DESKBOOK

Volume I

Criminal Law Department

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53rd GRADUATE COURSE

CRIMINAL LAW DESKBOOK

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Major Ernie Harper, USMC
July 2004

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SEARCH AND SEIZURE

Outline of Instruction

I. INTRODUCTION. *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 MREs 311-317.*

A. The Fourth Amendment. "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."

B. 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

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

e. Military Rules of Evidence which 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.

f. 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.

(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 which 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 Mil. R. Evid.).

II. LITIGATING FOURTH AMENDMENT VIOLATIONS.

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 also generally has the evidentiary burden (by a preponderance of evidence) that the search/seizure was proper.

A. 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.

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 (1996).

B. 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).

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 and consented in by 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 abuse of discretion. Abuse of discretion occurs if "[T]he 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. Sullivan*, 42 M.J. 360, 363 (1995). "Erroneous view of the law" is defined as *de novo* review. *United States v. Owens*, 51 M.J. 204 (1999).

III. APPLICATION OF FOURTH AMENDMENT.

For the Fourth Amendment to apply, there must be a search/seizure by a U.S. government official/agent. Furthermore, the person claiming protection must have a "reasonable expectation of privacy" in the thing/area searched/seized. Determining what is a "reasonable expectation of privacy" is done on a case-by-case basis utilizing the test set forth in Katz v. United States, which states that a person claiming an expectation of privacy must show that 1) he actually believed he had such an expectation, and 2) society views the expectation as objectively reasonable.

A. Nongovernment Searches. The fourth amendment does not apply unless there is a *government* invasion of privacy. *Rakas v. Illinois*, 439 U.S. 128, 140-49 (1978)

1. 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 when federal express 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 fourth amendment.

(2) *United States v. Daniels*, 03-0614/NA (2004). Whether a private actor serves as an agent of the govt hinges not on the motivation of the individual, but on the degree of the govt's participation.

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* overrules earlier case law which likened AAFES personnel to private security guards.

2. Foreign searches are not covered by the 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 the search was "participated in" by U.S. agents. 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. No Reasonable Expectation of Privacy. The fourth amendment only applies if there is a reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347 (1967) (the fourth amendment protects people, not places).

1. For the expectation of privacy to be reasonable:

a. The person must have an actual subjective expectation of privacy; and

b. Society must recognize the expectation as objectively reasonable.

2. Public view or open view. "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 (1967).

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

(1) Garbage. *California v. Greenwood*, 486 U.S. 35 (1988). There was no expectation of privacy in sealed trash bags left for collection at curbside.

(2) 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.

b. Aerial observation.

(1) *California v. Ciraolo*, 476 U.S. 207 (1986). Observation of a fenced-in marijuana plot from an airplane was not a search.

(2) *Florida v. Riley*, 488 U.S. 445 (1989). Observation of a fenced-in marijuana greenhouse from a hovering helicopter was not a search.

c. Peering into Automobiles. *United States v. Owens*, 51 M.J. 204 (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 (1999). If the car is stopped by a law enforcement official and then peered into, the investigative stop must be lawful.

d. The "passerby."

(1) *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.

(2) *United States v. Kalisky*, 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.

e. 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 they 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.

3. Plain view. Mil. R. Evid. 316(d)(4)(c).

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

(1) The property is in plain view;

(2) The person observing the property is lawfully present; and

(3) The person observing the property has probable cause to seize it.

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

c. 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 receiver to see serial number and identify whether receiver was stolen; seizure was unlawful because the serial number was not in plain view.

d. 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 patdown 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).

4. Government computers/diskettes. *United States v. Tanksley*, 54 M.J. 169 (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.

5. E-mail/Internet. The Department of Justice has promulgated a manual on computers and criminal investigations. The July 2002 Search and Seizure Manual can be found at www.cybercrime.gov/ searchmanual.htm.

a. *United States v. Maxwell*, 45 M.J. 406 (1996). Accused had reasonable expectation of privacy in electronic mail transmissions sent, received and stored in AOL computers. 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.

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

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

6. Bank records.

a. *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.

b. *United States v. Dowty*, 48 M.J. 102 (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.

7. Enhanced senses. Use of "low-tech" devices to enhance senses during otherwise lawful search is permissible.

a. Dogs.

(1) *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).

(2) *United States v. Alexander*, 34 M.J. 121 (C.M.A. 1992). Dog sniff in common area does not trigger fourth amendment.

(3) *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.

(4) *See* AR 190-12, Military Working Dogs. Detector dogs are not to be used to inspect people.

b. Flashlights. *Texas v. Brown*, 460 U.S. 730 (1983). Shining flashlight to illuminate interior of auto is not a search.

c. Binoculars. *United States v. Lee*, 274 U.S. 559 (1927). Use of field glasses or binoculars is not a search.

d. 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.

e. Thermal Imaging Devices. *Kyllo v. United States*, 533 U.S. 27 (U.S. 2001). Supreme Court ruled that police use of thermal imaging device without a warrant was unreasonable. Heat source was lamps used for growing marijuana is private dwelling. The Court found use of thermal imaging device during surveillance was a "search" and, absent a warrant, presumptively unreasonable.

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

a. One party may consent to monitoring a phone conversation.

(1) *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.

(2) *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.

(3) *United States v. Guzman*, 52 M.J. 218 (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.

b. 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.

c. Special rules exist for the use of wiretaps, electronic and video surveillance, and pen registers. Rules for video surveillance apply if "communications" are recorded

(1) A federal statute provides greater protections than the fourth amendment. 18 U.S.C. §§ 2510-21, 3117, and 3121-26 (2000).

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

(b) The statute contains its own exclusionary rule. 18 U.S.C. § 2515 (2000).

(c) The statute applies to private searches, even though such searches are not covered by the fourth amendment. *People v. Otto*, 831 P.2d 1178 (Cal. 1992).

(2) 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).

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

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

d. 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.

9. Government property.

a. General rule. Mil. R. Evid. 316(d)(3) and Mil. R. Evid. 314(d).

(1) 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).

(2) A reasonable expectation of privacy normally exists in personal-use items such as footlockers and wall lockers.

b. Government desks.

(1) *O'Connor v. Ortega*, 480 U.S. 709 (1987). Search of desk by employer, for "work-related" purpose, does not require probable cause or warrant.

(2) *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.

(3) *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) *But see 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.

(3) *But see United States v. Curry*, 46 M.J. 733 (N.M. Ct. Crim. App. 1997) *aff'd* 48 M.J. 115 (1998) (per curiam). No need to read *McCarthy* so broadly: according to Navy Court, there is, instead, a *reduced* expectation of privacy.

(4) *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) *United States v. Moore*, 23 M.J. 295, 299 (C.M.A. 1987) (Cox, J., concurring). "I am unable intellectually to harmonize the implicit assumption . . . that service members have legally enforceable expectations of privacy . . . in barracks rooms."

C. Open fields. The fourth amendment does not apply to open fields. Mil. R. Evid. 314(j).

1. *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.

2. *United States v. Dunn*, 480 U.S. 294 (1987). Police intrusion into open barn on 198-acre ranch was not covered by fourth amendment; barn was not within "curtilage."

IV. SEARCHES BASED ON AUTHORIZATION AND PROBABLE CAUSE. *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 still must be conducted in a reasonable manner.*

A. General Rule. A search is proper if conducted pursuant to a search warrant or authorization based upon 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.

B. 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*, 124 S. Ct. 521 (2003).

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.

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 auto.

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*, 124 S. Ct. 795 (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.

3. Staleness. Probable cause will exist only if information establishes that evidence is presently located in area to be searched. Probable cause may evaporate with the passage of time.

a. *United States v. Henley*, 53 M.J. 488 (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.

C. 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);

(c) On-post recreation centers.

c. Delegation prohibited. *United States v. Kalscheur*, 11 M.J. 378 (C.M.A. 1981). Power to authorize searches is a function of command and may not be delegated to an executive officer.

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 (1999). Commander may resume command at his discretion. 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) (Crawford, J.). 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 9, AR 27-10, Military Justice (6 Sep. 2002), for information on the military magistrate.

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.

D. 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).

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.

d. Is aware of an on-going investigation.

3. Alternatives. Avoid any potential "neutral and detached" problems by seeking authorization from:

a. A military magistrate.

b. The next higher commander.

E. **Reasonableness and the "Knock and Announce**." 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*, 124 S. Ct. 521 (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.

F. 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).

G. 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.

H. 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 (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).

I. 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) (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*, 122 S. Ct. 2105 (2002).

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. __, 123 S. Ct. 1843 (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*, 122 S. Ct. 2105 (2002) (finding no requirement to inform bus passengers they could refuse to cooperate with police).

(2) State may prosecute for failure to answer if the 'stop and ID' statute is properly drawn. No 4A violation in *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County, et al*, 2004 US LEXIS 4385 (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 fourth amendment.

f. 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. RCM 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.

(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*, 122 S. Ct. 2458 (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 (2002) (finding DD Form 553 is not the equivalent of a 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.

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.

A. 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).

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 – using 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).

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. *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. *Maryland v. Wilson*, 519 U.S. 407 (1997). *Mimms* rule extended to passengers. *But see 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.

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 (2001).

B. 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.

(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 auto.

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 forfeitures 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.

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 p.c. for the arrest/ apprehension. Certain brief detentions – called "stops" - require only "reasonable suspicion," and outer patdown 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 excepted from Fourth Amendment requirements. Finally, emergency searches are also excepted from Fourth Amendment requirements.

A. 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 (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). At the family dwelling, husband refused to consent to search of house, while at her work site, wife consented to search of the house. MNCCA found consent valid., as long as both had equal access to house. *United States v. Garcia*, 57 M.J. 716 (N-M. Ct. Crim. App. 2002), *reversed on other grounds*, 59 M.J. 447 (2004).

b. 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 whom 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. 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).

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. 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 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).

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.

B. 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 (1996) (citing *United States v. Edwards*, 415 U.S. 800 (1974) (10 hours)). *Curtis* was later reversed on other grounds and the sentence reduced. *United States v. Curtis*, 52 M.J. 166 (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. 545 (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*, 124 S. Ct. 2127 (2004), to include search of a vehicle if the arrestee was a "recent occupant" of the vehicle. How recent remains unclear.

d. 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).

C. 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 also United States v. Robinson*, 58 M.J. 429 (2003), for an excellent framework for RS analysis.

(1) Reasonable suspicion is measured under the totality of the circumstances.

(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 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); 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" noncriminal conduct amounted to reasonable suspicion to stop air traveler who paid $2100 cash for two tickets, had about $4000 in cash, was travelling to a source city (Miami), was taking 20 hour flight to stay only 2 days, was checking no luggage (only carry-ons), was wearing same black jumpsuit and gold jewelry on both flights, appeared nervous and was travelling 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.

(3) *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 (1967). 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 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. 461 (ACCA 2003). Police may conduct a protective sweep of a house, even though the arrest takes place outside the house.

D. 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;

         (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 (ACMR 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. *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.

b. Valid inspection.

(1) Knowledge of "Reports." *United States v. Brown*, 52 M.J. 565 (Army 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. *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.

(3) Primary Purpose. *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.

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 Police Working Dogs (30 Sep. 1993).

(4) Civilian employees. Check labor agreement for impact on overtime and late arrivals.

(5) Female patdowns. 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.

E. Border Searches.

1. Customs inspections.

a. Customs inspections are constitutional border searches. *United States v. Ramsey*, 431 U.S. 606 (1977) (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.

F. 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 (28 Feb 1994).

   b. Admitted to the hospital, AR 700-84, Issue and Sale of Personal Clothing (28 Feb 1994).

   c. Placed in pretrial or post-trial confinement, AR 190-47, The U.S. Army Corrections System (15 Aug. 1996).

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).

G. Sobriety Checkpoints.

1. General rule. The fourth amendment does not forbid 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).

2. 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.

3. Information Gathering Roadblocks. *Lidster v. Illinois*, 124 S. Ct. 885 (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).

2. *Michigan v. Taylor*, 436 U.S. 499 (1978). Entry into burning or recently burnt building is permissible.

3. *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 egregious odor.

4. *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 (2000), *cert. denied*, 532 U.S. 919 (2001) for applicability of medical purpose exception to members of the Temporary Disability Retired List.

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 need" 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*, 122 S. Ct. 2559 (2002).

VII. EXCLUSIONARY RULE AND ITS EXCEPTIONS. *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.*

A. 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.

B. 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);

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 (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 (2001). Regardless of whether the mil. mag. 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.

9. *But see United States v. Maxwell*, 45 M.J. 406 (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 is not applicable. Evidence suppressed.

C. 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 marihuana. 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. *United States v. Fogg*, 52 M.J. 144 (1999).

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.

D. Exception: Inevitable Discovery.

1. General rule. Illegally obtained evidence is admissible if it inevitably would have been discovered through independent, lawful means.

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. Mil. R. Evid. 311(b)(2). Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made.

3. *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.

4. *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.

5. *United States v. Kalisky*, 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.

6. 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?

E. 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. *Wong Sun v. United States*, 371 U.S. 471,

484-87 (1963). Accused's unlawful arrest did not taint his subsequent statement where statement was made after his arraignment, release on own recognizance, and voluntary return to the police station several days later.

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.

F. 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 T-shirt 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. CONCLUSION.

IX. 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

X. APPENDIX B: GUIDE TO ARTICULATE 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. Witness or source should be asked three questions:

A. What is where and when? Get the facts!

1. Be specific: how much, size, color, etc.

2. Is it still there (or is information stale)?

a. If the witness saw a joint in barracks room two weeks ago, it is probably gone; the information is stale.

b. If the witness saw a large quantity of marijuana in barracks room one day ago, probably some is still there; the information is not stale.

B. How do you know? Which of these apply:

1. "I saw it there." Such personal observation is extremely reliable.

2. "He [the suspect] told me." Such an admission is reliable.

3. "His [the suspect's] roommate/wife/ friend told me." This is hearsay. Get details and call in source if possible.

4. "I heard it in the barracks." Such rumor is unreliable unless there are specific corroborating and verifying details.

C. Why should I believe you? Which of these apply:

1. Witness is a good, honest soldier; you know him from personal knowledge or by reputation or opinion of chain of command.

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

3. Witness has no reason to lie.

4. Witness has truthful demeanor.

5. Witness made statement under oath. ("Do you swear or affirm that any information you give is true to the best of your knowledge, so help you God?")

6. Other information corroborates or verifies details.

7. Witness made admission against own interests.

2. The determination that probable cause exists must be based on facts, not only on the conclusion of others.

3. The determination should be a common sense appraisal of the totality of all the facts and circumstances presented.

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53D GRADUATE COURSE

SELF-INCRIMINATION

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LTC David H. Robertson

February 2004

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53D GRADUATE COURSE

SELF-INCRIMINATION

Outline of Instruction

Open Confession is good for the soul

- Old Scottish Proverb

I. BACKGROUND.

A. Introduction.

In the military, the law of self-incrimination embraces Article 31, UCMJ, the Fifth Amendment, the Sixth Amendment, and the Voluntariness doctrine. Each source of law provides unique protections, triggered by distinct events. When analyzing a self-incrimination issue, therefore, it is imperative to categorize the analysis. First determine the relevant source of law in issue. Next, evaluate the situation and decide if the protections afforded under the source of law have been triggered. If so, 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 therefore, several steps of analysis. The confession or admission is admissible when the rights afforded under each source of law applicable 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.

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 (C.M.A. 1987).

2. Applying the Standard

a. Oral or written statements **are 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."

b. Verbal acts (physical act which is the equivalent of speaking) **are 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*, 120 S.Ct. 2037 (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 (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.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.

(5) Identification is generally not protected by PASI. *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). *See also Pennsylvania v. Muniz*, 496 U.S. 582 (1990).

d. 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), *cert. denied*, 479 U.S. 1011 (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 (1999). Conviction for misprison 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 misprison.

(3) *United States v. Medley*, 33 M.J. 75 (C.M.A. 1991), *cert. denied*, 112 S.Ct. 1473 (1992). 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).

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*, 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*. The Supreme Court reaffirmed that *Miranda v. Arizona* is a constitutional decision that the Congress is not permitted to "overrule." The Supreme Court also implicitly reaffirmed all the exceptions to *Miranda*. *Dickerson v. United States*, 120 S.Ct. 2326 (2000).

The trigger for *Miranda* warnings is "custodial interrogation." The test for custody is an objective examination, from the perspective of the subject, of whether there was a formal arrest

or restraint or otherwise 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 query 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.

Per *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.

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. 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. *Stansbury v. California*, 114 S.Ct. 1526 (1994).

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 (1997). Court 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 (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.

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.'" Policeman's initially uncommunicated decision to arrest driver does not bear on whether "in custody." *See also United States v. Rodriquez*, 44 M.J. 766 (N.M. Ct. Crim. App. 1996) (questioning of suspect about illegal gun sales during roadside stop was noncustodial).

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."

3. Military status as 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*."

4. Interrogation.

a. **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."

5. The term "interrogation" has the same meaning under the Fifth Amendment as it does for Article 31(b). (see Sec. IV. G. 4. [When must warnings be given?] of this outline)

6. 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."

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 gun was. Rehnquist: "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 5th 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*, 122 S. Ct. 2017 (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.

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 6th 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 limited to Law Enforcement Activity.

There was no violation of the Sixth Amendment where, following preferral, a state social services worker who had an independent duty under state law to investigate child abuse interviewed the accused. The social worker never contacted the government before or after the interview until subpoenaed. If a non-law enforcement official is not serving the "prosecution team", he is not a member of the "prosecutorial forces of organized society" and thus is not barred from contacting an accused based on a prior 6th 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.

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[1] Issuing *Miranda* warnings has been found sufficient to satisfy the 6th Amendment right to counsel warning requirement. *Patterson v. Illinois*, 487 U.S. 285 (1998).

[2] The Analysis to Mil. R. Evid. 305(d) notes it may be possible under unusual circumstances for the courts to find the 6th Amendment right attaches prior to preferral. *See United States v. Wattenbager*, 21 M.J. 41 (C.M.A. 1985) (pretrial confinement and clear movement toward prosecution found to trigger 6th Amendment counsel right).

That being said, mere confinement is not enough to trigger 6th 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).

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), or through police monitored radio transmissions. *Massiah v. United States*, 377 U.S. 201 (1964).

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 6th Amendment right to counsel and may not be used in government's case-in-chief. *United States v. Henry*, 447 U.S. 264 (1980) (government-paid, undercover informant initiated conversation with jailed appellant after gaining his confidences).

3. *United States v. Langer*, 41 M.J. 780 (A.F.Ct.Crim.App. 1995). 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. Fact that informant did not initiate conversation about drugs did not render police conduct acceptable.

D. Questioning must relate to the charged offense.

Texas v. Cobb, 532 U.S. 162 (2001). Appellant's 6th 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."

[3] *Blockberger 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."

A. Introduction.

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

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

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 (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 (Army Ct. Crim. App. 1998). Advising the accused that he was going to be questioned about rape implicitly included the offense of burglary. The Army Court determined that the burglary was 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 (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 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) warnings. *But see United States v. Kelley*, 48 M.J. 677 (Army 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. 283 (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:[4] 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. Over time, 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 "Person subject to this chapter" language of Article 31. Key elements of these tests were merged by the C.M.A. in *United States v. Duga*, 10 M.J. 206 (C.M.A. 1981)[5].

c. Failure to provide warnings when required could result in a violation of Article 98, Noncompliance with Procedural Rules.

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[4]This type of analysis was first suggested by Professor Maguire in 1958. 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. Lederer, *Rights Warnings in the Armed Services*, 72 Mil. L. Rev. 1 (1976).

[5]The foundation for what we now know as "the *Duga* test" was laid 27 years earlier in *United States v. Gibson*, 14 C.M.R. 164 (C.M.A. 1954). In *Gibson*, the court also provides a review of Article 31's purpose and legislative history.

d. The current standard:

(1) In *Duga*, the C.M.A. held Article 31(b) applies only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry. Accordingly, the court set forth a two-pronged test to determine whether a person is "a person subject to this chapter" for the purposes of Article 31. The points of analysis are:

(a) Was the questioner subject to the Code acting in an official capacity in the inquiry or was the questioning based on personal motivation?; *and*

(b) Did the person questioned perceive the inquiry as involving more than a casual conversation?

(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."[6]

e. Law enforcement or disciplinary inquiry: *The Primary Purpose Test.*

[6]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.

(1) *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). C.M.A. 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).

(2) *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.

(3) *United States v. Bowerman*, 39 M.J. 219 (C.M.A. 1994). Army doctor was not required to inform accused of Art. 31 rights when questioning him about child's injuries even though doctor thought child abuse was a distinct possibility.[7]

(4) *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.

(5) *United States v. Bell*, 44 M.J. 403 (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, R.C.M. 405(f)(7) requires that warnings be given to the accused at an Art 32 hearing. *See also* Mil. R. Evid. 301(b)(2) regarding military judges' obligation to provide witnesses warnings.

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[7] *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).

(6) *United States v. Moses*, 45 M.J. 132 (1996). Naval Criminal Investigative Service 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.

(7) *United States v. Payne*, 47 M.J. 37 (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) (Naval Criminal Investigative Service (NCIS) agents conducting background investigation).

(8) *United States v. Bradley*, 51 M.J. 437 (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 Art 31(b) warnings, since the purpose of the questioning was not for law enforcement of disciplinary purposes. The Court 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.

(9) *United States v. Norris*, 55 M.J. 209 (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.

(10) *United States v. Guyton-Bhatt*, 56 MJ 484 (2002). A legal assistance attorney was required to give Art. 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."

(11) *United States v. Benner*, 57 M.J. 210 (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.

(12) *United States v. Smith*, 56 M.J. 653 (Army Ct. Crim. App. 2001) President of prison's Unscheduled Reclassification Board was not required to read Art 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.

(13) Defense counsel not required to read Art 31 rights when conducting an interview of a witness on behalf of his client, 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.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?; (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?[8]

[8] *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.[9]

(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 (2000).

(5) *United States v. Moreno*, 36 M.J. 107 (C.M.A. 1992). State social services worker who had an independent duty under state law to investigate child abuse was not required to provide Article 31 or *Miranda* warnings prior to interviewing the accused. The court found no investigative merger or agency relationship. "[O]ne of the prime elements of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent."

[9] *United States v. 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 Court of Military Appeals denied appellant's motion to suppress, holding that the civilian police investigation had not merged with a military investigation.

(6) *United States v. Raymond*, 38 M.J. 136 (C.M.A. 1993). Social worker, subject to AR 608-18's reporting requirements, was not acting as an investigative agent of law enforcement when he counseled the accused with full knowledge that the accused was pending charges for child sexual abuse. CMA also ruled that health professionals engaged in treatment do not have a duty to provide Article 31(b) warnings.[10]

(7) *United States v. Payne*, 47 M.J. 37 (1997). The court 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.

g. Foreign police interrogations.

(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.[11]

(2) *United States v. Coleman*, 25 M.J. 679 (A.C.M.R. 1987). "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. *Affirmed*, 26 M.J. 451 (C.M.A. 1988), *cert. denied*, 488 U.S. 1035 (1989).

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

[11] *See United States v. Plante*, 32 C.M.R. 266, 273 (C.M.A. 1962) (holding that no Article 32(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 American CID headquarters building solely for the benefit of the German authorities where no American's were present).

(3) *United States v. French*, 38 M.J. 420 (C.M.A. 1993). Accused was questioned by British police in presence of his 1SG 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 MJ 489 (2002). Icelandic police were not required to give appellant Art 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 Court 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.

(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 United States Supreme Courts' 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 (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 Cox, 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 (Army 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 (Army 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 Army Court 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). 1SG 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: 1SG'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.

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 (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 the he was a LTC.

(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 nonprejudicial errors.

(b) *United States v. Vassar*, 52 M.J. 9 (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 6 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 (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. Court 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 (1996). A subordinate of the accused questioned the accused several times about suspected drug use without advising the accused of his Art. 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 (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 (1998). (A 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 AFOSI 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 5th 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 (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 Manual for Courts-Martial 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*, 114 S. Ct. 2350. 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 Court 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 (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 (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 platoon sergeant (PltSgt) that he had killed his wife. PltSgt questioned accused, absent rights warnings, about his wife's condition and location. Trial court admitted statements under "Public Safety Exception" because the PltSgt was motivated by concerns for the wife's health and safety. 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. 1984). 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.

	Art 31(b)	Miranda (5th Amend.)	6th Amend.
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
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 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	1) Right to counsel
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 5th or 6th 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 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 5th 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, however, counsel is made available when the subject has had a real opportunity to seek legal advice, otherwise, 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 6th Amendment, the subject cannot be questioned further unless: (1) counsel is present; or (2) the subject re-initiates questioning. For purposes of the 6th Amendment, continuous custody or a break in custody is irrelevant.

A 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 Art. 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 2 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.

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."[12] *But see McNeil v. Wisconsin*, 111 S.Ct. 2204 (1991). (Apparently limits *Minnick* holding regarding *Edwards* rule to periods of continuous custody.)

d. *United States v. Mitchell*, 51 M.J. 234 (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 M.J. 477 (1981).

e. *United States v. Gray*, 51 M.J. 1 (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.

3. Limits of the *Edwards* rule.

[12] *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*.

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 6-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 (1996) (re-interrogating accused who had been released from custody for 19 days provided meaningful opportunity to consult with counsel).

(2) *United States v. Faisca*, 46 M.J. 276 (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 (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 (Army 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.

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 such as "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. Watkins*, 32 M.J. 1054 (A.C.M.R. 1991). Accused reinitiated conversation by asking CID if he should get a civilian attorney and how much time the agent thought the accused might get. *Aff'd*, 34 M.J. 344 (C.M.A. 1992).

(4) *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 AFOSI 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), *cert. denied*, 114 S.Ct. 1056 (1994). 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 an American interview, while added intimidation in a foreign interview may make him unwilling to do so.

(2) In *United States v. Coleman*, 26 M.J. 451 (C.M.A. 1988) *cert. denied*, 488 U.S. 1035 (1989). American investigators had actual knowledge that Coleman had requested counsel during questioning by the German police, but *Edwards* did not apply to initial interrogation by American authorities. There must be, however, a complete rights advisement and waiver before the American interrogation.[13]

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."[14]

(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."

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

[14]*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 (1986), *on remand*, 22 M.J. 947 (A.C.M.R. 1986).

(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 Art. 15 proceeding: 1) does not constitute invoking Fifth Amend. right to counsel; 2) does not invoke a Sixth Amend. 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 U.S. 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).

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 Criminal Investigative Service (NCIS) agents: "Maybe I should talk to a lawyer." CMA ruled this ambiguous comment failed to invoke Fifth Amend. right to counsel, and NCIS agent properly clarified ambiguous comment before continuing. 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.[15]

(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 "Can I still have a lawyer or is it too late for that?" 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), *rev. denied*, 43 M.J. 145 (1995). 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's 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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[15]A statement either is an assertion to 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 "An 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 Art. 31(b) and *Miranda* counsel rights, the accused told CID investigators 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 court found that Nadel's request for a lawyer was "not a clear assertion of the right to have counsel present during the interview." Since it was an ambiguous request for counsel, the CID investigator had no duty to stop the interrogation or clarify Nadel's equivocal request. *citing Davis v. United States*, 512 U.S. 452 (1994).

(6) *United States v. Henderson*, 52 M.J. 14 (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 to *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 (1999). An explosive devise 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) **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. The Sixth Amendment counsel right does not invoke *Edwards.*

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 Art. 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.[16]

[16]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.

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).

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.

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; "The 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), *petition denied*, 23 M.J. 179 (C.M.A. 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. **Mil. R. Evid. 305(e)** provides that absent a valid waiver of counsel under Mil. R. Evid 305(g)(2)(c), once the Fifth or Sixth Amend. right to counsel has been invoked, either through a request for counsel in response to a Fifth or Sixth Amendment warning, or appointment or retention of counsel subsequent to the preferral of charges, counsel must be **present** before any subsequent interrogation concerning that offense may proceed.[17]

2. *Waiver.* **Mil. R. Evid. 305(g)(2)(c)** provides that if a person makes a valid request for counsel subsequent to the preferral of charges (*i.e.*, 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.

3. Fifth Amendment Limit.

   For Fifth Amendment counsel requests, application of this rule is limited to periods of continuous custody. *Minnick*; Mil. R. Evid. 305(g)(2)(B)(ii).

4. Sixth Amendment Limit.

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[17]The changes to Mil. R. Evid. 305 essentially replaced the old notice to counsel provisions that sprang from *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976). Under *McOmber* (as implemented by the old Rule 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 non-waivable until the COMA 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. Neither *LeMasters* nor the new Mil. R. Evid. 305(e) addresses the ethical implications of dealing with "represented" parties.

a. The rules concerning invocation of the Sixth Amendment right to counsel set limits on subsequent interrogation concerning the charged offense or offenses.

b. *United States v. Sager*, 36 M.J. 137 (C.M.A. 1992) (Wiss, J., concurring). Factors to consider when determining if offenses are related for purposes of Mil. R. Evid. 305(e) include: dissimilarity in victims, places, time frames, and seriousness of offenses.

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.

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."[18]

b. If matters to which the witness refuses to testify during cross-examination are purely collateral, there is no right to have the witness' 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.

[18]The Analysis to the rule describes collateral matters as "evidence of minimal importance"("usually dealing with a rather distant fact solicited for impeachment").

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 (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 the Privilege Against Self-Incrimination.** *Mitchell v. United States*, 119 S.Ct. 1307 (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).[19] Whether or not *Miranda* is implicated, a confession must be voluntary 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

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[19] *See generally*, Lederer, *The Law of Confessions - The Voluntariness Doctrine*, 74 Mil. L. Rev. 67 (1976).

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.

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 (1996).

2. "If the confession is the product of an essentially free and unconstrained choice by its maker, it may be used against him. If his will has been overborne and his capacity for self-determination critically impaired, the confession may not be used against him."[20]

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.[21]

4. *United States v. Lichtenhan*, 40 MJ 466, 470 (CMA 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.

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[20] 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 Bubonic's 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; 7) no request for the presence of an attorney.

[21] *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), *cert. denied*, 479 U.S. 827 (1986); *United States v. Norfleet*, 36 M.J. 129 (C.M.A. 1992); *United States v. Doucet*, 43 M.J. 656 (N.M.C. Ct. Crim. App. 1995); *United States v. Briggs*, 39 M.J. 600 (A.C.M.R. 1994); *United States v. Gill*, 37 M.J. 501 (A.F.C.M.R. 1993).

5. *United States v. Griffith*, 50 M.J. 278 (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.

6. *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.

7. *United States v. Henderson*, 52 M.J. 14 (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.

8. *United States v. Ford*, 51 M.J. 445 (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. Any evidence that the accused was threatened, tricked, or cajoled **into a waiver** will show that the defendant did not voluntarily waive his privilege. *Miranda*.

2. After a proper waiver, deception is permissible in the interrogation process as long as the artifice is not likely to produce an untrue confession. *United States v. Davis*, 6 M.J. 874 (A.C.M.R. 1979).

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." 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 (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. Official coercion is a necessary element in showing a violation of due process. *Colorado v. Connelly*, 479 U.S. 157 (1986). 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 accused's confession was voluntary.

3. *United States v. Campos*, 48 M.J. 203 (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*, 48 M.J. 227 (1998). An investigator telling the accused during an interrogation that "If 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.[22]

2. *United States v. Ellis*, 57 M.J. 375 (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.

3. *Arizona v. Fulminante*, 111 S.Ct. 1246 (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.

[22] 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, 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.

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 (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*. 57 M.J. 137 (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. *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.

2. *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".

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 (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 (CMA 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. (Note, no cleansing warning given)

B. After an Inadmissible Confession.

1. *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 MJ 466, 470 (CMA 1994).

2. *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).

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 **does** presumptively taint subsequent warned statements. Cleansing warnings, although not legally required, will help show voluntariness.

4. *United States v. McCaig*, 32 M.J. 751 (A.C.M.R. 1991). When statement is taken in violation of Article 31, subsequent statement must be voluntary and not the product of the prior violation in order to be admissible. Factors showing voluntariness: time lapse, new rights warnings, new questioner, cleansing warnings, questioner's references to prior admissions, whether accused admitted prior admission did not influence him, changed conditions, and whether illegal conduct "let the cat out of the bag." Statement found involuntary.

5. *United States v. Young*, 49 M.J. 265 (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 (1999).

6. *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,[23] *Miranda*,[24] Sixth Amendment,[25] 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).**

> "[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."

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[23]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. . . ."

[24]*Harris v. New York*, 401 U.S. 222 (1971); *accord Oregon v. Haas*, 420 U.S. 714 (1975).

[25]*Michigan v. Harvey*, 494 U.S. 344 (1990)(Statement given in response to police-initiated interrogation following attachment of accused's 6th 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 6th 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).

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." 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 (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."

XI. MENTION OF INVOCATION AT TRIAL.

A. Silence at trial.[26]

1. Comment by the prosecutor on the accused not testifying violates the Fifth Amendment and due process. *Griffin v. California*, 380 U.S. 609 (1965).

2. *Portundo 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 said 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. 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. *United States v. Robinson*, 485 U.S. 25 (1988).

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[26]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."
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> * * *
>
> (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 (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 (1999).

5. *United States v. Mobley*, 34 M.J. 527 (A.F.C.M.R. 1991). 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. *Aff'd*, 36 M.J. 34 (C.M.A. 1992) (Summary Disposition), *cert. denied*, 113 S.Ct. 596 (1992).

6. *United States v. Kirks*, 34 M.J. 646 (A.C.M.R. 1992). Trial counsel improperly described nontestifying accused's demeanor as "The iceman." Comments on a non-testifying accused's demeanor are objectionable on three grounds: 1) argues facts not in evidence; 2) violates Mi. R. Evid. 404(a) by using character evidence solely to prove guilt; and 3) violates Fifth Amendment. DC only objected on third ground, cured by 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 remark during findings argument that accused's tears in court were tears of remorse and guilt was harmless error though accused's courtroom behavior off witness stand was legally irrelevant to question of guilt.

7. *United States v. Dennis*, 39 M.J. 623 (N.M.C.M.R. 1993). TC argued on findings that no evidence was presented to refute the testimony of the government's key witness. NMCMR held that "even if improper" comment on the accused's failure to testify, TC's statement was harmless error. Evaluation factors regarding harm of TC's comment include: whether language was manifestly intended to comment on accused's failure to testify or was of such a character that members would naturally and necessarily take it as such; whether improper comments were isolated or extensive; whether evidence of guilt is overwhelming; and whether curative instructions were given.

B. Silence after warnings.

1. Use of accused's silence after *Miranda* warning to impeach later trial testimony as a fabrication violates due process. *Doyle v. Ohio*, 426 U.S. 610 (1976).

2. *United States v. Riley*, 47 M.J. 276 (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 (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 (1997).

4. *United States v. Miller*, 48 M.J. 811 (N.M. Ct. Crim. App. 1998). Relying on *Riley*, the Navy Court 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 (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 M.R.E. 304(h)(3), even when the one asking the questions was a friend who was inquiring out of personal curiosity. The Court also held that the start of the OSI investigation was the triggering event for the M.R.E. 304(h)(3) protections.

3. *United States v. Alameda*, 57 M.J. 190 (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). During cross-examination of the accused, the trial counsel questioned him about his failure to proclaim his innocence when confronted by investigators. The Air Force Court held that under the circumstances, the questioning by trial counsel did not violate M.R.E. 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.[27]

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[27] *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 arguement); *Brecht v. Abrahamson*, 113 S.Ct. 1710 (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*, 130 Wash.2d 228, 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.

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

D. Invoking the right to counsel.

United States v. Gilley, 56 M.J. 113 (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). TC 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.[28]

2. *United States v. Palumbo*, 27 M.J. 565 (A.C.M.R. 1988), *pet. denied*, 28 M.J. 265 (C.M.A. 1989). CID agent revealed to the court that accused asserted rights and declined to be interviewed. MJ 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 TC inadvertently introduced evidence.[29]

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."

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

[29]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).

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 can not 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.

a. *Motions and objections*. Defense must raise prior to plea or waive; good cause must be shown for an exception. M.R.E. 304(d)(2)(A).

b. *Specificity*: Judge may require defense to specify the grounds. M.R.E. 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. M.R.E. 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. M.R.E. 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. M.R.E. 304(e)(2)

f. *Rulings*. Shall be ruled on prior to plea, unless good cause. Judge shall state essential findings of fact.[30]

g. Guilty plea waives all.

2. **Standing to Challenge Self-Incrimination Issues.** *United States v. Jones*, 52 M.J. 60 (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.

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.[31]

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[30]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).

[31]*United States v. Adams*, 28 M.J. 576 (A.C.M.R. 1989), *petition denied*, 29 M.J. 439 (C.M.A. 1989)(Judge's failure to advise accused of his constitutional rights rendered guilty plea improvident).

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): "*Defense evidence*." 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), *cert. denied*, 498 U.S. 846 (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.[32]

[32] *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), *cert. denied*, 113 S.Ct. 196 (1992); *United States v. Williams*, 36 M.J. 785 (A.C.M.R. 1993).

d. *United States v. Duvall*, 47 M.J 189 (1997). A conviction cannot be based solely on a confession. Rather, some corroborative evidence must be introduced to the trier of fact pursuant to M.R.E. 304(g).

e. *United States v. Hall*, 50 M.J. 247 (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 M.R.E. 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 Air Force Court 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, as such, it can be used to corroborate a confession.

g. *United States v. Cottrill*, 45 M.J. 485 (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 (Army Ct. Crim. App. 2002)

h. *United States v. Howe*, 37 M.J. 1062 (N.M.C.M.R. 1993). 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). 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 (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, 118 S.Ct. 1151 (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 United States v. Bruton*, 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 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 and 2-7.

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. R.C.M. 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 (1999). The accused was one of many actors in a larceny scheme. Prior to trial, the defense asked the convening authority to grant a defense witness immunity. 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 (Procedures for Coordination with DoJ).

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.

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; (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 MJ 60 (2003); *But see United States v. McGeeny*, 44 M.J. 418 (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), CMA held that immunity protection described in *Kastigar* also extend to "nonevidentiary uses" of immunized statements, such as the decision to prosecute. *See also United States v. Mapes*, 59 MJ 60 (2003).

(2) Accordingly, the impact of testimonial immunity goes beyond the admissibility of certain statements. 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. McGeeny*, 41 M.J. 544 (N.M.C. 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, appellant testified at TSgt S's Article 32 hearing that he had never used drugs with TSgt S. Four days later, Olivero charged with drug use and perjury. At trial, Olivero moves to dismiss claiming decision to prosecute was wrongly based on his immunized statements. CMA agrees. 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 CAAF ruled that prosecutions may not "result from" statements taken in violation of Article 31(d).

(6) *United States v. Youngman*, 48 M.J. 123 (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 (A/C) privilege. Further, disclosure of attorney-client confidences while testifying under a grant of immunity does not constitute a voluntary waiver of the A/C privilege. *See United States v. Romano*, 46 M.J. 269 (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. 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 5th 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) *petition denied*, 21 M.J. 27 (C.M.A. 1985). 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.[33]

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[33]*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 (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-marital 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 Art. 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.

(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.[34]

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.[35]

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 CMA decision.[36]

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[34] *United States v. Conklan*, 41 M.J. 800 (Army Ct. Crim. App. 1995). Representations by a battalion CO, indicating that the Army would not prosecute accused for carnal knowledge offense, did not constitute offer of *de facto* transactional immunity, in light of CO'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 CA. The Accused's reenlistment after CO'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.

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

On the other hand, a USMC Commander's (O-6) assurances to two accused - "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 Colonel's action rendered the accused's statements, and all evidence derived therefrom, inadmissible.

[36] *United States v. Corcoran*, 40 M.J. 478 (C.M.A. 1994); *See also United States v. Martindale*, 40 M.J. 348 (CMA 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).

XIV. CONCLUSION.

53D JUDGE ADVOCATE OFFICER GRADUATE COURSE

SIXTH AMENDMENT

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JULY 2004

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53D JUDGE ADVOCATE OFFICER GRADUATE COURSE

SIXTH AMENDMENT

I. INTRODUCTION

A. "In all criminal prosecutions, the accused shall enjoy the right to a . . . **public trial** . . . to be **confronted** with the witnesses against him; to have **compulsory process** for obtaining witnesses in his favor, and to have the **Assistance of Counsel** for his defence." **U.S. CONST. amend. VI.**

B. Confrontation.

C. Compulsory process.

D. Assistance of counsel.

E. Public Trial.

II. WAYS TO SATISFY THE CONFRONTATION CLAUSE

A. Produce the witness. Producing the witness will satisfy the Confrontation Clause even if the witness cannot be cross-examined effectively. The Confrontation Clause guarantees an *opportunity* to cross-examine witnesses. There is no right to *meaningful* cross-examination.

1. *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."

2. *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. The victim was under oath and subject to cross-examination; the Confrontation Clause was satisfied.

3. *United States v. Gans*, 32 M.J. 412 (C.M.A. 1991). The military judge admitted into evidence a sexual abuse victim's statement given thirty months earlier to MPs as past recollection recorded (Mil.R.Evid. 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 limited. The Court of Military Appeals disagreed, relying on the *Fensterer* and *Owens* decisions that there is no right to *meaningful* cross-examination**.**

4. *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 reënactment 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 reënactment. Chief Judge Sullivan, Judges Cox and Crawford did not perceive a confrontation clause issue because the victim testified.

5. *See also United States v. Spotted War Bonnet*, 933 F.2d 1471, 1473 (8th Cir. 1991) (quoting *California v. Green*, 399 U.S. 149 (1970)); *United States v. Casteel*, 45 M.J. 379 (1996).

B. Waiver.

1. *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.

2. *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.

3. *United States v. Bridges*, 55 M.J. 60 (2001). The Court of Appeals for the Armed Forces [hereinafter 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 Confrontation 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.

1. *United States v. White*, 116 F.3d 903 (1997) (per curiam). Misconduct leading to the loss of confrontation rights also necessarily causes the defendant to forfeit hearsay objections (witness murdered). A defendant's actions that make it necessary for the government to resort to such proof should be construed as a forfeiture of the protections afforded under both the Confrontation Clause and the rules of evidence.

2. *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.

3. *United States v. Paaluhi*, 50 M.J. 782 (N-M. Ct. Crim. App. 1999). The Navy-Marine Court found the child victim's unavailability was a direct result of the actions of the appellant and members of his family acting on his behalf, with both his knowledge and approval. As a result, the appellant waived any evidentiary or constitutional right to object to the military judge's subsequent ruling that the witness was unavailable.

III. CONFRONTATION AND TESTIMONIAL HEARSAY

A. The paradigm for analyzing a hearsay's statement compliance with the requirements of the Confrontation Clause changed dramatically with the case of *Crawford v. Washington*, 124 S. Ct. 1354 (2004). The Supreme Court specifically overruled *Ohio v. Roberts* 448 U.S. 56 (1980) (holding that a hearsay statement possesses sufficient indicia of reliability to satisfy the Confrontation Clause if the statement falls into a "firmly rooted" exception to the hearsay rule OR (2) if the hearsay statement possesses sufficient "particularized guarantees of trustworthiness") and held that a reliability guarantee is insufficient to satisfy the

requirements of the Confrontation Clause. The Clause demands that before a testimonial statement of a hearsay declarant is admitted the prosecution must show that the witness is unavailable and that the accused has a prior opportunity to cross-examine the declarant.

1. Crawford was charged with assault and attempted murder when he stabbed the victim during an altercation that arose from the victim's alleged attempt to rape Crawford's wife, Sylvia. Sylvia led Crawford to the victim's apartment, thus facilitating the assault. Police arrested both Crawford and Sylvia and advised them of their *Miranda* rights. Crawford claimed self-defense. Sylvia gave a recorded statement that the prosecution contended significantly undermined the accused's claim of self-defense. At trial, the accused invoked Washington's marital privilege to prevent Sylvia's recorded statement from being introduced. The prosecution then sought to admit her statement as a statement against penal interest. Crawford claimed that the statement's admission would violate his right to confrontation. In admitting the statement, the trial court used the *Roberts* model to arrive at its conclusion that the statement possessed particularized guarantees of trustworthiness.

2. The Washington Court of Appeals reversed Crawford's conviction, applying a nine-factor test to determine that Sylvia's statement did *not* possess sufficient particularized guarantees of trustworthiness. The Washington Supreme Court unanimously reinstating Crawford's conviction finding that the interlocking nature of the statements (the accused's and Sylvia's), Sylvia's statement bore sufficient guarantees of trustworthiness.

3. Justice Scalia, writing for a seven-member majority, reviewed the pedigree of the confrontation clause and its meaning in English common law and early American jurisprudence. His review generated two important inferences: (1) the Confrontation Clause principally was directed against the civil-law mode of criminal procedure, particularly its use of *ex parte* examinations against a criminal defendant (*Crawford*, 124 S. Ct. at 1363) and (2) "that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id*. at 1365.

    a) Regarding the first inference, Justice Scalia noted that the Framers' focus on the mode of criminal procedure means that "not all hearsay implicated the Sixth Amendment's core concerns." *Id*. at

1364. *Testimonial*[1] hearsay, however, does have Sixth Amendment implications when the declarant is not available and was not subjected to a prior opportunity for cross-examination. **The Court refused to define the parameters of "testimonial," but noted that, at a minimum, the term applies to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 1374.**

b) Regarding the second inference, the Court determined that the Sixth Amendment incorporates the common law (as understood in 1791) limitations on the admissibility of an absent witness's examination "on unavailability and a prior opportunity to cross-examine." *Id.* at 1366.

4. The Court overruled *Roberts* declaring that "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protections to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" *Id.* at 1370. Most notable, the Court stated, "[The Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.*

5. The Court held "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 1374. Where nontestimonial evidence is at issue, however, "it is wholly consistent with the Framers' design to afford the States flexibility in the development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Id.*

B. What *Crawford* means to many of the previously admissible (for both evidentiary as well as Confrontation Clause purposes) hearsay statements under the rubric of "firmly rooted" is unclear. The Court sought to downplay the *Crawford*

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[1] Justice Scalia listed the various formulations of the class of "testimonial" statements: "*ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examination, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that the declarants would reasonably expect to be used prosecutorially [citation omitted]; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions [citation omitted]; 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 [citation omitted]." *Crawford*, 124 S. Ct. 1364, at 1364.

decision's impact on such cases as *White v. Illinois*, 502 U.S. 346 (1992)[2] by noting that *White* involved the very narrow question of whether the *Roberts* unavailability requirement applied to excited utterances and statements made for medical diagnosis and treatment. *See Crawford*, 124 S. Ct. at 1368 n8.

C. Also unclear is the decision's impact on the residual hearsay rule, where the *Roberts* test came into play most often. Will the character of the statement weigh more? Will the purpose for which the statement was made be dispositive? What does the intent of the speaker mean to the analysis?

D. Early interpretations.

1. *People v. Sisaveth*, No. F041885, 2004 Cal. App. LEXIS 820 (Cal. Ct. App. May 27, 2004) (holding that child sexual abuse victim's statement to police officer responding to call was testimonial because it was knowingly given in response to structured police questioning; statement made to a forensic interview specialist at a county facility for interviewing children suspected of being victims of abuse and made after the complaint and information were filed was testimonial because it was made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for use at a later trial).

2. *People v. Vigil*, No. 02CA0833, 2004 Colo. App. LEXIS 1024 (Colo. Ct. App. June 17, 2004) (holding that child sexual abuse victim's videotaped statement to law enforcement was interrogation and testimonial; excited statements statements to father and father's friend were not testimonial because those statements were not solemn or formal statements and were made to persons unassociated with government activity; statements to a doctor who examined and interviewed child after incident at the request of law enforcement were testimonial because the statements were made under circumstances that would lead an objective witness reasonably to believe that they would be used for later prosecution).

3. *In re R.A.S.*, No. 03CA1209, 2004 Colo. LEXIS 1032 (Colo. Ct. App. June 17, 2004) (holding that child sexual abuse victim's videotaped

[2] *White* involved four statements made by a 4-year-old victim of sexual assault: one statement to a babysitter made immediately after the defendant left the bedroom she was sleeping in. The victim made a second statement to her mother, who arrived approximately thirty minutes after the assault. The victim made a consistent third statement to a police officer who arrived approximately forty-five minutes after first screaming. The victim also made statements to medical personnel (a nurse and a doctor) approximately four hours after the attack. The first three statements were deemed "spontaneous declarations" and the last two were "medical examination" statements and all were admitted over objection. The victim never testified at trial. *White v. Illinois*, 502 U.S. 346, 348-350 (1992).

statement to police investigator was interrogation and therefore, testimonial).

4. *People v. Compan*, No. 02CA1469, 2004 Colo. App. LEXIS 865 (Colo. Ct. App. May 20, 2004) (holding that domestic violence victim's statements to a friend and a doctor were not testimonial because the statements were not solemn or formal declarations; observing also that "it appears that testimonial statements under *Crawford* will generally be (1) solemn or formal statements (not casual or off-hand remarks), (2) made for the purpose of proving or establishing facts in judicial proceedings (not for business or personal purposes), (3) to a government actor or agent (not to someone unassociated with government activity")).

5. *State v. Rivera*, 844 A.2d 191 (Conn. 2004) (holding that nephew's testimony at defendant's trial about what his uncle (a co-conspirator of the defendant's) told him about the defendant's involvement in a murder was outside the "core class" of testimonial statements in *Crawford* because the uncle's statement was in confidence on his own initiative to a close family member well before the defendant's arrest and more than four years before the uncle's arrest).

6. *Demons v. State*, No. S04A0413, 2004 Ga. LEXIS 274 (Ga. Mar. 29, 2004) (holding that decedent's statements to a co-worker about the source of bruises on his upper arms and chest and about a threat communicated by the defendant "were not remotely similar" to prior testimony or police interrogation and, therefore, were not testimonial).

7. *People v. Patterson*, 808 N.E.2d 1159 (Ill. App. Ct. 2004) (holding that admission of witness's grand jury testimony violated the Confrontation Clause).

8. *Hammon v. State*, No. 52A02-0308-CR-693, 2004 Ind. App. LEXIS 1099 (Ind. Ct. App. June 14, 2004) (police officer's testimony about what assault victim said to him about her attacker was not testimonial; "whatever else police 'interrogation' might be, we do not believe that word applies to preliminary investigatory questions asked at the scene of a crime shortly after it occurred").

9. *Fowler v. State*, No. 49A02-0310-CR-930, 2004 Ind. App. LEXIS 1103 (Ind. Ct. App. June 14, 2004) (excited utterance of domestic abuse victim to responding police officer was not testimonial; "Officer Decker's questioning of A.R. at the scene of the incident just minutes after it occurred does not qualify as classic 'police interrogation' as referred to in *Crawford*").

10. *Snowden v. Maryland*, No. 2933, 2004 Md. App. LEXIS 32 (Md. Ct. Spec. App. Apr. 5, 2004) (holding that child sexual abuse victims' statements to social worker who interviewed the victims for the purpose of developing their testimony were testimonial).

