-14c and 4-15 are <u>punitive</u>. Violations can be punished as violations of Article 92, UCMJ.

D. **<u>Commander's Analysis</u>**: How does the commander determine what's improper?

1. JAs must cultivate the idea that commanders should consult with OSJA.

2. Use common sense. "The leader must be counted on to use good judgment, experience, and discretion. . . ."

3. Keep an open mind. Don't prejudge every male/female relationship. Relationships between males of different rank or between females of different

rank can be as inappropriate as male/female relations. "[J]udge the results of the relationships and not the relationships themselves." DA Pam 600-35.

4. Additional scrutiny should be given to relationships involving (1) direct command/supervisory authority, or (2) power to influence personnel or disciplinary actions. "[A]uthority or influence . . . is central to any discussion of the propriety of a particular relationship." DA Pam 600-35. These relationships are most likely to generate adverse effects.

5. Be wary that **appearances of impropriety** can be as damaging to morale and discipline as actual wrongdoing.

E. **Command Response.**

1. The commander has a wide range of responses available to him and should use the one that will achieve a result that is "warranted, appropriate, and fair." Counseling the Soldiers concerned is usually the most appropriate initial action, particularly when only the potential for an appearance of actual preference or partiality, or an appearance without any adverse impact on morale, discipline or authority exists.

2. Adverse Administrative Actions: Order to terminate, relief, re-assign, bar to re-enlistment, reprimand, adverse OER/NCOER, administrative separation.

3. Criminal Sanctions: Fraternization, disobey lawful order, conduct unbecoming, adultery.

F. **Commander's Role.**

1. Commanders should seek to prevent inappropriate or unprofessional relationships through proper training and leadership by example. AR 600-20, para. 4-14(f).

2. Don’t be gun-shy. Mentoring, coaching, and teaching of Soldiers by their seniors should not be inhibited by gender prejudices. Old AR 600-20, para. 4-14 (e)(1).

3. Training. DA Pam 600-35.

IV. FRATERNIZATION AND RELATED OFFENSES

A. General.

1. Fraternization is easier to describe than define.

2. There is no stereotypical case. Examples include sexual relations, drinking, and gambling buddies.

B. Fraternization. UCMJ art. 134.

1. The President has expressly forbidden officers from fraternizing on terms of military equality with enlisted personnel. MCM, pt. IV, ¶ 83b.

2. Elements: the accused

a) was a commissioned or warrant officer;

b) fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;

c) knew the person(s) to be (an) enlisted member(s); and

d) such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and

e) under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

3. "Hard to define it, but I know it when I see it."

4. Article 134 has also been successfully used to prosecute instances of officer-officer fraternization, *United States v. Callaway*, 21 M.J. 770 (A.C.M.R. 1986), and even enlisted-enlisted relationships. *United States v. Clarke*, 25 M.J. 631 (A.C.M.R. 1987), *aff'd*, 27 M.J. 361 (C.M.A. 1989).

5. Maximum punishment: dismissal/dishonorable discharge, total forfeitures and two years confinement. MCM, pt. IV, ¶ 83e.

6. Custom.

a) The gist of this offense is a violation of the custom of the armed forces against fraternization; it does not prohibit all contact or association between officers and enlisted persons.

b) Customs vary from service to service, and may change over time.

c) Custom of the service must be proven through the testimony of a knowledgeable witness. *United States v. Wales*, 31 M.J. 301 (C.M.A. 1990).

7. Factors to Consider in Deciding How to Dispose of an Offense.

a) Nature of the military relationship;

b) Nature of the association;

c) Number of witnesses;

d) Likely effect on witnesses.

C. Failure to Obey Lawful General Order or Regulation. UCMJ art. 92.

1. Elements. MCM, pt. IV, ¶ 16b(1).

a) There was in effect a certain lawful general order or regulation;

b) the accused had a duty to obey it; and

c) the accused violated or failed to obey the order or regulation.

2. Maximum punishment: dismissal/dishonorable discharge, total forfeitures and two years confinement. MCM, pt. IV, ¶ 16e(1).