11. *People v. Geno*, No. 241768, 2004 Mich. App. LEXIS 1067 (Mich. Ct. App. Apr. 27, 2004) (holding statement at issue was not testimonial because the child sexual abuse victim's statement was made to nongovernmental employee (although interview arranged by Children's Protective Services) and victim's answer to question whether she had an "owie" was not a statement in the nature of "ex parte in-court testimony or its functional equivalent").

12. *City of Las Vegas v. Walsh*, No. 41317, 2004 Nev. LEXIS 49 (Nev. June 11, 2004) (healthcare professional's affidavit prepared solely for the prosecution's later use at trial was testimonial).

13. *People v. Moscat*, No. 2003BX044511, 2004 N.Y. Misc. LEXIS 231 (N.Y. Crim. Ct. Mar. 25, 2004) (holding that a 911 call is not testimonial as the term is used in *Crawford* because the call is generated by an "urgent desire of a citizen to be rescued from immediate peril" rather than a desire on the government's part to seek evidence against a particular suspect).

14. *People v. Cortes*, No. 658/02, 2004 N.Y. Misc. LEXIS 663 (N.Y. App. Div. May 26, 2004) (holding that "[w]hen a 911 call made to report a crime and supply information about the circumstances and the people involved, the purpose of the information is for investigation, prosecution, and potential use at a judicial proceeding" that the call is testimonial because such calls are formal in that they follow established procedures, rules, an patterns of information collection, therefore, falling within the *Crawford* definition of interrogation).

15. *People v. Rivera*, No. 3798, 2004 N.Y. App. Div. LEXIS 7825 (N.Y. App. Div. June 8, 2004) (in *dicta*, noting that a victim's girlfriend's telephoned statement to victim's sister identifying the defendant as assailant would not be testimonial).

16. *State v. Forrest*, No. COA03-806, 2004 N.C. App. LEXIS 827 (N.C. Ct. App. May 18, 2004) (holding that assault victim's statement to law enforcement immediately after defendant's arrest was not testimonial because such a statement is not police interrogation under *Crawford*).

17. *State v. Allen*, No. 80556, 2004 Ohio App. LEXIS 2764 (Ohio Ct. App. June 17, 2004) (holding that statement of co-defendant to police was testimonial).

18. *Cassidy v. State*, No. 03-03-0098-CR, 2004 Tex. App. LEXIS 4519 (Tex. App. May 20, 2004) (holding that aggravated assault victim's statement to law enforcement at the hospital after the assault was not testimonial).

19. *United States v. Saner*, 313 F. Supp. 2d 896 (S.D. Ind. 2004) (holding that co-defendant's statement to Department of Justice prosecutor are testimonial because the DoJ prosecutor's interview was generated by a desire to gather evidence against the declarant and other potential defendants to be used at trial).

20. *United States v. Manfre*, Nos. 03-2239WA, 03-2394WA, 2004 U.S. App. LEXIS 9162 (8th Cir. May 11, 2004) (noting that deceased co-conspirator's statements to his brother about defendant's involvement in arson were not testimonial because they were not the kind of memorialized, judicial-process-created evidence defined in *Crawford*).

E. From the cases above, it is clear that, at this point, there is no consensus on what "testimonial" means outside of the parameters that the Supreme Court provided – prior testimony at a preliminary or grand jury hearing, at a trial or police interrogation. And even with "police interrogation," there is disagreement among the courts as to the precise definition. Given this area's early development, it is incumbent on the trial practitioner to maintain a watchful eye on developments in this area of the law.

IV. COMMENT ON EXERCISING SIXTH AMENDMENT RIGHTS

A. *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.

B. *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.

V. LIMITATIONS ON CROSS-EXAMINATION

A. 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.

1. "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).

2. 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).

3. "[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).

4. "[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.

5. "[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).

6. 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).

B. **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.

C. **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).

D. **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.

E. **Bias**.

1. *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.

2. *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.

F. **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.

G. **Rule 412.** *See* Evidence outline.

VI. LIMITS ON FACE-TO-FACE CONFRONTATION

A. The Supreme Court.

1. *Coy v. Iowa*, 487 U.S. 1012 (1988). Appellant's confrontation rights were violated when a screen prevented the child victims from seeing him during their testimony. An Iowa statute provided for such protection without requiring a case-specific showing of necessity. The Court left for another day whether any exceptions existed to the requirement for face-to-face confrontation.

2. *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.

   a. 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.**

   b. **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:

      (1) the procedure proposed is necessary to protect the child victim,

      (2) The child victim would be traumatized by the presence of the accused, and

      (3) the emotional distress would be more than *de minimis*. What does *de minimis* 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).

   c. **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.

d. **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.

(1) Physical presence;

(2) Oath;

(3) Cross-examination;

(4) Observation of the witness by the fact finder.

B. Military Cases.

1. *United States v. Anderson*, 51 M.J. 145 (1999).

a) The government used the testimony of a licensed psychologist to establish the facts necessary for the judge to make the findings required to use special courtroom arrangements for two child witnesses. The testimony of the psychologist is included in the opinion. *Id.* at 147-48.

b) The judge prescribed an elaborate procedure so that the victims could testify without facing the accused. Closed circuit television was used so the military judge, counsel, and the reporter could all see the testimony.

c) The instruction the judge gave the panel before the witnesses' testimony is included. *Id.*

2. *United States v. McCollum*, 58 M.J. 323 (2003). This case required CAAF to pass on the 1999 amendment to M.R.E. 611, subsection (d), added after the CAAF's decision in *Anderson*.

a) The military judge permitted 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 himself IAW R.C.M. 804(c).

b) CAAF interpreted M.R.E. 611(d) consistently with *Maryland v. Craig*, finding that under the rule, the emotional distress required to justify the use of remote live testimony "must be sufficiently serious that it would prevent the child from reasonably testifying." *McCollum*, 58 M.J. at 331.

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 M.R.E. 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. *Id.* 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." *Id.* at 332.

d) CAAF also determined that a military judge is not required under the Sixth Amendment nor MRE 611(d) to interview or observe a child witness before making a necessity ruling. *Id.* at 333. In this case, the military judge made her determination based on unrebutted expert testimony, providing the judge with "sufficient expert-opinion testimony to make a finding" that the witness would suffer trauma and be unable to testify in the accused's presence.

e) 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." *Id.*

f) The witness indicated that she wanted to testify in the accused's presence, but the military judge, in assessing her ability to testify reasonably in the accused's presence, "was free, despite CS's desire, to defer to [the expert witness's] conclusion that CS would be harmed by testifying in front of Appellant." *Id.* fn 2.

3. **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 *Coy* and *Craig*. Case affirmed. *See also Coy v. Iowa*, 487 U.S. 1012 (1988).

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.

4. **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.

5. **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.

C. **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.

D. Other issues in remote testimony.

1. *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 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.

2. *U.S. 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 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. CAAF also emphasized that this was an unusual situation causing the military judge to "craft a creative solution," lest the testimony be temporarily lost.

3. *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.

4. *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).

VII. RIGHT TO BE PRESENT AT TRIAL

A. 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).

B. Disruptive Accused.

1. 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.

2. RCM 804. A military judge faced with a disorderly and disruptive accused has 3 constitutionally permissible responses:

a) bind and gag the accused as a last resort, thereby keeping him present;

b) cite the accused for criminal contempt;

c) remove the accused from the courtroom until he promises to conduct himself properly.

C. Intentionally absent accused. Trial may continue in the absence of the accused when the accused voluntarily absents himself from trial. *Taylor v. United States*, 414 U.S. 17 (1912). *See also* 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).

VIII. ASSISTANCE OF COUNSEL

A. The Sixth Amendment right to counsel attaches at preferral of charges. *United States v. Wattenbarger*, 21 M.J. 41 (C.M.A. 1985). It is offense specific. *Texas v. Cobb*, 532 U.S. 162 (2001) (using the *Blockburger v. United States*, 284 U.S. 299 (1932) elements test to define an offense); *NcNeil v. Wisconsin*, 501 U.S. 171 (1991); *United States v. Sager*, 36 M.J. 137 (C.M.A. 1992). The accused also maintains the right to assistance of counsel through appeal. *United States v. Dorman*, 58 M.J. 295, 297 (2003); UCMJ, art. 70(c); RCM 1202(b)(2).

B. Right to Counsel of Choice**.**

1. Conflict-free counsel.

a) *Mickens v. Taylor*, 535 U.S. 162 (2002). Appellant was convicted of premeditated murder and was sentenced to death. Appellant's attorney represented the victim at the time of the murder in an unrelated criminal matter. Appellant's attorney never disclosed to the trial court or to appellant that he had previously represented the victim. The Supreme Court held that because the appellant did not demonstrate that his counsel actively represented conflicting interests, his Sixth Amendment ineffective assistance of counsel claim failed. Since the Fourth Circuit found that the appellant failed to demonstrate prejudice by showing that the conflict significantly affected his counsel's performance, the Supreme Court affirmed the conviction.

b) *United States v. Cain*, 57 M.J. 733 (Army Ct. Crim. App. 2002), *rev'd*, 59 M.J. 285 (2004). Appellant convicted pursuant to his pleas of two specifications of indecent assault in violation of Article 134, UCMJ. On initial review, the appellant alleged that he and his lead military defense counsel had a coerced homosexual relationship that denied him effective assistance of counsel. The Army Court ordered a *DuBay* hearing to determine the underlying facts. The relevant facts found were: MAJ S and the appellant entered into a consensual sexual relationship shortly before the Article 32, UCMJ investigation on 3 December 1997; the relationship continued until the conclusion of the trial about six months later; appellant told several people about the relationship, including two civilian attorneys, who told appellant that he should fire MAJ S because counsel's behavior was unethical and illegal; appellant did not fire MAJ S because he believed that was the best military defense counsel available; in January 1998, MAJ S detailed CPT L to the case at appellant's request because appellant thought he should have two counsel (given that there were two trial counsel); after consulting with the appellant and MAJ S (both of whom initially wanted to contest the case) and thoroughly reviewing the facts, CPT L initiated negotiations with the Government regarding a pretrial agreement; on 2 June 1998, the accused pled guilty and was found guilty by a military judge sitting as a general court-martial; on 6 June 1998, appellant's parents, without appellant's knowledge, sent a letter to the convening authority alleging that MAJ S pressured appellant into sexual favors; on 18 June 1998, LTC F, the TDS XO, informed MAJ S of the allegation; and the following morning, MAJ S killed himself.

(1) The right to effective counsel includes the right to representation free from conflicts of interest. *Wood v. Georgia*, 450 U.S 261, 271 (1981). Where alleged IAC arises from a conflict of interest, the Army Court applies the two-pronged test of *Cuyler v. Sullivan*, 446 U.S. 335 (1980). In that context, an accused who raises no objections at trial must show that an actual conflict of interest existed and that the conflict of interest adversely affected counsel's performance. If both elements are shown, prejudice is presumed. In cases of a guilty plea, the *Cuyler* test is modified: the accused must show an actual conflict of interest and that the conflict adversely affected the voluntary nature of the plea. Quoting *United States v. Mays*, 77 F.3d 906, 908 (6th Cir. 1996), the Army Court specifically noted that an accused must "point to specific instances in the record to suggest an actual conflict . . . [and] must demonstrate that the attorney made a choice between possible alternative courses of action" to the accused's detriment. The Army Court also noted that an accused may waive the right to conflict-free counsel, but such waiver must be made "voluntarily, knowingly, and intelligently with sufficient awareness of the relevant circumstances and likely consequences."

(2) Applying the above law, the Army Court found that the appellant failed to meet his burden and affirmed the case.

(a) The Army Court, noting that a counsel's sexual relations with a client do not create a *per se* actual conflict of interest, declined appellant's invitation to adopt a *per se* criminal conduct rule, whereby a conflict of interest would exist *per se* in cases where a defense counsel engages in criminal conduct with an accused. Although his conduct was similar to the charged misconduct of the appellant, MAJ S's conduct was unrelated to appellant's charged crimes. Therefore, there was no actual conflict on the facts. The Army Court found that MAJ S did not fear or risk exposure of the relationship by aggressively and effectively representing the appellant. In the Army Court's words, "[t]he best way to maintain appellant's confidence required that MAJ S represent appellant's interests to the utmost of his abilities, and that appellant know of MAJ S's efforts on his behalf. . . . In short, not

only did MAJ S and appellant's interests not conflict, in some respects, they converged."

(b) The Army Court held, that even if there were an actual conflict, the appellant waived it. Appellant had the benefit of talking to several people, including two civilian attorneys who told that appellant that MAJ S's conduct merited MAJ S's release. Notwithstanding that advice, appellant "wanted MAJ S to continue to represent him because he believed him to be the best military attorney available."

(c) Finally, the Army Court found that there was no evidence in the record that any conflict adversely affected the defense team's performance, appellant's decision to plead guilty, or the terms and conditions of appellant's guilty plea. Further, even if MAJ S labored under a conflict, CPT L did not, because CPT L knew nothing of appellant's and MAJ S's relationship. The Army Court declared, "Measuring the combined efforts of MAJ S and CPT L on behalf of appellant, it is difficult to imagine what more they could have done on his behalf to produce a more favorable result."

(3) In reversing the Army Court, the CAAF held "[t]he uniquely proscribed relationship before us was inherently prejudicial and created a per se conflict of interest in counsel's representation of the Appellant." The CAAF focused on the relationship as constituting fraternization and a prohibited homosexual relationship, either one by itself subjected both MAJ S and appellant to punitive or adverse administrative action. These possible adverse consequences provided MAJ S with compelling motivation to place secrecy above trial strategy, thereby affecting his ability to provide objective advice to appellant on defense options. The CAAF did not find that the Army Court's analysis of the law was incorrect, rather that the lower court's determination that there was no conflict was incorrect. In reviewing ACCA's determination that even if there were a conflict that appellant waived it, the CAAF determined that neither civilian counsel whom appellant contacted "provided him with a detailed explanation of the relationship between the merits of the case and the attorney's ethical obligations." Therefore, "Appellant's

conversations with the two civilian attorneys in this case did not involve the type of informed discussion of the specific pitfalls of retaining Major S that would demonstrate a knowing, intelligent waiver of the right to effective assistance of counsel."

c) *United States v. McClain*, 50 M.J. 483 (1999). Accused waived the conflict of interest he created by accusing his defense counsel of collaborating with the prosecutor, lying, and general incompetence. After the military judge granted a three-day continuance to allow new counsel to prepare for trial, the accused talked to the prosecutor and decided to plead guilty. The accused then requested to be represented by the two original counsel detailed to defend him.

d) *United States v. Lindsey*, 48 M.J. 93 (1998). Accused clearly indicated in his unsworn statement that he was dissatisfied with his trial defense counsel. CAAF held that the military judge's abbreviated inquiry of accused (during the presentencing phase of the trial) to ferret out any potential counsel conflicts substantially satisfied the Sixth Amendment. Judge notified accused that he could either retain appointed counsel or represent himself *pro se*.

e) *United States v. Smith*, 48 M.J. 136 (1998). Trial defense counsel's statements of remorse and disappointment with the outcome of plea negotiations and sentencing case did not establish that his performance was ineffective under Sixth Amendment.

f) *Wheat v. United States*, 486 U.S. 153 (1988). Three co-defendants requested one defense counsel. A waiver was not sufficient. The Sixth Amendment guarantees effective representation but not necessarily counsel of choice. A presumption in favor of chosen counsel can be overcome by potential conflict. The trial judge makes this determination.

g) *United States v. Calhoun*, 47 M.J. 520 (A.F. Ct. Crim. App. 1997). Civilian attorney who conditioned his representation of accused on success in securing government payment of attorney fees created conflict of interest. Actual conflict of interest created since attorney effectively told accused if he prevailed on government payment of fees, then attorney would undertake representation; but if he failed to secure government payment, then client should go *pro se*.

h) *United States v. Smith*, 36 M.J. 455 (C.M.A. 1993). Need finding that counsel actively represented conflicting interests and actual conflict of interest adversely affected counsel's performance. If both prongs are established, prejudice is presumed. The existence of an actual conflict of interest does not automatically establish that the counsel's performance was affected.

i) *United States v. Jeffries*, 33 M.J. 826 (A.F.C.M.R. 1991). When potential conflict of interest exists, the military judge must "inquire into the propriety of multiple representation." *Id.* at 828. "If the military judge fails to conduct such an inquiry, a rebuttable presumption arises that the appellant was prejudiced by the conflict of interest caused by the multiple representation." *Id.* at 829.

j) *U.S. v. Beckley*, 55 M.J. 15 (2001). Conflict existed where an employee of civilian defense counsel's law firm previously represented appellant's then wife in a divorce proceeding against her husband. Alleged harassment and intimidation by SJA office did not change the calculus, where civilian defense counsel repeatedly stated on the record that he had to withdraw because of the conflict of interest.

k) *United States v. Washington*, 42 M.J. 547 (A.F. Ct. Crim. App. 1995). Sexual relations between civilian and military defense counsel may have showed poor judgment but did not *per se* create a conflict of interest.

l) *United States v. Bryant*, 35 M.J. 739 (A.C.M.R. 1992). Conflict when defense counsel advised his client against trial by a panel in favor of a trial by military judge alone because he believed that it was in the Army's best interests that every soldier be available for the upcoming ground war in the first Gulf War.

2. Does denial of continuance deprive accused of his counsel of choice?

a) *United States v. Phillips*, 56 M.J. 771 (C.G. Ct. Crim. App. 2002). The military judge in this case did not err in refusing to grant an open-ended continuance until the appellant's requested individual military counsel (IMC) would be available. Further, potentially protected communications that the appellant had with the IMC did not establish an attorney-client relationship, where the counsel was not previously detailed and was never authorized to represent the appellant in any capacity.

b) *United States v. Young*, 50 M.J. 717 (Army Ct. Crim. App. 1999). The trial judge did not abuse his discretion in denying the defense request for a continuance to hire a different civilian counsel where the defense had received a prior continuance, both counsel were at the Art. 32 investigation, and the delay would have caused witnesses to become unavailable.

c) *United States v. Phillips*, 37 M.J. 532 (A.C.M.R. 1993). An accused's right to counsel of choice is not absolute and must be balanced against society's interest in the efficient and expeditious administration of justice. The exercise of the right to civilian counsel cannot unreasonably delay the progress of a trial.

d) *United States v. Keys*, 29 M.J. 920 (A.C.M.R. 1989). Important lesson for military judges: Consider holding the Article 39(a) session "well before the projected trial date" so when the accused is advised of his rights he is provided an opportunity and time to exercise those rights. The accused was denied his request for civilian counsel retained the day before the Article 39(a) session and trial. Military judge denied the request for a two-week continuance because the witnesses would be inconvenienced. In this case, military judge should not have forced representation by detailed military counsel.

e) Defense goes on "strike." *United States v. Galinato*, 28 M.J. 1049 (N.M.C.M.R. 1989). The military judge granted three defense continuances, but denied the fourth request. Both civilian and military counsel did nothing in the case other than move for a mistrial at the close of the government's case on the grounds that they were unprepared to try the case. In spite of this outrageous conduct, the military judge was commended for maintaining his temper and decorum throughout the trial. The "net result" was to deny appellant any assistance of counsel in violation of the Sixth Amendment.

f) *United States v. Wilson*, 28 M.J. 1054 (N.M.C.M.R. 1989). "Matters to be considered by the trial judge in granting or denying a continuance to resolve a scheduling conflict include the number and length of previous continuances, whether an additional continuance would inconvenience witnesses, opposing counsel or the court, and whether the delay would prejudice the accused."

3. Separation from active duty. *United States v. Spriggs*, 52 M.J. 235 (2000). The accused acquitted in his first court-martial. Later, new charges arose, and the accused discussed them with the counsel who represented him at

the first trial; the counsel was on terminal leave, working in a civilian law firm. At the end of his terminal leave, the counsel became an Army reservist. The accused requested his former counsel as IMC, but the request was denied. CAAF held that if a civilian attorney happens to be a reservist, that person's availability as IMC must be determined based on actions taken while on active duty, not actions as a civilian attorney. The routine separation of a judge advocate from active duty normally terminates the attorney-client relationship established while the judge advocate was on active duty.

C. Can the defense counsel sever the attorney-client relationship?

1. *United States v. Cornett*, 47 M.J. 128 (1997). CAAF held that military defense counsel's post-trial representation was deficient in that he attempted to withdraw without authority and without proper consultation with his client. The military defense counsel attempted to withdraw because the accused hired a civilian defense counsel for post-trial matters. Though military counsel was deficient, the appellant demonstrated no prejudice.

2. *United States v. Calhoun*, 47 M.J. 520 (A.F. Ct. Crim. App. 1997). Civilian defense counsel was ineffective in unilaterally withdrawing from representation, without leave of court, based on accused's failure to pay him. *United States v. Starks*, 36 M.J. 1160 (A.C.M.R. 1993). Once the attorney-client relationship is established, absent express release by the accused or good cause shown on the record, the trial defense counsel remains as counsel for the accused from preferral of charges until appointment of appellate defense counsel.

3. *United States v. Hawkins*, 34 M.J. 991 (A.C.M.R. 1992). The accused's right to continued representation of counsel cannot be terminated arbitrarily for administrative convenience prior to the SJA's post-trial review. The representation can be terminated for "good cause." For example, the separation of trial defense counsel from the service or where the defense counsel is on terminal leave in preparation of separation from the service. "Good cause" does not include reassignment of defense counsel, even to a distant location.

4. *United States v. Thomas*, 33 M.J. 694 (A.C.M.R. 1991). "If a lawyer believes he cannot represent a client competently, he should so inform the client and withdraw from representation subject to protection of the client's interest and the approval of the court." *Id.* at 701-2.

5. *United States v. Cornelious*, 41 M.J. 397 (1995). Once accused complains of counsel's performance, counsel should advise accused of consequences

of terminating attorney-client relationship and ask whether client wants to discharge him. If discharged, counsel should inform his superiors and take no further action on the case. If the matter can be resolved counsel can continue to act. On these facts, it was unclear whether defense counsel resolved this issue.

D. Interference with the Right to Counsel.

1. Taping conversations between attorney and client**.** *United States v. Walker*, 38 M.J. 678 (A.F.C.M.R. 1993). During pretrial confinement, the accused's phone calls to his attorney were tape-recorded and security police escorts overheard whatever he said. Four part test to analyze governmental interference with the right to counsel: (1) Did the government use evidence at trial which resulted from the intrusion? (2) Was the intrusion intentional? (3) Did the prosecution receive confidential information? and (4) Was the overheard information used against the defendant? *Id*. at 681.

2. When defense counsel testifies for the government**.**

a) *United States v. Sanders*, 31 M.J. 834 (N.M.C.M.R. 1990). Appellant was deprived of his Sixth Amendment right to counsel when his only defense counsel was used as prosecution witness. The defense counsel, as an officer of the court, was asked whether he had informed his client of the trial date. Based on the defense counsel's answer, the military judge determined that the trial could proceed in absentia. Another counsel should have been appointed.

b) *United States v. Smith*, 35 M.J. 138 (C.M.A. 1992). When the defense counsel is called to testify in the government's case on a contested or noncollateral matter the defense counsel should withdraw from representing the accused.

3. Consultations with Counsel.

a) *United States v. Cannon*, 39 M.J. 980 (A.F.C.M.R. 1994). Military judge who cut off counsel's attempt to confer with his client as to whether the judge's instruction was sufficient did not interfere with the right to counsel. "However, we believe that a defense counsel's request to consult with the client should be liberally granted to preserve the appearance of fairness in the judicial proceedings and to keep the client informed about the proceedings." *Id*. at 982.

b) *United States v. Evans*, 35 M.J. 754 (N.M.C.M.R. 1992). Following a request for a punitive discharge, the military judge should only ascertain the accused's understanding of the consequences of requesting a BCD and his desires in this regard. Questioning of the accused about his conversations with his counsel and the nature of the counsel's advice regarding the request for a BCD is an intrusion upon the privileged communications between client and counsel.

E. **Effective Assistance** (Ineffective = Deficient Performance + Prejudice). *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Babbitt*, 26 M.J. 157 (C.M.A. 1988).

1. Outcome determinative vs. result of proceeding rendered fundamentally unfair or unreliable.

a) *Lockhart v. Fretwell*, 506 U.S. 364 (1993). An analysis of ineffective assistance of counsel claim that focuses solely on outcome determination, without any attention to whether results of proceeding were fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant defendant windfall to which the law does not entitle him.

b) *United States v. Murphy*, 36 M.J. 1137, 1146 (A.C.M.R. 1993). "Even where a deficiency is found, the test is not solely a mere outcome determination but whether the result of the proceeding was fundamentally unfair or was unreliable."

c) *United States v. Tharpe*, 38 M.J. 8 (C.M.A. 1993). The Court uses the three-part analysis from *United States v. Polk* to address IAC: (1) Are the allegations true and if they are, is there a reasonable explanation for counsel's actions in defense of the case? (2) If they are true, did the level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers? (3) If ineffective assistance of counsel is found to exist, is there a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt?

2. Presumption of Competence.

a) *United States v. Sales*, 56 M.J. 255 (2002). At trial, the appellant denied knowing use of cocaine and on appeal he alleged that his counsel were ineffective for failing to contact a witness who

admitted to spiking appellant's drink with cocaine. In support of this allegation, appellant produced an affidavit in which the witness admitted to spiking the appellant's drink and stated that appellant's counsel never contacted him. The trial defense counsel's affidavit stated that he had contacted the witness and that the witness not only denied spiking the drink, but also refused to testify or cooperate. The CAAF held that the service court erred by not ordering a fact-finding hearing because the affidavits were not speculative or conclusory; the record as a whole did not compellingly demonstrate the improbability of the facts asserted by appellant and the witness; and there was a reasonable probability of a different result if the factual conflicts resolved in the appellant's favor.

b) *United States v. Grigoruk*, 52 M.J. 312 (2000). Defense counsel are presumed to be competent. *United States v. Cronic*, 466 U.S. 648 (1984). To overcome the presumption, the Court applied the three-part test from *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991). The Court held that the accused's allegations were sufficient to order the defense counsel to explain why he did not call an expert at trial. In *United States v. Grigoruk*, 56 M.J. 304 (2002), CAAF found that defense counsel's decisions did not constitute ineffective assistance of counsel.

c) *United States v. Thompson*, 54 M.J. 26 (2000). Presumption of competence was overcome where the appellant alleged his defense team failed to interview witnesses, was unprepared for trial, entered into an illegal *sub rosa* agreement, and advised the accused to plead guilty to charges of which he was not guilty.

d) *United States v. Starling*, 58 M.J. 620 (N-M. Ct. Crim. App. 2003). At trial, after the trial counsel entered pertinent provisions of the appellant's service record, the trial defense counsel did not offer any evidence in extenuation or mitigation. During closing argument, the trial defense counsel highlighted favorable evidence from the appellant's service record. The trial defense counsel did not submit anything on behalf of appellant in post-trial clemency. Appellant asserted that his trial defense counsel was ineffective in failing to offer evidence in extenuation and mitigation and by failing to submit any post-trial clemency matters. The Navy-Marine Court expressly declined appellant's invitation to find that the failure to offer evidence in extenuation and mitigation or the failure to submit post-trial matters would constitute ineffectiveness *per se*. The court noted that trial defense's reference to favorable matters in the prosecution exhibit of appellant's service record "had the identical effect as if the defense had offered the identical

effect as if the defense had offered the same evidence in extenuation and mitigation." With respect to post-trial matters, the appellant did not submit any evidence that trial defense counsel acted contrary to his wishes nor had appellant submitted matters that would have been submitted but for the trial defense counsel's inaction.

3. Attorney's performance is deficient but no prejudice.

a) *United States v. Scott*, 51 M.J. 326 (1999) (defense counsel failed to object to expert testimony about future dangerousness).

b) *United States v. Straight*, 42 M.J. 244 (1995) (failure to request post-trial 39(a) session based on wrong belief that reconvened court could increase the sentence).

c) *United States v. Powell*, 40 M.J. 1 (C.M.A. 1994) (failure to object to unwarned admission and testimonial act of retrieving stolen merchandise from pants leg and failure to contact character witness deployed for Operation Desert Storm);

d) *United States v. Marrie*, 39 M.J. 993 (A.F.C.M.R. 1994), *aff'd in part*, 43 M.J. 35 (1995) (failure of civilian defense counsel to interview child psychiatrist who examined 9-year-old victim in sexual abuse case).

e) *United States v. Richardson*, 34 M.J. 1015 (A.C.M.R. 1992) (failure to raise adequately the issue of pretrial restraint was error, however, her performance did not amount to ineffective assistance of counsel since the restrictions on the accused prior to trial did not amount to restriction tantamount to confinement);

f) *United States v. Bell*, 38 M.J. 523 (A.C.M.R. 1993) (defense counsel should have asked victim in rape case whether she had martial arts training).

g) *United States v. Thomas*, 38 M.J. 614 (A.F.C.M.R. 1993) (failure to cross-examine witness whose testimony was based on a suggestive lineup).

h) *United States v. Cornelius*, 37 M.J. 622 (A.C.M.R. 1993) (counsel incorrectly advised client that guilty plea would not waive speedy trial motion).

i) *United States v. Demerse*, 37 M.J. 488 (C.M.A. 1993) (failure to present evidence of accused's awards in E & M, however judge inquired *sua sponte* so no prejudice).

j) *United States v. Taylor*, 38 M.J. 254 (C.M.A. 1993) (during sentencing phase defense counsel presented statement by company commander that accused should not remain in the Army, failure to ask the judge to disregard inadmissible portion was deficient performance).

4. Defense counsel had sound tactical strategy.

a) *Yarborough v. Gentry*, 124 S. Ct. 1 (Oct. 20, 2003) (*per curiam*). Noting that the Sixth Amendment "guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight," the Supreme Court reversed a Ninth Circuit Court of Appeals decision that found defense counsel ineffective because of errors of commission and omission during closing argument. The Ninth Circuit noted several points that the defense counsel could have made, but failed to do so, and on alleged errors of including other points, "'none of which mattered as a matter of law.'" The Supreme Court observed that defense counsel has wide latitude in representing a client and "deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." The Court declared that, during closing argument, "which issues to sharpen and how best to clarify them are questions with many reasonable answers."

b) *United States v. Wallace*, 58 M.J. 759 (N-M. Ct. Crim. App. 2003). Accused pled guilty to unpremeditated murder. He argued on appeal that failure to call military witnesses to testify about his rehabilitation potential was ineffective. Post-trial declarations from witnesses indicated that they would testify concerning accused's military character and performance but not about his rehabilitation potential. Appellate court did not equate good military character with rehabilitation potential. Defense counsel made tactical decision to present accused's military character through service book entries because he was concerned about the likelihood of very effective cross-examination of military character witnesses. Defense counsel was not ineffective.

c) *United States v. Terlep*, 57 M.J. 344 (2002). Appellant alleged that it was ineffective assistance of counsel to fail to object to the assault victim's testimony during presentencing that she was raped,

in light of the stipulation of fact to an assault not rape. CAAF concluded that the victim's testimony did not contradict the stipulation of fact because the stipulation did not expressly state that a rape did not occur; it did not state that the touchings to which the appellant plead guilty were the only touchings that occurred that night; it was "not necessarily inferable from the sexual assaults stipulated to that a rape did not also occur;" and the defense counsel indicated that he understood the stipulation of fact was limited and that the parties had additional evidence as to the events that had occurred. Because the stipulation of fact was not contradicted, the defense counsel's failure to object was not ineffective.

d) *United States v. Vines*, 57 M.J. 519 (A.F. Ct. Crim. App. 2002). Appellant alleged that his trial defense counsel was ineffective for failing to call witnesses to testify about the victim's conduct the day after the alleged attack; for failing to ask the military judge to reconsider his ruling excluding evidence that the victim and her boyfriend engaged in a wrestling match a few days earlier, to show possible source of injury; for failing to call the defense expert to testify that the victim suffered from a personality disorder and had Attention Deficit Hyperactivity Disorder, making her less credible; and for failing to ask the military judge to reconsider his ruling excluding evidence that the victim made a rape allegation against her boyfriend as evidence of bias. Applying the standard of review set out in *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991), the Air Force Court held that the defense counsel's performance was not deficient and that the appellant was not denied effective assistance of counsel.

e) *U.S. v. Dewrell*, 55 M.J. 131 (2001). Appellant alleged that counsel failed to attack government witness credibility, did not do enough to limit spillover effect of rape testimony, did not inform members of consequences of punitive discharge, did not allow him to testify, failed to put on "good soldier" defense. The "barebones" assertion that right to testify was abridged was insufficient to require a hearing to determine the truth of the claim. Tactics held to be "well within their discretion."

f) *U.S. v. Clark*, 55 M.J. 555 (Army Ct. Crim. App. 2001). Counsel employed accident reconstruction expert to investigate accident and provide report. Neither counsel personally interviewed the witness, and for tactical reasons, they did not call him to testify at trial. CAAF determined that appellant had met his "threshold burden" to demonstrate ineffective assistance of counsel and remanded. On remand, Army Court found this to be a reasonable

tactical call, and, assuming *arguendo* that the first prong of *Strickland* was met, held that the appellant was not deprived of a fair trial.

g) *United States v. Bray*, 49 M.J. 300 (1999). Defense counsel was not ineffective by calling a sentencing witness to testify about the effects of pesticide exposure on the accused and the offenses. The military judge found this raised a possible defense of lack of mental responsibility and would not allow the accused to plead guilty.

h) *United States v. Young*, 50 M.J. 717 (Army Ct. Crim. App. 1999). This case demonstrates how little a defense counsel can do and still be effective. The defense counsel were not ineffective even though they did not make an opening statement, made no attempt to present relevant expert testimony, presented no defense on the merits, and presented no evidence in extenuation and mitigation.

i) *United States v. Loving*, 41 M.J. 213 (1994), *aff'd* 517 U.S. 748 (1996). Defense counsel was not ineffective for failure to present a voluntary intoxication defense and evidence of the accused's mental condition. The decision not to present the evidence was made after careful consideration by the defense team.

j) *United States v. Curtis*, 38 M.J. 530 (N.M.C.M.R. 1993). Counsel's theory that accused killed LT out of rage over racial discrimination was reasonable even though alternative theory that accused's genetic, family, and psychological background led to the killing was also possible.

k) *United States v. Cordes*, 33 M.J. 462 (C.M.A. 1991). Although the defense request for an administrative discharge may have caused military authorities to reconsider the appropriateness of initial referral of accused's case to a special court-martial and ultimately led to referral to a general court-martial, the defense counsel's decision to submit the request was not ineffective, given the fact that the government may have been interested in a quick resolution of the case.

5. Prejudice found.

a) *United States v. Garcia*, 59 M.J. 447 (2004). Appellant received ineffective assistance of counsel when his civilian defense counsel waived the Article 32 investigation without the appellant's

consent, and when his military defense counsel did not explain all options available to the appellant before confessing his involvement in the charged criminal misconduct during the defense's case-in-chief.

b) *United States v. Paaluhi*, 54 M.J. 181 (2000). The Court found deficient performance by counsel when the defense counsel advised the accused to speak to a government psychologist who had not been officially detailed to assist in the defense. This advice was given 8 days before *Jaffee v. Redmond*. The Court also found prejudice because the government's case, without the accused's admissions to the psychologist, was weak.

c) *United States v. Alves*, 53 M.J. 286 (2000). Counsel's performance on the merits was deficient, but the accused was not prejudiced. Counsel failed to interview six Marines that may have witnessed the assault or the events leading up to it. Counsel's failure to interview several witnesses about the accused's duty performance was deficient and prejudiced the accused. However, no relief was granted in view of "the substantial clemency" given by the convening authority when this issue was raised during post-trial.

d) *Anderson v. Johnson*, 338 F.3d 382 (5th. Cir. 2003). Trial defense counsel did not interview one of two adult witnesses to shooting (a third witness was a child). This witness would have testified that petitioner was not the assailant. The Court of Appeals found such a failure to be below the objective standard of reasonableness. Prejudice found given the weak state of the evidence against the petitioner (no physical evidence against the petitioner and other adult witness identified him only by chance meeting three years after the event).

e) *Frazier v. Huffman*, 343 F.3d 780 (6th Cir. 2003). Totality of mitigation evidence presented during the trial was defendant's unsworn statement that he was not guilty even though defense counsel knew that the defendant suffered from a brain injury sustained after falling from a ladder four years earlier. Understanding that "residual doubt" is not a mitigating factor under Ohio state law, the Court of Appeals noted, "We can conceive of no rational trial strategy that would justify the failure of Frazier's counsel to investigate and present evidence of his brain impairment, and to instead rely exclusively on the hope that the jury would spare his life due to any 'residual doubt' about his guilt." *Id*. at *31-32. The Court of Appeals found that counsel's

performance was not objectively reasonable and that its confidence in the result was thereby undermined.

F. Capital murder is different.

1. *United States v. Curtis*, 46 M.J. 129 (1997). After reconsideration, CAAF changed its position, and held, in a very brief opinion, that counsel's performance during the sentencing phase of trial was ineffective. Chief Judge Cox, in a concurring opinion denying the government's petition for reconsideration, wrote that in "order to ensure that those few military members sentenced to death have received a fair and impartial trial within the context of the death-penalty doctrine of the Supreme Court, we should expect that:

   a) each military service member has available a skilled, trained, and experienced attorney;

   b) all the procedural safeguards prescribed by law and the Manual for Courts-Martial have been followed; and,

   c) each military member gets full and fair consideration of all pertinent evidence, not only as to findings but also as to sentence."

2. **Failure to present mitigation evidence was not deficient, despite trial defense counsels' admissions of ineffectiveness.** *United States v. Simoy*, 46 M.J. 592 (A.F. Ct. Crim. App. 1996). During the defense sentencing case, the civilian defense counsel presented no live witnesses. Appellant's two military lawyers agreed in post-trial affidavits that they and appellant's civilian attorney were ineffective in their representation during the sentencing phase of appellant's trial because they conducted an inadequate pretrial investigation; submitted no evidence in mitigation; did not develop a theme for the sentencing case; and did not request services of a mitigation specialist or any special mitigation instructions. The Court concluded that, despite the affidavits, the appellant was ably represented and that failure to use a mitigation specialist was not *per se* ineffective. *See also United States v. Loving*, 41 M.J. 250 (1994).

3. *United States v. Murphy*, 50 M.J. 4 (1998). CAAF set aside the case for three reasons relating to the assistance of counsel. First, an unresolved conflict of interest may have prejudiced the sentencing phase. Second, the inadequate investigation by the defense counsel and their lack of capital experience and knowledge called the death sentence into question. Third, the Court remanded the case to determine if an unexplored issue of

Murphy's mental status at the time of the offenses prevented him from receiving a fair trial.

G. **The Defense Team.** *United States v. Wean*, 45 M.J. 461 (1997). The *DuBay* judge was correct in his ruling that the accused was denied effective assistance of counsel in the following three areas: first, the defense's approach to cross-examination and use of expert witnesses in the area of "play therapy" and failure to object to numerous hearsay statements demonstrated a lack of understanding of the law and a failure to properly research the issues; second, the division of responsibilities between the civilian defense counsel and military counsel revealed that there was little discussion of the issues, the law, or the case methodology; and third, civilian defense counsel, after the accused consistently denied his guilt, essentially conceded guilt during the sentencing phase, and stated that the accused was suffering from "an illness of the mind [which] compelled him to do these things."

H. **Seizure of Privileged Information.** *United States v. Tanksley*, 54 M.J. 169 (2000). When the accused was arrested and placed into pretrial confinement, the duty officer went to the accused's office to secure his personal possessions. When the duty officer was in the office, he noticed a document on the computer screen entitled "Regarding the charges now pending against me." The accused was preparing this document for his attorney. The duty officer printed a copy of the document. The accused claimed a violation of the right to counsel. Seizure of privileged communication can be a violation of the right to counsel, but there is no *per se* rule. Because the document was exculpatory, not used at trial, did not reveal any confidential information about defense strategy, and produced no information or leads the government did not already have, CAAF found no violation of the right to counsel.

I. **Sentencing.**

1. *Wiggins v. Smith*, 123 S. Ct. 2527 (2003). Petitioner convicted of capital murder by trial judge. He elected to be sentenced by a jury, which sentenced him to death. His public defenders moved to bifurcate the sentencing proceedings seeking to show that Wiggins did not kill the victim by his own hand and then, if necessary, to present a mitigation case. The trial judge denied the motion. One of his PDs told the jury that they would hear about Wiggins' difficult life, but did not present any such evidence. Wiggins argued that his counsel were ineffective for failing to investigate and present mitigating evidence about his background. The Court found the PDs to be ineffective. The Court focused not on whether they should have presented a mitigation case, but rather whether the investigation supporting their decision was itself reasonable. The Court determined that the PDs did not conduct a reasonable investigation, relying only on a short presentencing investigation and Department of

Social Services records and not using allocated funds to commission a forensic social worker report, which was the standard for death penalty cases in Maryland. Court found prejudice because given the nature and extent of abuse in Wiggins' background, there was a reasonable probability that a competent attorney aware of his history would have introduced such evidence at sentencing, and that a jury hearing such evidence would have returned a different verdict.

2. *Bell v. Cone*, 535 U.S 685 (2002). Appellant was convicted of bludgeoning an elderly couple to death after a two-day shooting spree. During trial on the merits, the defense counsel introduced extensive mitigation evidence. In his opening statement at the sentencing hearing for the murders, the defense counsel reminded jurors of the mitigation evidence and urged the jury to impose a life sentence. The defense counsel also cross-examined prosecution sentencing witnesses; however he did not call any witnesses for the defense and waived final argument. The appellant was sentenced to death. The Supreme Court held that by waiving the final argument, the defense counsel prevented the prosecutor from depicting the appellant as a "heartless killer" in rebuttal, and that the state court's determination that this was a tactical decision, about which competent lawyers might disagree, was reasonable.

3. *United States v. Burt*, 56 M.J. 261 (2002). CAAF found the defense counsel was not ineffective during sentencing when he agreed during argument that the appellant had no rehabilitative potential, because he did not specifically concede a punitive discharge. Additionally, it was not ineffective for the defense counsel to reject for tactical reasons a proposed instruction that appellant would lose his retirement benefits if the panel adjudged a punitive discharge

4. *United States v. Kreutzer*, 59 M.J. 773 (Army Ct. Crim. App. 2004). Appellant wounded seventeen and killed one 82d Airborne Division soldier during a PT formation at Fort Bragg. He was found guilty, *inter alia*, of one specification of premeditated murder and sentenced to death. The Army Court determined that defense counsel were ineffective in failing to discover and evaluate the "full range of psychiatric evidence and expert opinion available to be used in mitigation." The defense team was also ineffective for failing to interview the deceased soldier's wife, a principal witness in the government's sentencing case. Citing *Wiggins*, the Army Court held that "[d]efense counsel's investigation into appellant's mental health background fell short of reasonable professional standards."

5. *United States v. Saintaude*, 56 M.J. 888 (Army Ct. Crim. App. 2002). Appellant's counsel were ineffective when they failed to research whether the appellant's *nolo contendere* pleas in state court were convictions under

Florida law and, thus, properly considered by the panel during sentencing. This error was aggravated when the defense counsel conceded that these pleas constituted convictions. In addition, the defense team neither investigated the appellant's background for potential mitigation evidence nor presented available mitigation evidence. Based on these errors, the Army Court set aside the sentence. The Army Court also cautioned that defense counsel's argument for a specific period of confinement, without appellant's consent, was also deficient.

6. *United States v. Briscoe*, 56 M.J. 903 (A.F. Ct. Crim. App. 2002). Appellant alleged that his defense counsel provided ineffective assistance by failing to require the prosecution to stipulate as a fact that appellant had outstanding rehabilitative potential and by failing to object to the First Sergeant's testimony that the appellant had no rehabilitative potential. The Air Force disagreed, holding that appellant was not entitled to a stipulation of a witness' opinion as a matter of fact, that defense counsel's failure to object to the First Sergeant's testimony did not contradict the existing stipulation of fact, and that it was not error for the trial counsel to present proper evidence of rehabilitative potential under R.C.M. 1001(b)(5).

7. *United Stated v. Weathersby*, 48 M.J. 668 (Army Ct. Crim. App. 1998) Accused was deprived of effective assistance of counsel during sentencing, where trial defense counsel failed to present any matter in mitigation to the military judge. Appellant had twenty-four years of service at the time of trial. Court concluded that counsel failed to take adequate steps to identify potential matters in mitigation or to evaluate adequately information that had been brought to their attention. *See United States v. Palenius*, 2 M.J. 86, 90 (C.M.A. 1977).

J. Post-trial matters.

1. *United States v. Key*, 57 M.J. 246 (2002). Appellant alleged that his trial defense counsel were ineffective because he could not remember being advised by his counsel about the possibility of requesting waiver of forfeitures. Citing to *United States v. Lewis*, 42 M.J. 1 (1995), CAAF disagreed, holding that the appellant's assertion was too equivocal and ambiguous to overcome the presumption of competence. Even if the appellant could overcome the *Lewis* hurdle, however, he was not prejudiced. There was no reasonable likelihood that the convening authority would have granted a request to waive the forfeitures for the appellant's child after he denied an earlier request to defer the forfeitures for the same purpose.

2. *United States v. Gilley*, 56 M.J. 113 (2001). On appeal, appellant claimed that his defense counsel was ineffective when he submitted extremely inflammatory letters from appellant's family members as part of the post-trial clemency matters. In an affidavit, appellant claimed that his defense counsel never discussed the contents of the letters with him, other than to say that they contained curse words and should be re-written. CAAF agreed, finding that the defense counsel failed to make an evaluative judgment on what items to submit to the convening authority; that there was no reasonable explanation for the inclusion of the letters; that the inclusion of the letters fell way below the normally expected standard of performance and that there was a reasonable probability that, had the letters not been submitted, there would have been a different result.

3. *United States v. Dorman*, 58 M.J. 295 (2003). Pursuant to his pleas, appellant convicted of attempted wrongful use of a controlled substance, three specifications of wrongful use of controlled substance, and wrongful distribution of a controlled substance, in violation of Articles 80 and 112a, UCMJ. The issue at bar was whether trial defense counsel must grant appellate defense counsel access to the case file on request, irrespective of a claim of ineffective assistance of counsel. Recalling that an accused has the right to the effective assistance of counsel through completion of appeal and that trial defense counsel maintains a duty of loyalty to an appellate during appellate review, CAAF held that trial defense counsel must, on request, supply appellate defense counsel with the case file, but only after receiving the client's written release.

4. **Failure to appoint new defense counsel**. *United States v. Knight*, 53 M.J. 340 (2000). CAAF returned the case for a new recommendation and action because the accused was denied his right to counsel. The accused expressed dissatisfaction with his defense counsel and indicated that he was going to hire a civilian counsel for post-trial submissions. When the accused submitted his post-trial matters without counsel, the staff judge advocate should have, but did not, make sure that the accused was appointed a new defense counsel.

5. **Failure of substitute counsel to establish attorney-client relationship.** *United States v. Howard*, 47 M.J. 104 (1997). Substitute counsel, appointed for post-trial matters, never contacted appellant and never entered into an attorney-client relationship with appellant as required under RCM 1106(f)(2). Further, substitute counsel failed to consult with the accused about defense submissions under RCM 1105 and 1106. The Court determined the appellant made a "colorable showing of possible prejudice" that warranted remand for a new recommendation and action. *See also United States v. Miller*, 45 M.J. 149 (1996) articulating the test for prejudice when substitute counsel appointed but does not enter into

attorney-client relationship with appellant). *See also United States v. Hickok*, 45 M.J. 142 (1996).

6. *United States v. Wiley*, 47 M.J. 158 (1997). Staff Judge Advocate's post-trial recommendation contained substantial errors that defense counsel failed to correct. Though the Court held that appellant was not prejudiced, Judge Effron dissented, averring that this failure to correct serious errors was a denial of effective assistance.

7. *United States v. Voorhees*, 50 M.J. 494 (1999). Defense counsel were not ineffective where they failed to object to the convening authority's post-trial review after the convening authority told the accused that if the accused didn't take the pretrial agreement, "I'm going to burn you."

K. Post-Trial Matters – Need for "Informative Discussions."

1. **Accused controls what is submitted**. *United States v. Hicks*, 47 M.J. 90 (1997). Defense counsel prepared and discussed the clemency package with the appellant, but was "deficient" because he did not "adequately explain" two of the clemency letters to his client. The accused has the right to submit or not to submit material to the convening authority over defense counsel's objection – the defense counsel provides tactical and strategic advice on what to submit. The defense counsel's deficiency did not prejudice the appellant.

2. *United States v. Hood*, 47 M.J. 95 (1997). The Court accepted as true the appellant's post-trial affidavits asserting that his substitute military defense counsel did not discuss the contents of the clemency package with him. The Court held that this alleged failure to consult was deficient, but that no prejudice resulted. The appellant alleged that had he been given the opportunity, he would have asked that one of his mother's three letters and his draft unsworn statement not be submitted with the rest of the materials.

3. *United States v. Sanders*, 37 M.J. 628 (A.C.M.R. 1993), *aff'd in part*, 41 M.J. 485 (1995). Defense counsel are not *per se* ineffective for failing to submit post-trial matters, regardless of how meritorious. Each case must be reviewed on its own merits. The accused's failure to contact his counsel or let counsel know how to contact him affected his ineffective assistance claim.

4. *United States v. Aflague*, 40 M.J. 501 (A.C.M.R. 1994). Record indicated that civilian defense counsel requested 3-week delay to submit clemency matters but nothing was submitted. Where no logical reason for failure to

submit post-trial matters is shown, counsel is no longer presumed to be effective.

5. *United States v. Dresen*, 40 M.J. 462 (C.M.A. 1994). Based on improper referral of one charge, post-trial matters asked for sentence rehearing or in the alternative, approval of the discharge but substantial reduction of the confinement. Counsel was ineffective in not discussing this request with the client whose chief concern was the punitive discharge. Returned for new action.

L. Waiver. *Iowa v. Tovar*, 124 S. Ct. 1379 (2004). Respondent pled guilty to a driving under the influence of alcohol (OWI) offense and waived his right to the assistance of counsel. During the judge's colloquy with the respondent, the judge informed him of his right to counsel, the nature of the offense, and the possible punishments. Tovar was later found guilty to two additional OWI offenses. The last offense was deemed a class D felony because of his two prior convictions. Tovar argued at the third trial that the first offense should be used as an aggravating factor because his waiver of his right to counsel was not voluntary, intelligent, and knowing. The trial judge denied Tovar's motion; the court found him guilty. The Iowa Supreme Court reversed requiring that an accused be advised, *inter alia*, that by waiving counsel, he could be overlooking a viable defense and he would lose an opportunity for an independent opinion on the wisdom of pleading guilty. In a unanimous opinion, the Supreme Court held that the Sixth Amendment requires only that the "trial court inform[] the accused of the nature of the charges against him, of his to be counseled regarding his plea, and of the range of allowable punishments attendant upon entry of a guilty plea." The additional warnings were not required as a matter of constitutional law. The Court noted, however, that states are free to adopt by statute, rule, or decisions any guides for the acceptance of an uncounseled guilty plea deemed useful.

M. **Appellate Review**: *United States v. Lewis*, 42 M.J. 1 (1995). 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. 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. CAAF rejects the Army Court's procedures for handling IAC allegations, originally set out in *United States v. Burdine*, 29 M.J. 834 (A.C.M.R. 1989).

IX. PUBLIC TRIAL

A. References.

1. Lieutenant Colonel Denise R. Lind, *Media Rights of Access to Proceedings, Information, and Participants in Military Criminal Cases*, 163 MIL. L. REV. 1 (2000).

2. 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.

B. "In addition to the Sixth-Amendment right of an accused to a public trial, the Supreme Court has held that the press and general public have a constitutional right under the First Amendment to access to criminal trials." *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985).

1. "In *Waller v. Georgia*, . . . the Supreme Court applied the same test to a defendant's objection to closure of a suppression hearing as had been applied in First-Amendment cases, stating 'that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public'" *Hershey*, 20 M.J. at 436.

2. "Without question, the Sixth Amendment right to a public trial is applicable to courts-martial." *Id.* at 435.

C. First Amendment.

1. **The Test of Experience and Logic.** To determine if there is a media right of access to the proceedings, apply the test of experience and logic. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) [*PE I*].

a) Test of Experience. This part tests whether the United States has experienced a history of openness or public access to the type of proceeding at issue.

b) Test of Logic. This part tests whether public access to such proceedings logically plays a particularly significant role in the functioning of the judicial process and the government as a whole. At least six societal interests must be considered in evaluating the logic test:

(1) promotion of informed discussion of government affairs by providing the public with the more complete understanding of the judicial system;

(2) promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings;

(3) providing a significant community therapeutic value as an outlet for community concern, hostility, and emotion;

(4) serving as a check on corrupt practices by exposing the judicial process to public scrutiny;

(5) enhancement of the performance of all involved; and

(6) discouragement of perjury. *United States v. Criden*, 675 F.2d 550, 556 (3d Cir. 1982).

c) If the proceedings have traditionally been open and public access is essential to the proper functioning of the judicial system, then the media has a qualified First Amendment right to attend the proceeding.

d) The media has standing to challenge an order closing the proceeding. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

2. The media has a right of access to:

a) Criminal Trials. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

b) Jury Selection Proceedings. *PE I*, 464 U.S. 501 (1984)

c) Probable Cause Hearings. *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) [*PE II*]. *See also ABC, Inc. v. Powell*, 47 M.J. 363 (1997).

d) Suppression Hearings. *Waller v. Georgia*, 467 U.S. 39, 44-46 (1984) (holding closing the trial over defense objection violated the Sixth Amendment Right to a Public Trial; in *dicta* the Court recognized the media's right of access).

3. The party seeking closure must advance a compelling interest.

4. **Conduct a strict scrutiny analysis.** The judge must weigh the compelling interest asserted with the need and benefits for openness and make the following findings.

   a) Closure is essential to preserve a compelling interest

   b) The judge must make individualized case-by-case findings to justify the closure.

   c) The closure must be narrowly tailored to serve the compelling interest; the court must consider alternatives.

5. Mandatory closure statutes are unconstitutional. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-10 (1982).

6. Typical compelling interests.

   a) The accused's right to a fair trial. A proceeding cannot be closed unless the court makes a case specific finding that there is a substantial probability that the Sixth Amendment right to a fair trial will be prejudiced by publicity that closure would prevent and that reasonable alternatives to closure cannot adequately protect the right to a fair trial. *PE I*, 464 U.S. at 512.

   b) Privacy of juror. *PE I*, 464 U.S.501 (1984).

   c) Trial participant's safety. *Unabom Trial Media Coalition v. District Court*, 183 F.3d 949 (9th Cir. 1999).

   d) Well-being of a victim. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

   e) Disclosure of sensitive information. *United States v. Lonetree*, 31 M.J. 849 (N.M.C.M.R. 1990), *aff'd and rem'd*, 35 M.J. 396 (C.M.A. 1992).

   f) Protecting confidential law enforcement information. *Ayala v. Speckard*, 131 F.3d 62 (2d Cir. 1997).

   g) Protecting trade secrets. *United States v. Andreas*, 150 F.3d 766 (7th Cir. 1998).

h) Concealing the identity of juveniles. *United States v. Three Juveniles*, 61 F.3d 86 (1st Cir. 1995).

7. Military cases.

a) *United States v. Story*, 35 M.J. 677, 678 (A.C.M.R. 1992). "[P]rior to excluding all or portions of the public from viewing a court-martial, the military judge must articulate findings warranting, and limiting as narrowly as possible, the infringement upon the constitutional right of the public to attend courts-martial of the United States." *See United States v. Terry*, 52 M.J. 574 (N-M. Ct. Crim. App. 1999) (trial judge erred when he closed the courtroom during the testimony of a rape victim).

b) "It was stated in oral argument that it is practice in some military courts to bar admittance of spectators except during a recess. Employment of such a procedure is a denial of public access to courts-martial and should be discontinued." *Hershey*, 20 M.J. at 438 n.6.

c) *United States v. Short*, 36 M.J. 802 (A.C.M.R. 1993). When accused's mother-in-law and 3 small children entered courtroom, military judge said: "No . . . no, out . . . out. This is not a waiting room for babies." Although the judge should have articulated the reasons for the exclusion, there was no constitutional violation under the circumstances of this case.

8. Defense requested closure**.**

a) *United States v. Travers*, 25 M.J. 61 (C.M.A. 1987). The accused wanted the courtroom closed because he was a confidential informant. The military judge refused. The accused did not present evidence of his cooperation with the Criminal Investigation Division. "Appellant was never denied the opportunity to present this evidence in an open courtroom; his failure to do so was his own election." *Id.* at 63.

b) *United States v. Fiske*, 28 M.J. 1013 (A.F.C.M.R. 1989). "This is the second case we are aware of in this decade that a military judge has closed an Air Force court-martial trial without a reason therefor being articulated on the record . . . *That's two too many*." *Id.* at 1013. The accused was a confidential informant who requested that the court be closed. There was no controversy; no one was complaining. The concurring opinion discussed three

guidelines concerning public trials. If the public wants access and accused wants the trial closed, the public wins. The majority reserved judgment on this issue.

D. Sixth Amendment.

1. *United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985). No violation of the Public Trial Clause where the judge closed the courtroom for the testimony of a child victim of sexual abuse.

2. *United States v. Terry*, 52 M.J. 574 (N-M. Ct. Crim. App. 1999). Violation of the Public Trial Clause where the military judge, over defense objection, closed the courtroom during the testimony of the alleged rape victim.

3. Security Issues and Public Trials**.**

a) *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977). No violation of the Sixth Amendment Public Trial Clause where the court was closed to received classified information.

b) *United States v. Lonetree*, 31 M.J. 849 (N.M.C.M.R. 1990), *aff'd in part*, 35 M.J. 396 (C.M.A. 1992). Mil. R. Evid. 505 (classified information) satisfied; no public trial violation. The military judge properly analyzed information and balanced competing interests before closing the court. When certain information is classified, a finding is not required each time the court is closed. Closings were "adequately tailored."

c) *United States v. Anzalone*, 40 M.J. 658 (N-M. Ct. Crim. App. 1994), *set aside on other grounds*, 43 M.J. 322 (1995). No violation of the right to a public trial when courtroom periodically closed during espionage trial. Court notes that closure was for short periods of time, when classified matters would be discussed, and only 16% of the record covered times when the public was excluded.

d) *United States v. Sombolay*, 37 M.J. 647 (A.C.M.R.). Provision in pretrial agreement for waiver of public trial not against public policy.

E. Issues.

1. RCM 806 allows a military judge to close a court-martial for good cause. This could be unconstitutional.

2. RCM 806 only allows a military judge to close a court-martial over the objection of the accused only when expressly authorized by the MCM.

3. Must the media and public receive notice before a court-martial can be closed?

4. RCM 405 allows an Article 32 Investigation to be closed in the discretion of the commander who ordered the investigation. *See ABC, Inc. v. Powell*, 47 M.J. 363 (1997).

5. MRE 412(c)(2) requires a closed hearing to determine the admissibility of evidence offered under Rule 412.

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53D GRADUATE COURSE

EXPERT TESTIMONY & EXPERT ASSISTANCE

I. FRE/MRE FRAMEWORK FOR EXPERT TESTIMONY

A. Rule 702

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, 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.

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* MRE 104(a).

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). 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* MRE 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* MRE 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* MRE 702 and 703.

   d) Relevant. Expert Testimony must be relevant. *See* MRE 402.

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e) Reliable. The expert's methodology and conclusions must be reliable. *See* MRE 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 any unfair prejudice that could result from the expert's testimony. *See* MRE 403.

3. 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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a) Knowledge, Training, and Education Foundation

(1) Show degrees attained from educational institutions;

(2) Show other specialized training in the field;

(3) Show the witness is licensed to practice in the field and has done so (if applicable) for a long period of time;

(4) Show teaching experience in the field;

(5) Show the witness' publications;

(6) Show membership in professional organizations, honors or prizes received, previous expert testimony.

b) Skill and Experience Foundation. An expert due to specialized knowledge. *See, United States v. Mustafa*, 22 M.J. 165 (C.M.A.).

(1) Example: *United States v. Meeks*, 35 M.J. 64 (C.M.A. 1992): Involved testimony by FBI agent concerning his "crime scene analysis" of a double homicide. Testimony included observations that killer was an "organized individual" who had planned and spent some time in preparation for crime, was familiar with crime scene and victims, and acted alone. Such evidence was not too speculative for admission under MRE 702.

(2) *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.

(3) *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.

(4) *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.

(5) *United States v. Billings*, 58 M.J. 861 (Army Ct. Crim. App. 2003). 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.

4. Proper Subject Matter ("Will Assist")

a) Helpfulness. Expert testimony is admissible if it will assist the fact finder. There are two primary ways an expert's testimony may assist.

(1) 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.

(2) 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).

(a) *United States v. Hall*, 165 F.3d 1095 (7th Cir. 1999). 7th Circuit held that trial judge did not abuse his discretion in excluding the defense expert on eyewitness identification. Even if the evidence meets the reliability prong of *Daubert*, it must also meet the helpfulness prong. Here the judge properly ruled that such testimony is not beyond the ken of lay jurors and there was no need for expert opinion testimony.

(b) *United States v. Dimberio*, 52 M.J. 550 (A.F. Ct. Crim. App. 1999). Military judge excluded the testimony of defense expert who would testify about the alcoholism, and mental problems of the accused's wife. Air Force court affirmed and held that this evidence was irrelevant because there was no link to these problems and her alleged violence. Testimony was impermissible profile evidence.

b) Form of the Opinion. The foundation consists of no more than determining that the witness has formed an opinion, and of what that opinion consists.

B. MRE 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.

1. 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.

   a) *United States v. Hill-Dunning*, 26 M.J. 260 (C.M.A.), *cert. denied*, 488 U.S. 967 (1988) (psychiatrist is competent to testify as to diagnosis of client and may testify that diagnosis is based upon assumption that what client said is the truth; yet, same witness may not testify that it is his opinion that what client said is truthful.)

   b) *United States v. Lipscomb*, 14 F.3d 1236 (7th Cir. 1994) (conclusion of law enforcement experts held qualified to opine that circumstances and behavior indicated intent to distribute drugs was not a legal conclusion as to a specific intent element).

   c) 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 identify of the perpetrator were the primary issues at trial.

2. One recurring problem is that 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).

   a) 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.

   b) 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).

c) Questions such as whether the victim's behavior is consistent with individuals who have been raped, or whether injuries are consistent with a child who has been battered, however, are permissible.

d) Examples: 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).

(1) *United States v. Cacy*, 43 M.J. 214 (1995): Accused charged with sodomy and indecent liberties on six-year-old daughter. Expert testimony that child's behavior is consistent with behavior patterns of a typical sexual abuse victim and that victim did not appear rehearsed admissible. However, testimony that expert explained to child importance of being truthful and, based on child's responses, recommended further treatment, was an affirmation that expert believed the victim, which improperly usurped the responsibility of the fact-finder

(2) *United States v. Marrie*, 43 M.J. 35 (1995): Government expert testified that preteen and teenage boys (the victims) were the least likely group to report abuse because of shame and embarrassment and fear of being labeled a homosexual. She opined that false allegations from that group were "extremely rare" and outside of her clinical experience. Such testimony was improperly admitted, although harmless.

(3) *United States v. Raya*, 45 M.J. 251 (1996). Social worker's testimony that rape victim was not vindictive and wanted to stay away from the accused was not improper comment on credibility.

(4) *United States v. Anderson*, 50 M.J. 447 (1999), Accused charged with child sexual abuse. On appeal for the first time defense objected to testimony of government expert on child abuse accommodation syndrome. Defense claimed that it amounted to labeling the accused as an abuser and vouching for the credibility of the victims because the expert got all her information form the victims. CAAF rejected that argument and noted that the expert testimony was limited to factors and that the facts of this case were consistent with those factors

(5) *But see United States v. Schlamer*, 47 M.J. 670 (N.M.Ct. Crim.App. 1997), *affirmed*, 52 M.J. 80 (1999). On redirect examination TC asked one of the accused's interrogators if he believed the accused was making the confession up. The court said the question was permissible because investigator was an eye-witness to the confession, the witness gave a conclusory answer that added nothing, and the accused had two doctors testify that the confession was unreliable, so the government should have the chance to rebut with an eye witness. And, if this was error, it was harmless.

(6) *United States v. Eggan*, 51 M.J. 159 (1999). Accused convicted of forcible sodomy with another soldier. Defense theory was that it was consensual. The victim sought counseling after the incident and the government called the counselor in as an expert witness. The defense asked the expert if the victim could be faking his emotions. The expert said it was possible. On re-direct the expert testified that he saw no evidence of faking. On appeal defense claimed that this opinion was error because he was commenting on the witness' credibility. CAAF rejected this argument noting that the defense opened the door to this line of questioning, did not object at trial.

(7) *United States v. Armstrong*, 53 M.J. 76 (2000). Accused charged with indecent acts with his daughter. Accused made a partial confession to the police and at trial stated that any contact with his daughters was not of a sexual nature. On rebuttal the govt. called an expert in child abuse who testified that in her opinion the victim suffered abuse at the hands of her father. The defense did not object. On appeal CAAF held error and reversed the case. The court noted that error was not constitutional. None the less, the court held that the error had a substantial influence on the findings and reversed.

(8) *United States v. Robbins*, 52 M.J. 455 (2000). Accused charged with two specifications of sodomy with a child under 16**.** Social worker testified that in this case, the allegation was substantiated. A second witness also testified, about what the victim told here. She testified that when the victim reported the incident to her, the victim appeared not to be lying. The defense did not object to any of this evidence. CAAF cited *Birdsall* and then distinguished this case primarily because it was a judge

alone case and since the judge is presumed to know and apply the law correctly, these errors were not plain error and no relief.

C. MRE 703

703. 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.

1. 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.

2. 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).

   a) 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:

      (1) Where and when the witness observed the fact;

      (2) Who was present;

      (3) How the witness observed the fact;

      (4) 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).

(1) "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).

(2) There is a potential problem of smuggling in otherwise inadmissible evidence.

(a) *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.

(b) *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 MRE 703.

(3) The elements of the foundation for this basis include:

(a) The source of the third party report;

(b) The facts or data in the report;

(c) If the facts are inadmissible, a showing that they are nonetheless of the type reasonably relied upon by experts in the particular field.

D. Relevance. Expert testimony, like any other testimony must be relevant to an issue at trial. *See* MRE 401, 402; *Daubert, v. Merrell Dow Pharmaceuticals, Inc*. 509 U.S. 579 (1993).

E. 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 MRE 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).

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.

c) After *Daubert*, "helpfulness" alone will not guarantee admission of evidence because it does not guarantee "reliability."

(1) Examples:

(a) DNA Testing. *United States v. Thomas*, 43 M.J. 626 (A.F.Ct. Crim. App. 1995), one Air Force appellate judge held that the military judge did not abuse his discretion in admitting DNA results obtained by PCR methodology. Judge properly applied *Daubert* factors and any weaknesses in PCR methodology go to weight not admissibility.

(b) Luminol Testing. *United States v. Hill*, 41 M.J. 596 (Army Ct. Crim. App. 1994), luminol tests satisfy the *Daubert* criteria where testimony is limited to an opinion that positive results only show a presumptive positive for blood. *See also*, *United States v. Holt*, 46 M.J. 853 (N.M.Ct. Crim. App. 1997), *United States v. Schlamer*, 47 M.J. 670 (N.M.Ct. Crim.App. 1997)

(c) Chemical Hair Analysis. *United States v. Nimmer*, 43 M.J. 252 (1995), case remanded in order to allow the lower court to apply the *Daubert* model to RIA and GC/MS testing for the presence of cocaine. *See also*, *United States v. Bush*, 44 M.J. 646 (A.F.Ct. Crim. App. 1996), military judge did not abuse his discretion in applying *Daubert* factors and permitting analysis of the accused's hair to go before the members.

2. Non-Scientific Evidence. Several years ago, 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.

a) *United States v. Brown* 49 M.J. 448 (1998). MJ Judge excluded the testimony of defense expert in eyewitness identification on 403 grounds. Army court said this per se denial was an abuse of

discretion but harmless. CAAF reviewed and affirmed. CAAF did not address the correctness of that part of the Army court's decision. Nor did CAAF illuminate how *Daubert* factors applied to this kind of expert testimony. The court did not announce any per se rule on the admissibility of this type of expert testimony. *See also, United States v. Rivers*, 49 M.J. 434 (1998).

b) *United States v. Mustafa*, 22 M.J. 165 (C.M.A.), *cert. denied*, 479 U.S. 953 (1986). In this pre-*Daubert* case involving blood-spatter evidence, the court used a three-step analysis. First, does the evidence involve an area of specialized knowledge? Second, would the expert testimony be relevant (helpful) to the trier of fact? Third, is the expert qualified to testify? After *Kumho Tire*, this minimal inquiry may not be sufficient. The trial judge should do more than consider the expert's qualifications in making the reliability determination.

c) Other Factors. Other factors courts have considered to evaluate the reliability of scientific and non-scientific testimony include:

(1) Was the information developed for the purpose of litigation?

(2) Did the expert unjustifiably extrapolate facts to support conclusions?

(3) Are there alternative explanations?

(4) Is the expert being as careful as they would be in their regular professional work outside paid litigation?

(5) Is there a well-accepted body of learning in this area?

(6) How much practical experience does the expert have and is there a close fit between the experience and the testimony?

(7) Is the testimony based on objective observations and standards?

F. Matters for Experts.

1. Drug Testing.

a) In *United States v. Campbell*, 50 M.J. 154 (1999), the defense claimed that the lab's use of GC/MS/MS to determine the existence of LSD in urine failed under *Daubert*. CAAF reversed the case because the government failed to show that the 200 PG/ML established by DoD adequately accounted for innocent ingestion.

b) On reconsideration, the CAAF clarified its opinion in *Campbell*, at 52 M.J. 386 (2000). In a urinalysis case, the government can show wrongful use by expert testimony that meets this 3-part test: (1) proof must show that the metabolite is not naturally produced by the body; (2) cutoff level and concentration are high enough to reasonably discount innocent ingestion; (3) testing method reliably detected and quantified the concentration. The 3-part test is not required if the evidence can explain, with equivalent persuasiveness, the underlying scientific methodology and significance of test results.

c) In *United States v. Green*, 55 M.J. 76 (2001), the CAAF held that a positive urinalysis, accompanied by the testimony of an expert witness interpreting the result, was sufficient to support the permissive inference of knowing and wrongful use of cocaine.

2. Sleep Disorders. *United States v. Blaney*, 50 M.J. 533 (A.F. Ct. Crim. App. 1999). Accused charged with sodomizing another male victim while the victim was asleep. Defense wanted to admit the testimony of two experts to testify about the victim's alleged sleep disorders. Military judge excluded the testimony and the Air Force Court affirmed. Court held that under *Daubert*, the expert's methodologies were unreliable and not helpful because the victim had not been interviewed.

3. False Confessions. *United States v. Griffin*, 50 M.J. 278 (1999), CAAF held that MJ did not abuse his discretion in excluding the testimony of an expert in false confessions. The court reasoned that no witness could serve as a human lie detector, and in this case the evidence was unreliable because there was no correlation between the expert's studies and the accused in this case. In the future, no per se exclusion, may be admissible if testimony is limited to factors and there is a close correlation between the study group and the accused at trial.

4. Child Abuse Accommodation Syndrome. *United States v. Suarez*, 35 M.J. 374 (C.M.A. 1992): In trial for child sex abuse crimes, evidence was received on how the victim exhibited "Child Sexual Abuse Accommodation Syndrome" (children change or recant their stories, delay or fail to report abuse, accommodate themselves to the abuse). While such

evidence is controversial, it may be admitted where it explains the abused child's delay or recantation, as was the case here. *United States v. Cacy*, 43 M.J. 214 (1995).

5. Dysfunctional Family Profile Evidence.

   a) *United States v. Banks*, 36 M.J. 150 (1992). Error to present expert testimony that accused's family in a situation as ripe for child sexual abuse, purporting to present characteristics of a family that included child sexual abuser, then pursuing a deductive scheme of reasoning that families with the profile present an increased risk of child sexual abuse and that Bank's family fit the profile.

   b) *United States v. Pagel*, 45 M.J. 64 (1996). No abuse of discretion in allowing government expert to testify concerning a dysfunctional family "profile" and whether the accused's family displayed any of its characteristics. Testimony went to support credibility of daughter's accusations and to explain her admitted unusual behavior. Unlike in *Banks* evidence used to explain the behavior of the victim on the assumption she was abused by someone, not necessarily the accused. Using "profile' evidence to explain the counter-intuitive behavioral characteristics of sexual abuse victims was permissible.

6. Rape Trauma Syndrome. Rape Trauma is a subcategory of PTSD in the DSM-IV. The psychiatric community recognizes it as valid and reliable. Evidence may assist fact-finder by providing knowledge concerning victim's reaction to assault. *United States v. Carter*, 26 M.J. 428 (C.M.A. 1988) (Rape trauma syndrome evidence will assist the trier of fact in determining the issue of consent. This would be particularly true where such members would likely have little or no experience with victims of rape. . . [The RTS evidence] serves as a helpful tool by providing the fact-finders with knowledge regarding a victim's psychological reactions to an alleged sexual assault.)

   a) Other uses: RTS testimony to rebut an inference that a victim's conduct was inconsistent with a claim of rape where she did not fight off the attacker, made inconsistent statements concerning the assault, did not make a fresh complaint, and recounted the incident in a calm and "unnatural" manner. *See United States v. Cox*, 23 M.J. 808 (N.M.C.M.R. 1986), *United States v. Hartford*, 50 M.J. 402 (1999).

   b) Impermissible Testimony. *United States v. Bostick*, 33 M.J. 849 (A.C.M.R. 1991). Psychologist impermissibly expressed an

opinion concerning the rape victim's credibility by discussing the performance of the victim on a "Rape Aftermath Symptoms Test," (RAST) and by stating that the victim did not fake or feign her condition. The expert thus became a "human lie detector." The RAST failed to meet the requirements for admissibility of scientific testimony (lack of foundation). Despite lack of defense objection, the court finds plain error and sets aside findings and sentence.

7. Handwriting Analysis. Two more district courts are following the trend to limit the expert's testimony to characteristics and prevent them from either testifying that a certain individual was the author of a questioned document or to their degree of certainty. *United States v. Ruthaford*, 104 F. Supp. 2d 1190 (Dist. of NE 2000); *United States v. Santillan*, 1999 U.S. Dist. Lexis 21611 (Northern Dist. of CA).

8. Hypnosis. Admissible if the military judge finds that the use of hypnosis was reasonably likely to result in recall compatible in accuracy to normal human memory. *United States v. Harrington*, 18 M.J. 797 (A.C.M.R. 1984*); Rock v. Arkansas*, 483 U.S. 44 (1987). Proponent must show by clear and convincing evidence satisfaction of the following procedural safeguards:

   a) Independent, experienced hypnotist conducted.

   b) Hypnotist not regularly employed by the parties.

   c) (c)Information revealed to the hypnotist is recorded.

   d) Detailed statement must be obtained from the witness in advance.

   e) Only hypnotist and subject present during session.

9. DNA. *United States v. Youngberg*, 43 M.J. 379 (1995) (evidence of DNA testing is admissible at courts-martial if proper foundation is laid. *United States v. Davis*, 40 F.3d 1069 (10th Cir), *cert. denied*, 115 S. Ct. 1387 (1995) (statistical probabilities are basic to DNA analysis and their use has been widely researched and discussed).

10. Psychological Autopsy.

   a) *United States v. St. Jean*, 45 M.J. 435 (1996). No error in allowing forensic psychologist to testify about suicide profiles and that his

"psychological autopsy" revealed it was unlikely the deceased committed suicide.

b) *United States v. Huberty*, 53 M.J. 369 (2000). Applying *Daubert* and *Kumho Tire* the CAAF affirmed the MJ's decision to exclude an experts opinion that the accused was not an exhibitionist. The court noted that there was no body of scientific knowledge to support the expert's claim that the MMPI could be used to conclude that an individual was not an exhibitionist and could not have committed a crime.

11. Eyewitness Identification.

a) *United States v. Garcia*, 44 M.J. 27, *cert. denied*, 117 S. Ct. 174 (1996). Abuse of discretion, though harmless, to limit testimony concerning the unreliability of eye witness identification by preventing testimony on the inverse relationship between confidence and accuracy in identifications and theories of memory transference and transposition.

b) *United States v. Brown* 49 MJ. 448, (1998). MJ Judge excluded the testimony of defense expert in eyewitness identification on 403 grounds. Army court said this per se denial was an abuse of discretion but harmless. CAAF reviewed and affirmed. CAAF did not address the correctness of that part of the Army courts decision. Nor did CAAF illuminate how *Daubert* factors applied to this kind of expert testimony. The court did not announce any per se rule on the admissibility of this type of expert testimony. *See also United States v. Rivers*, 49 M.J. 434 (1998).

c) *United States v. Hankey*, 203 F.3d 1160 (9th Cir. 2000). In this case the accused was charged with conspiracy and distribution of drugs. Accused was a member of a gang and a co-accused and other witnesses testified for the defense and denied any wrong doing. In rebuttal the government called a police officer to render an expert opinion that part of the gang affiliation code was not to testify against another gang member or suffer physical injury. Defense said that the witness's opinion was not reliable and more prejudicial than probative. 9th Circuit applying *Kumho* said the judge did not abuse his discretion in admitting this evidence.

d) *United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000). Trial judge abused his discretion by excluding a defense expert on the weaknesses of eyewitness identification. The trial judge's comments that he wanted to "experiment" were indicative of the

abuse of his discretion, as was his failure to even conduct a *Daubert* type reliability hearing.

12. Future Dangerousness. *United States v. Latorree*, 53 M.J. 179 (2000). Accused pleaded guilty to sodomizing a 7-year old girl. In sentencing, the government expert testified, in response to both defense and government questioning, that during treatment most sexual offenders admit to other sexual assaults. On appeal, defense claimed it was error for the expert to provide this information. CAAF ruled that the expert evidence lacked relevance and failed the reliability standards as required by *Daubert*, but any error in admitting the testimony was harmless.

G. MRE 707

MRE 707. Polygraph Examinations.

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

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1. The Past: From 1923 to 1987, the "Frye" test excluded polygraph evidence because it was not generally accepted within the scientific community. In 1987, the "Frye" test was overruled as the standard for admissibility for scientific evidence. *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987). From 1987-1991, polygraph evidence was not per se prohibited for use in courts-martial.

2. The Rule: In 1991, the President promulgated MRE 707 as a per se ban on all polygraph evidence in courts-martial - this included the results of an examination, the opinion of an examiner, any reference to an offer to take, the failure to take or the taking of a polygraph examination.

a) In 1996, CAAF held that the categorical ban on polygraph evidence is an impermissible infringement on the accused's 6th Amendment right to present a defense provided the accused testifies and had his credibility placed at issue. *United States v. Scheffer*, 44 M.J. 442 (1996).

b) The Supreme Court Speaks. In *United States v. Scheffer*, 523 U.S. 303 (1998), the Supreme Court overruled CAAF. In an 8 to 1 opinion the Court said that a per se exclusion on polygraph evidence does not unconstitutionally abridge the right of an accused to present a defense.

(1) Some unresolved issues:

(a) 4 members of the majority believe the ban is unwise and a more "compelling" case my lead to a different result.

(b) Per se ban is somewhat inconsistent with *Daubert*.

(c) No indication of what level of acceptance is required

(d) Dissent blasts the inconsistency of a vast DoD program that the government argues is unreliable

(e) Dissent points out that president my have violated Article 36 in the promulgation of the rule because there are no issues unique to the military. This issue was assumed by CAAF and not briefed to the Court.

3. *United States v. Light*, 48 M.J. 187 (1998). Accused was convicted of larceny for stealing govt. equipment. During the course of the investigation, he was giving a polygraph by CID which he failed. The polygraph failure was one issue that a Texas Justice of the Peace used to grant a search warrant of his civilian quarters. Issue, can polygraph results be considered to decide PC questions? Court noted but did not resolve the tension between these rules as to whether polygraph evidence can be considered.

4. *United States v. Clark*, 53 M.J. 280 (2000). Accused pleaded guilty to larceny and false official swearing. In his judge alone case, the stipulation of fact included information that the accused failed a polygraph test. The CAAF ruled that it was plain error for the military judge to admit this evidence, however, the error did not materially prejudice his rights. Therefore, no relief.

5. *United States v. Southwick*, 53 M.J. 412 (2000). Accused convicted of wrongful distribution of drugs. She sold the drugs to an informant. At trial, the defense attacked the credibility of the informant by trying to demonstrate that the Air Force had not done a proper certification of him. In response, the informant testified that he had been polygraphed before being accepted as an informant. The defense did not object to this evidence. The CAAF held it was harmless error for this evidence to come

before the fact finders, because the polygraph was not directly related to any issues at trial or the informant's in court testimony.

6. *United States v. Tanksley*, 54 M.J. 169 (2000). Buried on page seven of a nine-page statement to NIS agents, the accused stated that he refused to take a polygraph examination. The government offered the entire statement and the information about his refusal to take a polygraph was not redacted. The defense did not object. The CAAF ruled that any passing reference to a polygraph examination did not materially prejudice the accused.

7. *Unites States v. Morris*, 47 M.J. 695 (N.M.Ct. Crim. App. 1997). In this case the accused was convicted of false official statements and battery for sexually forcing himself on a female friend. The accused was questioned and he initially claimed the contact was consensual. Then, in a pre-polygraph interview he admitted that the contact was not consensual. The polygraph was never conducted. The MJ prohibited the accused from introducing evidence that the investigators never actually gave him a polygraph. Judge struck the right balance required by MRE 707 by admitting the statement and the circumstances surrounding the statement but not allowing any evidence about an offer to take or the taking of a polygraph to be admitted.

H. MRE 403 Test

1. The probative value of the evidence must outweigh other considerations under MRE 403. *See, United States v. Houser*, 36 M.J. 392 (1993).

2. Determination. Proper application of the five other factors set forth in *Houser*, will ensure that the probative value is not outweighed by other concerns.

II. EXPERT WITNESS REQUESTS

A. A request for expert consultation/assistance is different than a request for an expert witness. *United States v. Langston*, 32 M.J. 894 (A.F.C.M.R. 1991).

B. What Gives the Defense the Right to Ask?

1. Sixth Amendment. In all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses.

2. UCMJ, art. 46. Defense counsel shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.

3. R.C.M. 703(a). The defense shall have equal opportunity to obtain witnesses and evidence.

C. How Should the Defense Do It?

1. Government Employees.

a) R.C.M. 703(c)(2)(A) - the defense shall submit a written list of requested witnesses to the trial counsel.

b) R.C.M. 703(c)(2)(B) - contents of the request shall include the witness's name, telephone number, if known, and address or location such that the witness could be found upon exercise of due diligence AND a synopsis of expected testimony sufficient to show relevance and necessity.

2. Civilian Experts. Add the following:

R.C.M. 703(d). When employment of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and fix compensation of the expert. The request shall include a complete statement of the reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary and, if so, whether the Government has provided or will provide an adequate substitute. *United States v. Ndanyi*, 45 M.J. 315 (1996).

D. Analyzing the Requests. Determine if the factors set out in *United States v. Houser*, 36 M.J. (1993), have been met. See discussion above.

1. *Adequate Substitute*. If the defense shows that the proposed expert testimony would be relevant, and the principles and methodologies used in reaching her conclusions are reliable, who is the defense entitled to get?

a) The defense may not select the expert of its choice and bind the government to pay for her. *United States v. Hagen*, 25 M.J. 78 (C.M.A. 1987), *cert. denied*, 108 S. Ct. 1015 (1988).

b) But the government bears the burden of demonstrating that it can provide an adequate substitute (typically a government employee). To qualify as an "adequate substitute," the person must be one with **similar professional qualifications** and who **can testify to the same conclusions and opinions** as the defense requested expert. *United States v. Guitard*, 28 M.J. 952, 955 (N.M.C.M.R. 1989).

c) A government expert whose views diverge from those of the defense expert is not an adequate substitute. *United States v. Robinson*, 24 M.J. 649, 652 (N.M.C.M.R. 1987); *United States v. Van Horn*, 26 M.J. 434 (C.M.A. 1988).

III. EXPERT ASSISTANCE

A. An accused is entitled to investigative or other expert assistance *when necessary* to prepare an adequate defense. *United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986), *cert. denied*, 479 U.S. 953 (1986).

1. The key to a successful defense demonstration of necessity is a plausible showing that the expert could provide information that the defense and its staff would not be able to obtain on their own. *United States v. Gonzalez*, 39 M.J. 459, 461 (1994) citing *United States v. Allen*, 31 M.J. 572, 623 (N.M.C.M.R.), *aff'd*, 33 M.J. 209 (C.M.A. 1991); *United States v. True*, 28 M.J. 1057 (N.M.C.M.R. 1989).

2. The burden is on the defense to establish why assistance is needed, what the assistance would accomplish and why detailed counsel and staff could not perform the work themselves. *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986), *cert. denied*, 479 U.S. 985 (1986). *See also United States v. McAllister*, 55 M.J. 270 (2001).

3. An accused is not entitled to assistance simply by noting that the prosecution has employed expert assistance in preparation of its case. *United States v. Washington*, 46 M.J. 477 (1997). An accused is not automatically entitled to an expert of equal qualifications without a showing of necessity. *United States v. Anderson*, 47 M.J. 576 (N.M.Ct. Crim. App. 1997). If an accused procures expert witness at his own expense, any error from arising from the Government's failure to provide an expert becomes moot. *United States v. Gunkle*, 55 M.J 26 (2001).

4. While equal protection, the UCMJ and the MCM assure servicemembers entitlement to expert assistance, the accused must demonstrate the necessity of such services by showing that the expert would be of some value **and** denial would result in a fundamentally unfair trial. *United*

States v. Robinson, 39 M.J. 88 (C.M.A. 1994). This showing of necessity presumes that defense counsel will try to educate themselves to attain competence for defending the relevant issues in the case. *United States v. Thomas*, 41 M.J. 873 (N.M. Ct. Crim. App. 1995). *See also United States v. Kreutzer*, 59 M.J. 773 (Army Ct. Crim. App. 2004) (holding that military judge abused his discretion in denying a defense request for a mitigation expert in a capital case, where the defendant's state of mind was central to the case)

5. Defense counsel should be prepared to at least answer the following questions:

a) What have you done to educate yourself in the requested area of expertise?

b) What experts and government employees having knowledge in this area have you interviewed? If none, why not?

c) If the issue in question involves a laboratory analysis by CID or the FBI, have you requested the opportunity (using TDS funding) to visit the crime lab and to examine the procedures and quality control standards utilized within the laboratory in this or any other case? If so, what did you learn from the visit?

d) What do you need to learn that you still do not understand in order to defend the accused in this case?

e) What treatises have you examined?

f) Are there experts other than the one you requested who would meet your needs? Have you talked to them? Would providing a government employee as an expert consultant meet your needs? Why not?

g) How many cases have you tried which involved the issues in this case? As to military counsel with little or no experience -

(1) Have you requested that the SDC or RDC detail another defense counsel with greater familiarity in the area of expertise needed to defend the accused? Have you advised the accused of his right to request an IMC who has a greater familiarity in this area?

(2) Have you requested through TDS channels any resource materials in this area, if not already readily available from local sources?

(3) Have you requested through TDS channels that CID or other Army organizations provide you and other counsel training in this area?

(4) If your area of expertise is common to many cases in your jurisdiction, why have no such requests been previously made?

h) What is the nature of any confidential communication you wish to protect? What need, if any, would there be for your client and the expert to talk with each other?

i) As an alternative, could the defense need be met by the Court's appointment of an expert under Mil. R. Evid. 706?

j) Have you asked the convening authority to employ an expert for you?

B. Type of Assistance. If assistance is "necessary," to whom is the defense entitled?

1. A specific individual? - No.

a) When the defense requests an expert consultant, there is no right to demand that a particular individual be assigned. *United States v. Tornowski*, 29 M.J. 578 (A.F.C.M.R. 1989).

b) No right to choose consultant of own personal liking or receive funds to hire own. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

2. A government employee? - Probably.

a) Usually, investigative, medical and other expert services are available in the military and are sufficient to permit the defense to adequately prepare for trial. *United States v. Garries*, 22 M.J. 288, 290-91 (C.M.A. 1986).

b) If the accused successfully demonstrates need, he must accept military investigative services and cannot compel the Government to fund such civilian services, if an offer is made under a Mil. R.

Evid. 502 order of confidentiality. *United States v. True*, 28 M.J. 1057, 1061 (N.M.C.M.R. 1989).

3. Civilian Assistance? - Unlikely.

a) Only in very unusual circumstances, where the government within its own resources cannot provide investigative services sufficient to enable the defense to prepare adequately for trial, will it be required to fund such services. The test is whether any of the government offered consultants is sufficient to enable the defense *after doing their own research* to adequately prepare for trial. Sole reliance on the advice of experts is no substitute for the hard work required to obtain the knowledge necessary to prepare a client's case for trial. *True*, 28 M.J. at 1061-2.

b) Absent a showing by the accused that his case is unusual or the experts proffered by the government are unqualified, incompetent, partial or unavailable, the investigative, medical, and other expert services available in the military are sufficient to permit the accused to adequately prepare for trial. *United States v. Ndanyi*, 45 M.J. 315, 319 (1996).

c) Defense counsel must make efforts to use expert assistants made available by the Government. In *United States v. Short*, 50 M.J. 370 (1999), the accused was charged with wrongful use. Defense counsel requested an independent expert from outside the Government to assist with trial preparation. The government offered the services of a Navy laboratory employee. CAAF held that defense counsel failed to make an adequate showing of necessity in her motion to compel production of a civilian expert when she had not even talked to the government expert and refused to do so, did not seek help from more experienced counsel, and was successful on cross-examination eliciting testimony that she claimed she needed the help of an expert to obtain.

4. Competent Assistance? – Yes. In *United States v. McAllister*, 55 M.J 270 (2001), the accused was charged with murdering his ex-girlfriend. The convening authority granted the accused's request for a specific defense consultant on DNA evidence, Dr. Patrick Conneally. Dr. Conneally examined the evidence, determined that an expert in Polymerase Chain Reaction (PCR) testing was needed, and recommended employment of a PCR expert, Dr. Blake. Dr. Conneally did not have this expertise. At a motions hearing, the defense requested substitution of Dr. Blake as an expert witness on PCR. The military judge denied the request, as did the convening authority. Because DNA evidence—and particularly PCR

testing—was the lynchpin of the Government's case, it was error for the military judge to deny the defense request to substitute experts. CAAF set aside the findings and remanded the case to ACCA.

C. *Ex Parte* Hearings. There is no absolute right to an *ex parte* hearing to demonstrate the need for expert assistance at government expense. The military judge does not abuse his discretion when requiring a preliminary showing of necessity on the record. *United States v. Kaspers*, 47 M.J. 176 (1997). *See also United States v. Ruppel*, 45 M.J. 578 (A.F. Ct. Crim. App. 1997).

D. Confidentiality. MRE 502 [Lawyer-Client Privilege] controls.

1. A toxicologist assigned to consult in preparation for a court-martial and to advise during trial is a lawyer's representative for purposes of Mil. R. Evid. 502. *United States v. Turner*, 28 M.J. 487 (C.M.A. 1989).

2. However, the privilege concerning use of the accused's mental examination does not apply to preclude disclosure of statements made if the defense counsel requests the sanity evaluation. *United States v. Toledo*, 26 M.J. 104 (C.M.A. 1988).

IV. CONCLUSION

APPENDIX

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

A. Rule 103. Rulings on Evidence. (Effective 1 December 2000 in federal courts, Mil. R. Evid. effective date is 1 June 2002.)

103(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(2). Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which the questions were asked. 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.

B. Rule 404 (a). Character Evidence Generally. (Effective 1 December 2000 in federal courts, Mil. R. Evid. effective date is 1 June 2002.)

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 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 trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution.

C. Rule 701. Opinion Testimony by Lay Witnesses. (Effective 1 December 2000 in federal courts, Mil. R. Evid. effective date is 1 June 2002.)

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

D. Rule 702. Testimony by Experts. (Effective 1 December 2000 in federal courts, Mil. R. Evid. effective date is 1 June 2002.)

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, my testify thereto in the form of an opinion or otherwise, if (1) the testimony is the based upon sufficient facts or date, (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.

E. Rule 703. Bases of Opinion Testimony by Experts. (effective 1 December 2000 in federal courts, pending Mil. R. Evid. Effective date 1 June 2002).

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 in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

F. Rule 803(6). Hearsay Exceptions; Authentication by Certification. (Effective 1 December 2000 in federal courts, Mil. R. Evid. effective date is 1 June 2002).

(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, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, 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 compilation 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.

G. Rule 902(11-12). Self-Authentication. (Effective 1 December 2000 in federal courts, Mil. R. Evid. effective date is 1 June 2002.)

(11) Certified domestic records of regularly conducted activity.—The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
(B) was kept in the course of the regularly conducted activity; and
(C) was made by the regularly conducted activity as a regular practice. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) Certified foreign records of regularly conducted activity.—In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible
under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
(B) was kept in the course of the regularly conducted activity; and
(C) was made by the regularly conducted activity as a regular practice. The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

DESKBOOK

Volume II

Criminal Law Department

2004 - 2005

53rd GRADUATE COURSE

CRIMINAL LAW DESKBOOK

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53rd GRADUATE COURSE

JURISDICTION

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Major Jon S. Jackson
September 2004

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53rd GRADUATE COURSE

JURISDICTION

Outline of Instruction

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, 2002 ed., RCM 201 - 204

4. Customary international law and treaties

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

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

1. Jurisdiction over the offense (subject-matter jurisdiction).

2. Jurisdiction over the person (personal jurisdiction).

3. Court properly composed (military judge and members must have proper qualifications).

a. *United States v. Morgan*, 57 M.J. 119 (2002). The defense counsel requested an enlisted members panel by faxing a notice to the military judge two weeks before trial. The accused never made forum selection at trial, but at no time during the four-day trial did the accused object to the enlisted members on the panel. Following a *DuBay* hearing, the service court held that there had been substantial compliance with Article 25, UCMJ. The CAAF affirmed, holding that the failure to get the accused's forum selection on the record was a procedural error, but was not a jurisdictional defect.

b. *United States v. Townes*, 52 M.J. 275 (2000). It was error for the military judge not to obtain on the record the accused's personal request for a trial by enlisted members as required by UCMJ, art. 25. However, based on the circumstances of the case, there was substantial compliance with Article 25, and the error did not materially prejudice the substantial rights of the accused—the error was non-jurisdictional.

c. *United States v. Daniels*, 50 M.J. 864 (Army Ct. Crim. App. 1999). A panel consisting of both officer and enlisted members convicted the accused. At no time during the court-martial did the accused personally elect to be tried by an officer/enlisted panel. During a *Dubay* hearing, the accused stated that she remembered telling her defense counsel she wanted to be tried by an enlisted panel. The Army Court cited to the "substantial compliance analysis" in *Turner* in holding that the error was not a jurisdictional error and the accused's affirmations during the *Dubay* hearing rendered the error harmless.

d. *United States v. Turner*, 47 M.J. 348 (1997). 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. Defense counsel, not the accused, represented for the record, both orally and in writing, that the accused elected to be tried by military judge alone. Even though the accused did not personally make the request, considering the facts in the case, there was substantial compliance to satisfy UCMJ, art. 16.

e. *United States v. Seward*, 49 M.J. 369 (1998). Failure to formally request trial by military judge alone prior to assembly was error. However, under the facts of the case, the error was not prejudicial. The accused did not request to be tried by military judge alone until after completion of the sentencing proceedings. The court found that the accused's desire to be tried by judge alone was apparent by the terms of the pre-trial agreement (an agreement to be tried by military judge alone) and the post-assembly written submission to be tried by judge alone.

f. *United States v. Cook*, 48 M.J. 434 (1998). The court-martial did not lack jurisdiction even though there were substitute members detailed to the court-martial who replaced excusals beyond the one-third excusal limitation. Prior to assembly, the SJA excused more than one-third of the total number of members originally detailed. The Convening Authority in turn detailed substitute members to the panel. The court held that the members detailed in excess of the one-third excusal limitation under R.C.M. 505(c)(1)(B)(ii) were not "interlopers" and did not deprive the court-martial of jurisdiction.

g. *United States v. Sargent*, 47 M.J. 367 (1997). The unexplained absence of a detailed member did not deprive the general court-martial of jurisdiction over the accused so long as the statutory quorum was satisfied.

4. Convened by proper 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).

5. Charges properly referred.

a. *United States v. Williams*, 55 M.J. 302 (2001). One GCMCA (BG Essig) referred the case to trial on 10 Oct 95 and the accused was arraigned on 19 Oct 95 but did not enter pleas. On 26 Oct 95, BG Essig transmitted the case to his immediate superior, a second GCMCA (MG Foley), noting that he had previously referred this case to trial by GCM convened by CMCO No. 1. BG Essig retired on 31 Oct 95. Following several pretrial sessions, MG Foley referred the case to trial under GCMCO No. 2. The defense moved to dismiss the charges, arguing that the court-martial lacked jurisdiction because MG Foley had not properly withdrawn the initially referred charges. The CAAF held that under the circumstances, MG Foley's intent to withdraw the charges referred under GCMCO No. 1 was implicit in his re-referral of the same charges under GCMCO No. 2.

b. *United States v. Pate*, 54 M.J. 501 (Army Ct. Crim. App. 2000). Accused charged with violating Art. 92(2), failure to obey a lawful order, plead guilty by exceptions and substitutions to Art. 92(3), negligent dereliction of duty pursuant to a pretrial agreement. The PTA was not signed by the GCMCA, but instead the word "accepted" was circled with a notation indicating a voco to the SJA. Accused argued that since the CA never signed the PTA, the new charge was never referred. The Army Court held that jurisdiction existed since a proper referral does not need to be in writing. Petition for grant of review denied by CAAF (No. 01-0059/AR, 2001 CAAF LEXIS 216 (CAAF Mar. 5, 2001)).

c. *United States v. Underwood*, 50 M.J. 271 (1999). Issues of an improper referral for trial are not jurisdictional in nature. It was not an improper purpose to withdraw and re-refer charges to another court-martial because of witness availability.

II. JURISDICTION OVER THE OFFENSE.

A. Historical Overview.

1. *O'Callahan v. Parker*, 395 U.S. 258 (1969). The "service-connection" test is established.

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. *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990). *But see United States v. Lopez*, 37 M.J. 702 (A.C.M.R. 1993) (questioning the validity of the *Chodara* decision). *See also United States v. Smith*, Case No. 9500065, unpub. (Army Ct. Crim. App. 1998) (holding there was no court-martial jurisdiction over an offense that the accused allegedly committed while he was enlisted in the Mississippi National Guard).

2. 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).

3. 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.

4. Jurisdiction attaches as a result of the individual's status as a member of the armed forces and travel time may be included – "departure for duty" test is not used. *See United States v. Cline*, 29 M.J. 83 (C.M.A. 1989), *cert. denied*, 493 U.S. 1045 (1990) (holding that jurisdiction attaches at 0001 hours of the effective date of the orders); *See also United States v. Phillips*, 58 M.J. 217 (2003) (jurisdiction over reservist existed under Article 2(c) when reservist voluntarily submitted to military authority by traveling on, and receiving pay and benefits for, an authorized travel day).

III. JURISDICTION OVER THE PERSON.

A. 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. 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).

d. 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).

3. Persons in custody

a. Jurisdiction terminates once an accused's discharge is ordered executed (or enlistment expires) and he or she is released from confinement. The remaining suspended punishments are automatically remitted. *United States v. Gurganious*, 36 M.J. 1041 (N.M.C.M.R. 1993).

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[*] 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).

b. *Fisher v. Commander, Army Regional Confinement Facility*, 56 M.J. 691 (N-M. Ct. Crim. App. 2001). An accused that still has military confinement to serve pursuant to a court-martial sentence, is still a military prisoner subject to military jurisdiction under the concept of "continuing jurisdiction," notwithstanding the execution of his punitive discharge and receipt of the DD Form 214. This is true even where the prisoner is serving time in a state civilian prison. The discharge merely terminated his status of active duty, but did not terminate his status as a military prisoner.

4. P.O.W.'s

5. Persons accompanying or serving with the armed forces in the field in time of war.

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).

B. **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 ends upon delivery of a valid discharge certificate.

C. Inception of Court-Martial Jurisdiction.

1. **Enlistment:** A Contract Which Changes "Status." UCMJ, art. 2(b).

(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.

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):

(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."

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 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.** *United States v. Howard*, 20 M.J. 353 (C.M.A. 1985) (jurisdiction terminates on delivery of discharge and final pay).

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.

6. **Post-conviction Discharge.** *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).

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).

(A) [A] SUBJECT TO SECTION 843 OF THIS TITLE (ARTICLE 43), PERSON WHO IS IN A STATUS IN WHICH THE PERSON IS SUBJECT TO THIS CHAPTER AND WHO COMMITTED AN OFFENSE AGAINST THIS CHAPTER WHILE FORMERLY IN A STATUS IN WHICH THE PERSON WAS SUBJECT TO THIS CHAPTER IS NOT RELIEVED FROM AMENABILITY TO THE JURISDICTION OF THIS CHAPTER FOR THAT OFFENSE BY REASON OF A TERMINATION OF THAT PERSON'S FORMER STATUS.

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." *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).

b. **Exception:** UCMJ, art. 3(b), person obtaining a fraudulent discharge.

(B) EACH PERSON DISCHARGED FROM THE ARMED FORCES WHO IS LATER CHARGED WITH HAVING FRAUDULENTLY OBTAINED HIS DISCHARGE IS . . . SUBJECT TO TRIAL BY COURT-MARTIAL ON THAT CHARGE AND IS AFTER APPREHENSION SUBJECT TO THIS CHAPTER WHILE IN THE CUSTODY OF THE ARMED FORCES FOR THAT TRIAL. UPON CONVICTION OF THAT CHARGE HE IS SUBJECT TO TRIAL BY COURT-

MARTIAL FOR ALL OFFENSES UNDER THIS CHAPTER COMMITTED BEFORE THE 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). 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.

c. **Exception:** UCMJ, art. 3(c), deserter obtaining discharge for subsequent period of service.