3. Applications.

a) Applicable to officers and enlisted.

b) Most effective when used to charge violations of local punitive general regulations (for example, regulations prohibiting improper relationships between trainees and drill sergeants).

4. **Remember:** AR 600-20 re: improper relationships is NOW a punitive regulation.

D. Conduct Unbecoming an Officer. UCMJ art. 133.

1. Elements.

a) Accused did or omitted to do certain acts; and

b) That, under the circumstances, the acts or omissions constituted conduct unbecoming an officer and gentleman.

2. Only commissioned officers and commissioned warrant officers may be charged under article 133. Maximum punishment: dismissal, total forfeitures and confinement for a period not in excess of that authorized for the most analogous offense for which punishment is prescribed in the Manual, e.g., two years for fraternization.

E. Sexual Harassment.

1. Charged under Article 93 as Cruelty and Maltreatment.

2. Other offenses may be possible given the facts and circumstances of the case such as extortion, bribery, adultery, indecent acts or assault, communicating a threat, conduct unbecoming, and conduct prejudicial to good order/discipline.

V. Case Law

United States v. Pitre, 63 M.J. 163 (2006). The court held that simple disorder with a trainee is an LIO of Article 92, violation of a lawful general regulation, having a relationship not required by the training mission.

United States v. Fuller, 54 M.J. 107 (2000). Appellant was convicted of numerous offenses stemming from his sexual relations with subordinate female members of his unit. The CAAF granted review on the issue of whether the evidence was legally sufficient to sustain a conviction for cruelty and maltreatment of one of the victims. The evidence showed that while assigned to an inprocessing unit where the appellant was her platoon sergeant, the victim voluntarily went to the appellant's apartment with a friend, drank 10-12 oz. of liquor, kissed appellant, and got undressed and engaged in repeated sexual intercourse with appellant and another platoon sergeant. Additionally, the victim stated that in her decision to have sexual intercourse with the appellant, she never felt influenced by his rank and that he never threatened her or her career. Finally, the CAAF concluded that the evidence did not support a finding that the victim showed any visible signs of intoxication prior to the sexual intercourse with appellant. Although the CAAF found that the evidence was not legally sufficient to sustain a conviction for cruelty and maltreatment, they did find that it supported a conviction for the lesser-included offense of a simple disorder in violation of Article 134, UCMJ, since the appellant's conduct was prejudicial to good order and discipline or service discrediting. In mentioning that "appellant's actions clearly would support a conviction for violation the Army's prohibition against improper relationships between superiors and subordinates…", the CAAF cited to the current version of Army Regulation 600-20 (15 Aug[sic] 1999). The court, however, did not address the fact that the appellant's conduct occurred in 1996, when the regulation was not punitive and that therefore he could not have been found guilty for failure to obey a general regulation under Article 92, UCMJ.

United States v. Brown, 55 M.J. 375 (2001). ISSUES: The CAAF considered the issues, inter alia, of: 1) whether the trial court erred by admitting the Air Force's pamphlet on discrimination and sexual harassment for the members to consider on findings and sentencing; and 2) whether

the charges of conduct unbecoming an officer were supported by legally sufficient evidence. FACTS: The appellant, a captain and an Air Force nurse, was convicted of conduct unbecoming an officer for his comments to and physical contact with three co-workers over a ten month period. Appellant was married, had one child, and had served nearly ten years on active duty. All victims were female and, like the appellant, were company grade officers and Air Force nurses. All the victims worked in the operating room with the appellant at some point. The physical contact for which appellant was convicted included placing his hand on the other nurses' hair, thighs, knees, and buttock. The verbal conduct for which appellant was convicted included persistent complements on their hair, eyes, and physical appearance and questions about their weight, whether they were happily married, whether they had a boyfriend, if they had ever had an affair, and in the case of one nurse, what type of bathing suit she wore and if women masturbated. Additionally, he asked them for their home phone numbers and asked them out for dates. Some of the victims showed their displeasure with appellant's physical contact with them by moving away from the appellant, and one told the appellant that she did not like the way he touched her. Contrarily, none of the complainants made their disapproval of the appellant's verbal comments known to him or to anyone in their chain-of-command.