(C) NO PERSON WHO HAS DESERTED FROM THE ARMED FORCES MAY BE RELIEVED FROM AMENABILITY TO THE JURISDICTION OF THIS CHAPTER BY VIRTUE OF A SEPARATION FROM ANY LATER PERIOD OF SERVICE.

d. **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).

(A) THE FOLLOWING PERSONS ARE SUBJECT TO THIS CHAPTER:

(7) PERSONS IN CUSTODY OF THE ARMED FORCES SERVING A SENTENCE IMPOSED BY A COURT-MARTIAL.

e. **Exception:** UCMJ, art. 3(d), leaving a Title 10 status does not terminate court-martial jurisdiction.

(D) A MEMBER OF A RESERVE COMPONENT WHO IS SUBJECT TO THIS CHAPTER IS NOT, BY VIRTUE OF THE TERMINATION OF A PERIOD OF ACTIVE DUTY OR INACTIVE-DUTY TRAINING, RELIEVED FROM AMENABILITY TO THE JURISDICTION OF THIS CHAPTER FOR AN OFFENSE AGAINST THIS CHAPTER COMMITTED DURING SUCH PERIOD OF ACTIVE OR INACTIVE-DUTY TRAINING.

IV. JURISDICTION OVER THE RESERVE COMPONENT.

A. Historical Overview.

B. **BOTTOM LINE:** 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).

C. When does jurisdiction exist for IDT individual?

1. Compare UCMJ, art. 2, to service regulations defining IDT. *See* AR 27-10, para. 21-2(a) (jurisdiction continues during periods such as "lunch breaks" between unit training assemblies or drills on the same day and may continue overnight in situations such as overnight bivouac). For examples of IDT, *see* AR 140-1, Mission, Organization, and Training of Army Reserve.

2. Compare to ADT. *See United States v. Cline*, 29 M.J. 83 (C.M.A. 1989), cert. denied, 493 U.S. 1045 (1990) (holding that jurisdiction attaches at 0001 hours of the effective date of the orders). *See also United States v. Phillips*, 58 M.J. 217 (2003) (jurisdiction over reservist existed under Article 2(c) when reservist voluntarily submitted to military authority by traveling on, and receiving pay and benefits for, an authorized travel day).

3. *United States v. Wall*, 1992 CMR LEXIS 642 (A.F.C.M.R. 1992) (unpub. opinion) (jurisdiction existed over the accused during his lunchbreak).

4. *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).

D. 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 *United States v. Caputo*, 18 M.J. 259 (C.M.A. 1984) and *Duncan v. Usher*, 23 M.J. 29 (C.M.A. 1986).

E. 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:

1. Article 32 investigation.

2. Trial by court-martial.

3. Nonjudicial punishment.

F. Restrictions on the involuntary recall process.

1. 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.

2. Unless the order to involuntary active duty was approved by the appropriate Service Secretary, the member may not be:

a. sentenced to confinement;

b. forced to serve any punishment involving restriction on liberty except during a period of inactive duty training or active duty; or

c. placed in pretrial confinement. UCMJ, art. 2(d)(5).

3. General and Special Courts-Martial. Prior to arraignment the reservist must be on active duty. R.C.M. 204(b)(1).

4. 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.

G. 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.

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. *United States v. Alef*, 3 M.J. 414 (C.M.A. 1977).

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:

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).

VI. OTHER CONSIDERATIONS.

A. **Military Extraterritorial Jurisdiction Act of 2000.**

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 are under final review before being sent to Congress.*

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.

B. 2003 National Defense Authorization Act.

1. Contains a provision that discusses jurisdiction of National Guard members not in Federal service. Does not change the lack of federal jurisdiction over National Guard members in a Title 32 status; only reorganizes the sections of Title 32 U.S.C. §§ 326-333.

2. Requires the Secretary of Defense to "prepare a model State code of military justice and a model state manual for courts-martial to recommend to the States for use with respect to the National Guard not in Federal service."

VII. APPELLATE JURISDICTION: THE ALL WRITS ACT, 28 U.S.C. § 1651(A).

A. **Introduction.** In 1948, Congress enacted the All Writs Act, 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.

B. Scope of Authority.

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. *McKinney v. Jarvis*, 46 M.J. 870 (Army Ct. Crim. App. 1997). *See also Noyd v. Bond*, 395 U.S. 683 (1969); *United States v. Curtin*, 44 M.J. 439 (1996); *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979); *McPhail v. United States*, 1 M.J. 457 (C.M.A. 1976); *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).

C. Writ Classifications.

1. Mandamus.

a. **Definition.** Directs a party to take action; rights are not established or created; pre-existing duty enforced. *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979); *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996); *United States v. Gray*, 32 M.J. 730 (A.C.M.R. 1991); *United States v. Eggers*, 32 M.J. 583 (A.C.M.R. 1990) ("It is designed to confine a lower court to the lawful exercise of its prescribed jurisdiction." *Id.* at 584).

b. **Burden.** Petitioners must show that they lack adequate alternative means to obtain the relief they seek and carry "the burden of showing that [their] right to issuance of the writ is 'clear and indisputable.'" *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953).

2. Prohibition.

a. **Definition.** Directs a party to cease doing an act or prohibits execution of a planned act that violates a law or an individual's rights. *Cunningham v. Gilevich*, 36 M.J. 94 (C.M.A. 1992); *Moye v. Fawcett*, 10 M.J. 838 (N.M.C.M.R. 1981).

b. **Burden.** The same as a writ of Mandamus. Issuance of a writ of prohibition is a drastic remedy that should only be invoked in those situations that are truly extraordinary. *Pearson v. Bloss*, 28 M.J. 764 (A.F.C.M.R. 1989).

3. Error Coram Nobis.

a. **Definition.** "In our presence"; a review of a court's own prior judgment predicated on a material error of fact. *Chapel v. United States*, 21 M.J. 687 (A.C.M.R. 1985). Now also to correct constitutional or fundamental errors, including those sounding in due process. *Ross v. United States*, 43 M.J. 770 (N.M. Ct. Crim. App. 1995).

b. **Burden.** That (1) an error has been made that was unknown to the accused during appeal; (2) a more usual remedy is unavailable; (3) valid reasons exist for not previously attacking the conviction; and (4) the error was such a fundamental nature as to render the proceedings irregular and invalid. *Tillman v. United States*, 32 M.J. 962 (A.C.M.R. 1991). *See also Garret v. Lowe*, 39 M.J. 293 (C.M.A. 1994); *Ross v. United States*, 43 M.J. 770 (N.M. Ct. Crim. App. 1995); *Shelby v. United States*, 40 M.J. 909 (N.M.C.M.R. 1994).

4. Habeas Corpus.

a. **Definition**. "That you have the body"; directs the release of a person from some form of custody. *McCray v. Grande*, 38 M.J. 657 (A.C.M.R. 1993); *Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990).

b. **Burden**.

(1) Pre-trial confinement—Did the convening authority abuse his discretion; apply same standard as Mandamus. *Keaton v. Marsh*, 43 M.J. 757 (Army Ct. Crim. App. 1996); *Frage v. Moriarty*, 27 M.J. 341 (C.M.A. 1988).

(2) Post-trial confinement—Have all administrative remedies been exhausted and is the confinement illegal? *United States v. Miller*, 44 M.J. 582 (A.F. Ct. Crim. App. 1996); *McCray v. Grande*, 38 M.J. 657 (A.C.M.R. 1993).

D. 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.

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**. Ensuring adherence to a court order. 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**. A case that "touches" the military justice system. 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.

E. Actual v. Supervisory Jurisdiction: the All Writs Act and *Goldsmith*

1. **Recent Case Law (Pre-Goldsmith).** *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.

2. *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.

3. *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.

4. *Dew v. United States*, 48 M.J. 639 (Army 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.

5. *Clinton v. Goldsmith*, 526 U.S. 529 (1999). The CAAF exercised supervisory jurisdiction under the All Writs Act to stop the government from dropping the accused from the roles of the Air Force. The Supreme Court unanimously held that the CAAF had exceeded its supervisory 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.

6. **Recent Case Law (Post-Goldsmith).** *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).

7. *United States v. Byrd*, 53 M.J. 35 (2000). The accused petitioned the court, asking review of an ineffectiveness of counsel claim. The accused filed the petition after the 60-day window to petition CAAF for review expired and the government had already executed his sentence under Article 71, which included a punitive discharge. The late filing of the petition was not raised and review was granted (government did not offer lack of jurisdiction or untimely filing as reasons to deny review). Two years later, and after the case had been remanded to the NMCCA for further consideration, the government requested that appellate review be terminated for lack of *in personam* jurisdiction. The NMCCA held that jurisdiction for continued review ended following the proper execution of the discharge in 1997. CAAF held that the NMCCA erred in concluding that accused's discharge was proper under Article 71 (CAAF said there was no proof in the record that the accused had been properly notified of his right to petition CAAF, and Govt. failed to establish that accused's petition was untimely, therefore, review was not yet final so the discharge should not have been executed). It stated "this Court has jurisdiction to review such a case under the All Writs Act," but declined to decide which standard of review was more appropriate, direct or collateral.

8. *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.

9. *Fisher v. Commander, Army Regional Confinement Facility*, 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 (the petition was then denied).

10. *United States v. Beck*, 56 M.J. 426 (2002). The accused filed a writ-appeal petition for review of the ACCA's decision of his request for extraordinary relief and a motion to stay court-martial proceedings. The accused argued that he was fraudulently induced into signing his service contract and as such his order to active duty was void. He requested that the court-martial charges be dismissed for lack of jurisdiction and the court direct his discharge from the Army. He had filed suit in U.S. District Court to litigate the issue and argued that a stay of his court-martial proceedings should be granted until resolution of the civil case. The CAAF denied the petition and motion for stay and held that it would be inappropriate to issue a stay absent a persuasive ruling from a court outside the military justice system.

11. *Taylor v. Garaffa*, 57 M.J. 645, (N-M. Ct. Crim. App. 2002). The accused was charged with offenses that were committed prior to 15 May 2002 (effective date of the 2002 Amendments to the MCM). He filed a petition for extraordinary relief with the service court arguing that the military judge improperly denied his motion to limit the jurisdiction of his special court-martial to six months confinement and six months forfeitures. The court held that it had jurisdiction to consider the merits of the petition under the All Writs Act. As the highest judicial tribunal in the Navy, this authority was "in aid of its mandate to supervise the administration of courts-martial within the Navy and the Marine Corps."

F. Filing a Writ.

1. Does the case qualify?

a. Jurisdiction.

b. Extraordinary circumstance.

(1) Circumstances warrant extraordinary relief

(2) Ordinary course of appellate review cannot give adequate relief

(3) Available remedies are exhausted

c. Relief sought. Relief will advance judicial economy.

(1) Maximize judicial economy

(2) Resolve recurrent issues that will lead to more cases

(3) Prevent waste of time and energy of military courts.

2. Must the military judge grant a continuance?

a. Within the discretion of the military judge (R.C.M. 906(b)(1)).

b. No automatic stay; but once a stay is issued by CCA or CAAF, proceedings must stop.

3. Which forum?

a. 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).

b. 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.

c. Considerations of time and subject matter.

4. Procedure.

a. 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).

b. The "show cause" order shifts the burden.

VIII. CONCLUSION.

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53D GRADUATE COURSE

COURT-MARTIAL PERSONNEL
VOIR DIRE & CHALLENGES

OUTLINE OF INSTRUCTION

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MAJ Deidra J. Fleming

September 2004

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53D GRADUATE COURSE

COURT-MARTIAL PERSONNEL

VOIR DIRE & CHALLENGES

I. CONVENING AUTHORITY.

A. Review: A Convening Authority (CA) is an officer who has the power to decide whether to refer [forward or send] an accused's case to a court-martial for trial, appoint panel [jury] members, and take action approving, modifying or disapproving the findings and sentence. RCM 103(6); 401; 505; 601; 1107.

B. A CA who receives a charge sheet must make a prompt determination of the disposition of those charges. The CA's options include dismissal of the charges, forwarding them to a higher commander, or referral to a court-martial which that CA is empowered to convene. RCM 401. A CA may also appoint an investigation under Article 32, UCMJ, as a prerequisite to recommending a General Court-Martial. RCM 404(d).

C. An accused has a qualified right to have his case reviewed by an impartial CA. Cf. *United States v. Nix*, 40 M.J. 6 (C.M.A 1994). A CA may have her discretion limited if she has acted in some fashion that is inconsistent with the impartiality of a CA. A CA may, for example, become an "accuser." An accuser is a person who (1) signs and swears to charges, (2) directs that charges nominally be signed and sworn to by another, or (3) who has an interest other than an official interest in the prosecution of the accused. Article 1(9), UCMJ. *See also* RCM 601(c) Discussion.

1. A CA who is an accuser is disqualified from referring a case to a SPCM or a GCM. Articles 1(9), 22(b) and 23(b), UCMJ; RCM 601(c). The CA may dispose of the case administratively or dismiss the charges but, if she wishes the case to be tried by a general or a special court-martial, she must forward the case to the next higher commander, noting her disqualification. Articles 22(b), 23(b), UCMJ; RCM 401(c)(2)(A); 601(c).

2. A CA-accuser may be disqualified in either a "statutory" sense (e.g., having sworn the charges) or in a "personal" sense (by virtue of having an other than official interest in the case). *McKinney v. Jarvis*, 46 M.J. 870 (Army Ct. Crim. App. 1997). Whether the CA is statutorily or personally disqualified will determine the options available to the CA concerning a particular case.

a) Statutory disqualification. *McKinney v. Jarvis*, 46 M.J. 870 (Army Ct. Crim. App. 1997). A convening authority who becomes an accuser by virtue of preferring charges is not, *per se*, disqualified from appointing a pretrial IO to conduct a thorough and impartial investigation of those charges.

b) Personal disqualification. 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).

(1) Testifying Convening Authority. *United States v. Gudmundson*, 57 M.J. 493 (2003). 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 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'" (citation omitted). "However, 'if the [convening authority's] testimony is of an official or disinterested nature only,' the convening authority is not disqualified" (citation omitted).

(2) *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994) (SPCMCA, who was angered by accused's sexual banter with CA's fiancée, may have been disqualified from forwarding case with recommendation; case set aside).

(3) *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*, CMR 9101023 (A.C.M.R. 23 Jan. 1995) (unpub.). Accused charged under Art. 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. Involvement was official and not personal. *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.

(4) *United States v. Tittel*, 53 M.J. 313 (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. *See also United States v. Garcia*, 2003 CCA LEXIS 98 (N-M Ct. Crim. App. Apr 9, 2003) (unpub.). Applying the CAAF's opinions in *United States v. Tittel* and *United States v. Rockwood*, 52 M.J. 98 (1999), court held that appellant waived the accuser issue by failing to raise it at trial. In any event, the convening authority was not an "accuser" prohibited from convening a court-martial where convening authority issued the order the appellant 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) *United States v. Haagenson*, 52 M.J. 34 (1999). Case remanded for fact-proceeding on issue of whether SPCMCA became an accuser. Accused was a warrant officer. SPCMCA originally referred the accused's case to a SPCM, but withdrew it and forwarded it with recommendation for GCM. Accused alleged on appeal the case was withdrawn and forwarded because base commander's XO, who was the SPCMCA's superior, told SPCMCA "I want [accused] out of the Marine Corps."

(6) *United States v. Dinges*, 49 M.J. 232 (1998). 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 had terminated his status as an assistant, and contacted the SPCMCA (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 SPCMCA's 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).

(a) The CAAF stated that if the CA was personally disqualified, he could not order "charges investigated under Article 32, UCMJ," or recommend a general court-martial when forwarding those charges to the general court-martial convening authority.

(b) 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. *United States v. Dinges*, 55 M.J. 308 (2001).

(7) *United States v. Fisher*, 45 M.J. 159 (1996). Convening authority'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 M.R.E. 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.

(8) *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 adulterous affairs. 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 convening authority.

(9) *United States v. Anderson*, 36 M.J. 963 (A.F.C.M.R. 1993). 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.M.A. 1994) (accused convicted of three rapes, robbery, sodomy, and aggravated assault was not entitled to disqualification of convening authority 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).

3. The "Junior Accuser" Concept. Subordinate commander to an "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"; *United States v. Corcoran*, 17 M.J. 137 (C.M.A. 1984).

4. Failure to raise issue at trial results in waiver. *United States v. Gudmundson*, 57 M.J. 493 (2003). 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 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'" (citation omitted). "However, 'if the [convening authority's] testimony is of an official or disinterested nature only,' the convening authority is not disqualified" (citation omitted).

5. On waiver*: See Tittel; United States v. Voorhees*, 50 M.J. 494 (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. *See also United States v. Shiner*, 40 M.J. 155 (C.M.A. 1994): Issue of CA whether CA was disqualified because accused allegedly violated CA's personal order was waived by failure to raise at trial.

6. RCM 1302(b). Accuser not disqualified from convening summary court-martial; or initiating administrative measures (Art. 15, L.O.R., Bar to Reenlistment, etc.).

D. Convening a Court-Martial: Selecting members.

1. CA convening a court-martial must personally detail panel members. RCM 503(a). "The convening authority shall detail qualified persons as members for courts-martial." The CA must determine who in the CA's *personal* opinion are "best qualified" under the criteria set out in Article 25, UCMJ:

***J*udicial Temperament**
***E*xperience**
***T*raining**

***A*ge**
***L*ength of Service**
***E*ducation**

2. Courts-martial panels must be personally selected by the convening authority. Similar systems have been challenged in other parts of the world and even Congress has shown some interest in reducing the convening authority's power to influence courts-martial through panel selection.

a) In the wake of *Findlay v. United Kingdom*, 1995 Y.B. Eur. Conv. on H.R. 186 (Eur. Comm'n on H.R.), *confirmed by*, 30 Eur. Ct. H.R. (ser. B) at 263 (1997), both the British and Canadian armed forces have implemented systems that diminish the impact of local commanders on panel selection.

b) 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. The JSC report was forwarded to the SECDEF in August 1999.

c) 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" recommends modifying the pretrial role of the convening authority in both selecting court-martial members and making other pre-trial legal decisions that "best rest within the purview of a sitting military judge."

3. In the meantime, however, the CA is still required to personally select panel members. *United States v. Ryan*, 5 M.J. 97 (C.M.A. 1978). This power cannot be delegated. *Cf. United States v. Benedict*, 55 M.J. 451 (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 art. 25, UCMJ.

a) Authority to Convene?

(1) *United States v. Hundley*, 56 M.J. 858 (N-M. Ct. Crim. App. 2002). Battalion was designated as "separate" by the Secretary of the Navy and therefore under Art. 23(a)(7), UCMJ, its commanding officer had authority to convene a special courts-martial.

(2) *United States v. Hardy*, 60 M.J. ___, 2004 CCA LEXIS 170 (A.F. Ct. Crim. App. 2004). Between referral and the CA's 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 not to revoke the CA's power. AFFCA held, in the alternative, even if the Secretary 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."

b) Detail of members from other commands. *United States v. Gaspard*, 35 M.J. 678 (A.C.M.R. 1992). Accused assigned to Ft. Polk. CA at Ft. Polk disqualified (talked to victim's parents) therefore case convened by Corps CG at Ft. Hood who referred case to a Ft. Polk court-martial convening order (CMCO) with Ft. Polk members. Question – did Corps CG personally select the (Ft. Polk) members? If not, "fatally flawed . . .." Case remanded for *DuBay* hearing.

c) Redesignation of commands and units raises issues concerning selection of members. *See United States v. Allgood*, 41 M.J. 492 (1995). Commander of "United States Army Training Center and Ft. Dix" became new general court martial convening authority (GCMCA) when command was redesignated "United States Army Garrison, Ft. Dix." ACMR held that new GCMCA committed jurisdictional error by merely adopting members previously selected by prior GCMCA. CAAF reverses ACMR and indicates failure to follow RCM 504(d) is not necessarily jurisdictional error because "military reality" was that CA was a "predecessor commander." CAAF also points out defense failure to object and lack of prejudice. *Dissent:* J. Cox; command was terminated and Art.

25 violated by lack of personal selection of court-members. *See also United States v. McKillop*, 38 M.J. 701 (A.C.M.R. 1993) (similar facts to *Allgood* (above)). *See also United States v. Brewick*, 47 M.J. 730 (N.M. Ct. Crim. App. 1997) (holding that *Allgood* does not require a successor-in-command to "expressly adopt" predecessor's panel selections). *Accord*, *United States v. Vargas*, 47 M.J. 552 (N.M. Ct. Crim. App. 1997). *But see Daulton* (below) where Army fails to adopt Navy's reasoning in *Brewick.*

d) Acting Commanders. Article 23, U.C.M.J.

(1) Service regulations govern in determining who is properly in command**.** Those regulations should be followed, but violation of regulation may not spell defeat for government. Court looks to who was actually in command at the time the action was taken. *United States v. Yates*, 28 M.J. 60 (C.M.A. 1989). 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).

e) Predecessor in Command Must Personally "Adopt" Members. *United States v. Dalton*, No. 20040187 (Army Ct. Crim. App. July 22, 2004 (unpub.)). The CA referred the case to a CMCO comprising members appointed by his predecessor. ACCA held no evidence existed to show that the CA expressly personally "adopted" the members from the CMCO in violation of Article 25 (d)(2) or that the CA knew who constituted the court-martial convened by the CMCO. Failure to expressly "adopt" the members is a jurisdictional defect requiring reversal of the findings and the sentence. *But see United States v. Dalton*, No. 20040187 (Army Ct. Crim. App. Aug. 20, 2004) (unpub.), which vacated the court's original opinion after obtaining an affidavit from the SJA swearing that the CA did personally adopt the court members selected by his predecessor. The court stated "[b]y 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 Article 25 on] the convening authority are clearly met."

4. **The nomination process**. Most services try to simplify the panel selection process, especially at larger installations, by having the CA solicit nominees from subordinate commanders, who must also apply Article 25 in deciding whom they will nominate for court-martial duty. The CA may then select from this shorter list, but she must be aware that 1) she must apply Article 25 and 2) she may select

anyone in her command. Such a nomination process has raised significant issues, such as the potential for staff involvement to taint the panel selection, and for errors in the nomination memoranda which can affect the panel selection. Military justice managers must be wary of these issues.

a) *United States v. Upshaw*, 49 M.J. 111 (1998). Believing the accused was an E6 (he was in fact an E5), the SJA sent out memorandum seeking nominees from the SPCMCAs, requesting nominees in the grade of E7 and above. The court found no error. An element of "court stacking" is improper motive; none was shown here. Defense conceded that the exclusion of technical sergeants (E6) was "just simply a mistake." The CAAF found the evidence did not raise the issue of court stacking. The error was simply administrative and not jurisdictional, and the court found no prejudice to the accused.

b) *United States v. Roland*, 50 M.J. 66 (1999). The SJA solicited court-martial panel nominees by asking that subordinate commanders recommend qualified personnel in grades "E5 to 06." The subsequent memorandum transmitting the list of nominees to the GCMCA indicated that he was not limited to the proposed enlisted members, but could select any enlisted members from his command, provided they met the Article 25 criteria. The court noted that once the defense comes forward and shows an improper selection, the burden is upon the Government to demonstrate that no impropriety occurred. Here, the court held that the defense had not carried its burden to show that there was unlawful command influence. The record establishes that there was no indication of impropriety in the selection of members.

c) *United States v. Kirkland*, 55 M.J. 22 (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, 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. The 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.'"

d) Novel selection process. *United States v. Dowty*, 60 M.J. 163 (2004). Appellant 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 appellant. Note: Appellant and his 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 appellant's trial, only three "volunteers" remained on seven-member panel.

e) *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 UCMJ art. 37. Their errors will likely spill over to the convening authority.

f) *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988). Legal personnel who sought to ensure "hard core" female members selected for sex offense cases tainted convening authority's selection. The CMA condemned the involvement of trial counsel in the panel selection process. Case set aside.

E. Selecting a panel: Challenges to criteria used in panel selection.

1. The courts have allowed the convening authority to use other criteria in addition to those listed in Article 25. Race, gender, and duty position have been accepted, so long as the CA acts in good faith. Rank is not an acceptable criteria under Article 25.

2. **Race**. Inclusion by Race. *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* (below).

a) Cross-sectional representation. *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). Nevertheless, the commander may seek to have the panel's membership reflect the military community.

3. **Gender.** Permissible if for proper reason.

a) *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 a court-martial panel that is representative of the

military population. But, evidence indicated a hidden policy of ensuring two females were on all sexual assault cases based on their "unique experience."

b) *United States v. Lewis*, 46 M.J. 338 (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.)

4. **Command or duty position**. Duty position is appropriate criterion if used in a good faith effort to comply with Art. 25 criteria.

a) *United States v. White*, 48 MJ 251 (1998). CA who issued a memorandum directing subordinate commands to include commanders, deputies and first sergeants in the court member applicant pool, and then proceeded to select more commanders than non-commanders for court-martial duty did not engage in court packing absent evidence of improper motive or systematic exclusion of a class or group of candidates.

(1) Eight of 10 nominees for the accused's trial were in command positions. Seven of the nine selected were commanders. There was no systematic exclusion because the CA's memo requested that "staff officers and NCOs" and "your best and brightest staff officers" should be nominated to serve as member.

(2) *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. S*ee also Yager*, 7 M.J. 171 (E1 and E2 presumptively unqualified).

b) **New danger area?** *United States v. Wiesen*, 56 M.J. 172 (2001) *recon. denied*, 57 M.J. 48 (2002). "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." Finding prejudice resulting from the MJ's denial of a defense challenge for cause against the senior panel member, the CAAF reversed the ACCA, and set the findings and sentence aside.

5. Unit.

a) *United States v. Simpson*, 55 M.J. 674 (Army Ct. Crim.App. 2001). 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.

b) *United States v. Brocks*, 55 M.J. 614 (A.F. Ct. Crim. App. 2001). Exclusion of Medical Group officers did not constitute unlawful command influence where 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 (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."

6. **Rank.** Rank is not listed as a criteria under Article 25, UCMJ. The convening authority may not use rank as a device for deliberate and systematic exclusion of 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 below E-3 permissible); *see also United States v. Delp*, 11 M.J 836 (A.C.M.R. 1981) (below E-4).

a) *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986). Court selection procedure resulted in systematic exclusion of junior enlisted personnel and officers and was designed to exclude those more likely to adjudge light sentences. *But see United States v. McLaughlin*, 27 M.J. 685 (A.C.M.R. 1988) (CA did not violate Article 25 by excluding (excusing) the most junior officers and replacing them with enlisted members when an accused requested a panel including enlisted members).

b) *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 U.C.M.J., and that the improper selection deprived the court of jurisdiction. Findings and sentence set aside.

c) *United States v. Benson*, 48 M.J. 734 (A.F. Ct. Crim. App. 1998). An Air Force convening authority violated UCMJ 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," fails 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 Air Force court noted that case law permits the systematic exclusion of ranks E-2 and below. A convening authority would violate Art. 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 UCMJ art. 25 and court member selection.*

d) *United States v. Nixon*, 33 M.J. 433 (C.M.A. 1991). A panel consisting of only E8s and E9s creates an appearance of evil and is probably contrary to Congressional intent. The CG's testimony, however, established that he had complied with art. 25 and did not use rank as a selection criterion. Findings and sentence affirmed.

e) *United States v. Ruiz*, 46 M.J. 503 (A.F. Ct. Crim. App. 1997), *aff'd*, 49 M.J. 340 (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.

f) *United States v. Bertie*, 50 M.J. 489 (1999). Defense challenged selection of panel as improperly selected on the basis of rank (no member was below the grade of O4 or E8). The court noted that deliberate and systematic exclusion of lower grades and ranks is not permissible, nor may the convening authority purposefully stack a panel to achieve a desired result. However, the mere presence of senior ranking members does not create a presumption of court stacking or use of improper selection criteria. The court held there was no evidence presented to establish a court-stacking claim.

g) *See Upshaw, Roland, Kirkland*, above.

F. "Court stacking."

1. Generally, where the accused challenges the panel because the CA has allegedly excluded otherwise qualified people, analytically the CA's motive is irrelevant (e.g., the CA may have the intention of fully complying with Article 25, but, nevertheless, violates Article 25 when using rank as a "shortcut" in the selection process). However, where the convening authority appoints members to achieve a particular result (e.g., 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) 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 UCMJ art. 25 criteria to achieve a particular result in cases is a clear violation of UCMJ art. 25 and UCMJ art. 37.

b) *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).

c) *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).

d) *United States v. Roland*, 50 M.J. 66 (1999). Test: Once the defense comes forward and shows an improper selection, the burden is upon the Government to demonstrate that no impropriety occurred.

G. Staff errors.

1. Triggering Mechanisms. *United States v. Mack*, 58 M.J. 413 (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.

2. Interlopers. *United States v. Peden*, 52 M.J. 622 (Army Ct. Crim. App. 1999). Where Member A was selected by convening authority but Member B was inadvertently placed on convening order, Member B was an interloper whose presence constituted jurisdictional error. Court refused to apply doctrine of substantial compliance where there was no compliance.

3. No Convening Order. *United States v. Esparza*, ARMY 20020614 (Army Ct. Crim. App. Oct. 15, 2003) (unpub.). Failure of the convening authority to order original charges to be tried with Additional Charge (in new convening order), and failure to attach new referral directions to the original charge sheet (ordering all cases referred to old convening order be referred to new convening order) deprived court of jurisdiction over appellant and his offenses. Findings and sentence set aside.

II. COUNSEL.

A. Qualifications.

1. GCM. UCMJ art. 27(b): "Trial counsel . . . detailed for a general court-martial –

a) must be a judge advocate . . . 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 UCMJ art. 27(b) certified, trial counsel need not.

3. RCM 502(d)(2). Assistant trial counsel or 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.

5. Capital Cases.

a) Funding of Experts and Training. RCM 703(d). *United States v. Curtis*, 31 M.J. 434 (C.M.A. 1990). The court issued an interlocutory order requiring Navy JAG to provide $15,000.00 for "assistance related to

the unique constitutional issues" and "for various forms of other assistance related to aspects of this case." *But see United States v. Gray*, 37 M.J. 730 (A.C.M.R. 1993). No abuse of discretion for military judge (MJ) to deny defense request for funding for independent investigator where CID agent was appointed to assist defense. *See* RCM 703(d).

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 ignificance.

b) Failure to be attorney. *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 6th Amend. Performance of defense counsel measured by combined efforts of defense team.

c) Failure to maintain "active" bar status. *United States v. Steele*, 53 M.J. 274 (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 MJ 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.

2. Accuser. *United States v. Reist*, 50 M.J. 108 (1999). Assistant TC, a LTC and Director of a Law Center, had 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 UCMJ Art. 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 incompetence. *United States v. Galinato*, 28 M.J. 1049 (N.M.C.M.R. 1989). MJ had discretion to remove accused's counsel of choice, and to appoint different counsel, where counsel of choice had effectively withdrawn from proceedings.

6. Due to Conflict of Interest.

a) Civilian Counsel Conflict of Interest. *United States v. Beckley*, 55 M.J. 15 (2001). At issue was the accused's right to retain civilian counsel whom the MJ 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.

b) Military Counsel Conflict of Interest. *United States v. Cain*, 59 M.J. 285 (2004). Soldier 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 as fact that relationship was consensual and that appellant desired continued representation by his counsel, despite advice from two civilian counsel to fire him. ACCA held that appellant 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" that resulted in ineffective assistance of counsel under the Sixth Amendment. Findings and sentence set aside.

c) Prior Representation.

(1) *United States v. Humpherys*, 57 M.J. 83 (2002). Assistant trial counsel (ATC) previously represented appellant in legal assistance matter (child support issue). At trial, defense moved to disqualify ATC alleging that, during interview of accused's wife, a potential defense sentencing witness, ATC asked questions the bases of which were her prior representation of appellant. MJ denied motion at trial because: the charges did not relate to the period of time of the prior representation; subject matter of prior representation had no substantial relationship to any matter at issue in the court-martial; and MJ accepted ATC's representation that she did not recall the specifics of the prior representation. When wife called as a witness, ATC conducted cross-examination. HELD: affirmed. Appellant 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 appellant in the present case. Appellant could have requested MJ review legal assistance file, which still existed, or appellant could have testified in closed hearing with sealed record as to the matters of prior representation. Appellant's mere conclusory assertions were not sufficient.

(2) *United States v. Golston*, 53 M.J. 61 (2000). Trial counsel's failure to promptly disclose his prior attorney-client relationship with appellant's wife, a defense witness, did not substantially prejudice appellant's rights. ATC cross-examined wife, allegedly based on information gained as result of TC's attorney-client relationship. Evidence at trial revealed that TC did not disclose any attorney-client confidences. In his concurring opinion, Judge Gierke wrote that while he agreed "with the majority's ultimate conclusion that appellant was not prejudiced under the specific facts of this case . . . [he] sincerely hope[d] that this case will cause prosecutors to be more sensitive to the potential conflicts of interest arising form multiple military duties."

(3) *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990). Accused met with legal assistance attorney (LAO). LAO then moved to prosecutor's office. LAO disclosed to TC that he had represented accused on unrelated matter. Court follows three part (Rushatz) test to determine if attorney disqualified: (1) was there former representation (2) was there a substantial relationship between subject matters, and (3) was there a subsequent proceeding. Held: LAO attorney did not act as "prosecutor" in the case (although he did appear with trial counsel at Article 32). Due to status as

accuser. Asst TC, Director of a Law Center, had signed charge sheet and was present in court, announced as "accuser," 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)), defense waived the issue, and the court found no plain error. *United States v. Reist*, 50 MJ 108 (1999).

(4) *United States v. Smith*, 44 M.J. 459 (1996). Defense counsel previously represented another airman in companion case for Art 15 proceedings. Former client did not testify at trial, but testimony presented via stipulation of expected testimony. Accused consented to representation. Court holds 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.

d) *United States v. McClain*, 50 M.J. 483 (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.

e) *United States v. Thompson*, 51 M.J. 431 (1999). A pretrial complaint against defense counsel, made by appellant's wife, did not create a conflict of interest disqualifying him from further participation in this case. The 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.

f) *United States v. Johnston*, 51 M.J. 227 (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 appellant deprived him of his opportunity for sentence relief with the convening authority and was prejudicial to appellant's substantial rights.

g) *United States v. Murphy*, 50 M.J. 4 (1998). The Government called Private (PVT) French as a witness against appellant. French had been one of appellant's pretrial cell mates in the Mannheim Correctional Facility. French allegedly overheard the accused make incriminating comments to another inmate. French related this conversation to his lawyer, CPT S, who later negotiated a PTA for French. CPT S then moved to withdraw from French's case. Later, at accused's trial, French testified. The military judge was the same judge who had presided over French's trial. Defense counsel, of whom CPT S was one, did not impeach the testimony of French, although he had recently been convicted of several crimes involving dishonesty and deceit. Neither counsel nor the military judge discussed the potential conflict of interest on the record. 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. The court held that, assuming there was a conflict of interest, it had no impact on the merits portion of the trial, since French's testimony was mostly cumulative. However, the court was less convinced of the lack of impact on the sentence. Case returned to the Army for further proceedings.

h) *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.

III. ACCUSED

A. Accused's forum selection.

1. Trial before Military Judge Alone.

a) Request. R.C.M. 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.

b) A right? *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). The MJ must state reason for denial of a judge alone request.

c) *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.

d) *United States v. Edwards*, 27 M.J. 504 (C.M.A. 1988). Once MJ ruled he was not disqualified from hearing case, he abused his discretion by denying accused his right to trial by judge alone, as requested.

e) *United States v. Mayfield*, 45 M.J. 176 (1996). The absence of a written or oral request for trial by MJ alone did not establish a substantial matter leading to jurisdictional error based on the dialogue at trial, the absence of a defense objection, and appellant's post-trial Article 39(a) confirmations of his desire to be tried by MJ alone. A post-trial session is permissible to cure jurisdictional errors created by the failure to obtain an accused's request for trial by MJ alone. Conviction affirmed.

f) *United States v. Turner*, 47 M.J. 348 (1997). A written request for trial by MJ 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 MJ erred in failing to obtain an oral statement of selection of the forum from the accused, the error did not materially prejudice the accused. (Specified issue). *See also United States v. Mayfield*, above.

g) *United States v. Seward*, 49 M.J. 369 (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, the accused suffered no prejudice under UCMJ article 59 because his request for trial by MJ-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. The rule of *United States v. Mayfield*, 45 M.J. 176 (1996) (practical application of statute when record indicates that accused not prejudiced by technical violation of a statute in court personnel issues) obviated any claim of jurisdictional error.

h) *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 MJ was forced to declare a recess after the TC became ill. At the next session of court the parties presented the MJ with a PTA. Under the PTA, the MJ *dismissed the officer panel*, conducted a MJ-alone providence

inquiry, findings portion, and sentencing hearing. A MJ can lawfully approve a request for trial by MJ-alone *after assembly* if justified by the circumstances. RCM 903 does not expressly prohibit approval of after assembly forum requests, and in this case, the MJ approved the request under the terms of a pretrial agreement in which the accused agreed to plead guilty to one charge and specification, withdraw his request for trial by members and to request trial by MJ-alone. The agreement was mutually beneficial to both sides and the accused suffered no prejudice.

2. Request for trial before members. R.C.M. 903(b)(1).

a) Doctrine of substantial compliance. *United States v. Morgan*, 57 M.J. 119 (2002). Although military judge erred by failing to obtain accused's request for enlisted members on the record, there was substantial compliance with Article 25, UCMJ. Any error was procedural rather than jurisdictional, and did not materially prejudice the appellant's substantial rights. Panel selection was indicated by fax sent from detailed defense counsel to the military judge indicating request for enlisted members; *Dubay* hearing revealed that fax reflected appellant's choice, and that appellant had changed his choice, court would have been so notified. *See also United States v. Townes*, 52 M.J. 275 (2000); *United States v. Turner*, 47 M.J. 348 (1997); *United States v. Mayfield*, 45 M.J. 176 (1996). *But see United States v. Hood*, 37 M.J. 784 (A.C.M.R. 1993). At UCMJ Art. 39(a), accused deferred decision regarding choice of forum. Court convened with officer and enlisted members detailed and present. Nothing in the record, oral or written. Jurisdictional defect per RCM 903(b). Findings and sentence set aside.

b) *United States v. Daniels*, 50 M.J. 864 (Army 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 (Army Ct. Crim. App. 1999), *aff'd*, 53 M.J. 220 (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. Townes*, 50 M.J. 762 (N.M. Ct. Crim. App. 1999), *set aside on other grounds*, 52 M.J. 275 (2000). DC announced at an Article 39(a) session that "we make a forum election for officer and enlisted members." Military judge did not personally question accused. Evidentiary hearing ordered on appeal. Accused stated he could not recall whether, at the time of trial, he desired enlisted members. The Navy-Marine Corps Court held that the court was without jurisdiction, holding that the requirements of Article 25 are stringent: Accused must personally select, orally on the record or in writing, trial by enlisted members. Even though he never voiced any complaint about the composition of the court, *United States v. Brandt*, 20 M.J. 74 (C.M.A. 1985), requires that the court find a lack of jurisdiction; the court held that Congress intended the accused would personally select members. Article 16, concerning trial by military judge alone, differs because it does not require that the accused "personally" select forum. By retaining this language in Article 25, Congress intended that the accused could not be tried by enlisted members unless he personally so requested. CAAF disagreed, applied "substantial compliance," and reversed the Navy Court.

e) *United States v. Gray*, 51 M.J. 1 (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.

3. Refusal of Request for Enlisted Members. *United States v. Summerset*, 37 M.J. 695 (A.C.M.R. 1993). MJ abused his discretion when he denied as untimely accused's request for enlisted members made four days prior to trial. MJ made no findings of fact regarding unnecessary expense, unacceptable delay, or significant inconvenience. *See* RCM 903(a)(1) and (e).

B. Trial in Absentia. R.C.M. 804(b).

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.

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. MJ must balance public interest with right of accused to be present.

4. *United States v. Price*, 43 M.J. 823 (Army Ct. Crim. App. 1996), *rev'd*, 48 M.J. 181 (1998). Trial *in absentia* is not authorized when a military judge (MJ) fails to conduct a proper arraignment. Reversing the ACCA, the CAAF stated that when a MJ 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 MJ failed to also inform the accused that trial would proceed in accused's absence.

5. *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.

a) *Iowa v. Tovar*, 124 S. Ct. 1379 (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" (internal quotations omitted) are not required by the Sixth Amendment.

b) *United States v. Mix*, 35 M.J. 283 (C.M.A. 1992). R.C.M. 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 containing suggested questions.

c) *Godinez v. Moran*, 113 S. Ct. 2680 (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) (A "higher 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) (the CMA notes the accused was competent to "represent himself and to actually defend himself.")

2. Individual military counsel. R.C.M. 506(b). UCMJ art. 38(b); AR 27-10, para 5-7. *United States v. Spriggs*, 52 M.J. 235 (2000), *recon. denied*, 53 M.J. 242 (2000). An accused is not entitled to the services of a reserve judge advocate as his military defense counsel unless the accused can show that he entered into a bona fide attorney-client relationship with the advocate regarding the charges or that the advocate actively participated in the preparation of the pretrial strategy in the case. A military defense counsel's release from active duty constitutes good cause for severance of the attorney-client relationship. In addition, even if one existed, it was severed by the defense counsel's release from active duty.

3. Civilian Counsel. *United States v. Wiest*, 59 M.J.276 (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 factors from *United States v. Miller*, 47 M.J. 352 (1997) (surprise, timeliness of the request, other continuance requests, good faith of moving party, and prior notice), the Court held that the judge erred. Findings and sentence set aside.

4. Foreign counsel. R.C.M. 502(d)(3)(b). *Soriano v. Hosken*, 9 M.J. 221 (C.M.A. 1980). MJ determines if individual foreign civilian counsel is qualified.

IV. COURT MEMBERS.

A. The Sixth Amendment right to a jury of one's peers does not apply in the military. Court members are personally selected by the CA. This has led to criticism of the military justice system over the years, primarily because the CA, the commander who decides whether to "refer," or send, the accused's case to a court-martial, is also the person who selects the panel that will hear the case. To ensure that CAs appointed members who are conscientious and fair, Congress established broad criteria that the commanders must use in selecting panel members. Those criteria are set out below. Despite the creation of these criteria, litigation often arises over the CA's selection, for the CA violates the UCMJ if she:

1. selects members in a manner that deliberately and systematically excludes a group of otherwise qualified members, or

2. "stacks" the panel by picking only members who will guarantee a conviction or a harsh sentence.

B. Qualifications.

1. Virtually any member of the armed forces is eligible to serve on a court-martial panel. However, the CA may only select those members that, 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***.

2. While, generally, any servicemember is eligible to serve, not every member is "qualified" to serve. Moreover, the UCMJ and the Department of the Army (DA) have established some exceptions.

a) A member's duty position, and the bias implicit in that position, may preclude service.

(1) 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."

(2) *United States v. Dale*, 42 M.J. 384 (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.

(3) *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. MJ says "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) *United States v. Fulton*, 44 M.J. 100 (1996). MJ 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 appellant's misconduct. *Cf. Dale*, above.

b) The Secretary of the Army has further excluded certain personnel from consideration. AR 27-10, paras 7-1 thru 7-7, excludes Chaplains, Medical, Dental, Veterinary Officers, Nurses, Medical Specialist Corps, and IGs from service in Army courts-martial. While there is no DA ban on JAs serving, lawyers are generally never selected for court-martial duty. *See United States v. Sears*, 6 C.M.A. 661, 20 C.M.R. 377 (C.M.A. 1956).

3. 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), *cert. denied*, 114 S.Ct. 2100 (1994). 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.

4. Finally, the military courts have recognized that, because of their limited time in service, personnel below the grades of E-1 and E-2 (that is, PVTs and PV2s in the Army) may be presumptively disqualified under application of the Article 25 criteria.). *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 Art. 25(d)(2)).

5. UCMJ Art. 25(c)(1). Enlisted members should not be from the same "unit" as the accused.

a) *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 size 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 UCMJ art. 25(c). Also relevant is the language of RCM 912(f)(1)(A). Findings and sentence set aside.

b) "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), *cert. denied*, 33 M.J. 185 (C.M.A. 1991).

C. Quorum.

1. Five members for GCM, three members for SPCM. *Ballew v. Georgia*, 435 U.S. 223 (1978). "Jury" of less than six 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 6th 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. 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 court membership).

3. Twelve members for capital case. 10 U.S.C. sec. 825a (UCMJ, art. 25a) requires minimum of twelve members in capital cases, absent special circumstances, effective for all offenses committed after 31 December 2002. NOTE: SPC Gray was convicted and sentenced to death by a panel of six.

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 1/3 of the members. *See* AR 27-10, para. 5-20c. "Assembly" means after the preliminary organization is complete, the members are sworn, and the trial judge announces that "the court is assembled." *See United States v. Morris*, 23 U.S.C.M.A. 319, 49 C.M.R. 653 (1975).

a) *United States v. Cook*, 48 M.J. 434 (1998). The excusal of more that 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. Here, the SJA excused five of nine members who were detailed to sit as members. The CAAF held the accused suffered no prejudice because he failed to object to the excusals at trial, but skirted the issue of whether to apply the 1/3 rule to the venire (the 9 detailed) or to the total pool of selectees (five of nine detailed for the accused's case vs. 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 MJ for good cause shown. *United States v. Latimer*, 30 M.J. 554 (A.C.M.R.

1990). Court member's upcoming appointment for physical examination was not "good cause." A sleeping member is good cause for excusal. *United States v. Boswell*, 36 M.J. 807 (A.C.M.R. 1993). MJ 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. Requests to Call Witnesses/Evidence. *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 MJ must weigh difficulty, delay, and materiality; consider whether a privilege exists; and whether the parties object. *See also United States v. Lampani*, 14 M.J. 22 (C.M.A. 1982) (even after deliberations have begun members may request additional evidence.).

F. Replacement Members. Avoid sloppy paper trails. "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. *United States v. Gebhart*, 34 M.J. 189 (C.M.A. 1992). *See also United States v. Sargent*, 47 M.J. 367 (1997) and *United States v. Larson*, 33 M.J. 715 (A.C.M.R. 1991). *See also United States v. Mack, supra*.

G. Voir Dire. See below.

V. MILITARY JUDGE.

A. Qualifications.

1. Reserve Judges; Recent Change to the MCM.

a) Change to R.C.M. 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 new RCM 502(c) deleted that requirement, enabling reserve military judges to try cases while on active duty, inactive duty training, or inactive duty training and travel.

c) Issue: Does this mean reservists can try GCM and BCD-SPCMs? Generally, no. Only military judges assigned directly to TJAG and TJAG's delegate (the Trial Judiciary) may preside at GCMs. AR 27-10, paras. 8-1(e) –(f).

2. UCMJ art. 26. 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.

a) State Bar status. 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 (Army Ct. Crim. App., December 14, 2000) (unpub.); *United States v. Brown*, ARMY 9801503 (December 11, 2000) (unpub.) (ACCA also considered fact that judge, although "inactive" in state bar, was a member in good standing of "this [the ACCA] federal bar.").

3. Detail. AR 27-10, para. 5-3. 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 the MJ must be in writing, included in the record of trial *or* announced orally on the record.

a) 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.*

4. Tenure/Fixed Term and Appointment. Settled issue regarding appointment of civilians to Coast Guard Court of Criminal Appeals. *Edmond v. United States*, 117 S.Ct. 1573 (1997), *affirming United States v. Ryder*, 44 M.J. 9 (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. "Presence" required. But whose presence is required? *United States v. Reynolds*, 44 M.J. 726 (Army Ct. Crim. App. 1996), *aff'd*, 49 M.J. 260 (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 UCMJ articles 26 and 39, and R.C.M. 803, 804, and 805. The MJ held arraignment proceedings by speakerphone. The MJ was at Fort Stewart while the accused, DC and TC were in a courtroom at Fort Jackson. The MJ 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 MJ was physically present for the remainder of the trial.

1. Issue: Is it correct to say that the *military judge* was not present? Couldn't it be argued that the military judge was present but the *accused* was absent? If that is the case, the error that occurred was that the military judge allowed the accused to waive his (the accused's) presence at arraignment. It may be that the Army court was simply trying to avoid the difficulty that the RCM would pose if it found the accused was voluntarily absent from the arraignment. *Cf.* RCM 804(b)(1), (2) (accused may waive his presence *after* arraignment; he waives his presence at arraignment only if he is disruptive).

C. Disqualification.

1. In general. RCM 902(a). "[A] military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." Test: *Wilson v. Ouelette*, 34 M.J. 798 (N.M.C.M.R. 1991). Moving party must show factual basis for judge's disqualification. Test under RCM 902(a) is not actual partiality but the existence of a reasonable question about impartiality. Decision on recusal is reviewable for an abuse of discretion.

a) Financial interest? *United States v. Reed*, 55 M.J. 719 (Army 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 MJ (himself a policyholder member) immediately disclosed his affiliation with USAA and stated this would not affect his sentencing decision. The MJ allowed the defense an opportunity to voir dire, and the DC exercised it. The MJ 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 MJ's financial interests so remote and insubstantial as to be nonexistent.

b) Potential disqualification based on background. *United States v. Robbins*, 48 M.J. 745 (A.F. Ct. Crim. App. 1998). A MJ 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 MJs

to apply a totality of the circumstances type test to resolve recusal matters involving MJs 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."

c) Military judge and accused members of same chain of command. *United States v. Norfleet*, 53 M.J. 262 (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 AF paralegal, assigned to AF Legal Services Agency. Commander, AFLSA, served as director of AF 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 MJ's superiors taking themselves out of the decision making process, the full disclosure of the MJ, and opportunity provided to DC to voir dire the MJ, the accused received a fair trial by an impartial MJ.