HOLDING: The CAAF ruled that the military judge did not abuse his discretion when he admitted the nonpunitive Air Force Pamphlet (AFP) 36-2705, Discrimination and Sexual Harassment (28 February 1995) over defense objection. In so ruling, the CAAF agreed with the military judge that the AFP was relevant to establish notice of the prohibited conduct and the applicable standard of conduct in the Air Force community to the appellant. Additionally, the CAAF stated that in cases were evidence of the custom of the service is needed to prove an element of an offense, it is likely that the probative value will out weigh the prejudicial effect. With regard to the sufficiency of the evidence, the CAAF focused on the fact that government relied on the AFP to establish the applicable standard of conduct. When considering the standards in the AFP, combined with the facts of the case, the CAAF concluded that the government had to show that: "(1) appellant's conduct was 'unwelcomed'; (2) it consisted of verbal and physical conduct of a sexual nature and (3) it created an intimidating, hostile, or offensive work environment that was so severe or pervasive that a reasonable person would perceive that work environment as hostile or abusive, and the victim of the abuse perceived it as such." The CAAF went on to analyze the verbal comments and physical contact by the appellant separately. In finding the evidence legally insufficient to support appellant's convictions for the verbal comments, the CAAF noted that the record was clear that none of the victims ever informed the appellant that any of his remarks were unwelcome. While the AFP does not require a recipient of sexual remarks to tell the speaker that the remarks were unwelcome, the CAAF felt that a recipient's action or inaction in response to the remarks is relevant in determining whether the speech was unwelcome. The CAAF further noted from the record that the working atmosphere of the parties regularly accepted conversations involving physical appearance and sexual matters. This atmosphere cut against a finding that the appellant's comments created a work environment that was "hostile or abusive." However, the CAAF affirmed the convictions for the physical contact, concluding that it was not reasonable for the appellant "to assume that [the victims] would consent to physical contact of an intimate nature absent some communication of receptivity or consent."

United States v. Carson, 55 M.J. 656 (Army Ct.Crim.App. 2001). Appellant was convicted, contrary to his pleas, of maltreatment of subordinates (five specifications) and indecent exposure (three specifications). Appellant was the supervising desk sergeant in a military police station. While on duty appellant ordered a female MP to "physically search his crotch," and he repeatedly exposed his penis to three of his subordinate female MP Soldiers. The appellant challenged the

maltreatment conviction stemming from his conduct with one of the victims, stating that his conduct did not result in "physical or mental pain or suffering" by this alleged victim. The victim of the challenged conviction testified that she never asked appellant to see his penis, that she was bothered and shocked when he exposed himself, and that she considered herself a victim. In holding that proof that the victim suffered "physical or mental pain" was not required in order to support a conviction for maltreatment of a subordinate, the ACCA relied on the fact that neither the UCMJ nor the Manual of Courts-Martial contained this requirement. In making this determination, ACCA expressly overruled its earlier contrary holding in *United States v. Rutko*, 36 M.J. 798 (A.C.M.R. 1993). *Affirmed by United States v. Carson*, 57 M.J. 410 (C.A.A.F. 2002)

United States v. Matthews, 55 M.J. 600 (C.G.Ct.Crim.App. 2001). Contrary to his pleas, appellant was convicted of attempted forcible sodomy, maltreatment by sexual harassment, indecent assault, and solicitation to commit sodomy. The charges arose from allegations of a subordinate female enlisted sailor who claimed that while she was on TDY with the appellant, he sexually assaulted her and attempted to force her to perform oral sodomy on him while they were in his hotel room. Contrarily, the appellant testified that it was the alleged victim who had initiated the sexual interaction, that the sexual foreplay was mutual, and that he never used force on her. Evidence presented at trial established that the appellant had sixteen years on active duty and had amassed an outstanding record and reputation for devotion to duty and honesty. In sharp contrast, several witnesses stated that they had little or no confidence in the alleged victim's truthfulness or integrity, and that she was a poor duty performer. The service court felt that this case boiled down to a swearing contest between the two parties, therefore, the issue of each of their credibility was paramount. In overturning the appellant's convictions for attempted forcible sodomy, maltreatment by sexual harassment, and indecent assault, the court relied heavily on the disparate opinion and reputation testimony concerning the two involved parties. The majority gave little weight to the testimony of medical and psychiatric experts who treated the alleged victim and found her credible and her reaction to the assault consistent with post-traumatic stress disorder. The court noted that these experts had assumed the accuracy of the facts related by the alleged victim and also pointed to the defense forensic psychiatrist who was skeptical of the alleged victim's account of events. The majority was quick to point out that under the facts of the case, the appellant was guilty of violating the service's general regulation against fraternization, but that he was never charged with that crime.

United States v Goddard, 54 M.J. 763 (N.M.Ct. Crim.App. 2000). Contrary to his pleas, the appellant was convicted of maltreatment and fraternization in violation of Articles 93 and 134, UCMJ. The charges resulted from a one time consensual sexual encounter with his female subordinate on the floor of the detachment's administrative office. In setting aside the maltreatment conviction, the service court cited the CAAF's decision in *U.S. v. Fuller*, 54 M.J. 107 (2000), in which it concluded that, "a consensual sexual relationship between a superior and a subordinate, without more, would not support a conviction for the offense of maltreatment." The court did, however, approve the lesser-included offense of a simple disorder in violation of Article 134, UCMJ. The fact that the sexual encounter took place in the detachment's administrative office, that after the sexual encounter was over the appellant instructed the victim leave the office in a manner that ensured that other personnel would not see her, and that the victim lost respect for and avoided the appellant because she had been briefed that such relationships were improper, all led the court to conclude that appellant's conduct was prejudicial to good order and discipline.

United States v. Sanchez, 50 M.J. 506 (A.F.Ct.Crim.App. 1998). Accused cannot be convicted of both conduct unbecoming (Art. 133) and fraternization (Art. 134) when the misconduct alleged in the specifications is identical; fraternization gets dismissed. Those fraternization allegations not alleged in conduct unbecoming specifications remain. Court cites *United States v. Harwood*, 46 M.J. 26, 28 (1997) in support.

United States v. Hawes, 51 M.J. 258 (1999). CAAF affirmed Air Force Court's decision to set aside fraternization conviction and to reassess the appellant's sentence without ordering a rehearing. CAAF agreed that the fraternization offense was "relatively trivial" when compared to other misconduct.

United States v. Mann, 50 M.J. 689 (A.F.Ct.Crim.App. 1999). Sexual relationship is not a prerequisite for fraternization. Evidence was legally and factually sufficient to support conviction for fraternization. No interference with accused's access to witnesses where order prohibiting accused from contact with his fraternization partner did not prohibit accused's counsel from such contact. A.F. court finds no unlawful command influence or unlawfulness with the order.

United States v. Rogers, 54 M.J. 244 (2000). Evidence legally sufficient to sustain Art. 133 conviction for the offense of conduct unbecoming an officer by engaging in an unprofessional relationship with a subordinate officer in appellant's chain of command. AF Court holds there is no need to prove breach of custom or violation of punitive regulation.

APPENDIX

AR 600-20 FRATERNIZATION (EXTRACT)

Rapid Action Revision (RAR) Issue Date: 27 April 2010

4–14. Relationships between Soldiers of different rank

a. The term "officer," as used in this paragraph, includes both commissioned and warrant officers unless otherwise stated. The provisions of this paragraph apply to both relationships between Army personnel (to include dual-status military technicians in the Army Reserve and the Army National Guard) and between Army personnel and personnel of other military services. This policy is effective immediately, except where noted below, and applies to different-gender relationships and same-gender relationships.

b. Relationships between Soldiers of different rank are prohibited if they—

(1) Compromise, or **appear** to compromise, the integrity of supervisory authority or the chain of command.