2. Judicial exposure.

a) *Sao Paulo v. American Tobacco Co., Inc.*, 535 U.S. 229 (2002). In a *per curiam* decision, the Supreme Court held that a judge is not disqualified under 28 U.S.C. § 455(a) (upon which R.C.M. 902(a) is based) by the appearance of judge's name on a motion to file an *amicus* brief in a similar suit against some of the same companies. Section 455(a) (and R.C.M. 902(a)) requires a judge to recuse himself in any case in which his impartiality may be questioned. The lower court's opinion (reversed by the Supreme Court) was inconsistent with *Liljeberg v. Health Services Acquisition Corps.*, 486 U.S. 847 (1988), which held that §455(a) requires recusal only where "a reasonable person, knowing all the circumstances, would have expected that the judge would have actual knowledge of his interest or bias in the case." The lower court did not consider "all the circumstances," specifically that the judge's name was apparently added to the brief in error, and that he played no part in its preparation. As such, the Supreme Court reversed and remanded for further proceedings consistent with its opinion.

b) *Liteky v. United States*, 114 S.Ct. 1147 (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 (1994).

c) *United States v. Soriano*, 20 M.J. 337 (C.M.A. 1985). If the MJ is accuser, witness for prosecution, or has acted as investigating officer or counsel, disqualification of MJ is automatic. But MJ 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).

d) *United States v. Rivers*, 49 M.J. 434 (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.

e) *United States v. Howard*, 50 M.J. 469 (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 defense case on sentencing 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 appellant "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).

f) *United States v. Bray*, 49 M.J. 300 (1998). The MJ 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 MJ's impartiality.

g) *United States v. Winter*, 35 M.J. 93 (C.M.A. 1992). MJ 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.

h) *United States v. Elzy*, 25 M.J. 416 (C.M.A. 1988). MJ not required to recuse himself based on "irreconcilable differences." *See also United States v. Blanchard*, 24 M.J. 803 (N.M.C.M.R. 1987) Civilian DC indicated in 802 conference that he had concerns about accused's veracity.

i) Knowledge of witnesses.

(1) *United States v. Davis*, 27 M.J. 543 (C.M.A. 1988). MJ must use special caution in cases where he has heard a witness' testimony against a coactor 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 coactors did not require recusal of MJ in trial before members.

(2) *United States v. Wright*, 52 M.J. 136 (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. MJ 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.

j) *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. See also *United States v. Quick*, 2003 CCA LEXIS 104 (N-M Ct. Crim. App. Apr. 18, 2003) (unpub.). Military judge did not err by failing to recuse himself after he became aware of sentence limitation in pretrial agreement. The PTA limit was revealed during defense sentencing case; as such, any error was invited error. Moreover, disclosure did not prejudice appellant. MJ sentenced appellant to 65 years; PTA limited confinement to 30 years.

k) Consultations. *United States v. Baker*, 34 M.J. 559 (A.F.C.M.R. 1992). Judge's consultations with another judge concerning issue in a case is not improper.

j) 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 MJ becomes a witness for the prosecution, the MJ 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 MJ 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 (1997).

k) Accused's waiver of disqualification under R.C.M. 902(e). *United States v. Keyes*, 33 M.J. 567 (N.M.C.M.R. 1991). MJ previously sat in a different case involving the accused. Defense had no challenge under R.C.M. 902(b) and waived any challenge to the judge that might exist under R.C.M. 902(a). MJ properly recognized a *sua sponte* obligation to disqualify himself if warranted even with a defense waiver under 902(e). The judge, however, found no basis for disqualification. Upheld by NMCMR.

3. Extra-record statements and conduct.

a) *United States v. Quintanilla*, 56 M.J. 37 (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.

b) *United States v. Butcher*, 56 M.J. 87 (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).

c) *United States v. Cornett*, 47 M.J. 128 (1997). MJ did not abuse discretion when he denied a defense challenge for cause against the MJ based on an *ex parte* conversation between the MJ and trial counsel wherein the MJ 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?" The MJ invited voir dire concerning any predisposition toward sentence; accused selected MJ-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 MJ made full disclosure on the record and disclaimed any impact on him. R.C.M. 902(a) requirements regarding recusal and disqualification were fully met.

d) *United States v. Miller*, 48 M.J. 790 (N.M. Ct. Crim. App. 1998). Assuming *arguendo* that MJ 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 MJ. 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).

4. Conduct of trial and judicial advocacy.

a) Praise. *United States v. Carper*, 45 C.M.R. 809 (N.M.C.R. 1972). Improper for military judge to praise prosecution witness for his testimony.

b) 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). TEST: Whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put in doubt by the military judge's questions. *United States v. Reynolds*, 24 M.J. 261, 265 (C.M.A. 1987).

(1) *United States v. Acosta*, 49 M.J. 14 (1998). Accused was convicted of wrongful distribution and use of methamphetamine. The defense's case was based on entrapment. The defense cross examination resulted in the government witness stating that he put undue pressure on the accused to purchase drugs. When the trial

counsel failed to elicit the entrapment-negating information, the MJ 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. CAAF: The law permits an MJ wide latitude in asking questions of witnesses, the MJ has a right, equal to counsels', to obtain evidence, and the information was clearly rebuttal evidence that was admissible once the defense raised the entrapment defense.

(2) *United States v. Paaluhi*, 50 M.J. 782 (N.M. Ct. Crim. App. 1999), *rev'd on other gds*., 54 M.J. 181 (2000). The 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 appellant and when he instructed appellant to assist the Government to procure the presence of the prosecutrix.

(3) *United States v. Shackleford*, 2 M.J. 17 (C.M.A. 1976). MJ used information gained during busted providence inquiry to ask questions later before court members.

(4) *United States v. Bouie*, 18 M.J. 529 (A.F.C.M.R. 1984). MJ asked 370 questions to accused, no error under these facts.

(5) *United States v. Morgan*, 22 M.J. 959 (C.G.C.M.R. 1986). MJ 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 MJ's assistance in laying foundation for the admission of evidence was not error. Actions did not make the judge a partisan advocate.).

(6) *United States v. Richardson*, 2004 CCA LEXIS 157 (N-M. Ct. Crim. App. July 29, 2004) (unpub.). MJ did not abandon his impartial role by asking a series of questions of the accused after his sworn presentencing statement. MJ's indication that he was asking the questions to ensure that trial observers were fully informed was appropriate based on the MJ's concern in ensuring public confidence in the outcome of the trial.

c) Impartial and Objective Stance. *United States v. Hardy*, 30 M.J. 757 (A.C.M.R. 1990). MJ erred in *sua sponte* initiating discussion of appropriateness of defense counsel's sentencing argument and allowing trial counsel to introduce additional rebuttal.

(1) *United States v. George*, 40 M.J. 540 (A.C.M.R. 1994). MJ improperly limited DC's voir dire, cross-examination, extensively questioned defense witnesses, limited number of defense witnesses, assisted TC in laying evidentiary foundations, and limited DC's sentencing argument.

(2) *United States v. Felton*, 31 M.J. 526 (A.C.M.R. 1990). MJ should not have advised trial counsel on the order of challenges during voir dire.

(3) *United States v. Figura*, 44 M.J. 308 (1996). MJ 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 MJ give summary, rather than introduce evidence through transcript or witness testimony.

(4) *United States v. Barron*, 51 M.J. 1 (1999). The military judge did not abuse his discretion in denying motion for mistrial where government expert witness passed notes to trial counsel during cross examination of the defense expert. Even though the military judge acknowledged that the expert had virtually become a member of the prosecution team, a mistrial was not per se required. Moreover, the judge gave an extensive instruction noting that the expert had a “mark against” her, and granted the defense’s alternative request to fully cross-examine this prosecution expert and reveal her pro-prosecutorial conduct to the members. Any bias, beyond that normally attributed to the party who called her, was therefore fully disclosed to the members.

(5) *United States v. Harris*, 51 M.J. 191 (1999). The military judge in a child sexual abuse case did not abuse his discretion when he did not declare a mistrial after the government improperly elicited inadmissible credibility testimony and uncharged misconduct evidence from the prosecution’s expert witness. The expert was questioned concerning the credibility of the alleged victim and she disclosed alleged threats by the accused. The defense objected, the members were instructed to disregard the question and answer, and, ultimately, trial counsel was removed from the direct examination. Defense counsel stated the accused wished to go forward with the trial and not move for mistrial. The court found no prejudicial error in the manner in which the military judge dealt with the improper credibility evidence.

(6) *United States v. Watt*, 50 MJ 102 (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. (Sullivan, J., dissented, finding waiver and no prejudice).

(7) Racial Bias or Prejudice. *United States v. Ettinger*, 36 M.J. 1171 (N.M.C.M.R. 1993). Although remarks by MJ may demonstrate prejudice sufficient to constitute bias, accused must be a member of that class in order for comments to be disqualifying.

(8) *United States v. Cooper*, 51 M.J. 247 (1999). Military judge's making allegedly inappropriate comments to defense counsel did not plainly cause him to lose his impartiality or the appearance of his impartiality. The military judge's comments included repeating before the members the fact that defense had "thank[ed] [him] for helping perfect the government's case" through questions of a government witness. The military judge also commented disparagingly on the poor quality of the defense counsel's evidence (a videotape made by the accused's wife). The defense did not object to any of the comments. CAAF found no plain error; the military judge's questions were not inappropriate, he explained the neutral intent of his questions and instructed the members that they should not construe his questions as being pro-prosecution. His expression of irritation with defense, although inappropriate before the members, did not 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 the 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 by the judge's questions.

(9) *United States v. Weisbeck*, 50 M.J. 461 (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 Mil. R. Evid. 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.

(10) *United States v. Thompson*, 54 M.J. 26 (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.

(11) *United States v. Burton*, 52 M.J. 223 (2000). None of the military judge's questions reflect 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.

5. "Bridging the gap." 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 is fraught with peril and judges, should they elect to offer to conduct bridging the gap sessions, should limit such discussions to trial advocacy tips as opposed to substantive matters.

a) *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).

b) *United States v. McNutt*, 59 M.J. 629 (Army Ct. Crim. App. 2003), *pet. granted* 60 M.J. ___ (2004). MJ revealed during Bridge the Gap session that adjudged sentence was framed to take into account amount of good time credit soldier would receive, and to ensure that soldier would actually serve sixty days confinement. Sentence was seventy days; with ten days good time, soldier would serve sixty days. Court held that this type of extraneous information was not improperly before the MJ, as it was "within the general and common knowledge a military judge brings to deliberations;" as such, there was no basis for impeaching appellant's sentence. The court went on to state that although Bridge the Gap sessions are "expected, and usually beneficial," "the core of the deliberative process remains privileged, and military judges should refrain from disclosing information . . . concerning their deliberations, impressions, emotional feelings, or the mental processes used to resolve an issue before them . . . Military judges should therefore allow their findings and sentences to speak for themselves during "Bridge the Gap" sessions, and re-focus these sessions upon the conduct of counsel rather than the deliberations of the military judge."

c) If the military judge elects to conduct such sessions, consider the following:

(1) MJ should never conduct *ex parte*.

(2) MJ should 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.").

(3) MJ should always bear in mind the trial may not be truly "over." *Cf. United States v. Holt*, 46 M.J. 853 (N.M. Ct. Crim. App. 1997) (suggesting that, where trial judges provide 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).

D. 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 MJ, 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). Then Chief Judge for Air Force sixth judiciary circuit did not usurp power by convening a post-trial session to inquire into possible improper commander intervention as a result of commander ordering confinement of accused contrary to order of trial 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. Lepage*, 59 M.J. 659 (N-M. Ct. Crim. App. 2003). MJ committed plain error by admitting record of Article 15 into evidence. MJ determined that admitting the exhibit was erroneous in a post-trial 39(a) session, and that the erroneously admitted exhibit was considered by court in arriving at a sentence. However, MJ failed to take any corrective action during that hearing, but instead recommended that the convening authority disapprove BCD; convening authority declined to follow MJ recommendation.. HELD: "This case should not even be before us for review. . . the military judge had the authority under R.C.M. 1102(b)2) to take corrective action." That section takes precedence over R.C.M. 1009(a) (reconsideration of a sentence).

5. *United States v. Chisholm*, 58 M.J. 733 (Army Ct. Crim. App. 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, the military judge must ensure that the 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 this 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.

E. Replacement of Military Judges UP R.C.M. 505(e)(2). *United States v. Kosek*, 46 M.J. 349 (1997). The Air Force did not violate a CAAF remand order by substituting a new military judge at appellant's court-martial after the CAAF ordered that the record be returned to the "military judge" for reconsideration.

VI. OTHER COURT-MARTIAL PERSONNEL.

A. Staff Judge Advocates.

1. *United States v. Jones*, 52 M.J. 60 (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.

2. *United States v. Taylor*, 60 M.J. 190 (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.

B. Court Reporter. RCM 502(e). *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 and prepare the record of trial.

C. Interpreter. RCM 502(e). Must be qualified and sworn.

D. Bailiff. RCM 502(e). Cannot be a witness. *United States v. Martinez*, 40 M.J. 82 (C.M.A) 1994). MJ committed prejudicial error when, during sentencing deliberations, he conducted an *ex-parte* communication with bailiff.

E. Drivers.

1. *United States v. Aue*, 37 M.J. 528 (A.C.M.R. 1993). MJ's assigned driver told witnesses waiting to testify that the MJ told her that "he had already decided the case." MJ addressed issue at post-trial UCMJ art 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." A.C.M.R returns for *Dubay* hearing and indicates that MJ should have recused himself at the post-trial UCMJ art. 39(a) session. Otherwise, no misconduct by MJ and no prejudice to accused.

2. *United States v. Knight*, 41 M.J. 867 (Army 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 Art. 39(a) sessions. Defense motion for mistrial made during deliberations denied. CA grants immunity to members in post-trial 39(a). ACCA said SJA, CA, and MJ "were remiss" in failing to apply presumption of prejudice absent clear and positive showing by government.

VII. VOIR DIRE & CHALLENGES

A. Purpose.

1. To Gather Sufficient Information Regarding the Qualifications of Court members. R.C.M. 912 (a)(1); R.C.M. 912(d)-(g).

2. Educate the Panel and Defuse Weaknesses.

3. Establish a "Theme."

4. Build Rapport.

B. Judge Controls.

1. Before Impaneled. *United States v. Dewrell*, 55 M.J. 131 (2001). The accused, an Air Force master sergeant with over 19 years service, was convicted by an officer panel for committing an indecent act upon a female less than 16 years of age. The CA approved a sentence of dishonorable discharge, 7 years confinement, and reduction to E-1. On appeal the accused alleged the MJ abused

his discretion by refusing to allow any defense voir dire questions concerning the members' prior involvement in child abuse cases or their notions regarding preteen age girls fabrications about sexual misconduct. The CAAF, using an abuse of discretion standard, upheld the trial judges' practice of having counsel submit written questions seven days prior to trial, not allowing either side to conduct group voir dire, and rejecting DC's request for case specific questions relating to child abuse or the possibility that preteen girls fabricate allegations of sexual misconduct.

2. After Impaneled. *United States v. Lambert*, 55 M.J. 293 (2001). Right after the members returned a verdict of guilty to one specification of indecent assault, the CDC asked the MJ to allow voir dire of the members because one member took a book titled Guilty as Sin into the deliberation room. The MJ 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, the CAAF held the MJ did not err by declining to allow DC to voir dire the members.

3. Cautionary note: *United States v. Simpson*, 58 M.J. 369 (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. *See also United States v. Dowty*, 60 M.J. 163 (2004) (novel panel selection process affirmed in part due to MJ allowing defense counsel to conduct extensive voir dire of members concerning selection)

4. *United States v. McDonald*, 57 M.J. 747 (N-M Ct. Crim. App. 2002). MJ 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, e.g., 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 TDC."

5. Abuse of discretion?

a) *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.

b) *United States v. Williams*, 44 M.J. 482 (1996). The military judge (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."

c) *United States v. Jefferson*, 44 M.J. 312 (1996). The MJ did not abuse his discretion by refusing to permit "double-teaming" by defense counsel during voir dire; and limiting individual voir dire and questions 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, MJ 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.

d) *United States v. Belflower*, 50 M.J. 306 (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. CAAF did not apply *Jefferson's* standard (abuse of discretion to cut off further inquiry on a critical issue) and simply applied an abuse of discretion standard "focusing on DC's failure to ask the challenged questions during group voir dire."

6. Disallowed Questions. *United States v. Smith*, 27 M.J. 25 (C.M.A. 1988). Premeditated murder of wife; "Are you aware that a conviction for premeditated murder carries a mandatory life sentence?"

a) Judge could preclude defense counsel from asking this question where "jury nullification" was motive.

b) Purpose. Voir dire should be used to obtain information for the intelligent exercise of challenges. R.C.M. 912(d) discussion.

c) Standard. 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.

d) *See also 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?"

7. "Feelings" of Court Member About an Issue or Offense. *United States v. George*, 40 M.J. 540 (A.C.M.R. 1994). J. Johnston in concurring opinion indicates error to not allow DC to ask member how he "felt about the presumption of innocence."

8. Sanctity of Life Questions. *United States v. Nixon*, 30 M.J. 501 (A.F.C.M.R. 1989). In court-martial for the unpremeditated murder of accused's Filipino wife, there was no abuse of discretion when MJ 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.

9. Denial of questions tested for abuse of discretion.

a) *United States v. Pauling*, Army 9700685 (Army Ct. Crim. App. 15 July 1999) (unpub.). Military judge did not abuse his discretion in prohibiting defense counsel to ask, on voir dire, questions from a member concerning the impact of rehabilitative potential testimony.

b) *United States v. Belflower*, 50 M.J. 306 (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.

C. Challenges for Cause.

1. Liberally Grant Challenges!

a) *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985). MJs are to liberally grant challenges for cause to insure that accuseds are tried by court members who are impartial as to findings and sentencing. *See also United States v. Reynolds*, 23 M.J. 292 (C.M.A. 1987).

b) But – "There are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse of discretion, than in ruling on challenges for cause." *Smart* (above).

c) The *Moyar* mandate. *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."

d) **Danger Area – rating chain challenges.** *United States v. Wiesen*, 56 M.J. 172 (2001), *recon. denied*, 57 M.J. 48 (2002). During voir dire COL Williams, a brigade commander and the senior member, identified six of the ten members as his subordinates. The defense, arguing implied bias, attempted to challenge COL Williams. The military judge denied this causal challenge. In his majority opinion, Judge Baker concludes, "[w]here 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." The CAAF invoked the liberal grant mandate and held "the military judge abused his discretion when he denied the challenge for cause against COL Williams." Finding prejudice, the Court reversed the ACCA, and set the findings and sentence aside.

2. Actual and Implied Bias. *United States v. Minyard*, 46 M.J. 229 (1997). MJ should have granted challenge for cause against member whose husband investigated case against accused. A challenge for cause based on actual bias is resolved based on credibility. The MJ's credibility determination will be given great deference on review. A challenge for cause based on implied bias is reviewed under an objective standard viewed through the eyes of the public.

a) Standards:

(1) Challenge for cause based on actual bias involves an allegation that the member's bias will not yield to the military judge's instructions. This is a question of member's credibility and is reviewed for an abuse of discretion. Credibility determination is a *subjective determination* viewed through the eyes of the MJ. The MJ's opportunity to observe the demeanor of court members will be given "great deference" on appellate review.

(2) Challenge for cause based on implied bias is reviewed on an *objective standard* through the eyes of the public. Test: Would a reasonable member of the public have "substantial doubt as to the legality, fairness, and impartiality" of the proceedings?"

(3) Challenges for cause encompasses both actual and implied bias. *United States v. Armstrong*, 54 M.J. 51 (2000). LCDR T stated during voir dire that he worked with SA Cannon, the lead investigator in accused's case. SA Cannon sat at counsel table as a member of counsel team during trial and testified. LCDR T stated he was in intelligence and not law enforcement, that he had no personal involvement in accused's case but had heard it discussed in meetings. He said he could put that aside. The military judge denied the challenge for cause, finding no actual bias. Defense appealed alleging implied bias. The Coast Guard Court, exercising its *de novo* power of review, the court set aside the findings and sentence based upon implied bias. The government argued that the court should test only for plain error, the theory being that defense need not specifically invoke implied bias. The CAAF noted a challenge for cause under RCM 912(f)(1)(N) encompasses both actual and implied bias, and that the CG court did not err in applying RCM 912(f)(1)(N).

(4) *See also United States v. Napoleon*, 46 M.J. 279 (1997) (holding that under both actual and implied bias standard, the 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 knowledge of case through a staff meeting).

b) Cases Reviewing Actual and Implied Bias.

(1) *United States v. Strand*, 59 M.J. 455 (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.

(2) *United States v. Miles*, 58 M.J. 192 (2003). MJ 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. LESSON: "Where a particularly traumatic similar crime was involved . . . we have found that denial of a challenge for cause violated the liberal-grant mandate."

(3) *United States v. New*, 55 M.J. 95 (2001). This case, most noted for resolving the issue of who decides the 'legality' of an order, also raised the issue of the MJ's authority to deny defense challenges for cause. On appeal the defense argued that the MJ erred by denying their causal challenge against a member who previously ordered a subordinate to deploy to Macedonia. The court held there was no error. First, it deferred to the MJ on the issue of actual bias. Then it turned to the issue of implied bias and reasoned, "It is unlikely that the public would view all … who have ever given an order as being disqualified from cases involving disobedience of orders that are similar to any they may have given in the past."

(4) *United States v. Rockwood*, 52 M.J. 98 (1999). In a high profile case, some knowledge of the facts of the offense, or an unfavorable inclination toward an offense, in 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 fairy and impartially on its merits. Here, 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 CAAF concurred with the Army court's holding 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.

(5) *United States v. Warden*, 51 M.J. 78 (1999). Military judge did not abuse his discretion when he denied a challenge for cause against member who, mid-way through trial, announced that he knew one of the government witnesses, that she was the wife of a soldier who had worked for him at a prior duty station. The member stated he would "have faith" in the testimony of the witness' husband (who was also to testify) but stated he would weigh all the evidence. The court found no actual bias, and found that the record did not reasonably suggest implied bias. As to actual bias, the court found the member's dialog with the judge and counsel showed his concern with being fair and that he was capable of weighing the evidence objectively. Concerning implied bias, there was no evidence that their relationship was anything other than official, and the member's candor and concern enhanced the perception that the accused received a fair trial.

(6) *United States v. Daulton*, 45 M.J. 212 (1996). In a child sexual abuse case the MJ 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."

(7) *United States v. Lavender*, 46 M.J. 485 (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) (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 case of accused convicted of murder during course of 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 from trial in sequestered hotel).

(8) *United States v. Youngblood*, 47 M.J. 338 (1997). Application of the implied bias standard is appropriate to determine whether a MJ 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 a staff meeting where the convening authority and the SJA gave a presentation on standards, command responsibility, and discipline where the SJA and convening authority expressed dissatisfaction with a previous commander's disposition of an offense.

(9) *United States v. Rome*, 48 M.J. 467 (1998). MJ abused discretion by failing to grant a challenge for cause, based on implied bias, against member who MJ 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. Member (LTC M) had a supervisory relationship with an enlisted member of panel, had professional relationship with trial counsel, and also relationship with special agent who was prosecution witness in addition to previous engagement in unlawful command influence. During voir dire, LTC M stated that he "knew defense counsel only from courts-martial" and that she "did a good job" in supporting her client. CAAF bases implied bias only on UCI situation (personal embarrassment via defense counsel "grilling"). Attempted robbery conviction reversed. Judge Crawford strongly dissents, noting again the majority's lack of faith in member rehabilitation, and questions whether commanders and senior NCO's can ever serve as court members.

(10) *United States v. Velez*, 48 M.J. 220 (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 on the basis of 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.

(11) *United States v. Baum*, 30 M.J. 626 (N.M.C.M.R. 1990). MJ 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 `

(12) *United States v. Henley*, 53 M.J. 488 (2000). LtCol M was asked questions about his friendship with two individuals who were victims of sexual abuse. Neither friend was abused as a child. LtCol M said he could put aside his knowledge of his friends' background and judge the accused based solely on evidence presented. DC also challenged LtCol M because he said he believed someone with an extensive collection of pornography probably had a "fixation or something of that nature." But he also stated that he would not convict anyone of a sexual offense solely because they possessed large quantities of pornography. Military judge did not err in denying challenge for cause. There was neither actual or implied bias on the part of the member. "There is a substantial difference between a court member who has "friends" who were victims or who may know a victim of a crime and a member who may have had "family" as a victim of a crime."

(13) *United States v. Napolitano*, 53 M.J. 162 (2000). Where member indicated on questionnaire disapproval of civilian DC's behavior in another case, military judge did not abuse discretion in denying challenge for cause; member retracted opinion, stated he was not biased against CDC.

c) Disclosure of Potential Basis for Challenge for Cause.

(1) *United States v. Modesto*, 43 M.J. 315 (1995). TC failed to disclose that court member (Brigadier General) had dressed as a woman at Halloween Party. Member, upon being asked about dressing in costume as a female, failed to disclose information during voir dire. In trial of Colonel charged with conduct unbecoming (performing as female impersonator at gay club, sodomy with another male, indecent touching with another male, cross-dressing in public), reversal of conviction not warranted because incident did not constitute grounds for a challenge for cause or preclude effective voir dire. Testimony raised issue whether SJA may have told TC not to disclose information to

defense. Gov't should disclose information that might be a basis for a challenge for cause.

(2) *United States v. Dunbar*, 48 M.J. 288 (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. Taylor*, 44 M.J. 475 (1996). The accused was not entitled to relief based on an argument that the president of the panel, who was convicted of several sexual offenses against minor boys after accused's trial, failed to honestly answer general questions concerning fairness and impartiality. At the time of accused's trial, the president was not aware that he was under investigation, and there was no other evidence that his answers were untruthful. The accused, moreover, was unable to show how a correct response would have provided a basis for a challenge.

(4) Making the record. *United States v. Smith*, 30 M.J. 631 (N.M.C.M.R. 1990). MJ abused his discretion in limiting scope of voir dire to prevent defense counsel from developing possible grounds for disqualification of MJ. *See also United States v. Adams*, 36 M.J. 1201 (N.M.C.M.R. 1993). Reversible error to refuse defense counsel an opportunity to question prospective court members regarding their previous experiences with or expertise in drug urinalysis program and their beliefs about the reliability of the program.

d) Individual Attitudes.

(1) Findings.

(a) Urine test bias. *United States v. Dorsey*, 29 M.J. 761 (A.C.M.R. 1989). In case for cocaine use, defense 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) Note that request for bench trial does not waive review of denied causal challenges; request for judge alone trial to avoid trial by challenged members preserves issue for appeal.

(2) Sentencing. Juries are not leaves swayed by every breath. Learned Hand, *United States v. Garsson*, 291 F. 646 (S.D.N.Y. 1923).

(a) A member is not automatically disqualified just because she admits to an unfavorable inclination or predisposition toward a particular offense.

(b) The test is whether the member is "inflexible:" Will the member's personal bias yield to the evidence presented and the judge's instructions? *United States v. Reynolds*, 23 M.J. 292 (C.M.A. 1987). In barracks larceny case O5 member says he was inclined "to be very tough" on offenders; O4 says crime was "bordering on a despicable act" and he would be "disposed" to vote for a discharge. Both members evinced a willingness to keep an open mind.

(c) "Would you consider no punishment as a sentencing option?" *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. *See also United States v. Czekala*, 38 M.J. 566 (A.C.M.R. 1993), *aff'd*, 42 M.J. 168 (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 MJ. Denial of CfC not abuse of discretion.

(d) *United States v. Greaves*, 48 M.J. 885 (A.F. Ct. Crim. App. 1998). Accused pleaded guilty to wrongful use of cocaine. MJ 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, and, that in 99.9 percent of the cases, some punishment would be in order. The member did not express an inflexible attitude toward sentencing--he merely stated what is "patently obvious--while a sentence to no punishment is an option which should be considered, it is not often appropriate."

(e) *United States v. Giles*, 48 M.J. 60 (1998). MJ *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, and the full range of punishments, his statements, in response to defense questions, that anyone distributing drugs should be punitively discharged with a BCD, and that he had not heard of, or experienced any circumstance where a punitive discharge would not be appropriate, disqualified him under R.C.M. 912(f)(1)(N).

(f) Another Example: How many of you think cocaine abusers should be removed from the Air Force? *United States v. Mayes*, 28 M.J. 748 (A.F.C.M.R. 1989). Member had “general” bias against retention and rehabilitation of drug abusers; denial of challenge not error.

(g) Distinction between “general” and “specific” bias. *United States v. Collins*, 29 M.J. 778 (A.C.M.R. 1989). MJ abused discretion by not granting challenge against member who felt strongly that the term “rehabilitation” was a “cop-out” to get a lighter sentence and equated rehabilitation with temporary insanity--another defense that he “could not stand.” The court ordered a rehearing on sentence even though the member was peremptorily challenged and did not participate in sentencing. *But see Ross v. Oklahoma*, 487 U.S. 81 (1988).

(h) *United States v. Dale*, 42 M.J. 384 (1995). Member (06 president) in child abuse case indicated he was aware of sentence for child abuse in civilian system that was "excessively lenient." Member upon further questioning by MJ indicated he was not predisposed to any punishment in this case and assured the MJ he would follow the law and keep an open mind. (Sentence was 20 years).

(i) *United States v. Denier*, 43 M.J. 693 (A.F. Ct. Crim. App. 1995). In drug case member stated his daughter was a recovering cocaine addict and he would be fair, but he would still be affected some but not intellectually. No abuse of discretion to deny challenge for cause.

(j) *United States v. Schlamer*, 52 M.J. 80 (1999). Accused charged with pre-meditated murder of a female marine. One 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 supported the CAAF's finding that 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. *See also United States v. Napoleon*, 46 M.J. 279 (1997) (holding that under both actual and implied bias standard, MJ 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 knowledge of case through a staff meeting).

(k) *United States v. Rolle*, 53 M.J. 187 (2000). Accused, a Staff Sergeant, pleaded guilty to use of cocaine. Voir dire focused on whether the panel members could seriously consider the option of no punishment, or whether they felt a particular punishment, such as a punitive discharge, was appropriate for the accused. 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." (Although CSM L did note 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." The military judge denied the challenges for cause against CSM L and SFC W; the CAAF noted that "[p]redisposition to impose some punishment is not automatically disqualifying. *United States v. Jefferson*, 44 MJ 312, 319 (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." *United States v. McGowan*, 7 MJ 205, 206 (C.M.A. 1979). The CAAF found no error, noting the court was reluctant "to hold that a prospective member who is not evasive and admits to harboring an opinion that many others would share -- such as that a convicted drug dealer should not remain a noncommissioned officer or should be separated from the armed services -- must automatically be excluded if challenged for cause [citations omitted].'" The members did not express a predisposition toward a particular punishment but agreed to follow the military judge's instructions and to not completely exclude the possibility of no punishment. "[W]e have another case of responses to 'artful, sometimes ambiguous inquiries' that do not require the military judge to grant a challenge for cause [citations omitted]."

(l) Artful question or inflexible attitude? Judge should inquire and clarify on record.

(i) Are you aware that punishment can range from no punishment, to the slight punishment of a reprimand, all the way to a discharge and confinement?

(ii) Do you understand that you should not decide on a punishment until you hear all of the evidence?

(iii) Can you follow the court's instructions regarding the law?

(iv) Will you listen to all of the evidence admitted at trial, before deciding a sentence?

(v) Can you give this accused a full, fair, and impartial hearing?

(3) Misperception of Human Nature or Evidentiary Rules. *United States v. Ovando-Moran*, 48 M.J. 300 (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.

(4) Dislike of Counsel. *United States v. Grandy*, ARMY 2000258 (Army Ct. Crim. App. Jan. 12, 2004) (unpub.). MJ did not err by denying challenge for cause of member who provided answer on questionnaire to the effect that the first word or phrase that [came] to mind when he thought of defense attorneys was "leeches." On closer examination, member was referring to civilian practitioners "and the amount of money that they make, or more accurately, take from their clients." Member had no negative impression of TDS attorneys. No actual or implied bias.

(5) Capital Cases. *Adams v. Texas*, 448 U.S. 38 (1980). Juror may be challenged for cause when that juror's views about capital punishment would prevent or substantially impair the performance of their duties as a juror in accordance with the judge's instructions and the juror's oath. *See also Wainwright v. Witt*, 469 U.S. 412 (1985).

(a) *United States v. Curtis*, 28 M.J. 1074 (N.M.C.M.R. 1989). The court affirmed a challenge for cause against a member because of his unwillingness to impose the death penalty even when it was not shown that he would never vote for death. There is no requirement to show that the panel member's bias is unambiguous or unmistakably clear.

(b) *Morgan v. Illinois*, 112 S.Ct. 2222 (1992). Trial in state court consisted of two phases, with the court conducting voir dire of the jury. The trial court's refusal to inquire whether potential jurors would automatically impose the death penalty is inconsistent with the Due Process Clause of the Fourteenth Amendment. If the defense requests such an inquiry, the court must inquire into the member's views on capital punishment.

(c) Under *Witherspoon*, exclusion of venire members must be limited to those who are "irrevocably committed . . . to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," and to those whose views would prevent them from making an impartial decision on the question of guilt. *United States v. Gray*, 51 M.J. 1 (1999): The court held the military judge did not abuse his discretion in granting challenges for cause against two members who voiced opposition to the death penalty. One member stated his chances of voting for death were "very remote;" the other stated he could never vote for the death penalty. The military judge properly applied the relevant test: "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath,'" *quoting Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980).

(6) Voir Dire and High Profile Cases. *United States v. Rockwood*, 48 M.J. 501 (Army Ct. Crim. App. 1998). In a high profile case, some knowledge of the facts of the offense, or an unfavorable inclination toward an offense, in 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. The 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 Army 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.

e) Victim Analysis.

(1) Considerations in victim analysis:

(a) Who was victim - panel member or a family member?

(b) Similar crime?

(c) Was crime unsolved?

(d) Traumatic? How many times a victim?

(e) Does the member give clear, reassuring, unequivocal answers about his impartiality?

(2) *United States v. Miles*, 58 M.J. 192 (2003). MJ 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. LESSON: "Where a particularly traumatic similar crime was involved . . . we have found that denial of a challenge for cause violated the liberal-grant mandate."

(3) Member in a robbery case had been a robbery victim seven times. Another member, a two-time victim of burglary, indicated "(I)t'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.' *See also United States v. Fulton*, 44 M.J. 100 (1996). Member sitting for robbery and larceny case not disqualified based on fact that member was victim of burglary.

(4) Member in a rape case had been a larceny victim. *United States v. Smith*, 25 M.J. 785 (A.C.M.R. 1988). Challenge denied; any recent crime victim is not automatically disqualified.

(5) E8 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. *United States v. Hudson*, 37 M.J. 968 (A.C.M.R. 1993). Member's responses indicated that he could remain fair and impartial.

(6) *United States v.White*, ARMY 2001132 (Army Ct. Crim. App. Dec. 8, 2003) (unpub.). Appellant charged with attempted murder of wife; convicted of assault with intent to inflict GBH and other offenses. MJ 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. Note: MJ got less discretion on implied bias because he did not address that issue. "On these facts, an objective observer would likely question the fairness of the military justice system." Contested findings and sentence set aside.

(7) *United States v. Mack*, 36 M.J. 851 (A.C.M.R. 1993), *aff'd after Dubay inquiry*, 16 February 1996, No. 9102134 (mem. op.). 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?

(8) Member in a barracks larceny case had been victim of four larcenies. *United States v. Campbell*, 26 M.J. 970 (A.C.M.R. 1988). Challenge should have been granted based on equivocal responses.

(a) Member "waffled" in response to questions about his impartiality.

(b) "Would try to be open-minded, somewhat objective, but 'not sympathetic to thieves.'" Could not have same approach as someone who has not been a victim.

(9) Larceny of ATM card and money; member's wife had been victim of a similar crime. *United States v. Reichardt*, 28 M.J. 113 (C.M.A. 1989). Not error to deny challenge based on judge's inquiry, unequivocal responses, and judge's findings;

(10) Larceny victim. *United States v. Basnight*, 29 M.J. 838 (A.C.M.R. 1989). Member was victim of three larcenies and his

parents victims of two larcenies. Denial of challenge for cause proper in light of member's candor and willingness to consider complete range of punishments.

(11) Indirect Victim.

(a) *United States v. Daulton*, 45 M.J. 212 (1996). In a child sexual abuse case the MJ 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."

(b) Friends as victim v. family members as victim. *United States v. Henley*, 53 M.J. 488 (2000). LtCol M was asked questions about his friendship with two individuals who were victims of sexual abuse. Neither friend was abused as a child. LtCol M said he could put aside his knowledge of his friends' background and judge the accused based solely on evidence presented. DC also challenged LtCol M because he said he believed someone with an extensive collection of pornography probably had a "fixation or something of that nature." But he also stated that he would not convict anyone of a sexual offense solely because they possessed large quantities of pornography. Military judge did not err in denying challenge for cause. There was neither actual or implied bias on the part of the member. "There is a substantial difference between a court member who has "friends" who were victims or who may know a victim of a crime and a member who may have had "family" as a victim of a crime."

f) Rating Chain Challenge. One member is the rater of another member of the panel.

(1) *United States v. Wiesen*, 56 M.J. 172 (2001), *recon denied*, 57 M.J. 48 (2002). Sergeant Wiesen was convicted of two specifications of attempted forcible sodomy with a child, indecent acts with a child, and obstruction of justice by an enlisted panel. He was sentenced to a dishonorable discharge, confinement for 20 years, total forfeitures, and reduction to the lowest enlisted grade. During *voir dire* COL Williams, a brigade commander and the

senior member, identified six of the ten members as his subordinates. The defense, arguing implied bias, 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]." In his majority opinion, Judge Baker concludes, "[w]here 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." The CAAF held "the military judge abused his discretion when he denied the challenge for cause against COL Williams." Finding prejudice, the Court reversed the ACCA, and set the findings and sentence aside.

(2) *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) *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985). "Inconvenience, however, is not an adequate ground to deny a challenge for cause."

(4) *United States v. Garcia*, 26 M.J. 844 (A.C.M.R. 1988). Rating relationship merits inquiry and appropriate action based on members' responses.

(5) Obligation is on the party making the challenge to conduct the inquiry into any rating chain relationships. A *sua sponte* challenge by the military judge is not required. *United States v. Blocker*, 33 M.J. 349 (C.M.A. 1991).

(6) *See also United States v. DeNoyer*, 44 M.J. 619 (Army 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 5 of the 9 members, MJ denied defense request for individual voir dire. No abuse of discretion by denying defense request for individual voir dire. The Army court, however, cautions that granting defense requests would have eliminated appellate issues and enhanced perception of fairness.

g) Knowledge.

(1) "When the peremptory challenges were all exhausted, a jury of twelve men were impaneled-a jury who swore that they had neither heard, read, talked about nor expressed an opinion concerning a murder which the very cattle in the corrals, the indians in the sage brush and the stones in the street were cognizant of." Mark Twain, *Roughing It*, 1872.

(2) Member knows a witness.

(a) *United States v. Ai*, 49 M.J. 1 (1998). The MJ 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. The 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. 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. 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.

(c) *United States v. Napoleon*, 46 M.J. 279 (1997). The MJ properly denied a challenge for cause against a member who had: official contacts with special agent-witness. Member knew local OSI detachment commander and stated that witness was "very credible because of the job he has . . .," had worked with witness on some other cases, would want him in his organization, but would follow judges

instructions and would not automatically believe the witness.

(d) Read a list of anticipated witnesses to the members.

(3) Member is a 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). N.M.C.M.R. overturns findings and sentence. Potential witnesses in case should have been excused for cause.

(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 MJ.

(5) Member's Outside Investigation. *United States v. Nigro*, 28 M.J. 415 (C.M.A. 1989). In a bad check case, MJ 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.

(6) Member knows Trial Counsel. *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994). MJ 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) Distant knowledge of accused's sanity report. *United States v. Dinatale*, 44 M.J. 325 (1996). In an indecent acts on minors case, the MJ 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.

(8) Experience with Key Trial Issues. *United States v. Daulton*, 45 M.J. 212 (1996). In a child sexual abuse case, the MJ did not abuse his discretion by denying a defense challenge for cause

against a member who was a medical doctor with psychiatric training and clinical experience involving child sexual abuse victims, and who indicated that "it bothered her that children would have to testify in public about the abuse they had experienced." The member's responses to the MJ's questions showed that she would keep and open mind, and perform her duties with fairness and impartiality.

h) Member's 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 06-member who was a group commander; former squadron commander; had preferred charges in 3-4 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.

i) Panel Members and Questions. UCMJ art. 46; R.C.M. 703(a); R.C.M. 801(c). *United States v. Hill*, 45 M.J. 245 (1996). The fact that panel members ask an exceptionally large number of questions does not necessarily reflect a lack of impartiality and establish a basis for a challenge for cause. Panel members submitted approximately 125 "member questions," many containing multiple questions. Of the 125 questions, the president submitted 53. The member questions reflected a thorough immersion in the trial and attentiveness to the testimony and issues. Findings reflected precision (accused fully acquitted of half the charges) and sentence imposed for larceny, wrongful appropriation, receipt of stolen property, and wrongful possession of pistol was not harsh (BCD, 1 year confinement, total forfeitures, reduced to E-1).

j) Combination of Biases.

(1) *United States v. Guthrie*, 25 M.J. 808 (A.C.M.R. 1988). Accused charged with wrongful distribution of cocaine. Member was a friend of the accused's company commander, had a degree in criminology, and had a brother-in-law who overdosed on cocaine.

(a) Judge should first ask if TC opposes challenge before ruling.

(b) An experienced prosecutor may join in the challenge to avoid needless appellate issues and the risk of reversal on

appeal, and to keep the outcome of the trial "free from doubt."

(c) The record. The judge questioned the member closely and extensively, assessed his credibility, and determined that he could properly serve as a panel member.

k) *United States v. Carns*, 27 M.J. 820 (A.C.M.R. 1988). Member worked in bad check office and rater was government witness in bad check case. Question of bias is essentially one of credibility and demeanor; due to his superior position, judge's determination of bias is entitled to great deference.

l) Challenges During Trial.

(1) 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.

(2) *United States v. Camacho*, 58 M.J. 624 (N-M. Ct. Crim. App. 2003). During lunchbreak after completion of Government case on merits and rebuttal, President of panel 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. Remaining members were read all testimony without original members present. HELD: Affirmed. NOTE: "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 . . .."

(3) *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: email on its own not "an apparent ground for challenge for cause." As such, MJ did not abuse his discretion by failing to sua sponte reopen voir dire.

(4) *United States v. Lambert*, 55 M.J. 393 (2001). Right after the members returned a verdict of guilty to one specification of indecent assault, the CDC asked the MJ to allow voir dire of the members because one member took a book titled Guilty as Sin into the deliberation room. The MJ conducted voir dire of the member who brought the book into the deliberation room, but did not allow the defense an opportunity to conduct voir dire. Analyzing the issue under an abuse of discretion standard, the court held that under the circumstances the MJ asked adequate questions and did not err by declining to allow DC to voir dire the members

(5) *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.

(a) Legal clerk did not answer member's question.

(b) Immediately reported to judge who investigated contact and found no outside information.

(6) Member recognizes a witness. *United States v. Warden*, 51 M.J. 78 (1999). Military judge did not abuse his discretion when he denied a challenge for cause against member who, mid-way through trial, announced that he knew one of the government witnesses, that she was the wife of a soldier who had worked for him at a prior duty station. The member stated he would "have faith" in the testimony of the witness' husband (who was also to testify) but stated he would weigh all the evidence. The court found no actual bias, and found that the record did not reasonably suggest implied bias. As to actual bias, the court found the member's dialog with the judge and counsel showed his concern with being fair and that he was capable of weighing the evidence objectively. Concerning implied bias, there was no evidence that their relationship was anything other than official, and the member's candor and concern enhanced the perception that the accused received a fair trial. *See also United States v. Arnold*, 26 M.J. 965 (A.C.M.R. 1988). Conduct individual voir dire to test for bias.

m) Challenges After Trial.

(1) *United States v. Humpherys*, 57 M.J. 83 (2002). Defense submitted post-trial motion for new trial based on discovery that two members were in same rating chain, although both answered MJ question on that issue in the negative. MJ held post-trial 39(a) session and questioned members, during which both responded that they did not remember the MJ asking the question and their answers were not an effort to conceal the rating chain relationship. MJ concluded responses during trial were "technically . . . incomplete," but responses caused him to conclude he would not have granted a challenge for cause based on the relationship, and denied motion for new trial. HELD: affirmed. In order to receive new challenge based on 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 MJ has not abused his or her discretion in reaching the findings and conclusions." Here the MJ 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."

(2) *United States v. Dugan*, 58 M.J. 253 (2003). MJ refused to grant post-trial 39(a) session to voir dire members concerning UCI in deliberations. CAAF remands for *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.

3. Timing of Challenges. UCMJ art. 41.

a) UCMJ art. 41(a). If exercise of challenge for cause reduces court below minimum required, the parties shall exercise or waive all other causal challenges *then apparent*. Peremptories will not be exercised at this time. *See United States v. Dobson*, ARMY 20000098 (Army Ct. Crim. App. Aug. 20, 2004) (unpub.). Use of challenges for cause reduced the panel below one-third enlisted but not below quorum. The MJ then allowed the parties to exercise their peremptory challenges interpreting

Article 41(a)(2) to limit the use of peremptory challenges only when the court fell below quorum but not when the court membership fell below one-third enlisted. ACCA held "assuming arguendo" that error occurred the error was administrative and not jurisdictional.

b) UCMJ art. 41(b). Each party gets one peremptory. 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.

c) 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 decided, each party gets one peremptory challenge against members not previously subject to a peremptory challenge.

d) What about the members who have already been subjected to voir dire? Do they have to sit through the voir dire session with the new members?

(1) No. Under RCM 912(d), the military judge may excuse the original members while voir dire of the newly-detailed members occurs. Cf. RCM 805(b).

4. Preserving Denied Causal Challenges - the ***"But For"*** Rule from R.C.M. 912(f)(4).

a) *United States v. Jobson*, 31 M.J. 117 (C.M.A. 1990). COMA translates R.C.M. 912 (f)(4) as follows:

(1) If you don't exercise your peremptory challenge, you waive your objection to the denied causal. You preserve your denied causal if you use your peremptory against any member of the panel.

(2) If you use your peremptory against the member you unsuccessfully challenged for cause and fail to state the "but for" rule, you waive your objection to the denied causal. So...,

(3) You preserve your denied causal if you use your peremptory against the member you unsuccessfully challenged for cause and you state the "but for" rule.

b) *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."

c) *United States v. Jobson*, 31 M.J. 117 (C.M.A. 1990). Defense intended to challenge COL X, but had to challenge LTC Y because of previously denied causal challenge against LTC Y. Denied challenge for cause properly preserved.

(1) Removal of the "objectionable" member did not cure the error of the improperly denied causal.

(2) A rule to the contrary would force an accused to leave the member on the panel just to allow appellate review.

(3) Adopts Army court's view (Contra *Ross* (above) that peremptorily excusing challenged member does not resolve error. *United States v. Anderson*, 23 M.J. 894 (A.C.M.R. 1987).

d) *See also United States v. Eby*, 44 M.J. 425 (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 the MJ had granted the challenge for cause.

e) Proposed Amendment to R.C.M. 912(f)(4) (waiver).

(1) Language. Delete the sentence dealing with preserving denial of a challenge for cause, i.e. "However, when a challenge for cause is denied, a peremptory challenge by the challenging party against any member shall preserve the issue for later review, provided that when the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted." Insert immediately after the words "When a challenge for cause has been denied" the words, "the successful use of a peremptory challenge by either party, excusing the member from further participation in the court-martial, shall preclude further consideration of the challenge of that excused member upon later review."

(2) Analysis. "This amendment is consistent with the President's lawful authority to promulgate a rule that would result in placing before the accused the hard choice faced by defendants in federal district courts-to let the challenged juror sit on the case and challenge the ruling on appeal or to use a peremptory challenge to remove the juror and ensure an impartial jury." *See United States v. Miles*, 58 M.J. 192 (2003) (Crawford, C.J., dissenting). *See also United States v. Williams*, 2003 CCA LEXIS 141 (A.F. Ct. Crim. App. May 20, 2003) (unpub.). HELD: although the military judge abused his discretion in granting TC challenge for cause against disabled member over DC objection, error harmless. "An erroneous ruling on a challenge for cause does not automatically violate the right to an impartial jury . . . If the court members who heard the case were impartial, the right is not violated*." But see United States v. Armstrong*, 54 M.J. 51 (2000) (rejecting harmless error analysis where denial of challenge for cause results in use of peremptory challenge to excuse member); *United States v. Jobson*, 31 M.J. 117 (C.M.A. 1990).

D. Peremptory Challenges.

1. Normally, One Per Side. Additional Peremptory. *United States v. Carter*, 25 M.J. 471 (C.M.A. 1988). Judge denied defense request for additional peremptory after panel was "busted" and new members were appointed.

2. *United States v. Martinez-Salazar*, 120 S. Ct. 774 (2000). Peremptory challenges do not have a constitutional foundation.

3. 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.

4. *United States v. Pritchett*, 48 M.J. 609 (A.F. Ct. Crim App. 1998). The MJ 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.

5. Discriminatory Use of Peremptory Challenge.

a) *Batson v. Kentucky*, 476 U.S. 79 (1986). Prosecutor's use of peremptories to exclude minority members based solely on their race violated Equal Protection Clause. Scenario: *Batson* was triggered by prosecutor's peremptory challenge of member who was of same racial minority group as accused. If defense objected, prosecutor required to give a race neutral explanation for the challenge.

b) Accused and juror need not be of same racial group to trigger *Batson*. *Powers v. Ohio*, 111 S. Ct. 1366 (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 be reason of their race. . . ."

(1) The Court's holding removes the requirement from *Batson* that the accused and challenged juror be of the same race.

(2) Court's ruling in *Powers* is very broad. Focuses on both the rights of the accused as well as the challenged member. Result is that ruling can include prosecutor's racially based challenges to *non-minority* members.

(3) Prosecutors must now be prepared to articulate a race-neutral reason for all peremptory challenges, regardless of the races of the accused/member.

c) *Batson* applies to the military. *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 through the Fifth Amendment): "In our American society, the Armed Services have been a leader in eradicating racial discrimination." Government's use of only peremptory challenge against minority court member raised *prima facie* showing of discrimination. Court noted no right to a representative cross section of population in a jury panel exists in a court-martial. (Reaffirmed UCMJ art. 25 selection criteria.)

(1) *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989). *Per se* rule. *Batson* is triggered automatically when trial counsel challenges a member of a minority accused's racial group. There is no requirement for the defense, unlike in civilian courts, to make a prima facie showing of discrimination.

(2) *Batson* applies to defense. *United States v. Witham*, 47 M.J. 297 (1997) (holding *Batson* applicable to defense in courts-martial); *Georgia v. McCollum*, 112 S.Ct. 2348 (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.

(3) *Batson* applies to both sides in civil cases. *Edmonson v. Leesville Concrete Co.*, 505 U.S. 42 (1991). *Batson* applies to both parties in civil litigation. At issue here was the use of two peremptory challenges by the defense against two jurors of the same racial minority group as plaintiff.

(4) When Do *Batson* and *Powers* apply? After *Powers* and *Witham*, trial counsel and defense counsel must, upon objection by the opponent, be prepared to provide a race-neutral explanation for all peremptory challenges. Requires counsel objection to the challenge.

(5) What Are "Racially Neutral Reasons?" *United States v. St. Fort*, 26 M.J. 764 (A.C.M.R. 1988). Trial counsel's peremptory challenge of black female member in attempted adultery trial based on prior experience that member was "a little too sympathetic" towards those accused of crimes was race neutral. *See also Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1364 (1991). "an explanation based on something other than the race of the juror. . . Unless a discriminatory intent is inherent in the prosecutors explanation the reason offered will."

(a) *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."