(2) Cause actual or **perceived** partiality or unfairness.

(3) Involve, or **appear** to involve, the improper use of rank or position for personal gain.

(4) Are, or are **perceived** to be, exploitative or coercive in nature.

(5) Create an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission.

c. Certain types of personal relationships between officers and enlisted personnel are prohibited. Prohibited relationships include—

(1) Ongoing business relationships between officers and enlisted personnel. This prohibition does not apply to landlord/tenant relationships or to one-time transactions such as the sale of an automobile or house, but does apply to borrowing or lending money, commercial solicitation, and any other type of on-going financial or business relationship. Business relationships which exist at the time this policy becomes effective, and that were authorized under previously existing rules and regulations, are exempt until March 1, 2000. In the case of Army National Guard or United States Army Reserve personnel, this prohibition does not apply to relationships that exist due to their civilian occupation or employment.

(2) Dating, shared living accommodations other than those directed by operational requirements, and intimate or sexual relationships between officers and enlisted personnel. This prohibition does not apply to—

(a) Marriages. When evidence of fraternization between an officer and enlisted member prior to their marriage exists, their marriage does not preclude appropriate command action based on the prior fraternization. Commanders have a wide range of responses available including counseling, reprimand, order to cease, reassignment, administrative action or adverse action. Commanders must carefully consider all of the facts and circumstances in reaching a disposition that is appropriate. Generally, the commander should take the minimum action necessary to ensure that the needs of good order and discipline are satisfied.

(b) Situations in which a relationship that complies with this policy would move into non-compliance due to a change in status of one of the members (for instance, a case where two enlisted members are dating and one is subsequently commissioned or selected as a warrant officer). In relationships where one of the enlisted members has entered into a program intended to result in a change in their status from enlisted to officer, the couple must terminate the relationship permanently or marry within either one year of the

actual start date of the program, before the change in status occurs, or within one year of the publication date of this regulation, whichever occurs later.

(c) Personal relationships between members of the National Guard or Army Reserve, when the relationship primarily exists due to civilian acquaintanceships, unless the individuals are on active duty (other than annual training), on full-time National Guard duty (other than annual training), or serving as a dual status military technician.

(d) Personal relationships between members of the Regular Army and members of the National Guard or Army Reserve when the relationship primarily exists due to civilian association and the Reserve component member is not on active duty (other than annual training), on full-time National Guard duty (other than annual training), or serving as a dual status military technician.

(e) Prohibited relationships involving dual status military technicians, which were not prohibited under previously existing rules and regulations, are exempt until one year of publication date of this regulation.

(f) Soldiers and leaders share responsibility, however, for ensuring that these relationships do not interfere with good order and discipline. Commanders will ensure that personal relationships that exist between Soldiers of different ranks emanating from their civilian careers will not influence training, readiness, or personnel actions.

(3) Gambling between officers and enlisted personnel.

d. These prohibitions are not intended to preclude normal team building associations that occur in the context of activities such as community organizations, religious activities, Family gatherings, unit-based social functions, or athletic teams or events.

e. All military personnel share the responsibility for maintaining professional relationships. However, in any relationship between Soldiers of different grade or rank, the senior member is generally in the best position to terminate or limit the extent of the relationship. Nevertheless, all members may be held accountable for relationships that violate this policy.

f. Commanders should seek to prevent inappropriate or unprofessional relationships through proper training and leadership by example. Should inappropriate relationships occur, commanders have available a wide range of responses. These responses may include counseling, reprimand, order to cease, reassignment, or adverse action. Potential adverse action may include official reprimand, adverse evaluation report(s), nonjudicial punishment, separation, bar to reenlistment, promotion denial, demotion, and courts martial. Commanders must carefully consider all of the facts and circumstances in reaching a disposition that is warranted, appropriate, and fair.