(b) *United States v. Williams*, 44 M.J. 482 (1996). Accused and senior officer member of panel were members of the Masons. Peremptory challenge based on "fraternal affiliation" is race-neutral.

(6) Trial counsel's reasons should be supported by the record of voir dire.

(a) Hunches and Guesses: *Purkett v. Elem*, 115 S. Ct. 1769 (1995) (Per Curium). Missouri prosecutor struck two black men from panel because – "I don't like the way they looked," and they "look suspicious to me." Supreme Court OK's this is a legitimate hunch. Batson process does not demand explanation that is "persuasive or even plausible;" only facial validity (as determined by trial judge) is required.

(b) *Purkett and courts-martial. United States v. Tulloch*, 47 M.J. 283 (1997). The differences between the military and civilian manner of selecting members to sit on a panel/jury requires a different standard for assessing the validity of a trial counsel's proffered race-neutral explanation for a peremptory challenge under *Batson*. When a convening authority designates a servicemember as "best qualified" under art. 25, UCMJ, the trial counsel may not strike that person on the basis of a proffered reason that is unreasonable, implausible, or that otherwise makes no sense.

(c) Protecting Quorum? *United States v. Hurn*, 55 M.J. 446 (2001). The DC objected after the TC exercised the government's peremptory challenge against the panel's only non-Caucasian officer on the panel. The TC's said his basis "was to protect the panel for quorum." The CAAF held the reason proffered did not satisfy the underlying purpose of *Batson v. Kentucky*, 476 U.S. 79 (1986), *United States v. Moore*, 28 M.J. 366 (1989), and *United States v. Tulloch*, 47 M.J. 283 (1997),which is to protect the participants in judicial proceedings from racial discrimination. *United States v. Hurn*, 55 M.J. 446 (2001). Case remanded for *Dubay* hearing based on trial counsel's affidavit, filed two and one-half years after trial, which set forth additional reasons for challenging the member in question.

(d) *Post-Dubay: United States v. Hurn*, 58 M.J. 199 (2003). Trial counsel testified he also removed member, the only Non-caucasian on panel, because member had expressed concern about his "pressing workload." MJ determined challenge was race-neutral. CAAF affirmed,

finding no "clear error." What about Green – mixed motive not okay?

(e) Occupation? *United States v. Chaney*, 53 M.J. 383 (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.

(f) *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 female panel 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 MJ 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).

(g) *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989) (Cox, J.,). "[T]he judge must determine whether trial counsel articulated a neutral explanation ***relative to this particular case***, giving a clear and reasonably specific explanation of the legitimate reasons to challenge this member."

(h) *United States v. Norfleet*, 53 M.J. 262 (2000). TC challenged the sole female member of the court and, in response to DC's request for a gender-neutral explanation, stated the member "had far greater court-martial experience than any other member" (and would dominate the panel), and she had potential "animosity" toward the SJA office.

Failure of the MJ to require TC to explain "disputes" between member and OSJA was not abuse of discretion. When proponent of peremptory challenge responds to Batson objection with 1) a valid reason and 2) a separate reason that is not inherently discriminatory and on which opposing party cannot demonstrate pretext, denial of Batson may be upheld on appeal.

(i) *United States v. Robinson*, 53 M.J. 749 (Army 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.

(j) *United States v. Shelby*, 26 M.J. 921 (N.M.C.M.R. 1988). TC peremptorily challenged junior black officer in sodomy trial of black accused. Inexperience (junior member) was accepted racially-neutral explanation, even though other junior enlisted members remained.

(k) Learning experience. *United States v. Curtis*, 28 M.J. 1074 (N.M.C.M.R. 1989). TC challenged black member who stated that serving on court-martial in a capital case would be a good "learning experience." Upheld as a racially-neutral explanation.

(l) *United States v. Dawson*, 29 M.J. 595 (A.C.M.R. 1989). Educational background in criminal justice, junior status on the panel, and lack of experience (officer challenged was member of accused's race and female) was supported by voir dire and valid basis for challenge.

(m) *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. Held: where part of the reason for a challenge is not race neutral, the entire reason must fail. Reversed; findings and sentence set aside.

(n) *United States v. Woods*, 39 M.J. 1074 (A.C.M.R. 1994). TC says "(w)e 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 (emphasis added)." ACMR panel says TC's motive (inattentiveness) was not mere pretext for intentional discrimination.

(o) *United States v. Gray*, 51 M.J. 1 (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 black panel members. The 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.

d) Gender Based Peremptory Challenges. *J.E.B. v. Alabama*, 114 S.Ct. 1419 (1994). 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" (*See Edmonson v. Leesville Concrete* [above] and *Georgia v. McCollum* [above]) during voir dire for purposes of Equal Protection analysis. Dissent by J. Scalia notes that by ending of hunches, guesses, looks, gestures, body language, and gut instinct. "[W]e force lawyers to articulate what we know is often inarticulable." *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. Ninth Circuit says this was gender based discrimination. Single men on panel were not challenged.

(1) *United States v. Witham*, 47 M.J. 297 (1997). Gender, like race, is an impermissible basis for the exercise of a peremptory challenge by either the prosecution or the military accused. *See J.E.B. v. Alabama ex. rel. T.B.*, 114 S.Ct. 1419 (1994) (The Equal Protection Clause prohibits litigants from striking potential jurors solely on the basis of gender) and *Georgia v. McCollum*, 505 U.S.

42 (1992) (the *Constitution* prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of a peremptory challenge).

(2) *United States v. Ruiz*, 49 M.J. 340 (1998). The *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989) *per se* rule is applicable to Government peremptory challenges based on gender whether a MJ requests a gender neutral reason or not. The accused was convicted of adultery and fraternization. During the trial, the defense counsel made a *Batson* objection to the Government's peremptory challenge against the only female member of the panel. The trial court declined to require the Government to state the basis for the peremptory because it believe that *Batson* did not apply to gender (and the court did not have the benefit of the *J.E.B.* decision). The government submitted a post-trial affidavit which stated that its peremptory challenge was based on the fact that the member was a contracting officer, and trial counsel believed contracting officers held the government to a very high standard of proof. The CAAF modifies the lower court application of *Batson* by holding that, while some situations may preclude raising a rational *Batson* issue, MJs should normally require the party making a peremptory challenge against a female court member to provide a reason supporting that challenge.

e) Peremptory challenges based on white ethnic origin may violate *Batson*. *Rico v. v. Leftridge-Byrd*, 340 F.3d 178 (3d. Cir. 2003). *Batson v. Kentucky* prohibits peremptory challenges of *white jurors* based on ethnic origin. In this murder and conspiracy case tried in Philadelphia, the prosecutor used seven of his twenty peremptory challenges to strike Italian-Americans from the jury. Whether *Batson* applies to a white ethnic group depends on whether the group is a cognizable group that has been or is currently subjected to discriminatory treatment, a question of fact for the trial judge. Applying *Batson* to the challenges at issue, the court determined that the prosecutor offered race-neutral explanations for the challenges, and denied the petition for writ of habeas corpus.

f) Peremptory based on prior misconduct proper. *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; defense made *Batson* objection; government gave same reason for peremptory as for challenge for cause. HELD: government articulated a race neutral, reasonable, plausible reason for challenge that otherwise made sense. Fact that government

could have used peremptory to challenge another member whose challenge for cause was also denied did not make its exercised challenge one that did not make sense.

g) Peremptory challenges based on marital status do not violate *Batson*. *United States v. Nichols*, 937 F.2d 1257 (7th Cir. 1991), *cert. denied*, 117 L. Ed. 2d 151 (1992).

h) Peremptory challenges based on age do not violate *Batson*. *Bridges v. State*, 695 A.2d 609 (Md. Ct. Spec. App. 1997). Prosecutor's peremptory challenges against jurors based on fact that they were around or under age 30 do not require explanation and did not violate *Batson*. *Batson* only applies to classifications subject to strict or heightened scrutiny. Age falls into the classification subject to *rational basis scrutiny*.

i) *Batson* Based on Religion and Religious Affiliation. The Supreme Court has not ruled on this issue.

(1) *United States v. DeJesus*, 347 F.3d 500 (3d Cir. 2003). The 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. *United States v. Stafford*, 136 F.3d 1109 (7th Cir. 1998), but did not resolve the issue because the court found no plain error.

(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."

(3) *United States v. Williams*, 44 M.J. 482 (1996). The TC 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 *Batson* does not extend 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*, 114 S.Ct. 2120 (1994) as authority that *Batson* does not apply to religion.

(4) *See also U.S. v. Sommerstein*, 959 F.Supp. 592 (E.D.N.Y 1997). In trial of defendant-operators of a kosher catering service on trial for defrauding employees of benefits, prosecutors use of peremptory challenges to remove jurors who were ostensible members of, or had some relationship with the Jewish faith violated *Batson*. The issue of religion was sufficiently intertwined with the criminal charges as to make religion a basis for *Batson* inquiry.

6. Procedural Issues.

a) Order of challenges.

(1) *United States v. Gray*, 51 M.J. 1 (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.

b) Timing. Defense should object to peremptory challenge before excused member departs the courtroom.

c) Privacy. Judge should use appropriate trial procedures to best protect privacy interest of challenged member.

d) Type of proceedings to substantiate reasons.

(1) Argument by defense is typically enough to complete the record.

(2) 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).

e) Findings on Record.

(1) 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).

(2) MJ not required to raise the issue *sua sponte*, question member, or recall member for individual voir dire.

f) Avoid the Issue. Government should use peremptory challenge sparingly and only when a challenge for cause has not been granted, then *Batson* will most likely be satisfied. *Santiago-Davila* (above).

g) Waiver. *United States v. Galarza*, Army 9800075 (Army 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). *See also United States v. Gray*, 51 M.J. 1, 35 (1999); *United States v. Brocks*, 55 M.J. 614, 618-19 (A.F. Ct. Crim. App. 2001); *United States v. Walker*, 50 M.J. 749, 750 (N-M Ct. Crim. App. 1999).

h) Three tiers of challenges:

(1) Peremptory challenge: any reason or no reason. Trial counsel's basis must be plausible, reasonable, and make sense. *See Tulloch*, above. While "no reason" might be proper, TC and DC must be prepared to state a race/gender neutral basis or that race/gender was not a motivation for the peremptory challenge.

(2) *Batson* challenge: reasonable racial and/or gender neutral explanation. This applies to TC and DC.

(3) Causal challenge: disqualifying bias (knowledge, experience, victim, free-from-doubt).

VIII. CONCLUSION.

IX. APPENDIX - COURT-MARTIAL PERSONNEL SUMMARY

A. MAJOR POINT	*SUMMARY*
THE CONVENING AUTHORITY	A convening authority who is an accuser (e.g., by virtue of swearing the charges or having an other than official interest in a case) is disqualified from referring a case to a SPCM or a GCM. UCMJ Art. 1(9), Arts. 22 and 23. A CA who is *statutorily* disqualified can appoint the Article 32 officer and make a recommendation on disposition of the case but must state his or her disqualification. A CA who is *personally* disqualified may not appoint an Article 32 nor may she forward the case with a recommendation for GCM. There is no presumption of impropriety that arises based solely on the preponderance of senior ranks or commanders on a panel. A convening authority (CA) must personally select members and refer cases to courts-martial. UCMJ Art. 25(d).
COURT MEMBERS	A CA may violate the law if she uses criteria other than the UCMJ art. 25(d) criteria (age, experience, education, training, length of service, judicial temperament) to select members (particularly if the criteria unilaterally excludes a group of otherwise qualified individuals), or to achieve a particular result. Rank is not a selection criterion. Gender and race may be criteria where a CA, in good faith, seeks to include members of these categories for fairness or cross sectional representation. "Court stacking" is impermissible! No per se exclusion for MPs, rater-ratees. The presence of an interloper (that is, someone not detailed to the panel) may not be ratified after trial. However, errors in convening order triggering mechanisms (for example, automatic mechanisms to seat at least one-third enlisted members when the accused so requests) are administrative matters, so long as all members who sit are personally selected by the convening authority.
TRIAL *IN ABSENTIA*→	Trial *in absentia* is only permissible after an effective arraignment. The MJ must ensure that the accused is called upon to enter pleas. Arraignment does not include *entry* of the plea.
THE MJ'S AUTHORITY TO CONTROL 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). This ensures fairness of the process and implements RCM 912 (f)(1)(N), which provides that a member should not sit if it would cast substantial doubt as to the legality or fairness of the proceeding. A MJ should not be concerned about the gov't being forced to obtain additional members. 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.
***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. *Batson* does not currently prohibit peremptory challenges based on religion. *See Williams*. *But see DeJesus and Brown*. Civilian cases support that *Batson* does not prohibit peremptory challenges based on age. There is no military case on age.

53D GRADUATE COURSE

PRETRIAL PROCEDURES

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MAJ Deidra Fleming
September 2004

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53D GRADUATE COURSE

PRETRIAL PROCEDURES

Outline of Instruction

I. ARTICLE 32 INVESTIGATIONS.

A. Art. 32, UCMJ: "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."

B. Purposes of the art. 32 investigation.

1. Statutory Purposes. Art. 32, UCMJ; RCM 405(a) discussion; and RCM 405(e).

   a. Inquire into the truth of the matter alleged in the charges.

   b. Consider the form of the charges.

   c. Make recommendations as to disposition of the charges.

2. Discovery as a purpose. The investigation also serves as a means of discovery. RCM 405(a) discussion; *United States v. Roberts*, 10 M.J. 308 (C.M.A. 1981); *and* art. 32(b), UCMJ.

3. Preservation of testimony.

a. Art. 32 testimony may be admissible at trial as a prior statement under M.R.E. 801(d)(1) (*substantive evidence*). Use caution: *United States v. Austin*, 35 M.J. 271 (C.M.A. 1992). Child victim testified in detail at the art. 32 but recanted her testimony at trial. Over defense objection, trial court admitted 15-page transcript of art. 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 R.C.M. 921.

b. *United States v. Ureta*, 44 M.J. 290 (1996), *cert. denied*, 117 S.Ct. 692 (1997). Art. 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. Accused's wife testified at art. 32 that accused confessed. After art. 32 terminated, wife refused to discuss her testimony with Gov't. Unsure whether wife would recant art. 32 testimony at trial, Gov't called wife as witness, she recanted, acknowledged inconsistency, and over defense objection, art. 32 transcript was admitted and taken into deliberation. CAAF held that art. 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 Art. 32 transcript admissible under M.R.E. 801(d)(1)(A) as substantive evidence and Gov't can call witness to establish foundation for admission. *Error to send transcript into deliberations, but harmless because unlike Austin, art 32 transcript was not the only evidence against accused*.

c. Art. 32 testimony may be admissible at trial as former testimony under Mil. R. Evid. 804(b)(1). *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 art. 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, and in the last resort, a warrant of attachment on the witness.

d. Art. 32 testimony may be admissible at trial as residual hearsay for unavailable declarants under M.R.E. 804(b)(5). *United States v. Cabral*, 47 M.J. 808 (1997). Five year old victim of sexual abuse appeared for trial but refused to testify. Witness declared "functionally unavailable" and Art. 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 under M.R.E. 804(b)(5).

4. Art. 32 is required, except:

a. When there has been an adequate substitute. RCM 405(b). If there has already been an investigation into the subject matter of the charges and the accused was present at that investigation, had the right to be represented by counsel, and to present evidence, that investigation may satisfy the requisites of Art. 32. *United States v. Diaz*, No. 00-0903, (N-M Ct. Crim. App. Sept. 1, 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. When the accused waives the Art. 32. RCM 705(c)(2)(E) and RCM 905(e).

(1) RCM 905(e); RCM 705(c)(2)(E); *United States v. Shaffer*, 12 M.J. 425 (C.M.A. 1982). Art. 32 is not a jurisdictional requirement. RCM 905(b)(1) Discussion.

(2) *United States v. Garcia*, 59 M.J. 447 (2004). Accused must personally waive right to Article 32 hearing (attorney cannot waive it for him).

(3) May be waived as a condition of a pretrial agreement.

(4) 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) (Accused's oral agreement and then written waiver of the Art. 32 was not part of the pretrial agreement and when the "deal" fell through, the government was not required to accept accused's revocation of his waiver of the Art. 32.) *See also United States v. Nickerson*, 27 M.J. 30 (C.M.A. 1988) (Accused's withdrawal of guilty plea was not good cause for relief from waiver of art. 32 investigation where guilty plea and waiver were not mutually dependent).

(5) Defense offer to waive is not binding on the government; investigation may still be held. RCM 405(a) Discussion.

5. Scope of the investigation.

a. Investigation should be limited to issues raised by the charges and necessary to proper disposition of the case. RCM 405(e) Discussion.

b. Investigation is not limited to examination of the witnesses and evidence mentioned in the accompanying allied papers.

c. What if the investigation discloses new offenses?

(1) Art. 32(d): IO may investigate subject matter of that offense without preferral of new/additional charge(s). RCM 405(e).

(2) Possible courses of action:

(a) IO consults legal adviser, delays Art 32; new charges preferred; IO then reconvenes hearing to investigate all charges.

(b) IO could prefer the new charges after the hearing. RCM 405(d)(1). IO is disqualified to act later in the same case in any capacity. *But see United States v. Beckerman*, 35 M.J. 842 (C.G.C.M.R. 1992) (Article 32 IO could subsequently prefer a new charge against the accused), *set aside on other grounds*, 44 M.J. 273 (1996); *adhered to*, 48 M.J. 698 (Coast Guard Ct. Crim. App. 1997).

(c) IO consults legal adviser, notifies accused of general nature of new offenses which she intends to investigate, and begins calling witnesses, allowing accused the same rights of representation, examination, and presentation of evidence concerning the new charges. *See* Article 32(d); RCM 405(e) Discussion.

d. 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).

e. May include inquiry into legality of searches or the admissibility of a confession. RCM 405(e) Discussion.

f. IO should note objections but is not required to rule on them.

C. 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. The appointing authority should be reasonably neutral and detached. She does not need to be absolutely neutral.

a. *United States v. Wojciechowski*, 19 M.J. 577 (N.M.C.M.R. 1984). Appointing Authority told a NIS agent and the accused's DC, prior to completion of the Art. 32, that he was "going to send (appellant) to a general court-martial."

b. Accuser disqualification.

(1) *McKinney v. Jarvis*, 46 M.J. 870 (Army Ct. Crim. App. 1997). SPCMCA who was accuser [preferred charges therefore *statutorily disqualified*] had only official interest in case and was not disqualified from appointing IO.

(2) *United States v. Dinges*, 49 M.J. 232 (1998). "An accuser [other than official interest therefore *personally disqualified*] under Article 1(9) . . . may not order charges investigated under Article 32 . . . and may not recommend a general court-martial [when forwarding the charges to the GCMCA]." Following a *DuBay* hearing where SPCMCA testified, the CAAF held SPCMCA was not an accuser under the facts of this case (55 M.J. 308 (2001)).

D. Investigating officer. RCM 405(d)(1).

1. Must be a commissioned officer. Cannot be a commissioned warrant officer. AR 27-10, para. 7-7d.

2. Preference for field grade officers or officers with legal training. 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. RCM 405(d)(1). IO is disqualified to act later in the same case in any capacity. *But see United States v. Beckerman*, 35 M.J. 842 (C.G.C.M.R. 1992) (Article 1(9), UCMJ, Article 32, and RCM 405(d)(1) do not preclude an IO who has investigated the charge against an accused from subsequently preferring a new or an additional charge against the accused).

5. Article 32 IO serves in a judicial capacity. *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977).

a. Ex parte contacts by the IO regarding substantive matters constitute error which 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 is very difficult to prove. *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).

b. *United States v. Argo*, 46 M.J. 454 (1997). Staff Judge Advocate's request to Art. 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.

6. *United States v. Holt*, 52 M.J. 173 (1999). Art. 32 IO recommended accused's case be referred capital for his alleged murder of a fellow-biker. After referral, the Article 32 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 the government that the spatter patterns on jeans seized from the accused were consistent with a stabbing. The 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 that the military judge committed no prejudicial error; the decision to submit the jeans for testing and to call the expert witnesses were solely the decisions of the prosecution.

E. Witness and evidence production.

1. 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.

a. 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 reasonably available. *Note, despite the "100 mile" language in RCM 405(g)(1)(A), the witness' immediate commander may veto an art. 32 IO's determination per RCM 405(g)(2)(A).

(2) Interpretation of 100-Mile Test. *United States v. Marrie*, 43 M.J. 35 (1995). A witness located more than 100 miles away from the situs of an art. 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).

b. *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 because IO obtained evidence via telephone and MJ allowed accused further opportunity to interview witnesses. *Record should support IO's determination of availability when victim does not appear for art. 32 investigation. IO's determination must be carefully considered, clearly articulated, and amply supported in the record.*

c. *United States v. Willis*, 43 M.J. 889 (A.F. Ct. Crim. App. 1996), *aff'd*, 46 M.J. 258 (1997). IO's misapplication of 100-mile rule, amongst other things, did not substantiate claims of IO bias.

2. Determining availability of witnesses.

a. Military witnesses.

(1) Investigating officer 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. Para. 5-12, AR 27-10.

(3) Cannot be subpoenaed to appear at an art. 32 hearing. *Cf. United States v. Johnson*, 53 M.J. 459 (2000). Accused was convicted, primarily through testimony of his wife, of assaults on his eight month-old daughter. His wife testified against him at the Article 32 hearing, and later at trial. She appeared at the Article 32, UCMJ, hearing pursuant to a German subpoena, which threatened criminal penalties if she did not comply. The military judge found that the subpoena was unlawful and issued without apparent legal authority, but found that the accused was not prejudiced by having a witness illegally produced at the hearing. The CAAF agreed with the military judge that the subpoena was unlawful, and that the accused suffered no prejudice to his substantial rights as a result of the improper production of the witness. The CAAF concluded that the accused did not have standing to object to the use of the Article 32 testimony at trial because the evidence presented against him was reliable.

(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 art. 32 investigation concerns matters which are related to the civilian's job. *Weston v. Dept. of Housing & Urban Development*, 724 F.2d 943 (Fed. Cir. 1983).

c. Immunized witnesses. Only a GCMCA has the authority to grant immunity to witnesses to testify at an Art. 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 art. 32).

F. Alternatives to testimony and evidence. RCM 405(g)(4) and (5). DC may be considered the "gatekeeper" of the admissibility of evidence at the Art. 32 hearing, because admissibility generally hinges on whether DC makes an objection.

1. Testimony.

a. If no defense objection, all relevant testimony (and substitutes for testimony) will be received, regardless of availability of the witness.

b. The following evidence may be admitted over defense objection, provided the witness is *not* reasonably available:

(1) Sworn statements. Witnesses who invoke their right to self-incrimination at the Art. 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 M.R.E. 804(a)(1).

(2) Statements under oath taken by telephone, radio, etc.

(3) Prior testimony under oath.

(4) Depositions; and,

(5) In time of war, unsworn statements.

2. Evidence. Absent a defense objection, virtually all forms of evidence may be admitted, regardless of the availability of the evidence. If there is a defense objection, and the evidence is reasonably unavailable, the following may be considered:

a. Testimony describing the evidence.

b. An authenticated copy, photograph, or reproduction.

c. Stipulation of fact, document's contents, or expected testimony.

G. Procedure for conducting the investigation.

1. General Procedure.

a. CA is authorized to prescribe specific procedures for conducting the investigation. RCM 405(c). 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 authority to approve pretrial 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. IO has broad discretion regarding sequence of events and other details.

2. Military Rules of Evidence. RCM 405(i). Military Rules of Evidence do *not* apply other than Mil. R. Evid. 301 (self incrimination), 302 (statements from mental examination), 303 (degrading), 305 (rights warning), 412 (rape shield) and Section V (privileges).

3. Open versus closed hearing.

a. Ordinarily, the proceedings should be open, but may be restricted or closed in the discretion of the appointing authority or the investigating officer. Qualified First and Sixth Amendment rights to open hearings.

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. *McKinney v. Jarvis*, 46 M.J. 870 (Army Ct. Crim. App. 1997) (SPCMCA erred in directing closure of hearing).

d. The press enjoys the same right to a public Article 32 and has standing to complain if access is denied.

(1) *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 04 charged with murder of 11-year old girl. While Art 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."

e. Analogy: Standard at trial. *See United States v. Anderson*, 46 M.J. 728 (Army Ct. Crim. App. 1997) (adopting the "stringent test" for closure of court-martial proceedings (*citing Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 520 (1984)).

(1) ***The standard for courts-martial.*** *See ABC, Inc, v. Powell*, 47 M.J. 363 (1997). SPCMCA'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. ***A servicemenber has a qualified right to an open article 32 investigation.***

(2) Closure determination must be 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.

II. THE ARTICLE 34 PRETRIAL ADVICE.

A. Introduction.

1. UCMJ art. 34: "The convening authority may not refer a specification under a charge to a general court-martial for trial unless he has been advised in writing by the staff judge advocate. . . ."

2. Description: The Pretrial Advice is a formal document containing the SJA's independent advice regarding the disposition of the charges.

3. Required under Article 34, UCMJ, as a prerequisite to trial by General Court-Martial.

4. Not required for trial by Special (SPCM) or Summary Court-Martial. RCM 406(a) Discussion. *But see* AR 27-10, *Military Justice*, para. 5-27 (b) (stating SJA will prepare a pretrial advice for SPCM involving confinement in excess of 6 months, forfeiture of pay for more than six months, or a BCD). *Proposed changed to AR 27-10, para. 5-27(c) recommends removing pretrial advice requirement from SPCM*.

5. No civilian equivalent.

B. Purposes of the advice.

1. Substantial pretrial right of the accused.

2. Protects accused against trial on baseless charges.

a. Protects accused against referral to an inappropriate level of court-martial.

b. Prosecutorial Tool - provides legal advice to the CA regarding the charges.

C. Mandatory contents (Short Form). Art. 34, UCMJ.

1. Conclusions with respect to whether each specification alleges an offense under the code;

2. Conclusions with respect to whether the allegation of each offense is warranted by the evidence indicated in the report of investigation; the standard is probable cause. RCM 406(b) Discussion.

3. Conclusion with respect to whether a court-martial would have jurisdiction over the accused and the offense; and

4. SJA Recommendation of the action to be taken by the convening authority (nonbinding). (SJA need not set forth the underlying analysis or rationale for the conclusions. RCM 406(b) Discussion.).

D. Optional contents (Long Form). R.C.M 406(b) Discussion.

1. Personal data concerning the accused.

2. Summary of charges.

3. Summary of evidence.

4. Summary of extenuation and mitigation.

5. Subordinate commander's recommendations.

6. Failure to include optional information is not error. RCM 406(b) Discussion.

a. Whatever matters are included in the advice should be accurate. RCM 406(b) Discussion. *United States v. Foley*, 37 M.J. 822 (A.F.C.M.R. 1993). SJA's advice inaccurately reported that unit commander recommended referral to GCM. Court found that error was harmless in light of accused's light sentence. *See also United States v. Murray*, 25 M.J. 445 (C.M.A. 1988). Pretrial advice omitted a charge. Procedural error tested for prejudice.

b. Reference to race is inappropriate for inclusion in court-martial records, including the pretrial advice. *United States v. Brice*, 33 M.J. 176 (C.M.A. 1991) (summary disposition); reference to accused's "Racial/ethnic identifier." *See also United States v. Holt* and *United States v. Phillips*, both at 27 M.J. 402 (C.M.A. 1988) (summary dispositions).

E. Short form vs. Long form.

1. Short form: Easier preparation.

2. Short form: Less likely to be inaccurate – minimal proofreading required.

3. Long form: SJA does not personally brief CA.

4. Long form: CA prefers - and gets - more detailed information.

a. May include victim comments per AR 27-10, para 18-14.

b. Capital Cases. Use Pretrial Advice to give notice of aggravating factors prior to arraignment per RCM 1004(b)(1) and (c).

F. Preparation and contents.

1. SJA need not personally prepare the advice but is personally responsible for it. SJA must personally sign the pretrial advice. It may not be signed "For the SJA." *United States v. Hayes*, 24 M.J. 786 (A.C.M.R. 1987).

a. The trial counsel may *draft* the pretrial advice for the SJA's consideration. *See United States v. Smith*, 33 M.J. 527 (A.F.C.M.R. 1991), *aff'd*, 35 M.J. 138 (C.M.A. 1992).

b. Inappropriate comments by the SJA in the pretrial advice may disqualify the SJA from preparing the SJA Post-trial Recommendation. *United States v. Plumb*, 47 M.J. 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.

2. Dispute over Advice may disqualify SJA from preparing Post-Trial Recommendation.

a. Mere preparation of the pretrial advice is not enough to disqualify the SJA. However, under RCM 1106(b), the SJA may be disqualified from preparing the post-trial recommendation when the sufficiency or correctness of the earlier action (the pretrial advice) is placed in issue.

b. *See United States v. Lynch*, 39 M.J. 223 (C.M.A. 1994). Accused questioned the pretrial advice in a motion prior to trial. "[W]here a legitimate factual controversy exists between the SJA and DC, the SJA must disqualify himself from participating in the post-trial recommendation."

3. SJA must make an independent and informed appraisal of the charges;

4. Enclosures with the Pretrial Advice.

a. Charge sheet.

b. Forwarding letters and endorsements.

c. Report of (Article 32) investigation, DD Form 457.

G. Defects in the pretrial advice.

1. Objections are waived if not raised prior to entry of pleas or if the accused pleads guilty. RCM 905(b) and (e); *see generally* RCM 910(j); *see also United States v. Packer*, 8 M.J. 785 (N.C.M.R. 1980); *United States v. Blakney*, 2 M.J. 1135 (C.G.C.M.R. 1976); *United States v. Henry*, 50 C.M.R. 685 (A.F.C.M.R. 1975).

   a. Defects are not jurisdictional and are raised by a motion for appropriate relief. RCM 906(b)(1); RCM 406 Discussion.

   b. Omission of a charged offense from the Advice may allow the inference that the CA did not see it, was not briefed on it, and that he did not intend to send it forward to trial. *Cf. United States v. Moore*, 36 M.J. 795 (A.C.M.R. 1993): Accused charged with AWOL, larceny, housebreaking, and wrongfully making a military ID card. At trial, military judge consolidated specifications into one specification of larceny by false pretenses (wrongful appropriation of $850.00 from Merchants National Bank; ten specifications of forgery of checks from the account of a Calvin A. Moore with Merchants National Bank; and three specifications of fraudulently writing checks on the account of Calvin A. Moore with Merchants National Bank knowing that the account had insufficient funds for payment). Court was without jurisdiction to try the offense: There was no express or constructive indication that the convening authority had referred the larceny charge to trial; no evidence that CA ordered the consolidated larceny charge be tried by the court-martial; new charge not mentioned in pretrial agreement.

2. Testing for error.

   a. Information which is so incomplete as to be misleading may result in a defective advice, necessitating appropriate relief. RCM 406(b) discussion; *see* RCM 905(b)(1) and 906(b)(3).

   b. 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 M.J. 760 (A.C.M.R. 1979).

H. Failure to Provide Pretrial Advice.

1. Failure to provide a written pretrial advice to the convening authority is error which will be tested for prejudice. *United States v. Murray*, 25 M.J. 445 (C.M.A. 1988).

2. *United States v. Green*, 44 M.J. 631 (1996). Accused failed to raise absence of written pretrial advice at trial for wrongful appropriation of motor vehicle, larceny, and obtaining services by false pretenses. Waiver rule applied.

III. PLEAS.

A. RCM 910 governs entry of pleas.

1. RCM 910(a)(1) permits pleas to lesser included offenses to be made without pleading by exceptions and substitutions.

2. Effect of Guilty Plea. RCM 910(j). General rule: Guilty plea waives any objection, whether or not previously raised, if the objection relates to the factual issue of guilt.

3. Not waived:

a. Multiplicity (only not waived if charges are "facially duplicative").

b. Jurisdictional issues

c. Ineffectiveness of counsel

d. Unlawful command influence (adjudicative, not accusatory)

e. Selective prosecution

(1) *United States v. Lloyd*, 46 M.J. 19 (1997) (waiver of multiplicity issues that are not facially duplicative). *United States v. McMillian*, 33 M.J. 257 (C.M.A. 1991) (multiplicious charges made during sentencing not waived by guilty plea to the charges); *United States v. Johnston*, 39 M.J. 242 (C.M.A. 1994). Although accused did not raise unlawful command influence issue at trial, UCI is not waived by guilty plea. *United States v. Henry*, 42 M.J. 231 (1995). Where facts necessary to make claim not fully developed, accused did not waive his claim of racially-based selective prosecution. Many alleged co-conspirators had yet to be tried.

4. Waived:

a. Suppression issues (confession, other evidence);

b. Speedy Trial (per RCM 707(e)); CAAF has not yet ruled if Article 10 issues are waived by failure to raise at trial. *See United States v. Birge*, 52 M.J. 209 (1999). *But see United States v. Mizgala*, No. 34822, 2004 CCA LEXIS 24 (A.F. Ct. Crim. App., Jan. 23, 2004) (unpub.), *pet. granted*, 2004 CAAF LEXIS 562 (C.A.A.F., June 25, 2004). AFCCA ruled the accused, by entering an unconditional plea of guilty, waived his right to appellate review of his speedy trial claim under Article 10, UCMJ. The CAAF has granted review to determine if an accused does waive his right to a speedy trial under Article 10, UCMJ by entering an unconditional guilty plea.

c. Factual issues (related to the offense).

5. Conditional Guilty Plea. RCM 910(a)(2).

a. "With the approval of the military judge and the consent of the Government [only the General Court-Martial Convening Authority (GCMCA) may consent for the government, para. 5-23(b), AR 27-10], an accused may enter a conditional plea of guilty, reserving in writing the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails (on appeal). . . , the accused shall be allowed to withdraw the plea of guilty." Case law (primarily from the Air Force courts) requires that the motion or issue in question be case-dispositive.

b. ***But see* proposed change to AR 27-10, para. 5-25(b).** Deletes GCMCA authority to enter into conditional guilty pleas and requires approval from the Chief, Criminal Law Division after coordination with the Assistant Judge Advocate General for Military Law and Operations.

c. *United States v. Vaughan*, 58 M.J. 29 (2003). Appellant entered conditional plea to "child neglect" charge under Article 134, UCMJ "preserving the issue of whether the charge states an offense." Under R.C.M. 907(b)(1)(B), this issue is never waived; however, appellate courts view the issue differently if it is raised for the first time on appeal. *See United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986) (holding that specifications challenged for the first time on appeal are "liberally constru[ed] in favor of validity").

d. *United States v. Mapes*, 59 M.J. 60 (2003). Appellant convicted of involuntary manslaughter and various other offenses arising from his injection of a fellow soldier with a fatal dose of heroin. Appellant entered into a pretrial agreement that permitted him to enter a conditional plea pursuant to R.C.M. 910(a)(2) that preserved his "right to appeal all adverse determinations resulting from pretrial motions." At trial, appellant 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, appellant 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, the CAAF noted that although military practice, unlike its federal civilian

counterpart, does not limit conditional pleas to issues that are dispositive, "the Analysis of the Military Rules of Evidence advises cautious use of the conditional plea when the decision on appeal will not dispose of the case . . . Where a conditional guilty plea is not case dispositive as to either the issue preserved for appeal or as to all of the charges in a case, the military judge should address as part of the providence inquiry the understanding of the accused and the parties as to the result of the accused prevailing on appeal." Although the military judge initiated a discussion with the accused concerning this matter, it was inadequate.

e. *United States v. Shelton***,** 59 M.J. 727 (Army Ct. Crim. App. 2004). Pretrial agreement preserved for appellate review "any adverse determinations made by the military judge of any of the pretrial motions made at [the accused's] court-martial." Defense made a motion to suppress based on the clergy privilege, and also made a discovery motion for the CID Agent Activity Summaries (commonly known as "28's"). "Based on the lack of emphasis given to the discovery motion at the trial level, the convening authority and stag judge advocate, and the parties at trial, may not all have been aware that appellant's conditional guilty plea preserved the discovery motion." Additionally, the military judge mentioned that only the clergy privilege motion was preserved by the plea. Citing *Mapes*, the court found that "the military judge failed to thoroughly address the parameters of the conditional guilty plea's impact." Accordingly, both motions were preserved for appeal.

f. *United States v. Proctor*, 58 M.J. 792 (A.F. Ct. Crim. App. 2003). Appellant spent 107 days in pretrial confinement prior to preferral of charges, and a total of 161 days prior to arraignment. Appellant entered a conditional plea of guilty, preserving the speedy trial issues for appeal. Court reversed and dismissed several charges and specifications with prejudice due to a violation of R.C.M. 707 grounds, but found no Sixth Amendment or Article 10 violation, and did not dismiss those offense discovered after the imposition of pretrial confinement. Court notes that because of the "all-or-nothing effect" or R.C.M. 910, allowing an appellant who enters a conditional plea to withdraw the if he prevails on appeal, "staff judge advocates are cautioned not to enter into conditional pleas unless the matter is case.

dispositive. . . . In this case, appellant's speedy trial issue was not case dispositive, because it did not require dismissal of those charges for which the appellant was not placed into pretrial confinement. However, because the conditional plea was authorized for all the offenses, we must allow the appellant to withdraw his pleas." The speedy trial clock for offenses discovered after the imposition of pretrial confinement began on the date of preferral of those charges

g. *See United States v. Lawrence*, 43 M.J. 677 (A.F. Ct. Crim. App. 1995), for an excellent discussion of the policy reasons behind conditional guilty pleas.

h. *United States v. Dies*, 43 M.J. 847 (N-M. Ct. Crim. App. 1995), *aff'd*, 45 M.J. 376 (1996). Conditional guilty plea preserved speedy trial issue under RCM 707. *See also United States v. Conklan*, 41 M.J. 800 (Army Ct. Crim. App. 1995) (conditional guilty plea preserved issue of waiver of transactional immunity and due process claims).

i. *United States v. Clinkenbeard*, 44 M.J. 577 (A.F. Ct. Crim. App. 1996). Appellant entered conditional pleas, at BCD-SPCM, to carnal knowledge and two instances of failure to go, sodomy with a minor, disobedience of an order, and three motor vehicle accidents. Nature of conditional plea was that the Federal Assimilative Crimes Act, 18 U.S.C 13 (FACA) did not assimilate non-criminal traffic offenses occurring on base. FACA may not be used to convict accused of state law traffic infractions if those infractions have been decriminalized. Conditional guilty plea preserved motion to dismiss. *See also United States v. Dies*, 42 M.J. 847 (N.M. Ct. Crim. App. 1995), *aff'd*, 45 M.J. 376 (1996) (conditional guilty plea preserved speedy trial issue under RCM 707).

j. *United States v. Tarleton*, 47 M.J. 170 (1997). An issue or argument that was not raised at trial and not included as a written part of a conditional guilty plea cannot form the basis of a plea for appellate relief. At trial, the accused's conditional guilty plea preserved for appellate review the issue of admissibility of his confession based on argument that his waiver of Article 31 rights was involuntary because he was not informed that he was a suspect. Accused was foreclosed, therefor, on appeal from asserting that the confessions should have been suppressed due to the failure of military police to apprise him that evidence from command directed urinalysis, which prompted his confession, was not admissible at court-martial.

6. Providence or *Care* Inquiry. *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (1969). "the record of trial. . . must reflect not only that the elements of each offense charged have been explained to the accused but also that the military trial judge or the president has questioned the accused [under oath] about what he did or did not do, and what h intended."

a. *United States v. Bates*, 40 M.J. 362 (C.M.A. 1994). Accused in carnal knowledge prosecution told MJ "I had attempted intercourse with my daughter. I touched my penis to her vagina. She had said that it hurt. I stopped" The court indicates "attempt" in context of providence inquiry was a "term of art." Plea not rendered improvident. Dissent by J. Wiss: "The providence inquiry is a model of inadequacy" and MJ did not advise accused of requirement of "penetration."

b. *United States v. Sweet*, 38 M.J. 583 (N.M.C.M.R. 1993); *aff'd*, 42 M.J. 183 (1995). Navy court indicates military judge is not required in every case to question accused to elicit statements of fact that simply paraphrase facts contained in stipulation of fact. Factual basis is established when accused admits to tailored elements, and stipulation accompanies inquiry. Court cautioned that more detailed questioning "is strongly encouraged, however, and may be required depending on the nature of the case and the contents of the stipulation. An in-depth personal colloquy offers the best chance to discover and obviate misunderstandings."

c. *United States v. Langston*, 53 M.J. 335 (2000). Defense requested exclusion of witnesses from courtroom during providence inquiry. Military judge refused the request, ruling, incorrectly, that Mil. R. Evid. 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.

1. Advice Concerning Rights Waived by Plea

a. *United States v. Vonn*, 535 U.S. 55 (2002). Vonn charged with armed bank robbery and using and carrying a firearm during a crime of violence. During his first appearance following arrest, the Magistrate Judge informed Vonn of his constitutional rights, including the "right to retain and to be represented by an attorney of [his] choosing at each and every stage of the proceedings." Vonn was again informed of this right three days later at his arraignment. On his third appearance, Vonn indicated that he would plead guilty to armed bank robbery but would go to trial on the firearms offense. In accordance with Fed. R. Crim. P. 11 (upon which R.C.M. 910 is based), the judge then advised Vonn of the rights he would give up by pleading guilty, but "skipped the required advice that if Vonn were tried he would have 'the right to the assistance of counsel.'" Several months later, following indictment on an additional offense, Vonn entered pleas to the new offense and the firearm charge. Again the judge neglected to render the required advice about counsel, despite the government attorney calling the omission to the judge's attention. Eight months later, Vonn attempted to withdraw his plea on the firearms charge. The judge denied the request and sentenced Vonn to 97 months in prison. On appeal, Vonn attempted to set aside all his pleas due to the judge's failure to render complete advice concerning the right to counsel. HELD: First, this type of unobjected to error during guilty plea advice is reviewed for plain error, rather than harmless error; as such, Vonn bears the burden of proving error, that is plain and obvious, and that affects his substantial rights. Second, in determining whether there is plain error in a guilty plea advisement, the court may look beyond the plea colloquy itself to other parts of the official record to see whether the defendant's substantial rights were affected. Because the Circuit Court of Appeals considered only the plea colloquy, the Court reversed and remanded for further consideration in light of its opinion. On remand, the Circuit Court affirmed the conviction. *United States v. Vonn*, 294 F.3d 1093 (9th Cir. 2003).

b. *United States v. Dominguez Benitez*, 124 S. Ct. 2333 (2004). The Accused's PTA contained a safety valve provision reducing his sentence below the mandatory minimum of ten years. The Accused's PTA stated that the agreement, however, did not bind the sentencing court and that he could not withdraw his guilty plea if the sentencing court rejected the government's recommended safety valve reduction. During the plea inquiry, the judge failed to advise the accused pursuant to Fed. R. Crim. Proc. 11 (upon which R.C.M. 910 is based) that the accused could not withdraw his plea if the reduced sentence was not given. Between the providency inquiry and sentencing, the probation office determined that the accused had previous convictions under a different name making him ineligible for the safety valve and the reduced sentence. On appeal the accused alleges the judge's failure to advise him of his rights under Rule 11 warranted withdrawal of his plea. The Supreme Court ruled when an accused raises a Rule 11 error on appeal, the accused must show the error is "plain" and "a reasonable probability that, but for the error, he would not have plead guilty." Based on the evidence against the accused and the warning provided in the PTA, the Court believed the Rule 11 error "tends to show that [it] made no difference to the outcome here." Placing the burden of proof on the accused: (1) encourages timely objections, (2) reduces wasteful reversals by demanding strenuous exertion to get relief on unpreserved error, and (3) places emphasis on the finality of guilty pleas, which rest on the accused's admission of guilt in open court which is indispensable in the operation of the modern criminal system. *See also United States v. Vonn*, 535 U.S. 55 (2002) (holding when an accused is late in raising a Rule 11 error reversal is not required unless the error is plain and affects the accused substantial rights, as proven by the defense, upon review of the entire record not only the plea proceedings).

c. *But see United States v. Hansen*, 59 M.J. 410 (2004). The MJ's failure to appraise the accused of his right to confront witnesses and right against self-incrimination required reversal when the record failed to show the accused's plea was voluntary and informed. "[T]he military judge is required to ensure the accused personally understands the rights he is about to waive." Although the MJ also failed to advise the accused of his right to a trial of the facts by the court, the CAAF could determine, from the record, that the accused still voluntarily and knowingly waived that specific right. Chief Justice Crawford, in dissent, advocates adopting the *Vonn/Dominquez Benitez's* plain error test, placing a burden upon the defense in ensuring the accused understands his rights.

2. Use of information gained during the providence inquiry.

a. Mixed Plea Situation.

(1) General Rule: Military judge should defer informing court members of the offenses to which the accused pled guilty until after findings are announced on the contested offenses. RCM 913(a); RCM 910(g) Discussion; *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). A.C.M.R. observed that it was inappropriate to so advise members, and tested for prejudice, and found remedial measures were needed.

(2) Exceptions: (a) If the accused requests members be informed of guilty pleas, or (b) if guilty plea to LIO and the Gov't intends to prove the greater offense. RCM 913(a), Discussion. Military judge committed error in not cleaning up flyer, which reflected greater offense to which the accused pled not guilty and which the Gov't did not intend to pursue, was not waived by accused's failure to object. Sentence set aside. *United States v. Irons*, 34 M.J. 807 (N.M.C.M.R. 1992).

(3) *United States v. Kaiser*, 58 M.J. 146 (2003). Appellant, an instructor at the Defense Language Institute, was charged with numerous violations arising from improper relationships with students. Appellant pled guilty to some of the offenses; military judge informed the panel of the guilty plea prior to commencement of trial on the merits. When the defense raised a question as to why the offenses to which the appellant plead guilty were on the flyer that the members would see, the MJ mistakenly replied that he MJ Benchbook required members be informed of guilty pleas. The panel convicted appellant of two additional offenses, and found him not guilty of other offenses. HELD: "The law in this area is clear – in a mixed plea case, in the absence of a specific request made by the accused on the record, members of a court-

martial should not be informed of any prior pleas of guilty until after the findings on the remaining contested offenses are made. This rule is long standing and embodied in the Benchbook." Error was prejudicial and required reversal of findings and sentence, as it directly impacts the presumption of innocence and the fundamental right to a fair trial. Trial counsel intimated that the pleas might serve as a basis for "inferring" something, and appellant was found guilty of the offenses similar to those to which he had pled guilty, and not guilty of the dissimilar ones.

(4) *United States v. Ramelb*, 44 M.J. 625 (Army Ct. Crim. App. 1996). Accused pled guilty to lesser included offense of wrongful appropriation. During case to prove the greater offense of larceny, Gov't called witness who sat in courtroom during accused's providence inquiry to testify as to everything accused said. Accused convicted of larceny. Court holds that it is error to use accused's statements given during providence inquiry to prove greater offense. Correct procedure is to use the ***plea*** of guilty to a lesser included offense to establish the common elements between the lesser and greater offense.

(5) *United States v. Grijalva*, 55 M.J. 223 (2001). The accused shot his wife. At trial the 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. Then, after trial on the merits on the greater offense in which the MJ used the accused's admissions during the guilty plea inquiry, the MJ convicted the accused of attempted premeditated murder. Following settled case law, the CAAF held the MJ could properly use the accused's plea to a lesser-included offense to prove a greater offense, but that when a plea of guilty is rejected any statement made by an accused during the plea inquiry is inadmissible. However, finding the MJ's error harmless beyond a reasonable doubt the CAAF affirmed.

b. Sentencing.

(1) *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. *See also United States v. Dukes*, 30 M.J. 793 (N.M.C.M.R. 1990). Navy 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."

(2) *United States v. Irwin*, 43 M.J. 479 (1995). Accused description of his misconduct (AWOL, rape, sodomy, indecent acts, kidnapping, threats, and unlawful entry) was so detailed and graphic that TC played tape-recording to members. CAAF finds tape constituted aggravating circumstances per RCM 1001(b)(4) and was not cumulative because there was no stipulation (No PTA). Court (in footnote) pointed out that MJ did not advise accused that statements made during providence inquiry could be considered in sentencing. (Remember, this evidence must meet all requirements, including Mil. Rules of Evid. 401, 402, 403 and 901).

(3) *United States v. Figura*, 44 M.J. 308 (1996). CID agent charged with forgery. Gov't 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 holds 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.

3. Misunderstandings of maximum possible sentence may render plea improvident.

a. All factors are examined to determine if misapprehension of maximum punishment affected guilty plea, or whether the factor was insubstantial in accused's decision.

b. *United States v. Silver*, 40 M.J. 351 (C.M.A 1994). After findings in provident guilty plea, MJ noticed that maximum punishment was 5 years more than he had previously advised the accused. MJ asked accused if he still wished to plead guilty. Accused indicated he did. No error on part of MJ by failing to expressly advise accused (per the MJ Benchbook) of his right to withdraw his plea.

c. *United States v. Mincey*, 43 M.J. 376 (1995). Accused charged with bad checks and wrongful appropriation. MJ advised accused max confinement was 6-1/2 years and *DD*. Pretrial agreement was 39 months. Correct maximum was 109 months (9 years and 1 month) and *BCD*. No prejudice.

d. *United States v. Ontiveros,* 59 M.J. 639 (C.G. Ct. Crim. App. 2003) (incorrect advice as to maximum sentence did not render plea improvident where evaluation of all the circumstances of the case revealed that it was "an insubstantial factor in the decision to plead guilty). *Accord United States v. McAuley*, 59 M.J. 697 (C.G. Ct. Crim. App. 2004) (companion case to *Ontiveros*); *United States v. Blodgett III,* ACM 35267, 2004 CCA Lexis 160 (A.F. Ct. Crim. App. July 30, 2004). *See* four factors in *United States v. Poole*, 26 M.J. 272 (C.M.A. 1988).

IV. PRETRIAL AGREEMENTS.

B. RCM 705(a): "Subject to such limitations as the Secretary concerned may prescribe, an accused and the convening authority may enter into a pretrial agreement in accordance with this rule."

C. Formation.

1. Oral pretrial agreement. *United States v. Mooney*, 47 M.J. 496 (1997). MJ erred by accepting accused's guilty plea and pretrial agreement after it was clear that pretrial agreement was not in writing as required by RCM 705(d)(2). *However*, while the CAAF criticized counsels' and the MJ's disregard for the rule, Court holds that reversal of conviction not required where the specific terms of the oral agreement are placed on the record, all parties acknowledge and comply with terms of agreement, and accused concedes that he received the benefit of the bargain. Accused suffered no harm under UCMJ art. 59(a).

2. *United States v. Forester*, 48 M.J. 1 (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. The 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).

D. Waiver. *United States v. Robbins*, 52 M.J. 159 (1999). A guilty plea "waives any objection . . . insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made." A guilty plea does not waive a claim of lack of jurisdiction or failure to state an offense. Here, the CAAF held the accused had not waived a preemption challenge to his guilty plea to involuntary manslaughter by causing the death of a fetus (an Ohio statute applicable via Article 134 and the Assimilated Crimes Act) (a question of subject matter jurisdiction). Nevertheless, the CAAF found that the assimilation of the offense was not preempted, although the court did strike the "manslaughter" language from the specification to reaffirm that the conviction was not premised on homicide (which would be preempted by the UCMJ) but on the commission of a felony which wrongfully terminates of another's pregnancy.