4–15. Other prohibited relationships

a. Trainee and Soldier relationships. Any relationship between permanent party personnel and initial entry training (IET) trainees not required by the training mission is prohibited. This prohibition applies to permanent party personnel without regard to the installation of assignment of the permanent party member or the trainee.

b. Recruiter and recruit relationships. Any relationship between permanent party personnel assigned or attached to the United States Army Recruiting Command and potential prospects, applicants, members of the Delayed Entry Program (DEP), or members of the Delayed Training Program (DTP) not required by the recruiting mission is prohibited. This prohibition applies to United States Army Recruiting Command Personnel without regard to the unit of assignment of the permanent party member and the potential prospects, applicants, DEP members, or DTP members.

c. Training commands. Training commands (for example, TRADOC and AMEDDC) and the United States Army Recruiting Command are authorized to publish supplemental regulations to paragraph 4–15, which further detail proscribed conduct within their respective commands.

4–16. Fraternization

Violations of paragraphs 4–14*b*, 4–14*c*, and 4–15 may be punished under Article 92, UCMJ, as a violation of a lawful general regulation.

Chapter 47

COMMISSIONS

Chapter Is Currently Under Construction

Chapter 48

PROTECTION OF MILITARY INSTALLATIONS/ SAUSA

Chapter Is Currently Under Construction

Chapter 49

MEDIA

Chapter Is Currently Under Construction

Chapter 50

CAPITAL LITIGATION

Chapter Is Currently Under Construction

Chapter 51

CYBER LAW

Chapter Is Currently Under Construction

Chapter 52

I. References.

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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/usc_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/usc_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

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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.

Chapter 53

I. References.

A. SHARP Program website : www.sexualassaut.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 "Lautenburg 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/pdffiles/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/pdffiles/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/pdffiles/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 of 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 teams 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 Battalion & 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 superseded 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, restrain, 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 alpha-numeric 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.

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.

Chapter 54

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 "Lautenburg 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 2009The 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.

Chapter 55

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 voco 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 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) <u>and</u> 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

* 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).

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. Wieczorek*, 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)

6. *United States v. Brehm* 11-4755 Decided 10 August 2012, 4th Cir.

a) On Thanksgiving Day 2010, Sean Brehm (a South African), who was a contractor working for a U.S. company on Kandahar Airfield, Afghanistan (KAF), stabbed another contractor in the arm and stomach causing serious injuries. Brehm was taken into custody by Military Police. As part of his "Foreign Service Agreement" Brehm acknowledged and accepted that he may be subject to U.S. federal civilian criminal jurisdiction under MEJA (Military Extraterritorial Jurisdiction Act – passed in 2000 MEJA allow for the prosecution of civilians accompanying American troops overseas), by virtue of the fact that he was accompanying the U.S. Armed Forces outside the United States. As a result of the stabbing a grand jury indictment ensued whereby Brehm was charged with two counts of assault (one with a dangerous weapon, and one resulting in serious bodily injury).

Brehm pleaded guilty in Federal District Court in the Eastern District of Virginia to assault resulting in serious bodily injury. In exchange he was allowed to challenge, through appeal, the jurisdictional basis of the indictment. On appeal Brehm argued: 1) The indictment's reliance on MEJA was misplaced, in that the statute cannot be applied to him in a manner consistent with the Constitution, and 2) there lacked a sufficient nexus between himself and the United States to support the exercise of criminal jurisdiction. The court rejected Brehm's arguments and affirmed the district court conviction.

Concerning his first argument, Brehm did not challenge the constitutionality of MEJA and agreed that "under some circumstances Congress might have the authority to criminalize acts of foreign nationals." But argued that neither he nor the victim are American citizens, and that during the stabbing he was not acting in furtherance of his job duties, which of course was with an American company. The court reverted to the Constitution, specifically the power of Congress to "raise and support Armies." Such power entitles it to "make all Laws necessary and proper" to adequately support the armed forces. The court also pointed out that it is not unusual for foreign nationals to be tried in American Courts for criminal conduct that occurs within U.S. borders. However, MEJA contemplates the very conduct for which Brehm was charged: criminal "conduct outside the United States." Thus, the court concluded that the status of Brehm and his victim as foreign nationals is irrelevant, and that "rarely, we think, would a private employer include vicious attacks on third parties within an employee's job description."