E. Failure to Define Elements/Factual predicate for plea.

1. *United States v. Hardeman*, 59 M.J. 389 (2004). Plea improvident because a definitive report date is necessary for an AWOL specification. The providency inquiry did not ultimately reveal the date on which the accused was willing to admit he went AWOL.

2. *United States v. Redlinski*, 58 M.J. 117 (2003). MJ erred by failing to adequately explain elements of attempted distribution of marijuana; plea improvident and set aside. MJ failed to advise appellant that the offense requires an overt act done with specific intent, and that the act amounted to more than mere preparation and apparently tended to effect the commission of the intended offense – the four elements of an attempt offense. In order for plea to be knowing and voluntary, the record of trial must reflect that the elements of each offense charged have been explained to the accused by the military judge. If the MJ fails to do so, plea must be set aside unless "it is clear from the entire record that the accused knew the elements, admitted them freely, and pleaded guilty because he was guilty" (citation omitted). The Court "looks to the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially" (citation omitted). For a plea to an attempt offense, "the record must objectively reflect that the appellant understood that his conduct, in order to be criminal, needed to go beyond preparatory steps and be a direct movement toward the commission of the intended offense."

3. *United States v. Barton*, 60 M.J. 62 (2004). MJ did not repeat larceny elements for each larceny and conspiracy to commit larceny offense but rather cross-referenced his predicate statement of elements. For one specification, the Accused failed to state and the stipulation of fact failed to mention that the value of the stolen property exceeded $100. The only admission regarding value existed in the accused's acknowledgement that he understood the elements of the larceny offense based on the MJ's cross-reference. In affirming the providency of the plea, the CAAF reasoned that the value determination is not a complex legal element and the MJ made the accused look at the charge sheet for each specification and the specification in issue clearly stated the stolen property exceeded $100. The CAAF cautioned, however, "we may have doubts that a similar methodology of cross-reference will work generally."

4. *United States v. Negron*, 60 M.J. 136 (2004). Accused pled guilty to depositing obscene matters in the mail in violation of Article 134, UCMJ. During the providency inquiry the MJ failed to provide the correct definition of "obscene." An accused is not provident to an offense when the MJ uses a substantially different definition of "obscene" from that proscribed by the offense charged. Additionally, the CAAF cautioned MJs "regarding the use of conclusions and leading questions that merely extract from the [accused] 'yes' and 'no' responses during the providency inquiry."

5. *United States v. Mason, Jr.*, 60 M.J. 15 (2004). The accused pled guilty to possessing child pornography under Article 134, clause 3 (crimes and offenses not capital) prior to the Supreme Court's ruling in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (holding visual depictions that "appear to be" of children are not criminal). The MJ defined the elemental term of "child pornography" by using the "appear to be" language later struck down in *Free Speech Coalition.* The CAAF ruled this improper definition made the accused's plea to the Article 134, clause 3 offense improvident. The MJ, however, advised the accused of an additional element, under Article 134, clause 2, that his conduct was of a nature to bring discredit upon the armed forces. The accused admitted his conduct of possessing child pornography was service discrediting and the court sustained his plea under Article 134, clause 3's LIO of Article 134, clause 2. *See U.S. v. Irvin*, 60 M.J. 23 (2004) (determining an accused's plea to possessing child pornography under Article 134, clause 2 was provident). *United States v. Anderson*, 60 M.J. ___, 2004 CCA LEXIS 152 (A.F. Ct. Crim. App. 2004). Plea to possessing child pornography overturned where judge failed to advise and accused failed to state the pictures were of actual children. Court did find accused guilty of lesser included offense of Article 134, clause 2, conduct of nature to bring discredit upon the armed forces.

6. *United States v. McCrimmon*, 60 M.J. 145 (2004). Accused drill instructor pled guilty to bribery for asking for and receiving money from trainees to protect them from receiving an Article 15 for going to the PX without authorization. At the time of the bribe, the accused knew the Article 15 was a scare tactic by the first sergeant. ACCA questioned whether the accused could intend for the bribe to influence his official actions, an element of bribery, if he knew the Article 15 was merely a scare tactic. Although the first sergeant's threat of the Article 15 was a bluff, the CAAF held the bribe could still influence the accused in his official actions because he still possessed the power to recommend an Article 15 to the company commander. In upholding the bribery conviction, the CAAF focused on the detailed dialogue between the MJ and the accused regarding bribery and its intent element and the detailed stipulation of fact explicitly establishing the accused's intent to be influenced by the bribe.

7. *United States v. Fox*, 50 M.J. 444 (1999). Accused received an item of mail at her off-base residence. The address on the envelope apparently listed appellant's place of residence, but the addressee on the envelope was a different person, Mr. David S. Cogdill. Accused opened envelope without realizing that it was addressed to someone else, found a check made out to Mr. David S. Cogdill, and subsequently cashed the check. She pleaded guilty to theft of mail matter. Citing to the analogous federal statute and a split in federal case law, she challenged her plea on the ground that an item in the mail loses its quality as "mail matter" once it is delivered to the place listed on the envelope, even if the named addressee is not located at that place. The CAAF noted that the MCM offense of mail theft applies from the point that an item is "deposited in a postal system" until it is "delivered to or received by the addressee." Her plea was provident.

8. *United States v. Falk*, 50 M.J. 385 (1999). Accused's plea to a violation of the child pornography statute, 18 USC § 2252, was improvident. The statute penalized "knowingly possess[ing] 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction" of child pornography. Congress later created a new section, § 2252A (making it a crime to possess "any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more images" of child pornography), but this statute had not been enacted at the time of accused's trial. Accused pleaded guilty to possessing 126 computer images depicting minors engaging in various sex acts. The CAAF held that a single computer hard drive is more like a single "book" and that the accused's plea, based on the facts in the record, was not provident, nor could he be found guilty under the statue alleged. The accused fell through a "loophole" in the statute which required the setting aside of that finding and the sentence.

9. *United States v. Schuler*, 50 M.J. 254 (1999). Accused who pleaded guilty to carnal knowledge stated that, at the time of the offense in August 1994, he believed that his 14-year-old victim was of college age, as she allegedly had told him. These statements did not affect the providence of his pleas because the defense of reasonable mistake of fact was not available at the time of the offense or the trial. He argued the providence of his plea should be assessed because, while his case was on direct review, Congress amended the law to permit a defense of reasonable mistake of fact. Citing 1 USC § 109, however, the CAAF held that the amendment to Article 120 provides members of the armed forces with an opportunity to raise the defense of mistake of fact and, as such, the change is not within the narrow class of legislative actions that would preclude application of the general federal savings statute.

10. *United States v. Grimm*, 51 M.J. 254 (1999). Fact that accused secreted a disassembled 9 mm pistol on his person supported his plea of guilty to carrying a concealed weapon under Article 134. The accused challenged the conviction on appeal, claiming a disassembled pistol could not be a dangerous weapon. While acknowledging *United States v. Davis*, 47 M.J. 484 (1998) (unloaded pistol not a dangerous weapon within the meaning of Article 128), the court noted that what constitutes a "dangerous weapon" is a question of fact, and the weapon's disassembled state was merely "one circumstance, among many, which can be considered by the fact finder." The accused did not show a "substantial basis" for reversal of his conviction: He showed merely one fact which could support an argument that the gun was not a weapon or dangerous, among other things. Accused conceded these factual issues at trial when he pleaded guilty. "Post trial speculation" as to the factual issues will not "be countenanced" by the court.

11. *United States v. Thomasson*, 50 M.J. 179 (1999). Accused engaged in a scheme to obtain fraudulent refunds from a military exchange for clothes stolen from the exchange. When a civilian store detective became suspicious, the accused fled in her car. The MPs were summoned in pursuit, and she continued to drive in her car for about two minutes before pulling over. The accused's plea to resisting apprehension was improvident. Under Article 95 as it existed at the time of the conduct in question, flight from a law enforcement officer, unaccompanied by any other act of resistance, did not constitute the offense of resisting apprehension. The colloquy between the military judge and appellant with respect to the offense of resisting apprehension focused exclusively on her flight from the MP. The military judge did not inquire as to any act of resistance other than flight. Error harmless as to sentence.

12. *United States v. Bickley*, 50 M.J. 93 (1999). Accused pleaded guilty to violation of a lawful general regulation for having a .22 caliber rifle in his room in violation of paragraph 2-4 of Fort Stewart Regulation 190-2 (27 October 1995), which prohibited storage of weapons in living spaces. Accused testified he had been storing the weapon at his girlfriend's residence, but she returned the weapon to him at 0130 hours on the morning of the inspection, and he planned to return it to the arms room when it opened at 0900 hours. He felt he could keep it in his room because he had heard that the commander had authorized soldiers to turn weapons into the arms room within 72 hours. Actually, the commander permitted a 24 hour grace period. The CAAF held that accused's vague and ambiguous musings did not provide a "'substantial basis' in law and fact for questioning the guilty plea."

13. *United States v. Olinger*, 50 M.J. 365 (1999). Accused pleaded guilty to absence without leave and missing movement. During sentencing, he stated that he decided to miss the movement of his ship because his wife was suffering from severe depression and his departure "might kill her." He claimed on appeal that his comments reasonably raised the necessity defense, a matter substantially in conflict with his plea. The court held that the statement by the accused, without further details establishing an immediate threat of death or grievous bodily harm to his wife, or establishing that there were no alternative sources of assistance for his wife other than his going AWOL, did not render his plea invalid. Although declining to say whether the necessity defense was available in the military, or whether more expansive comments would raise the narrower defense of necessity, the court noted it would not overturn the plea based on a "mere possibility" of a defense.

14. *United States v. Smith*, 50 M.J. 380 (1999). Accused pleaded guilty to attempted larceny of funds from a bank. The providence inquiry revealed that, using personal information obtained from an unwitting soldier in her unit, she and a co-conspirator planned to obtain a false credit card and use the card to make purchases. The coconspirator then called the bank and requested the card. However, the bank cancelled the credit card before it was issued. The court held that the accused had admitted sufficient facts to show a substantial step beyond mere preparation.

F. Pleas to lesser included offenses.

1. Normally, when an accused pleads guilty to a lesser included offense, and the government intends to try to prove the greater offense before a panel, it is incumbent upon the military judge to instruct the panel that they may accept certain previously admitted elements of the greater offense as proven. RCM 913(a) Discussion. 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). Should the military judge so instruct, it is generally considered error. *Id.*

2. Waiver. *United States v. Smith*, 50 M.J. 451 (1999). The accused was charged with raping and sodomizing H, his stepdaughter. He was also charged with indecent acts arising from those offenses. He pleaded guilty by exceptions and substitutions to the indecent acts offense (this offense alleged that he had placed his fingers into her into – and is penis upon - H's vagina and anus; the accused claimed that he had penetrated her anus and vagina with his fingers and that he had placed his penis on her vulva, but that he had not placed his penis on her anus). He denied ever raping her or attempting to sodomize her). The accused further stated that the actions took place on three different occasions in June, July, and August (he was charged with committing the indecent acts "from…June 1995 to … August 1995"). The military judge instructed the panel that they could consider that the accused's plea to Charge III established certain elements of Charge III, as well as certain elements of Charge I and Charge II (the rape and sodomy offenses). The CAAF treated the issue on appeal as one of instructional error, and, applying the waiver provision of RCM 920(f), found the defense counsel's actions amounted to an affirmative waiver of the requirement for the prophylactic instruction concerning the use of the accused's plea.

3. *United States v. Nelson*, 51 M.J. 399 (1999). Accused sought to enter a plea of guilty to the AWOL, but moved to preclude the use of his statements during providence inquiry on the merits of the other offenses. The military judge denied the motion, the accused entered pleas of not guilty, and he was convicted of all charges. The Army Court of Criminal Appeals affirmed the findings and sentence without opinion. The CAAF ruled the accused had not preserved for appeal the issue of whether the military judge erred in ruling that the accused's providence inquiry admissions could be used against him on the merits of the other offenses. The CAAF then set aside the ACCA decision on unrelated grounds.

G. Pleas and the privilege against self-incrimination. *Mitchell v. United States*, 526 U.S. 314, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999): A defendant's right under the Self-Incrimination Clause of the Fifth Amendment applies during sentencing in a criminal case.

H. Contents of Pretrial Agreements.

1. Permissible Terms and Conditions.

a. A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or as to which a confessional stipulation will be entered. *See United States v. Bertelson*, 3 M.J. 314,315 (C.M.A) 1977).

b. A promise to testify (or provide assistance to investigators) as a witness in the trial of another person;

c. A promise to provide restitution. *United States v. Mitchell*, 46 M.J. 840 (N.M. Ct. Crim. App. 1997). An 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 indigence. Accused uttered bad checks and defrauded financial institutions of $30,733.00. The defense proposed a term which 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 indigence to negate operation of PTA term requiring full restitution. CA properly vacated suspension under PTA.

d. A promise to conform the accused's conduct to certain conditions of probation. *See United States v. Spriggs*, 40 M.J. 158 (C.M.A. 1994). COMA indicates that an indeterminate term of suspension (up to 15 years to complete sex offender program) was not appropriate.

e. Misconduct Provision. *United States v. Tester*, 59 M.J. 644 (Army Ct. Crim. App. 2003). As part of plea offer, appellant agreed to not violate any punitive article in the UCMJ. In exchange, convening authority agreed, *inter alia*, to defer any adjudged confinement until action and to suspend any confinement for twelve months. Appellant got DUI off post fifteen days after his court-martial. Court held that although provision is specifically listed as permissible in R.C.M. 705, convening authority followed wrong procedure to vacate the deferral. Convening authority followed rescission of deferment provisions of R.C.M. 1101(c). This was incorrect. CA must follow vacation procedures of R.C.M. 1109. Because appellant was denied due process protections of R.C.M. 1109, his confinement was improper and was set aside.

f. A promise to waive procedural requirements such as the Article 32 investigation, 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); Court upholds PTA requiring accused to waive admin. board if CM failed to impose BCD. Court says not in violation of public policy considerations or fundamental fairness: Accused can ask for discharge in lieu of court-martial; valid bargaining chip; and, no overreaching. (3-2 decision).

g. A promise to waive a request for Art. 13 credit.

(1) *United States v. McFadyen*, 51 M.J. 289 (1999). Accused's waiver of Article 13 issue as part of pretrial agreement does not violate public policy. As of 20 November 1999, 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, UCMJ. Accused was an airman who complained about his treatment in pretrial confinement at a Navy brig (e.g., stripped of rank, prevented from contacting his attorney, and 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 the pretrial confinement in determining the amount of confinement appropriate as a punishment.

(2) *United States v. Inong*, 58 M.J. 460 (2003). CAAF overrules *United States v. Huffman*, 40 M.J. 225 (C.M.A. 1995), in which court refused to apply doctrine of waiver to issues of unlawful pretrial punishment in violation of Article 13, UCMJ, in the absence of an affirmative, fully developed waiver on the record. Court holds that article 13 issues are henceforth waived if not raised at trial. Court does not specifically overrule *McFadyen*, which does not rely on *Huffman* rationale.

g. Mandated Waiver of Members. *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 did not violate public interest. Even if government had declined *any* PTA unless accused waived members, the "government would not be depriving appellant of anything he was entitled to." *See also 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." A.C.M.R. says "[W]e hold that the change to RCM 705 now permits the government to propose as a term of the pretrial agreement, that the appellant elect trial by military judge alone, and the amount of the sentence limitation may depend on that election."

h. Agreement Not to Discuss Alleged Constitutional Violation. *United States v. Edwards*, 58 M.J. 49 (2003). As part of PTA, appellant 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 R.C.M. 705, accused may knowingly and voluntarily waive it. R.C.M. 705 does not prohibit this pretrial term, and specifically does not deprive the appellant 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.

i. Suspension Terms. *United States v. Wallace*, 58 M.J. 759 (N-M. Ct. Crim. App. 2003). Appellant sentenced to life without parole. In accordance with his pretrial agreement, the convening authority suspended all confinement in excess of thirty years for the period of confinement plus twelve months after appellant's release. Appellant argued that the period of suspension could only be five 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. R.C.M. 1108 states that a period of suspension should not be unreasonably long. "It is this Court's opinion that placing Appellant on probation for 31 years of an adjudged life sentence without possibility of parole is not unreasonably long and does not violate public policy."

j. Waive Comparative Sentence 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 (1998), inapposite, as presentation of sentence comparison material was not permitted by military judge; in contrast, appellant here agreed to waive his right under *Grill* in exchange for the benefits of a pretrial agreement.

k. Enrollment in 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.

l. Forfeiture of personal property. *United States v. Henthorn*, 58 M.J. 556 (N-M Ct. Crim. App. 2003). Criminal forfeiture of servicemember's personal computer, as set forth in pretrial agreement, was not an unduly harsh punishment and did not force the servicemember to forego a fundamental right.

2. Impermissible Terms and Conditions.

a. *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.

b. *United States v. Copley*, ARMY 20011015, (Army 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

c. *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.

d. *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 PTA provision requiring the Accused to agree not to request a transfer to the reserve, if a BCD was not given, violated public policy.

e. *United States v. Libecap*, 57 M.J. 611 (C.G. Ct. Crim. App. 2002). Pretrial agreement which required accused to request a bad-conduct discharge in his unsworn statement is void as against public policy, as it interferes with the accused's right to a complete sentencing proceeding in violation of R.C.M. 705(c)(1)(B). This is so despite fact that appellant reached his pretrial agreement and did not request a bad-conduct discharge. Remedy is rehearing on sentence.

f. *United States v. States v. Cassity*, 36 M.J. 759 (N.M.C.M.R. 1992). Accused pleaded 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.

g. *United States v. Clark*, 53 M.J. 280 (2000). A provision of PTA required accused to agree to "reasonable stipulations concerning the facts and circumstances" of his case. Both sides agreed to a stipulation which included a reference to the accused's "deception indicated" polygraph. On appeal, the accused argued such evidence violated Mil. R. Evid. 707. The CAAF held the receipt of the polygraph information was obvious error, but there was no reason to believe the military judge relied on the information in accepting accused's pleas. While affirming the case, the CAAF noted the that a PTA provision requiring the admission of polygraph evidence should not be enforced.

h. *United States v. Conklan*, 41 M.J. 800 (Army 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.

i. *United States v. Rivera*, 46 M.J. 52 (1997), *affirming* 44 M.J. 527 (A.F. Ct. Crim. App. 1996). Term in pretrial agreement (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. While record indicates that accused had no viable motions, counsel, military justice managers, and military judges should be on the lookout for such "explosive language" in PTAs. 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* (accused not yet called to testify).

j. *United States v. Forester*, 48 M.J. 1 (1998). Term in which required that accused to 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 the fact that the accused failed to raise any defense during the providence inquiry or sentencing phase.

k. Waiver of Speedy Trial Impermissible. *See United States v. McLaughlin*, 50 M.J. 217 (1999). Term requiring accused to forego any motions which may be legally waived was void as against public policy and MCM in a case where accused also agreed to waived any speedy trial issue. Term violated RCM 705(c)(1)((B) and *United States v. Pruitt*, 41 M.J. 736, 738 (N.M. Ct. Crim. App. 1994)). The CAAF held that the provision was unenforceable, so the military judge should have declared it impermissible, upheld the remainder of the agreement, and then asked 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. Nothing in record to support such a motion. *See also United States v. Benitez*, 49 M.J. 539 (N.M. Ct. Crim. App. 1998). RCM 705(c)(1)(B) and public policy prohibit including the waiver of the right to a speedy trial as a term in a PTA. This rule applies to both constitutional and statutory speedy trial rights.

l. *United States v. Perlman*, 44 M.J. 615 (N-M. Ct. Crim. App. 1996), 48 M.J. 353 (1998) (sum. disp.) (affirming but expressing no opinion on whether term is lawful). Gov't argued that term in PTA permitted SPCMCA to execute vacation of suspension without forwarding case to GCMCA for action UP UCMJ art. 72 and RCM 1109. 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 waiveable. *See also United States v. Smith*, 46 M.J. 263 (1997) (holding that a pretrial agreement term which provides for vacation proceedings and processing under UCMJ art. 72 and RCM 1109 in the event of future misconduct cannot be interpreted as waiver of general court-martial convening authority's (GCMCA) responsibility to review and take action on vacation).

h. *United States v. Forester*, 48 M.J. 1 (1998). Term in *stipulation of fact* leads the CAAF to caution 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).

i. *United States v. Davis*, 50 M.J. 426 (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 to 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). The 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 United States v. Bertelson*, 3 M.J. 314 (CMA 1977). The CAAF cautioned against the use of such a proceeding, which circumvented Article 45(a), but found that the accused's due process rights were not prejudiced, since the military judge properly conducted a *Bertelson* inquiry concerning the stipulation and it was clear the accused entered the agreement knowingly and voluntarily.

2. Contents of Quantum.

a. Effect of changes to arts. 58(b) and 57(a), UCMJ.

(1) Art. 58(b) mandates total (or 2/3) forfeitures as a result of GCMs and BCD SPCM if an accused is confined for more than six months, or, when *any* confinement is adjudged in combination with a punitive discharge. Article 47(b) makes these provisions effective 14 days after sentencing or the date the CA approves the sentence, whichever occurs *first*. The CA may defer forfeitures (or reductions) until approval of a sentence. If these are to be made part of a pretrial agreement, the defense must still request deferral of the forfeitures during the initial 14-day period after trial.

(2) Under art. 58(b), if the accused has dependents, the CA may waive any or all forfeitures of pay and allowances for a period not to exceed 6 months, provided those funds are paid directly to dependents. The CA's decision to defer or waive forfeitures for dependents may be a term or condition of the pretrial agreement.

b. Fines. *United States v. Smith*, 44 M.J. 720 (Army 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 in order to avoid some more dreaded lawful punishment. The appellant was convicted of felony murder. The MJ imposed a fine as part of the sentence which required the accused to pay the United States $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. While the Court holds the contingent confinement portion of the sentence was impermissible because it circumvented Secretary of Army parole authority, it reiterated that a fine is an otherwise permissible punishment and proper bargaining chip in pretrial agreements even if appellant does not realize an unjust enrichment.

c. Pretrial confinement credit.

(1) *United States v. Rock*, 52 M.J. 154 (1999). The accused secured a PTA limiting confinement to 36 months. The military judge awarded 8 months' credit for conditions on liberty, not amounting to confinement, that effectively punished the accused in violation of Article 13, UCMJ. The military judge applied the credit to the adjudged sentence, which included 61 months' confinement, reducing the adjudged confinement from 61 months to 53 months. There was no error: The quantum of the PTA or the adjudged sentence, whichever is less, establishes the maximum permissible confinement; *confinement credit* applies against that maximum. The period of time credited by the military judge did not involve confinement, nor was it tantamount to confinement, so there was no error in applying it to the adjudged sentence rather than the PTA's confinement limitation.

(2) *United States v. Spaustat*, 57 M.J. 256 (2002). Court holds that "in 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.

d. CA Approval of any "Other Lawfully Adjudged Punishment." *United States v. Edwards*, 20 M.J. 439 (C.M.A. 1985). Where fine not mentioned in agreement and sentence includes total forfeitures plus $1,000.00 fine, the fine could not be approved.

3. Interpretation of pretrial agreements.

a. Ambiguities and intent of parties. *United States v. Acevedo*, 50 M.J. 169 (1999). A term in a pretrial agreement requiring the Government to suspend for 12 months and then remit a dishonorable discharge did not preclude approval of an adjudged bad conduct discharge. *See also United States v. Gilbert*, 50 M.J. 176 (1999) (identical holding in companion case).

b. Military Judge's responsibility. Must conform terms to intent of parties or allow accused to withdraw from PTA. *See Aviz v. Carver*, 36 M.J. 1026 (N.M.C.M.R. 1993).

c. Draftsmanship.

(1) *United States v. Womack*, 34 M.J. 876 (A.C.M.R. 1992). Accused submitted agreement to plead guilty to drunk driving if government would not go forward on related assault charge. PTA was silent as to punishment. MJ opined (after reading his sentence and comparing it to the PTA) that the literal meaning was CA can only impose "no punishment." *Court resolved ambiguity in favor of accused.*

(2) *United States v. Gooden*, 23 M.J. 721 (A.C.M.R. 1986). Where pretrial agreement provided that CA could approve no sentence in excess of a BCD, confinement for 2 months, forfeiture of two-thirds pay per month for two months, and reduction to the grade of PVT E-1, it was error to approve a reprimand. Remedy: use "any other lawful punishments, including a fine, may be approved."

(3) *United States v. Davis*, 20 M.J. 903 (A.C.M.R. 1985). Pretrial agreements are strictly enforced based on express wording of agreement where record established that parties interpreted its terms in a manner consistent with its plain language. "BCD" crossed out in sentence limitation and confinement raised from 7 to 18 months.

4. Unitary nature of pretrial agreement.

a. 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).

b. *United States v. Barraza*, 44 M.J. 622 (N-M. Ct. Crim. App. 1996). The appellant pled guilty to sodomy and indecent acts in exchange for pretrial agreement which suspended confinement in excess of 46 months for 12 months from date of convening authority's action. Appellant was sentenced to 10 years, total forfeiture of pay and allowances, reduction to E-1, and a dishonorable discharge. Defense Counsel requested that the CA reduce confinement to aid the recovery process of appellant's family. The CA 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.

c. *United States v. Sparks*, 15 M.J. 895 (A.C.M.R. 1983). PTA: CA agrees to approve no sentence in excess of Conf x 4 mos; 2/3 Forf x 4 mos; Red to E1; & BCD. Sentence: Conf x 2 mos; 2/3 Forf x 6 mos; Red to E1; & BCD. CA may approve sentence as adjudged. *Overall* severity not increased by extra two month's forfeitures.

d. *United States v. Barratt*, 42 M.J. 734 (Army Ct. Crim. App. 1995). No PTA. Adjudged sentence: 16 months conf. and TF and E1. Accused requested CA substitute BCD for reduction in confinement to 6 months (New Sent. = BCD and 6 months conf.). 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 ɜ 3811.

e. Avoid problem in PTA agreement by stating that CA will not approve "*any part* of a sentence in excess of..."

5. Immunity Issues.

a. Only the GCMCA may grant immunity.

b. Immunity does not extend to prosecutions in Federal District Court or state courts without coordination with HQDA and DOJ.

c. Problem area: De facto immunity. *See United States v. Jones*, 52 M.J. 60 (1999) (SJA's actions in pretrial negotiations conferred de facto transactional immunity on co-accused but there was no command influence and no material prejudice to the accused); *United States v Conklan*, 41 M.J. 800 (1995); *Samples v. West*, 38 M.J. 482 9C.M.A. 1994).

6. Ambiguous Terms.

a. *United States v. Acevedo*, 50 M.J. 169 (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 appellant 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. The CAAF held that it appeared that all parties had the same understanding, i.e., that an unsuspended bad-conduct discharge was envisioned as a possible approved and executed punishment.

b. *United States v. Gilbert*, 50, M.J. 176 (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 appellant 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. The CAAF held the provision was lawful and that the BCD could be approved.

c. *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, which they did ($5000), along with confinement and a punitive discharge. 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. Military Judges Must Inquire Into Terms of PTA.

a. *United States v. King*, 3 M.J. 458 (C.M.A. 1977) (holding military judge must secure from trial and defense counsel "confirmation that the written agreement encompasse[s] all of the understandings of the parties, and that the judge's interpretation of the agreement comport[s] with their understanding both as to the meaning and effect of the plea bargain."). *See also United States v. Green*, 1 M.J. 453 (C.M.A. 1976) (reasoning the military judge must establish "on the record that the accused understands the meaning and effect of each provision in the pretrial agreement.")

b. *United States v. Felder*, 59 M.J. 444 (2004). MJ did not inquire into a term of the PTA regarding a waiver of any motions for sentence credit based on Article 13 and restriction tantamount to confinement. Accused's counsel did inform the MJ that no punishment under Article 13 or tantamount to confinement occurred. While the MJ's failure to discuss the term was error, the accused failed to show the error materially prejudiced a substantial right.

c. *United States v . Rigg*, 59 M.J. 614 (C.G. Ct. Crim. App. 2003). MJ failed to resolve differing interpretations of pretrial agreement term purporting to defer confinement. *See also United States v. Scalo*, 59 M.J. 646, 652, (2003) (en banc) (Clevenger, J., dissenting).

8. Unintended Consequences and misunderstanding of terms.

a. *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.

b. *United States v. Perron*, 58 M.J. 78 (2003). Imposing alternative relief on the appellant against his will to correct a failure of a material provision of a pretrial agreement due to a mutual misunderstanding violated the Due Process Clause because imposing remedies on an unwilling accused after the conclusion of the providence inquiry intruded upon an accused's decision to plead guilty and resulted in erroneous conclusions of voluntariness. Provision in PTA required convening authority to waive all automatic forfeitures and pay them to accused's family during his confinement. Appellant ETS'd prior to trial and entered no-pay status upon entry into confinement. Lower court determined provision was material term of PTA and remanded to either set aside plea and sentence or determine whether some other form of alternative relief was appropriate. On remand, convening authority modified sentence by approving only BCD and reduction to E-3 (original sentence, as limited by PTA, included confinement for 60 days, BCD, and reduction to E-3). Lower court set aside the reduction from E-5 to E-3. Appellant continued to argue that the relief did not give him the benefit of his bargain. Although there are circumstances when alternative relief may be appropriate, an appellate court cannot impose such relief in the absence of the appellant's consent. Here, "appellant pleaded guilty in exchange for the Government agreeing to provide his family with income while he was incarcerated. That agreement was not fulfilled in this case." Appellant has the right to choose to withdraw from the agreement. *United States v. Mitchell*, 50 M.J. 79 (1999): Impact of DoD regulation may invalidate plea. Accused's enlistment was almost over at the time of trial. After trial, he was placed in confinement. His attempt to extend his enlistment was, therefore, invalid, and he went into a no-pay status, thus mooting the PTA term limiting forfeitures. CAAF returned the case for a *Dubay* hearing; if the accused did not receive the benefit of his bargain, the pleas would be treated as improvident, and the findings set aside.

c. *United States v. Sheffield*, 60 M.J. ___ (A.F. Ct. Crim. App. 2004). Accused plead 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 disapprove the accused's BCD because the government did not agree to the alternative relief. The original PTA was nullified and findings and sentence set aside.

I. Policy: CA inelastic attitude? *See generally United States v. Zelenski*, 24 M.J. 1 (C.M.A. 1987) (PTAs should be negotiated on an individualized basis).

1. Appearance of fairness.

2. RCM 705 works both ways (CA may require members).

J. Unlawful command influence.

1. *United States v. Weasler*, 43 M.J. 15 (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, an accused may *initiate* a waiver of unlawful command influence in order to secure a favorable pretrial agreement. *See* Judge Wiss' concurrence in the result, warning "that this Court will witness the day when it regrets the message that the majority opinion implicitly sends to commanders."

2. *United States v. Sherman*, 51 M.J. 73 (1999). CAAF sets aside the ACCA decision and directs a *Dubay* hearing on whether there was a sub rosa agreement to waive a command influence claim.

3. *United States v. Bartley*, 47 M.J. 182 (1997). CAAF sets aside case based on finding of *sub rosa* agreement to not raise claim of command influence.

K. *Sub rosa* agreements.

1. *United States v. Sherman*, 51 M.J. 73 (1999). Accused pleaded guilty to offenses stemming from his insubordinate behavior at an off-duty dinner. After trial, accused told his appellate defense counsel that unlawful command influence had affected his pretrial confinement and his trial but was told that if the defense raised the issue they would lose the favorable pretrial agreement. TC's affidavit noted that he recalled defense raising the possibility of pretrial motions, to include an issue of command influence, but they never discussed waiving those issues as part of a pretrial agreement, and that his understanding was that even after the government agreed to the PTA, "the defense was free to raise the issues it was concerned with without fear of losing the benefits of the agreement." DC's affidavit noted that the TC had implied that he might not recommend a pretrial agreement if the UCI motions were raised, particularly since motions would require delay and the deal would be contingent to going to trial on a date certain. CAAF sets aside the ACCA decision and directed a Dubay hearing on whether there was a sub rosa agreement.

2. *United States v. Bartley*, 47 M.J. 182 (1997). Case set aside based on finding of *sub rosa* agreement to waive claim of command influence.

3. *United States v. Allen*, 39 M.J. 581 (N.M.C.M.R. 1993). Waiver of Article 32 (and the admissibility of uncharged misconduct in stipulation of fact) was undisclosed term of PTA. NMCMR expresses concern over TC and DC assurance to MJ that his inquiry covered all terms.

4. *United States v. Rhule*, 53 M.J. 647 (Army Ct. Crim. App. 2000). Accused attempted to plead guilty to several bad check offenses under Article 123a. He was also charged with larceny and forgery, to which he pleaded not guilty. After the MJ rejected the pleas as improvident, the defense announced the accused requested trial by military judge alone, and the government moved to dismiss the larceny and forgery specifications. Post-trial affidavits showed there was a sub rosa agreement for the government to dismiss the larceny and forgery offenses in exchange for the accused's election for trial by military judge alone and for proceeding to trial that day. This agreement was governed by RCM 705; it should have been in writing and disclosed at trial. Moreover, the TC should not have acted to bind convening authority. It was clear, however, that the accused's waiver of a panel was knowing, voluntary, and intelligent. There was no prejudice to the accused.

L. Post-Trial Re-Negotiation of Pre-Trial Agreement.

1. *United States v. Pilkington*, 51 M.J. 415 (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 pleaded 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.

2. *United States v. Dawson*, 51 M.J. 411 (1999). Accused and CA agreed to a PTA in which the first 30 days of any adjudged punishment would be converted into 1.5 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. The 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.

M. Withdrawal from PTA.

1. Withdrawal by the accused.

a. RCM 705(d)(4)(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."

b. Accused may withdraw a plea of guilty, at the discretion of the military judge, before sentence is announced. RCM 910(h)(1).

c. *United States v. Bray*, 49 M.J. 300 (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 subsequently, in the same court-martial, later reenters pleas of guilty to the same charges. The accused withdrew his guilty plea and from the pretrial agreement, which limited confinement to 20 years to pursue the "bug spray" defense. Appellant 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. The 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.

2. Withdrawal by the CA.

a. RCM 705(d)(4)(B). The convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement. *United States v. Pruner*, 37 M.J. 573 (A.C.M.R. 1993). Accused had not yet signed proposed stipulation of fact and had not yet requested witnesses.

b. A party may withdraw from an agreement to stipulate or from a stipulation at any time before the stipulation is accepted. RCM 811(d). After a stipulation has been accepted, a party may withdraw only if permitted to do so in the discretion of the military judge.

N. *United States v. Villareal*, 52 M.J. 27 (1999). Convening authority could lawfully withdraw from a pretrial agreement based upon pressure from the 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 pleaded not guilty. The 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.

V. CONCLUSION.

VI. APPENDIX – PRETRIAL PROCEDURES SUMMARY

B. MAJOR POINT *SUMMARY*

ARTICLE 32S	Where a witnesses' testimony at trial is inconsistent with her testimony at an Article 32 hearing, her pretrial testimony may be used to impeach her (Mil. R. Evid. 613) and it may also be admissible against her as substantive evidence under Mil. R. Evid. 801(d)(1)(A).
PLEAS	Where an accused enters mixed pleas, the substance of her providency admissions may not be admitted against her during the contested trial of the offenses to which she pled not guilty. Where an accused enters mixed pleas, the members will not be informed of her guilty plea unless she has pled guilty to a lesser included offense and the government intends to contest the greater offense, or the accused requests that the panel be told of the guilty plea. RCM 913(a).
PRETRIAL AGREEMENTS	An accused's offer to "waive all motions" violates public policy. A term in a PTA offering to "waive the accused's right to speedy trial" violates public policy. The military judge should inform both parties that the provision is unenforceable and then determine whether the accused wishes to litigate the issue or waive it. Pretrial agreements may be invalidated where DOD regulations change an accused's post-trial pay status and deprive him of the benefit of his bargain. Generally, command influence issues should not be the subject of pretrial agreements. The military courts will set aside cases in which command influence issues are waived pursuant to *sub rosa* agreements.

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53D GRADUATE COURSE

DISCOVERY

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SEPTEMEBER 2004

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53D GRADUATE COURSE

DISCOVERY

I. INTRODUCTION

"Providing broad discovery at an early stage reduces pretrial motions practice and surprise and delay at trial. It leads to better-informed judgment about the merits of the case and encourages early decisions concerning withdrawal of charges, motions, pleas, and composition of court-martial. In short, experience has shown that broad discovery contributes substantially to the truth-finding process and to the efficiency with which it functions. It is essential to the administration of justice; because assembling the military judge, counsel, members, accused, and witnesses is frequently costly and time consuming, clarification or resolution of matters before trial is essential." MANUAL FOR COURTS-MARTIAL, United States, RCM 701 analysis, app. 21, at A21-32 (2002) [hereinafter MCM].

II. REFERENCES

A. Article 46, UCMJ. "The trial counsel, the defense counsel, and the court martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."

B. Rule for Courts-Martial (RCM) 701.

C. RCM 703.

D. RCM 914.

E. Military Rules of Evidence (MRE) 301, 304, 311, 321, 404(b), 412, 413, 414, 807.

F. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992).

III. DISCLOSURE REQUIREMENTS

A. Mandatory Disclosure Requirements of RCM 701 for Trial Counsel.

1. Rule for Courts-Martial 701(a)(1):

a) Any papers that accompanied the charges when referred;

b) The convening orders; and

c) Any sworn or signed statement ***relating to*** an offense charged which is in the possession of the trial counsel.

2. Rule for Courts-Martial 701(a)(3). Before the beginning of the trial on the merits, the trial counsel shall notify the defense of the names and addresses of the witnesses the trial counsel intends to call:

a) In the prosecution case-in-chief; and

b) 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.

3. Rule for Courts-Martial 701(a)(4). Before arraignment, 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.

4. Rule for Courts-Martial 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.

B. Mandatory Disclosure after Defense Request for Trial Counsel.

1. Rule for Courts-Martial 701(a)(2)(A): books, papers, documents, photographs, tangible objects, buildings, or places, and

2. Rule for Courts-Martial 701(a)(2)(B): results or reports of physical or mental examinations, and of scientific tests or experiments.

a) Key requirements of both sections:

(1) *Intended for use* by the trial counsel as evidence in the case-in-chief; OR

(2) *Material* to the preparation of the defense; <u>and</u>

(3) In the possession, custody, or control of military authorities.

b) *United States v. Jackson*, 59 M.J. 330 (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 (if intended for use at the presentencing proceedings). RCM 701(a)(5):

a) Written material; and

b) Names and addresses of witnesses.

C. Trial Counsel's rebuttal evidence. No requirement to disclose rebuttal evidence. *United States v. Clark*, 37 M.J. 1098 (N.M.C.M.R. 1993) (holding that at presentencing, the trial counsel was not required to disclose a letter from the City of Los Angeles indicating that a different defense-offered letter indicating that the city would hire the accused was not true; evidence which could have been introduced during the case-in-chief during presentencing but is withheld does not fall within the rebuttal exception); *see also United States v. Trimper*, 28 M.J. 460 (C.M.A. 1989) (holding that rebuttal evidence is not discoverable under RCM 701 unless it is exculpatory in nature or material to punishment). *But see United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002) (rejecting the *Trimper* court's "narrow interpretation" of phrase

"material to preparation of defense" and holding that *Trimper* should no longer be followed in Army courts-martial).

D. Disclosure Requirements of the Military Rules of Evidence.

1. Grants of Immunity or Leniency. Mil. R. Evid. 301.

2. Accused's statements. Mil. R. Evid. 304(d)(1). Prior to arraignment, 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*.

3. Evidence. Mil. R. Evid. 311(d)(1). Prior to arraignment, 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.

4. Identifications. Mil. R. Evid. 321(c)(1). Prior to arraignment, the prosecution shall disclose all evidence of prior identifications of the accused that it *intends to offer* into evidence against the accused at trial.

5. Notice of Uncharged Misconduct. Mil. R. Evid. 404(b). 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.

6. Rape Shield. Mil. R. Evid. 412. Proponent must give notice of intent to introduce evidence of victim's past sexual behavior.

7. Similar Crimes. Mil. R. Evid. 413 and 414. 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.

8. Residual Hearsay. Mil. R. Evid. 807. 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 (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).

E. Mandatory disclosure requirements for Defense Counsel.

1. Rule for Courts-Martial 701(b)(1) – Witnesses and Statements. Before the beginning of trial on the merits, 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, ***and*** provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.

2. Rule for Courts-Martial 701(b)(2) – Notice of Certain Defenses. Defense *shall* give notice before the beginning of trial on the merits of its intent to offer the defense of alibi, innocent ingestion, or lack of mental responsibility, or its intent to introduce expert testimony as to the accused's mental condition. Notice shall include places, circumstances, and witnesses to be relied upon for these defenses.

a) *United States v. Lewis*, 51 M.J. 376 (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.

F. Mandatory disclosure after Government Request by Defense Counsel.

1. Rule for Courts-Martial 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 under RCM 1001(c); and

2. Rule for Courts-Martial 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.

G. Defense Counsel's surrebuttal evidence. Defense not required to disclose surrebuttal evidence. *United States v. Stewart*, 29 M.J. 621 (C.G.C.M.R. 1989).

H. 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:

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).

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).

I. 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 (2004).

J. Information not subject to disclosure. Rule for Courts-Martial 701(f). Disclosure not required if 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,'" quoting *Hickman v. Taylor*, 329 U.S 495, 510 (1947)).

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's agreement to testify pursuant to a pretrial agreement with the U.S. Attorney's Office does not waive that witness's attorney-client privilege regarding statement made to his attorney during the course of pretrial negotiations).

IV. DUE PROCESS: *BRADY V. MARYLAND*

A. *Brady v. Maryland*, 373 U.S. 83 (1963). "[T]he suppression by the prosecution of evidence *favorable* to an accused upon request violates due process where the evidence is *material* either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution" (emphasis added). *Id.* at 87. The duty to disclose favorable evidence exists even without a request by the accused. *United States v. Agurs*, 427 U.S. 97, 107 (1976).

1. **Favorable**. Includes exculpatory evidence *and* information that might be used to impeach government witnesses. *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). 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 material); *United States v. Mahoney*, 58 M.J. 346 (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 (1997); *Graves v. Cockrell*, 351 F. 3d 156 (5th Cir. 2003) (remanding case to district court for an evidentiary hearing to determine "(l) the substance of the alleged statement [by co-defendant made the day before trial], along with Carter's statement allegedly exonerating Graves; (2) whether Graves was aware of these statements or exercised due diligence to discover these statements; (3) whether the state's failure to disclose these statements was material to Graves' defense under Brady; and (4) for a determination of whether Graves is entitled to relief on these claims.").

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 material).

2. **Material**. The government's failure to disclose evidence only violates due process if the undisclosed evidence is material to guilt or punishment. The Supreme Court in *Banks*, 124 S. Ct. 1256 (2004) reiterated that the touchstone of materiality is the *Kyles* case. The *Kyles* Court noted that the materiality standard in *Brady* is met when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S., at 435. Earlier, the Court in *Bagley*, 473 U.S. 667 (1985), announced two standards for determining materiality:

a) First, 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. *Id*. at 682.

b) Second, in cases where there is no discovery request, a general discovery request, or a specific discovery request, evidence is "material" if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id*. at 679-80.

c) **What is a "reasonable probability?"**

(1) A reasonable probability is "a probability sufficient to undermine confidence in the result." *Id*. at 682.

(2) "[T]he adjective is important. 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.

(3) "[T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's

conclusion . . . the question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 434-35.

d) **Higher standard of review in the military: look at the <u>specificity</u> of the defense request**. "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 (2004) (citing, *United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990). *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).

(1) *See also United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002). The government did not disclose unfavorable but *material* evidence to the defense. The Army Court held (1) that equal opportunity to obtain evidence under Article 46, UCMJ, as implemented by the President in the Rules for Courts-Martial, is a "substantial right" of a military accused within the meaning of Article 59(a), UCMJ, independent of due process discovery rights provided by the Constitution; and (2) that accordingly, violations of a soldier's Article 46, UCMJ, rights that do not amount to constitutional error under *Brady* and its progeny must still be tested under the material prejudice standard of Article 59(a), UCMJ. The court also emphasized that when a trial counsel fails to disclose information pursuant to a specific request or when prosecutorial misconduct is present, the evidence is considered material unless the government can show that failure to disclose was harmless beyond a reasonable doubt.

(2) *But see United States v. Figueroa* 55 M.J. 525 (A.F. Ct. Crim. App. 2001). Government failed to disclose favorable evidence that the defense had specifically requested. The Air Force Court found that this failure was error, regardless of good faith. There, however, was no reasonable probability that the result of trial would have been different if the evidence had been

disclosed. In reaching this decision, the court discussed the impact of Article 46 and pointed out that in *Bagley*, the Supreme Court rejected a higher standard of review in cases involving specific defense requests. What about the statutory analysis? *See also United States v. Brozzo*, 57 M.J. 564 (A.F. Ct. Crim. App. 2002), *vacated by* 58 M.J. 284 (2003) *on remand*, 2003 CCA LEXIS 187 (A.F. Ct. Crim. App. 2003) (unpub. opinion), *pet. granted*, 59 M.J. 399 (2004). The CAAF vacated the Air Force Court's opinion on a question whether the defense counsel was ineffective for failing to exercise due diligence in securing an erroneous drug test report, the substance of which the government disclosed pursuant to a defense request for discovery. The Air Force Court found no ineffective assistance of counsel.

3. Although the government is required to be forthcoming with favorable evidence, it is not required to draw inferences from the evidence which defense counsel is equally able to draw. *See United States v. Grossman*, 843 F.2d 85 (2d Cir. 1988); *Todden v. Auger*, 814 F.2d 528 (8th Cir. 1987).

4. 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; *Bailey v. Rae*, 339 F.3d 1107 (9th Cir. 2003) (finding no evidence that prosecution intentionally withheld victim's therapy reports, but holding that prosecution's failure to disclose reports concerning victim's mental capacity was a *Brady* violation because such evidence was favorable as it tended to negate allegation that victim was mentally defective and incapable of consent).

B. The Components of a *Brady* Violation.

1. *Strickler v. Greene*, 527 U.S. 263 (1999) (holding there was no *Brady* violation when the state did not disclose notes taken by a detective of a conversation with the main government witness; such notes likely to have cast serious doubt on portions of the witness's in-court testimony). There are three components of a *Brady* violation:

a) The evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching;

b) The evidence must have been suppressed by the state; and

c) Prejudice must have resulted. The third prong is a materiality analysis. *See Strickler*, 527 U.S. at 297 n. 2 ("In keeping with suggestions in a number of our opinions [citations omitted] the Court treats the prejudice enquiry as synonymous with the materiality determination under *Brady v. Maryland* [citations omitted]. I follow the Court's lead.") (Souter, J., concurring in part and dissenting in part).

2. "Assuming that the information is of a type that is discoverable under RCM 701 and *Brady*, the threshold question is whether the information at issue was located within the parameters of the files the prosecution must review for exculpatory material." *United States v. Williams*, 50 M.J. 436, 440 (1999).

3. *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001). 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." *Id*. at 100. According to the Court of Appeals, the closer a disclosure is to trial, the less opportunity there is for use, and the more detailed that disclosure must be. *Id*. at 102.

C. *Brady* and Guilty Pleas. *United States v. Ruiz*, 536 U.S. 622 (2002). "Fast track" plea bargain requires a defendant to waive, *inter alia*, the right to any impeachment information relating to any informants or other witnesses in exchange for the Government's recommendation of a two-level downward departure from the mandatory federal sentencing guidelines. Ruiz turned down the offer, but ultimately pled guilty without the benefit of a recommended downward departure. At sentencing, she requested the downward departure; the Government opposed and the District Judge denied the request. The Ninth Circuit Court of Appeals noted that the Constitution requires the Government to make impeachment information available to a defendant before trial. It also decided that defendants are entitled to such information before they enter into a plea agreement and, further, that such a right was nonwaivable. The Supreme Court reversed, holding that 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." Whether this ruling by the Supreme Court applies to military practice is undecided.

V. GOVERNMENT DUTY TO SEEK OUT EVIDENCE

A. *United States v. Williams*, 50 M.J. 436 (1999). The scope of the government's duty to search with beyond the prosecutor's own files generally is limited to:

1. The files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses. *Id*. at 441.

   a) *United States v. Bryan*, 868 F.2d 1032 (9th Cir. 1989). In a mail fraud case, the local IRS office and the National Office of the IRS investigated the defendant. The defense requested all witness interviews and opinion letters by IRS attorneys in the possession of all IRS officials. The trial court held the prosecutor only had to disclose records within the district. The appellate court vacated the convictions, holding that 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." *Id.* at 1036.

   b) *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).

   c) *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).

   d) *Kyles v. Whitley*, 514 U.S. at 437 ("This . . . means that 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").

2. Investigative files in a related case maintained by an entity closely aligned with the prosecution. *United States v. Williams*, 50 M.J. at 441.

   a) *United States v. Hankins*, 872 F. Supp. 170 (D.N.J. 1995). After trial, the defense discovered an affidavit made by a co-conspirator during a civil forfeiture action that was inconsistent with her proffer to DEA agents after she became a cooperating witness. In the affidavit, the witness said she never used her van to facilitate drug transactions in any way. In her proffer to the DEA, she said she did use the van to pick up drugs. The

affidavit was not disclosed to the defense. The District Court found the civil division of the U.S. Attorney's office was "closely aligned with the prosecutor." "Thus, 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." *Id*. at 173.

b) *United States v. Romano,* 46 M.J. 269 (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's testimony at trial.

3. Files designated in the defense discovery request that involved a specified type of information within a specified entity. *United States v. Williams*, 50 M.J. at 441.

a) *United States v. Shelton*, 59 M.J. 727 (Army Ct. Crim. App. 2004). Defense made a timely request to review the CID Agent Activity Summaries. The special agent in charge did not permit either the trial counsel or the defense counsel (or the CID brigade JA) to review the AAS. The trial counsel argued that the documents were internal, administrative CID work product focused on internal supervisory reviews of the case agent's progress on investigative plans. The military judge reviewed the documents *in camera*, determining that none were relevant. One of the entries stated, "We'll never get anything from the Pastor, he's got problems of his own." Appellant claimed that this entry implies the existence of derogatory information that could have possibly been used to impeach this potential government witness (appellant pled guilty but preserved several issues for appeal with a conditional guilty plea). The Army Court determined that the military judge's failure to release the AAS was error, but there was no reasonable probability that defense discovery of the comment in the AAS at trial would have resulted in additional impeachment evidence rendering the pastor unbelievable. The court in a footnote made it very clear that AAS should be made available to defense: "In a typical criminal case, after the investigation has been completed the CID AAS should routinely be available for defense inspection and photocopying." *Id*. at 734 n.14.

b) *United States v. Veksler*, 62 F.3d 544 (3d Cir. 1995). In a tax evasion case, the defense requested and received post-trial

information regarding the status of the grand jury investigation of one of the government's main witnesses. The defense did not request this information before trial, even though the defense knew of the proceedings. "Constructive knowledge can only be found where the defense has made a specific request for the information." *Id.* at 550.

c) *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. With respect to a CID agent, the trial counsel responded to the discovery request without comment. By responding without comment, the trial counsel was asserting there was no record of a prior conviction or NJP. 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.