To support his second argument, Brehm noted that until he came to Virginia as an accused he had never set foot in the United States, thus he lacked a sufficient nexus between himself and the United States to allow for the application of MEJA. For this, the court states that Brehm's very presence on KAF would not have been possible without a DOD Letter of Authorization entitling him to DOD support while living on KAF. Thus, while KAF is not "technically territory of the United States" the court found it a "suitable proxy for due process purposes" whereby "the imposition of American criminal law there is not arbitrary." Further, the court stated that since Afghanistan had "disclaimed any interest in prosecuting criminal conduct at KAF by those situated similarly to Brehm, due process is not offended by the United States stepping into the jurisdictional void." Finally, the court did not find any unfairness in prosecuting Brehm, in that "fair

warning does not require that the defendants understand that they could be subject to criminal prosecution in the United States so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere." Brehm should have reasonably understood that his conduct of stabbing a fellow contractor was criminal in nature.

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 <u>declared war or a contingency operation</u>, 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.)

In July of 2012 CAAF released its decision which was based on review two issues where Ali renewed his earlier arguments: 1) he does not fall within the provisions of 2(a)(10) and 2) exercising jurisdiction over him violated his Fifth and Sixth Amendment rights.

CAAF ruled that the court-martial had jurisdiction over Ali under the provisions of Article 2(a)(10), and that the application of 2(a)(10) to Ali did not violate the Constitution ***"under the circumstances of this case."***

The last six words of the above sentence seem to indicate that this result may be quite narrow and limited to the facts of this particular case. First, looking to the issue of jurisdiction under 2(a)(10), the *Ali* opinion reminds us that there are three prerequisites that must be met for courts-martial jurisdiction to vest: 1) jurisdiction over the offense, 2) jurisdiction over the accused, and 3) a properly convened and composed court-martial.

The court stated that Ali does not contest the finding that Operation Iraqi Freedom was a contingency operation. Ali's argument centered on the second prong of the jurisdiction test where he argued that the terms "accompanying" and "serving with" are not defined in the MCM, Art. 2, or case law; thus ambiguous. Ali urged the court to look to the Military Extraterritorial Jurisdiction Act (MEJA) and the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA), as both MEJA and the NATO SOFA define those terms and exclude host country nationals from their jurisdiction. However, the court noted that the phrase "persons serving with or accompanying an armed force" was addressed in *U.S. v. Burney, 6 C.M.A. 776*. "The test is whether the accused has moved with a military operation and whether his presence with the armed force was not merely incidental, but directly connected with, or dependent upon, the activities of the armed force or its personnel."

Additionally, the court pointed out that an accused may be considered to be accompanying or serving with an armed force even though he is not directly employed by that armed force or the Government, "but instead works for a contractor engaged on a military project." Thus the court looked to the facts to determine if Ali was "serving with" or "accompanying the force." What those facts revealed was that Ali was "virtually indistinguishable from the troops serving in 1st Squad and he faced the same daily routines and threats as they did." Ali was fully embedded with his unit, he wore a "U.S. Army Tape" and unit patch on his uniform, as well as body armor and a helmet. He lived in a combat outpost, and received mission orders from the squad leader, to whom, for operational purposes, he also reported. As such, Ali was both serving with and accompanying the force in the field. Additionally, the court found that in the least, Ali continued to accompany the force while awaiting trial thereby satisfying the second prong of the three part jurisdiction test.

Turning to the Constitutional claims made by Ali, the court summed up the issue by saying that "Ali must show that he was entitled to Fifth and Sixth Amendment protections and that, under the facts of the this case, these protections were violated when he was subjected to military jurisdiction." The bottom line here is that since Ali, a noncitizen, lacked, and never developed, "substantial connections" with the United States, and no precedent exists that mandates conferring upon him Fifth and Sixth Amendment rights. The court further stated that "whatever rights Appellant had were met through the court-martial process."

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