VI. RULE FOR COURTS-MARTIAL 703 – COMPULSORY PROCESS

A. 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.

1. If evidence is under the control of the government, trial counsel need only notify 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).

2. What if the evidence the defense requests is not in the government's control? Rule for Courts-Martial 703(f)(4)(B) permits a trial counsel to issue a subpoena *after* referral IAW RCM 703(e)(2). *See e.g. Flowers v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir. 2002) (holding that there is no authority for issuing a subpoena for bank records to be produced at UCMJ art. 32 hearing).

3. Rule for Courts-Martial 703(f) authorizes the use of a subpoena to obtain the requested material if the requesting party can establish that the evidence does exist and that it is relevant. *United States v. Rodriguez*, 57 M.J. 765 (N-M. Ct. Crim. App. 2002), *pet. granted*, 59 M.J. 117 (2003).

B. The defense must list the items of evidence to be produced and must include a description of each item sufficient to show its relevance and necessity; a statement where it can be obtained; and, if known, the name, address, and telephone number of the custodian of the evidence. RCM 703(f)(3).

1. No requirement on the part of the government to create the requested evidence. "Generally, the government has no responsibility to create records to satisfy demands for them." Judge did not err in denying defense request for negative urinalysis laboratory report in wrongful possession case. *United States v. Birbeck*, 35 M.J. 519, 522 (A.F.C.M.R. 1992).

2. If the government refuses to produce defense requested evidence, the defense may make a motion for appropriate relief IAW RCM 906(b)(7). *See also* RCM 701(g)(3).

C. Witnesses.

1. "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. "The defense shall submit to the trial counsel a written list of witnesses whose production by the Government the defense requests." RCM 703(c)(2). The request must include:

a) Name, address, phone number, and

b) A synopsis of the expected testimony sufficient to show its relevance and necessity. For sentencing, the request must also show why the witness's personal appearance is necessary under standards set forth in RCM 1001(e)(2).

3. If the trial counsel contends that a witness's production is not required under the rule, the matter may be submitted to the military judge. *See* RCM 906(b)(7). If the judge orders production of the witness, the trial counsel shall produce the witness or the proceedings shall be abated.

D. Procedures for Producing Witnesses.

1. Military Personnel: Coordinate with the soldier's commander. RCM 703(e)(1).

2. Civilian Witnesses: Subpoena. RCM 703(e)(2).

a) Issued by the summary court-martial, trial counsel of a special or general court-martial, deposing officer, or president of court of inquiry. RCM 703(e)(2)(B).

b) Witness must be subject to U.S. jurisdiction (RCM 703(e)(2)(A), discussion) and may be served at any place within the United States, its Territories, Commonwealths, or possessions (RCM 703(e)(2)(E)); but, cannot compel civilians to travel outside United States (RCM 703(e)(2)(A), discussion).

c) May not be used for pretrial interview or investigation. RCM 703(e)(2)(B), discussion.

3. 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).

a) 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.

b) Only non-deadly force may be used.

c) *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.

4. Enforcement proceedings. Article 47, UCMJ.

a) Article 47. Criminal complaint brought in federal district court by U.S. Attorney.

b) Punishable by fine and/or imprisonment.

5. If the witness has a valid excuse, one option is a deposition. *See* Article 49, UCMJ. In determining whether to admit a deposition when a witness is temporarily unavailable, the military judge should consider all of the circumstances, including (1) the importance of the testimony; (2) the amount of delay necessary to obtain the in-court testimony; (3) the trustworthiness of the alternative to live testimony; (4) the nature and extent of earlier cross-examination; (5) the prompt administration of justice; and (6) any special circumstances militating for or against delay. *United States v. Dieter*, 42 M.J. 697, 699-700 (Army Ct. Crim. App. 1995). The military judge erred in *Dieter*. The 100-mile rule is not an acceptable excuse for military witnesses.

E. Experts.

1. Expert Witnesses. Rule for Courts-Martial 703(d).

a) When the employment of an expert at government expense is considered necessary by a party, the party shall, in advance of the employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation of the expert. The request shall include a complete statement of the reasons why employment of the expert is necessary and the estimated cost of employment.

b) The government can provide an adequate substitute to the defense instead of employing a requested civilian expert.

c) A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary.

d) If the military judge grants the motion for employment, the proceeding shall be abated if the government fails to comply with the ruling.

2. Expert Assistance.

a) *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.

b) *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986). In a capital murder case, the defense requested $1,500 to hire a private defense investigator. The defense refused an offered OSI investigator to work under an order of confidentiality. The Court of Military Appeals held 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. Nonetheless, the military judge's denial of a private investigator was proper under the facts of the case. The defense had access to all reports and investigations completed. Importantly, the defense refused to make a record in open court regarding the necessity of the private investigator.

c) *United States v. Ndanyi*, 45 M.J. 315 (1996). Expert assistance is provided only when the defense can establish necessity. There is a three-part test for establishing necessity:

(1) Why is the expert assistance needed;

(2) What would the expert assistance accomplish for the accused; and

(3) Why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop.

VII. MILITARY JUDGE'S REGULATION OF DISCOVERY

A. **Time, place, and manner.** 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).

B. **Protective and modifying orders.** The military judge may order that discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion, the military judge may permit the party to make such showing, in whole or in part, in writing to be inspected only by the judge. If the judge grants relief after such an *ex parte* showing, the entire text of the party's statement shall be sealed and attached to the record of trial as an appellate exhibit. RCM 701(g)(2).

C. *In camera* review. The judge may require the evidence be subject to an *in camera* inspection in order to determine whether relief should be granted. *See* RCM 701(g) and 703(f)(4)(c). Courts are relying on the *in camera* review to balance the government's interest in maintaining the confidentiality of records of certain categories of information with the accused's right to present a defense and confront witnesses.

1. Cases.

a) **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. *Id.* at 94-95. *See also Alderman v. United States*, 394 U.S. 165 (1969). Defense counsel may argue that they are in a better position to consider the relevancy of material sought in discovery than a judge considering the material *in camera*.

b) **Rape Victim's Medical Records.** *United States v. Briggs*, 48 M.J. 143 (1998). Military judge's denial of defense request for rape victim's complete medical record was not an abuse of discretion where the defense was unable to show relevance to the charged offense. The government had provided the medical records pertaining to the charged offense. The defense requested the victim's entire medical record. "[T]rial defense counsel could not point to any possibility that there was exculpatory material contained within the victim's medical records." The CAAF sets forth the *in camera* review as a **preferred** procedure for handling such issues at trial. *Id.* at 145.

c) **Government Witness's Military Records.**

(1) *United States v. Abrams*, 50 M.J. 361 (1999). The accused was convicted of pandering and soliciting another to engage in prostitution. The accused was alleged to have acted as a pimp for his live-in girlfriend and another female sailor. The female sailor was a critical government witness. The government provided

adverse counseling entries and nonjudicial punishment for the female sailor's prostitution but the government opposed the production of the rest of the female sailor's records. The defense counsel proffered that because the female sailor had been to therapy, he needed to see the entire record to determine if there was additional impeachment evidence. The trial judge ruled that the defense counsel had not made a showing of relevance or necessity and then reviewed the records *in camera*. The case was remanded because the judge failed to seal the records he reviewed *in camera* and append them to the record of trial as is required by RCM 701(g)(2). The Navy-Marine Court affirmed on remand (1999 CCA LEXIS 271 (N-M Ct. Crim. App. 1999)), which decision CAAF also affirmed (2000 CAAF LEXIS 959 (2000)).

(2) *United States v. Kelly*, 52 M.J. 773 (Army Ct. Crim. App. 1999). The court found that the trial judge abused his discretion by not reviewing the victim's personnel files *in camera.* However, instead of returning the record to the trial judge to conduct an *in camera* inspection, the Army Court found "no reasonable probability that the result of trial would have been different" if the files had been inspected by the trial counsel or military judge. The court made this finding despite the fact it is impossible to determine whether undisclosed evidence would have an impact on the verdict or sentence unless you know what the undisclosed evidence is.

d) **Inspector General's Report of Inquiry.** *United States v. Sanchez*, 50 M.J. 506 (A.F. Ct. Crim. App. 1999). The defense requested the judge to compel production of all documents related to a previous IG Report of Investigation into a complaint made by a government witness against the base's senior enlisted advisor. The defense proffered that the investigation determined the witness was not credible. The trial judge neither ordered production nor conducted an *in camera* inspection. The appellate court returned the record, ordered the government to provide a copy of the report for inspection. Upon inspection of those records *in camera*, the AFCCA found no evidence favorable to the defense.

e) **Public Interest Privilege**. *United States v. Rivers*, 49 M.J. 434 (1998). On appeal, defense appellate counsel sought to view

the contents of a sealed record the trial judge inspected and refused to disclose to trial defense counsel. The defense is not entitled to unrestricted access to government information. "**Where a conflict arises between the defense search for information and the Government's need to protect information, the appropriate procedure is '*in camera* review' by a judge."** The defense argued at trial that the confidential informant's prior statements and CID agent notes should be disclosed. The judge, after reviewing the documents *in camera*, found that the evidence was irrelevant and that it was protected under Mil. R. Evid. 506 (detrimental to the public interest). The judge ultimately lifted the protective order as to two of the informant's three sworn statements. On appeal, the Army Court of Criminal Appeals reviewed the sealed portion of the record *in camera* and refused to unseal the evidence.

D. *Ex parte* hearing. *United States v. Rhea*, 33 M.J. 413 (C.M.A. 1991). Defense had calendar of child victim, which inculpated the accused. Defense counsel requested an *ex parte* hearing before the military judge for a ruling on their duty to disclose the calendar. The military judge's *ex parte* hearing was proper given the defense counsel's duty to protect client confidential communication.

VIII. REMEDIES FOR NONDISCLOSURE

A. RCM 701(g)(3). During trial, the judge can take one or more of the following actions:

1. Order discovery;

a) *United States v. Rodriguez*, 57 M.J. 765 (N-M. Ct. Crim. App. 2002), *review granted*, 59 M.J. 117 (2003).[1] At the invitation of agents from the Bureau of Alcohol, Tobacco, and Firearms, an NBC videographer taped the traffic stop and search of appellant's vehicle along Interstate 95. In support of his pretrial motion to suppress his statements given to ATF and Naval Investigative Service Command,[2] the accused sought all NBC

[1] CAAF granted the following issue, among others: I. Whether the military judge erred in denying appellant's motion to order the production of NBC's recordings related to appellant's traffic stop and subsequent detainment, search and interrogation.

[2] As noted in a footnote of the opinion, from 1988 to 1992, the current Naval Criminal Investigative Service (NCIS) operated under the name Naval Investigative Service Command. United States v. Rodriguez, 57 M.J. 765, n.3 (N-M. Ct. Crim. App. 2002), *pet. granted*, 2003 CAAF LEXIS 805 (Aug. 5, 2003).

videotape of the traffic stop. NBC provided a videotape of the broadcast material of the traffic stop. NBC also 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. NBC's response referenced its earlier response and First Amendment privilege. The military judge denied the defense request to compel production. The military judge found that the requested videotape (the outtakes) was not of central importance to the accused's case. The military judge found the search was conducted some distance from the interview by law enforcement and on that the video crew focused its attention on the search of the vehicle. The Navy-Marine Court reviewed the military judge's determination for an abuse of discretion and found none. The appellant, the Navy-Marine Court noted, failed to demonstrate that the requested evidence was both necessary and relevant. The military judge viewed the broadcast portion of the tape and found that the outtakes were unnecessary and cumulative on the issue of voluntariness of the appellant's statements. The Navy-Marine Court found that the defense counsel failed to show how the outtakes would have been material to the determination of any material issue. Because of appellant's failures to show the necessity and relevancy of the requested information, compulsory process does not lie: "A party is entitled to compulsory process for the production of relevant and necessary information."

2. Grant a continuance (common remedy);

a) *United States v. Irwin*, 30 M.J. 87 (C.M.A. 1990). Defense counsel offered a continuance in response to CA's order requiring the presence of a third party when the defense counsel interviewed the child/victims.

b) *United States v. Trimper*, 28 M.J. 460 (C.M.A. 1989). Defense counsel moved to preclude use of the urinalysis report. The military judge denied the request for exclusion, but granted a continuance, which was an appropriate remedy.

c) *United States v. Murphy*, 33 M.J. 323 (C.M.A. 1991). The Government did not disclose its sole witness (an eyewitness accomplice), 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.

3. **Prohibit introduction of the evidence, calling a witness, or raising a defense not disclosed.** *See* Discussion to RCM 701(g)(3)(c) (exclude defense evidence only where failure to comply is "willful and motivated by a desire to obtain a tactical advantage or conceal a plan to present fabricated testimony").

a) The Sixth Amendment right to present witnesses is not absolute. The sword of Compulsory Process cannot be used irresponsibly. Surprise alibi witness excluded because defense counsel committed a "willful and blatant" violation of a discovery rule. However, alternative sanctions will be adequate and appropriate in most cases. *See Taylor v. Illinois*, 484 U.S. 400, 414 (1988).

b) *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.

c) *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.

d) *United States v. Pomarleau*, 57 M.J. 352 (2002). Appellant convicted of drunk driving and involuntary manslaughter. Before trial, the trial counsel moved to compel defense discovery, but the record did not indicate the military judge's response. At trial, the trial counsel asserted that the defense had not disclosed a number of exhibits and other material and contended that he was being ambushed by the defense. The military judge sustained the objection, excluding the evidence and prohibiting the defense expert from referring to it in his testimony. The CAAF held that under the circumstances of the case, 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.

e) *United States v. Barreto*, 57 M.J. 127 (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 CAAF agreed with the Air Force Court that these witnesses were unavailable within the meaning of RCM 703, 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.

f) *United States v. Weisbeck*, 50 M.J. 461 (1999). The Court of Appeals for the Armed Forces found that the military judge abused his discretion by not granting a continuance to allow the defense to call an expert witness, who would present testimony going to the heart of the defense; the continuation would not have an adverse impact on the government's case; and there was no cost to the government for producing the witness.

g) *United States v. Preuss*, 34 M.J. 688 (N.M.C.M.R. 1991). 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.

h) *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. Such other order as is just under the circumstances.

a) Dismiss charges

b) 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."

c) Instructions. *Arizona v. Youngblood*, 488 U.S. 51, 59-60 (1988)(Stevens, J., concurring). Justice Stevens found the trial judge's instructions significant: "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." *See also United States v. Ellis*, 57 M.J. 375 (2002).

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.

B. A trial judge contemplating a sanction for a discovery violation should consider (*State v. Coelho*, 454 A.2d 241, 145 (RI 1982)):

1. The reason for nondisclosure;

2. The extent of prejudice to the opposing party;

3. The feasibility of rectifying that prejudice by a continuance; and

4. Any other relevant factors (defense v. prosecution).

IX. ETHICAL CONSIDERATIONS

A. Ethical Issues—Special Responsibilities of trial counsel (Rule 3.8(d)). A trial counsel must make timely disclosure of *Brady* material known to him. *See United States v. Kinzer*, 39 M.J. 559, 562 (A.C.M.R. 1994). Appellate court found that trial counsel's discharge of his discovery duties (failure to timely provide two statements of key government witness) was "especially careless and an example not to be followed by other trial counsel." *See also United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002).

B. Fairness to Opposing Party and Counsel. Rule 3.4, AR 27-26. "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. The exercise of that right can be frustrated if relevant evidence is altered, concealed, or destroyed" (Comment to rule).

X. THE JENCKS ACT

A. Rule for Courts-Martial 914. 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. *See also* 18 U.S.C. § 3500.

B. A statement is a "written statement by the witness that is signed, adopted or approved by the witness." A statement also 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).

C. 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).

1. Rule for Courts-Martial 914 applies to:

a) CID Agent Investigator Notes (28s). Unless defense can show they are relevant and necessary, nothing requires the automatic production of such notes as long as the investigator does not testify. 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).

b) Witness interview notes by attorneys, potentially.

c) Article 32 tapes.

(1) *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.

(2) *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.

d) 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.

e) Confidential Informant's Notes.

(1) *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.

(2) *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.

XI. DESTRUCTION/PRESERVATION OF EVIDENCE

A. Supreme Court.

1. *California v. Trombetta*, 467 U.S. 479 (1984). Respondents challenged their convictions for driving while intoxicated because the State did not preserve the breath samples taken by law enforcement personnel. As a routine matter and in good faith, the breath samples were not preserved after the Intoxilyzer measured the alcohol concentration in the sample. The Court noted that "[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." *Id*. At 488. Therefore, the Court held that such 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." *Id*. at 489. In this case, the Court held that the evidence was likely to *inculpate* the respondents and there were other avenues of attack in raising reasonable doubt regarding the validity of the results. Under the facts of the case, there was no due process violation.

2. *Arizona v. Youngblood*, 488 U.S. 51 (1988). The Government did not preserve (by refrigeration or freezing) clothes or perform certain tests on physical evidence taken from a child victim who had been sodomized and sexually assaulted. The evidence marshaled against the respondent was the boy's prior identification of him from a line-up; the Government did not make use of any of the materials in its case-in-chief. The Court held "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. The Court also noted to the extent that Arizona required the police to conduct certain tests, "we strongly disagree." The Court stated, "the police do not have a constitutional duty to perform any particular tests." *Id*. at 59.

3. *Illinois v. Fisher*, 124 S. Ct. 1200 (2004) (per curiam). Respondent challenged conviction for cocaine possession because the police acting in good faith and in accordance to established procedure destroyed the evidence he requested ten years earlier in a discovery motion. In 1988, he was charged with cocaine possession. After being charged, he filed a motion requesting all physical evidence the Stated intended to introduce at trial. The State responded that all such evidence would be made available on request. After being released on bond, respondent failed to appear in court and remained a fugitive for ten years. In the interim, the State destroyed the evidence that tested four times previously as cocaine. The Court determined that the evidence was "potentially useful," but not exculpatory (rather it was inculpatory).

Given the evidence's nature and the lack of bad faith, the Court held that Fisher did not establish a due process violation. The Court also noted that the existence of a pre-existing discovery violation does not eliminate the necessity of showing bad faith required under *Youngblood*, which Fisher failed to do.

B. Military Cases.

1. *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986). "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." *See also United States v. Kern*, 22 M.J. 49 (C.M.A. 1986).

2. *United States v. Manuel*, 43 M.J. 282 (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.

3. *United States v. Ellis*, 57 M.J. 375 (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 CAAF did not decide whether this was plain error, because there was no reasonable likelihood that the members would have reached a different conclusion even had the military judge taken these steps.

4. *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990). The court held that the car contained crucial evidence to which an accused should have access under Article 46. Witnesses, reports, physical evidence, and photographs were available to the defense.

5. *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.

XII. CONCLUSION

XIII. 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
M.R.E. 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
M.R.E. 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**
RCM 701(a)(1)	Government	As soon as practicable after service of charges	Papers accompanying the charges; convening orders; & statements
Brady, Bagley, Roberts,* and *Adens	Government	As soon as practicable	Evidence favorable and material 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)
RCM 701(a)(2)	Government	Defense Request	Documents, tangible objects and reports etc.
RCM 701(a)(3)(B)	Government	Defense notice under RCM 701(b)((1) or (2); Before start of trial	Witnesses to rebut certain defenses
RCM 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
RCM 706(c)(3)(B)	Government	Completion of sanity board	Mental examination of accused – distribution of the report
RCM 701(b)(1)(B)	Defense	Government request	Pre-sentencing witnesses and evidence
RCM 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
RCM 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

Arraignment

Authority	Burden On	Trigger/Deadline	What is Required
RCM 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
RCM 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

Trial

Authority	Burden On	Trigger/Deadline	What is Required
RCM 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)
RCM 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.
RCM 701(b)(1)(A)	Defense	Before trial on the merits	Names of witnesses and statements
RCM 701(b)(2)	Defense	Before trial on the merits	Notice of certain defenses (alibi; lack of mental responsibility; innocent ingestion, etc.)

Post-Trial

Remember that the duty to disclose is a continuing duty. Even if something covered by these rules is discovered after trial, it must be disclosed.

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53D GRADUATE COURSE

THE GENERAL ARTICLES

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MAJ Jeff Hagler
September 2004

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53D GRADUATE COURSE

THE GENERAL ARTICLES

OUTLINE OF INSTRUCTION

I. INTRODUCTION.

A. History.

"All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the above articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and be punished at their discretion."

AMERICAN ARTICLES OF WAR OF 1776, §XVIII, art. 5, reprinted in William Winthrop, MILITARY LAW AND PRECEDENTS 971 (2d rev. ed. 1920).

B. "Enumerated" Article 134 Offenses. MCM, pt. IV, ¶¶ 61-113.

1. Nonexhaustive list. Other offenses may be charged, provided the alleged misconduct satisfies one of the three clauses of article 134, and the misconduct cannot be prosecuted under another article of the UCMJ. *United States v. Wright*, 5 M.J. 106 (C.M.A. 1978).

2. Proof and Pleading. The "enumerated" Article 134 offenses require proof of the misconduct's prejudice to good order and discipline *or* its tendency to bring discredit upon the armed forces. There is no requirement to plead these elements. See the model specifications at MCM, pt. IV, ¶¶ 61-113.

II. THE GENERAL ARTICLE. UCMJ ARTICLE 134.

A. Theories for Criminal Liability.

1. Conduct prejudicial to good order and discipline [Clause 1].

2. Conduct of a nature to bring discredit upon the armed forces [Clause 2].

3. Conduct constituting a non-capital crime not punishable under another article of the UCMJ [Clause 3].

B. Fair Notice.

1. Due Process notice of criminal sanction. The Fifth Amendment requires that a person have "fair notice" that an act is criminal before being prosecuted for that act. Potential sources of this notice include: federal law, state law, military case law, military custom and usage and military regulations. *United States v. Vaughan*, 58 M.J. 29, 31-32 (2003); *United States v. Saunders*, 59 M.J. 1 (2003) (holding the existence of federal and state anti-stalking statutes provided sufficient notice to accused convicted of "harassment" under UCMJ art. 134, Clause 2).

2. "General notice" of elements in the specification. A person must also have "fair notice as to the standard applicable to the forbidden conduct" against which he must defend. *Vaughan*, 58 M.J. at 31, citing *Parker v. Levy*, 417 U.S. 733, 755 (1974); *Sanders*, 59 M.J. at 9 (holding a specification patterned after a Georgia statute provided the accused with adequate notice of the elements of "harassment" charged under Article 134, Clause 2).

C. Elements. MCM, pt. IV, ¶60b.

1. Depend upon the nature of the charged offense.

a. For Clause 1 or Clause 2 offenses, the evidence must prove the following elements:

(1) That the accused did or failed to do certain acts; and

(2) That, under the circumstances, the accused's conduct 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. For Clause 3 offenses, the evidence must prove every element of the incorporated or assimilated offense.

D. 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, ¶60b(2)(c).

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).

3. A breach of military custom may result in a Clause 1 offense. MCM, pt. IV, ¶60c(2)(b). To serve as the basis of an Article 134 offense, the custom must satisfy the following requirements:

   a. Long established practice;

   b. Common usage attaining the force of law;

   c. Not contrary to military law; and

   d. Ceases when observance has been abandoned.

   United States v. Smart, 12 C.M.R. 826 (A.F.B.R. 1953).

4. Applications.

   a. Cross-dressing. *United States v. Davis*, 26 M.J. 445 (C.M.A. 1988) (on-post); *United States v. Guerrero*, 33 M.J. 295 (C.M.A. 1991) (off-post), *cert. denied*, 502 U.S. 1096 (1992).

   b. Displaying images depicting bestiality to subordinates while on duty. *United States v. Farence*, 57 M.J. 674 (C.G. Ct. Crim. App. 2002), *pet. denied*, 58 M.J. 203 (2003).

   c. Possession of child pornography. *United States v. Mason*, 60 M.J. 15 (2004) (may be prejudicial to good order and discipline regardless of whether images are "virtual" and thus constitutionally protected from prosecution under civilian criminal law).

   d. Being naked in a subordinate NCO's bedroom with that NCO's partially clad wife. *United States v. Diggs*, 52 M.J. 251 (2000).

   e. Wrongfully inhaling chemical fumes. *United States v. Glover*, 50 M.J. 476 (1999) (inhaling Dust-Off, a cleaning product that contained chlorodifluoromethane and difluromethane).

   f. "Mooning" under circumstances prejudicial to good order and discipline. *United States v. Choate*, 32 M.J. 423 (C.M.A. 1991).

g. Self-injury without the intent to avoid service. *United States v. Ramsey*, 40 M.J. 71 (C.M.A. 1994) (enumerated at MCM, pt. IV, ¶103a in 1995).

h. Unprotected sexual intercourse while HIV-positive. *United States v. Woods*, 28 M.J. 318 (C.M.A. 1989) (enumerated in 1999 at MCM, pt. IV, ¶100a as reckless endangerment).

i. Setting off false fire alarm and writing on the doors of a dormitory. *United States v. Koop*, 9 M.J. 564 (A.F.C.M.R. 1980).

j. Being a "Peeping Tom" in a women's latrine. *United States v. Johnson*, 4 M.J. 770 (A.C.M.R. 1978).

E. 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 to lower the service in public esteem. MCM, pt. IV, ¶60c(3); *see United States v. Saunders*, 59 M.J. 1 (2003).

2. Wholly private conduct is generally not reached by Article 134; however, "open and notorious" conduct may be service-discrediting. *United States v. Hickson*, 22 M.J. 146 (C.M.A. 1986); *United States v. Berry*, 20 C.M.R. 325 (C.M.A. 1956) (multiple sexual partners in a single hotel room; parties knew others were present).

3. Public knowledge of military status and conduct.

a. Conduct may be service discrediting where civilians are aware of both the military status of the offender and the discrediting behavior. *United States v. Lowe*, 16 C.M.R. 228 (C.M.A. 1954) (drunkenness in the presence of citizens of a foreign country is discrediting to the service).

b. Knowledge required? *United States v. Perez*, 33 M.J. 1050 (A.C.M.R. 1991) (some civilian must be aware of the behavior and the military status of the offender); *cf. United States v. Green*, 39 M.J. 606 (A.C.M.R. 1994) (no evidence that adultery in the barracks was service-discrediting, in violation of local civil law or community standards). *But see United States v. Nygren*, 53 M.J. 716 (C.G. Ct. Crim. App. 2000) (Clause 2 covers "all conduct of a *nature* to bring discredit upon the armed forces. . . which *has a tendency* to bring the service into disrepute or which *tends* to lower it in public esteem.").

4. Violation of state or foreign law is not *per se* service discrediting. *United States v. Sadler*, 29 M.J. 370 (C.M.A. 1990).

5. Applications.

a. "Open and notorious" sexual activities.

(1) It is not necessary that a third person actually observe the act, but only that it is reasonably likely that a third person would perceive it, considering the location of the act itself, and the attendant circumstances surrounding its commission. *See United States v. Izquierdo*, 51 M.J. 421 (1999) (intercourse in a barracks room with two roommates in the room, even though the accused hung a sheet that substantially blocked roommates' side of room).

(2) *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 barracks 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) *United States v. Sanchez*, 29 C.M.R. 32 (C.M.A. 1960).

b. False public speech about military service. *United States v. Stone*, 40 M.J. 420 (C.M.A. 1994).

c. Non-consensual, obscene phone calls. *United States v. Sullivan*, 42 M.J. 360 (1995) (asking strangers intimate questions about their sexual activities under the pretense of conducting a survey).

d. Resisting arrest / flight from apprehension by non-military authorities. *United States v. Seymore*, 19 M.J. , 608 (A.C.M.R. 1984) (foreign police); *United States v. Williams*, 26 M.J. 606 (A.C.M.R. 1988) (post exchange detective).

e. Possession of child pornography. *United States v. Mason*, 60 M.J. 15 (2004) (may be service-discrediting regardless of whether images are "virtual" and thus constitutionally protected from prosecution under civilian criminal law).

f. Child Neglect. *United States v. Vaughan*, 58 M.J. 29 (2003) (leaving an infant unattended overnight).

g. Harassment / Stalking. *United States v. Saunders*, 59 M.J. 1 (2003) (pattern of harassing phone call and visits to ex-fiancée in Germany).

F. Crimes and Offenses Not Capital (Clause 3).

1. Violation of a non-capital federal criminal statute.

a. Jurisdiction. The offense must occur in a place where the law in question applies. MCM, pt. IV, & 60c(4)(c)(i). S*ee, e.g.*, *United States v. Martens*, 59 M.J. 501 (A.F. Ct. Crim. App 2003); *United States v. Cream*, 58 M.J. 750 (N.M. Ct. Crim. App. 2003) (holding Rota Naval Station was within the statute's definition of "Federal territory").

b. Attempts. A service member can be convicted of an attempt to commit a federal offense under Clause 3, even if the underlying federal statute has no attempt provision. *United States v. Craig*, 19 M.J. 166 (C.M.A. 1985).

c. Proof. Elements of the federal statute are controlling. *United States v. Ridgeway*, 13 M.J. 742 (A.C.M.R. 1982).

d. Lesser-included offenses. 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 1 or 2, Article 134. *United States v. Sapp*, 52 M.J. 90 (2000); *United States v. Augustine*, 52 M.J. 95 (2000); *United States v. Mayo*, 12 M.J. 286 (C.M.A. 1982). *See also United States v. Gould*, 13 M.J. 734 (A.C.M.R. 1982).

2. Applications

a. Threat against the President: 18 U.S.C. §87. *United States v. Ogren*, 54 M.J. 481 (2001) (threat made while in pretrial confinement for unrelated charges: "I'm going to find Clinton and blow his [expletive] brains out").

b. Child pornography: 1996 Child Pornography Prevention Act (CPPA), 8 U.S.C. §§ 2252A.

(1) *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002). The definition of "child pornography" in the CPPA was overbroad in violation of the First Amendment's protection of free speech. Specifically, the "virtual" image prohibitions defined in 18 U.S.C. §§ 2256(8)(B) and 2256(8)(D) swept too broadly by prohibiting non-obscene sexually explicit depictions created without actually victimizing minors.

(2) *United States v. O'Connor*, 58 M.J. 450 (2003) (holding guilty plea to violation of the CPPA not provident, because the record was unclear whether accused was pleading guilty to possession of virtual or actual child pornography; could not be upheld as a provident plea to Clause 2, because there was no discussion of service-discrediting character during the providence inquiry).

(3) *United States v. Tynes*, 58 M.J. 704 (Army Ct. Crim. App. 2003) (holding that the instructions negated any possibility that the convictions were based on unconstitutional portions of the CPPA; contains a pattern instruction for child pornography cases), *review granted*, 2004 CAAF LEXIS 910 (Sept. 9, 2004).

(4) *United States v. Mason*, 60 M.J. 15 (2004) (holding accused's improvident plea to violation of the CPPA was provident to Clause 1 or 2 offense).

c. Federal Assimilative Crimes Act (FACA): 18 U.S.C. §13.

(1) Adopts un-preempted state offenses as the local federal law of application.

(2) The purpose of FACA is to fill the gaps left by the patchwork of federal statutes. *United States v. Picotte*, 30 C.M.R. 196 (C.M.A. 1961).

(3) "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).

(4) Applies state law whether enacted before or after passage of the FACA. *United States v. Rowe*, 32 C.M.R. 302 (C.M.A. 1962).

(5) The FACA may not be used to extend or narrow the scope of existing federal criminal law. *Lewis v. United States*, 118 S.Ct. 1135 (1998); *United States v. Perkins*, 6 M.J. 602 (A.C.M.R. 1978).

(6) Jurisdiction.

(a) The government must establish exclusive or concurrent federal jurisdiction before the FACA is applicable. *See United States v. Dallman*, 34 M.J. 274 (C.M.A. 1992).

(b) A guilty plea may be sufficient to establish jurisdiction required by the FACA. *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. Limitations on the Use of Article 134.

1. The Preemption Doctrine.

a. Article 134 cannot be used to prohibit conduct "specifically mentioned" by Congress in UCMJ arts. 78 and 80-132. MCM, pt. IV, ¶60c(5)(a).

b. Under the test provided in *United States v. Wright*, 5 M.J. 106 (C.M.A. 1978), conduct is "specifically mentioned" 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. For preemption to apply, it must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way. *United States v. Kick*, 7 M.J. 82 (C.M.A. 1979).

d. FACA "preemption." As addressed above, the Federal Assimilative Crimes Act (FACA), 18 U.S.C. §13, permits the adoption of state offenses as the local federal law of application. Such crimes are charged as violations of Article 134, Clause 3. Whether the state law may be assimilated is governed by a two-part test:

(a) Is the accused's "act or omission . . . made punishable by any enactment of Congress"? If not, then assimilate. If so, then ask the next question.

(b) Do the relevant federal statutes preclude application of the state law, for example, because its application would interfere with the achievement of a federal policy, effectively rewrite an offense definition that Congress carefully considered, or because the federal statutes reveal an intent to occupy the entire field of misconduct under consideration? (*i.e.*, Is there evidence of Congress's intent to permit or deny assimilation?)

Lewis v. United States, 118 S.Ct. 1135 (1998).

e. Applications.

(1) 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).

(2) State statute prohibiting wrongfully eluding a police officer is not preempted. *United States v. Kline*, 21 M.J. 366 (C.M.A. 1986).

(3) State auto burglary statute is not preempted. *United States v. Sellars*, 5 M.J. 814 (A.C.M.R. 1978).

(4) State statute prohibiting hunting at night is not preempted. *United States v. Fishel*, 12 M.J. 602 (A.C.M.R. 1981).

(5) State child abuse statute is not preempted per se; however, evidence established 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 (1998).

(6) State statute prohibiting false reports of crimes is preempted. *United States v. Jones*, 5 M.J. 579 (A.C.M.R. 1978).

(7) 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).

(8) State statute prohibiting the unlawful termination of a pregnancy is not preempted by Articles 118 and 119. *United States v. Robbins*, 52 M.J. 159 (1999). *But see* UCMJ art. 119a (LEXIS 2004) (creating death or injury of an unborn child as an offense).

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. *See United States v. French*, 27 C.M.R. 245 (C.M.A. 1959).

H. Pleading Considerations.

1. Generally. Offenses arising under Article 134 that are either analogous to, or lesser-included offenses of, other offenses arising under the enumerated articles of the UCMJ should be pled separately; the trier of fact should be instructed that the accused could not, however, be convicted of both. *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994).

2. Clauses 1 and 2.

a. Use the form specification if the alleged misconduct falls under any offense listed in MCM, pt. IV, ¶¶61-113.

b. Drafting a specification for unenumerated misconduct:

(1) Identify and expressly plead the elements of the offense. The MCM provides that there are only two elements for Clause 1 and 2 offenses: act or omission by accused, and prejudicial or discrediting effect. MCM, pt. IV, ¶60b.

(2) Notice pleading is the rule. 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. Allege in the specification only those facts that make the accused's conduct a crime. *See* Appendix A below.

(3) Generally, no specific allegation is required that the conduct at issue is a disorder or neglect. MCM, pt. IV, ¶60c(6)(a); *United States v. Williams*, 24 C.M.R. 135 (C.M.A. 1957).

(4) 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.

(5) However, when drafting novel specifications, it may be necessary to allege wrongfulness of the act if it would be otherwise innocent conduct. *United States v. Regan*, 11 M.J. 745 (A.C.M.R. 1981) (dismissing specification for failure to state an offense that alleged that the accused "threw butter on the ceiling in the dining facility").

3. Clause 3.

a. Identify the federal or assimilated state statute. MCM, pt. IV, ¶60c(6)(b).

b. Consult civilian case law or pattern jury instructions. Each element of the federal or assimilated state statute must be alleged expressly or by necessary implication. MCM, pt. IV, ¶60c(6)(b).

c. Sample specifications. *See* Appendix B.

I. Punishment.

1. For the offenses listed in MCM, pt. IV, ¶¶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 ¶¶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 it 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).

c. If the punishment for an unlisted offense cannot be determined by applying the above tests, then the punishment is that provided by the civilian statute or as authorized by the custom of the service. R.C.M. 1003(c)(1)(B)(ii).

(1) 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).

(2) 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).

(3) When a state statute is assimilated, its penalty is also assimilated. *United States v. Picotte*, 30 C.M.R. 196 (C.M.A. 1961).

III. CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN. UCMJ ARTICLE 133.

A. Elements. MCM, pt. IV, ¶59b.

1. The accused did or omitted to do certain acts; and

2. Under the circumstances, these acts or omissions constituted conduct unbecoming an officer and a gentleman.

B. Class of Potential Offenders.

1. "Gentleman" includes both male and female offenders. MCM, pt. IV, ¶59c(1). *See, e.g., United States v. Norvell*, 26 M.J. 477 (C.M.A. 1988).

2. Commissioned officers, cadets, and midshipmen. UCMJ art. 133.

   a. "Commissioned officer" includes commissioned warrant officers. *See United States v. Beckermann*, 35 M.J. 842 (C.G.C.M.R. 1992).

   b. "Cadet" means a cadet of the United States Military Academy, the United States Air Force Academy, or the United States Coast Guard Academy. "Midshipman" means a midshipman of the United States Naval Academy and any other midshipman on active duty in the naval service. UCMJ art. 1.

C. "Unbecoming" Conduct.

1. Includes conduct that dishonors, disgraces or seriously compromises the offender professionally and/or personally. MCM, pt. IV, ¶59c(2); *United States v. Tedder*, 24 M.J. 176 (C.M.A. 1987); *United States v. Schumacher*, 11 M.J. 612 (A.C.M.R. 1981).

2. Merely failing to meet the standards expected of an ideal officer does not amount to an Article 133 violation. MCM, pt. IV, ¶59c(2). It is reserved for "serious delicts of officers." *United States v. Wolfson*, 36 C.M.R. 722 (A.B.R. 1966). The offender's dishonor or disgrace must be severe. *See United States v. Giordano*, 35 C.M.R. 135 (C.M.A. 1964). The misconduct "must be so disgraceful as to render an officer unfit for service." *United States v. Guaglione*, 27 M.J. 268 (C.M.A. 1988).

3. Article 133 is not unconstitutionally void for vagueness, in part due to this rigorous standard. *See Parker v. Levy*, 417 U.S. 733, 753 (1974) (act "must so offend so seriously against law, justice, morality, or decorum as to expose to disregard, 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").

4. The offender may be acting in either a personal or professional capacity. *See, e.g.*, *United States v. Bonar*, 40 C.M.R. 482 (A.B.R. 1969) (essentially personal conduct--driving private automobile in violation of a state judge's order); *United States v. Gunnels*, 21 C.M.R. 925 (A.B.R. 1956) (essentially professional conduct--accepting money from an enlisted member to procure a discharge).

5. Opinion testimony from witnesses regarding whether the accused's conduct is unbecoming an officer and a gentleman is received at trial and considered by the appellate court. *United States v. Lewis*, 28 M.J. 179 (C.M.A. 1989); *United States v. Guaglione*, 27 M.J. 268 (C.M.A. 1988).

6. A violation of Article 133 is not predicated upon violation of another article of the UCMJ.

   a. Offender can violate Article 133 without violating another punitive article. *United States v. Taylor*, 23 M.J. 314 (C.M.A. 1987) (affirming conviction for conduct not amounting to a solicitation to commit larceny); *United States v. Lewis*, 28 M.J. 179 (C.M.A. 1989) (charging fellow officer $2000.00 for tutoring in platoon leader skills); *United States v. Bilby*, 39 M.J. 467 (C.M.A. 1994), *cert. denied*, 115 S. Ct. 724 (1995) (solicitation to violate arguably unconstitutional statute was unbecoming conduct).

   b. Offender can violate another punitive article without violating Article 133. *United States v. Sheehan*, 15 M.J. 724, 727 (A.C.M.R. 1983) (two-day AWOL from administrative duties during peacetime does not amount to an Article 133 violation); *United States v. Clark*, 15 M.J. 594 (A.C.M.R. 1983) (failure to go to PT formation, based upon arriving 15 minutes late, although a violation of Article 86, did not constitute an Article 133 offense).

D. Applications.

1. Financial Irregularities.

   a. Loaning money to subordinates and charging usurious interest rates. *United States v. Giordano*, 35 C.M.R. 135 (C.M.A. 1964). *Cf. United States v. Smith*, 16 M.J. 694 (A.F.C.M.R. 1983) (merely borrowing money from a subordinate may not constitute a violation of Article 133).

b. Charging a fellow officer "tuition" for tutoring in officer skills. *United States v. Lewis*, 28 M.J. 179 (C.M.A. 1989)

c. Wrongfully failing to pay a just debt. *United States v. Brunson*, 30 M.J. 766 (A.C.M.R. 1990).

d. Negligently writing 76 dishonored checks. *United States v. Jenkins*, 39 M.J. 843 (A.C.M.R. 1994).

2. Honesty/Integrity.

a. Perjury at a state criminal trial. *United States v. Schneider*, 38 M.J. 387 (C.M.A. 1993).

b. Dishonorable catheterization to avoid giving a valid urine sample. *United States v. Norvell*, 26 M.J. 477 (C.M.A. 1988).

c. Forging false PCS orders. *United States v. Timberlake*, 18 M.J. 371 (C.M.A. 1984).

d. Lying to a superior to get a pass. *United States v. Sheehan*, 15 M.J. 724 (A.C.M.R. 1983).

e. Violation of a state judge's order. *United States v. Bonar*, 40 C.M.R. 482 (A.B.R. 1969).

f. Public association with person known by accused to be drug smuggler. *United States v. Maderia*, 38 M.J. 494 (C.M.A. 1994).

3. Indecent/Immoral Conduct.

a. Sexual intercourse with a subordinate during duty hours. *United States v. Jefferson*, 21 M.J. 203 (C.M.A. 1986) (per curiam); *United States v. Callaway*, 21 M.J. 770 (A.C.M.R. 1986) (off-duty, on-post intercourse).

b. Sexual exploitation of a civilian waitress under the accused's supervision. *United States v. Shober*, 26 M.J. 501 (A.F.C.M.R. 1986).

c. Mailing a sexually suggestive letter to a 14-year old student in response to her letter written as part of a public support campaign during Operation DESERT STORM. *United States v. Hartwig*, 39 M.J. 125 (C.M.A. 1994).

d. Indecent language may be unbecoming conduct even when uttered in "private." *United States v. Moore*, 38 M.J. 490 (C.M.A. 1994).

e. Marital misconduct. *United States v. Schneider*, 38 M.J. 387 (C.M.A. 1993) (adultery); *United States v. Czekala*, 38 M.J. 566 (A.C.M.R. 1993) (deceitful orchestration of divorce), *aff'd*, 42 M.J. 168 (1995).

f. Cross-dressing at off-post bar frequented by homosexuals. *United States v. Modesto*, 39 M.J. 1055 (A.C.M.R. 1994), *aff'd*, 43 M.J. 315 (1995).

4. Misconduct with enlisted members / subordinates.

a. Obtaining $200 from an enlisted member to procure a discharge. *United States v. Gunnels*, 21 C.M.R. 925 (A.B.R. 1956).

b. Smoking marijuana with enlisted members. *United States v. Graham*, 9 M.J. 556 (N.C.M.R. 1980); *see United States v. Newak*, 25 M.J. 564 (A.F.C.M.R. 1987), *aff'd*, 29 M.J. 304 (C.M.A. 1989).

c. Consensual sodomy with enlisted members off post. *United States v. Coronado*, 11 M.J. 522 (A.F.C.M.R. 1981).

d. Sexual intercourse with subordinate commissioned officer while other military personnel were present in the same house. *United States v. Callaway*, 21 M.J. 770 (A.C.M.R. 1986).

e. Conviction reversed where accused officer visited legal brothels with enlisted soldiers, where the accused did not participate in, or seek to participate in, sexual activities. *United States v. Guaglione*, 27 M.J. 268 (C.M.A. 1988).

f. Attempting to use subordinates to get a date for the accused with another subordinate. *United States v. Tedder*, 24 M.J. 176 (C.M.A. 1987).

g. Communicating a procedure for concealing marijuana use by catheterization and admitting personal use of the procedure to an enlisted subordinate. *United States v. Norvell*, 26 M.J. 477 (C.M.A. 1988).

E. Pleadings.

1. When an offense alleged to violate UCMJ art. 133 is the same as another offense set forth in the MCM, the elements for the former offense are the same as those set forth for the specific offense, with the additional requirement that the act or omission is conduct unbecoming an officer and gentleman. MCM, pt. IV, ¶59c(2).

2. Failing to allege that the act was dishonorable or the conduct was unbecoming an officer and a gentleman is not necessarily fatal. *United States v. Wilson*, 14 M.J. 680 (A.F.C.M.R. 1982).

3. Lesser-included offenses.

a. Where the underlying acts of misconduct are the same, a service disorder or discredit under Article 134 is a lesser-included offense of Article 133. *United States v. Cherukuri*, 53 M.J. 68 (2000) (holding four specifications of indecent assault were multiplicious with specification of conduct unbecoming an officer by abusing position as a medical doctor to indecently assault four women); *United States v. Rodriquez*, 18 M.J. 363 (C.M.A. 1984).

b. Where the underlying act of misconduct is the same, larceny under Article 121 is a lesser-included offense of Article 133. *United States v. Frelix-Vann*, 55 M.J. 329 (2001) (officer pled guilty to one specification of conduct unbecoming and one specification of larceny for stealing a package of dog bones, a "Die Hard with Vengence" video cassette, an "Alien Nation" video cassette, a "Predator 2" video cassette, a "New Edition" compact disc, and an "LL Cool J" compact disc). *See also United States v. Palagar*, 56 M.J. 294 (2002) (larceny and conduct unbecoming multiplicious where unauthorized purchases with government credit card constituted same underlying misconduct for both offenses).

4. Allegations of "undue familiarity" and "excessive social contacts" with married female service members were insufficient to allege unbecoming conduct. *United States v. Kroop*, 38 M.J. 470 (C.M.A. 1993). *But see United States v. Boyett*, 42 M.J. 150 (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 (2001) (holding specification stating USAF LTC had "unprofessional relationship" with LT in his command stated an offense).

F. Referral Decision.

1. Commissioned officers have traditionally been held to a higher standard of conduct than enlisted members or civilians. *United States v. Tedder*, 24 M.J. 176 (C.M.A. 1987); *United States v. Court*, 24 M.J. 11, 17 n.2 (C.M.A. 1987) (Cox, J., concurring).

2. The convening authority may take officer's commissioned status into account in making the referral decision. *United States v. Means*, 10 M.J. 162 (C.M.A. 1981).

3. Opinion testimony from witnesses regarding whether the accused's conduct is unbecoming an officer and a gentleman is received at trial and considered by the appellate court. *United States v. Lewis*, 28 M.J. 179 (C.M.A. 1989); *United States v. Guaglione*, 27 M.J. 268 (C.M.A. 1988).

G. 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 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 duplicitously 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).

APPENDIX A: LEGALLY SUFFICIENT SPECIFICATIONS

I. The Test. *United States v. Sell*, 11 C.M.R. 202 (C.M.A 1953). A legally sufficient specification must:

A. Allege all the elements of the offense,

B. Provide notice to the accused of the offense against which he must defend, and

C. Give sufficient facts to protect against re-prosecution.

II. Alleging the Elements.

A. Every element must be alleged either *directly* or by *fair implication*.

B. Applications.

1. *United States v. Brown*, 42 C.M.R. 656 (A.C.M.R. 1970) ("club" alleges, by fair implication, a building or structure as required for housebreaking).

2. *United States v. Knight*, 15 M.J. 202 (C.M.A. 1983) ("burglariously" enter does not allege, by fair implication, the element of breaking and entering required for burglary).

C. Omissions.

1. Traditional, formal analysis. *United States v. Brice*, 38 C.M.R. 134 (C.M.A. 1967) ("wrongfully" omitted from possession spec; fatal defect).

2. "Guilty plea" or "greater tolerance" test. *United States v. Watkins*, 21 M.J. 208 (C.M.A. 1986) ("without authority" omitted from AWOL spec., was not fatal; flawed specifications first challenged on appeal are viewed with greater tolerance). *Watkins* "greater tolerance" test applies when:

a) The specification could reasonably be construed to charge a crime;

b) The specification is not challenged at trial;

c) The accused pleads guilty; and

d) No prejudice is shown.

3. Applications.

a) Omitting "knowledge." *United States v. Brown*, 25 M.J. 793 (N.M.C.M.R. 1987) (having "knowledge of" a lawful order omitted; fatal omission, prejudicial).

b) Omitting "wrongful" - *Brice* revisited. *United States v. Brecheen*, 27 M.J. 67 (C.M.A. 1988) ("wrongful" omitted from both conspiracy to distribute specs in guilty plea case; not fatal); *see also United States v. Woods*, 28 M.J. 318 (C.M.A. 1989) (failure to allege traditional words of criminality in a UCMJ art. 134, clause I spec not fatal).

c) Omitting "wrongful." *United States v. Simpson*, 25 M.J. 865 (A.C.M.R. 1988) ("wrongful" omitted from one of four distribution specs; not fatal, because fairly implied from other specifications).

d) Omitting "sexual intent." *United States v. LeProwse*, 26 M.J. 652 (A.C.M.R. 1988) ("with intent to arouse sexual desires" omitted; alleged by fair implication).

e) Omitting "wrongful" in a contested case. *United States v. Bryant*, 28 M.J. 504 (A.C.M.R. 1989) ("wrongful" omitted from conspiracy to distribute spec in a contested case; fairly implied from separate distribution spec); *see also United States v. Woods*, 28 M.J. 318 (C.M.A. 1989) (words of criminality omitted from Art. 134 specification alleging reckless endangerment for AIDS-related misconduct; specification adequate).

III. Notice and Protection from Re-prosecution.

A. *United States v. Curtiss*, 42 C.M.R. 4 (C.M.A. 1970) (holding wrongful appropriation of "personal property" too vague).

B. *United States v. Alcantara*, 40 C.M.R. 84 (C.M.A. 1969) (holding larceny of "foodstuffs" sufficient).

C. *United States v. Weems*, 13 M.J. 609 (A.F.C.M.R. 1982) (holding larceny of "three unknown items" was vague but sufficient to protect the accused from re-prosecution for any three items on that date).

D. *United States v. Durham*, 21 M.J. 232 (C.M.A. 1986) (holding stolen property sufficiently identified in record to protect from a second prosecution; not fatally defective).

E. *United States v. Peszynski*, 40 M.J. 874 (N.M.C.M.R. 1994)(setting aside conviction on ground that conduct popularly styled sexual harassment did not state an offense).

IV. Bill of Particulars. R.C.M. 906(b)(6).

Motion to compel the government to inform the accused of the precise misconduct alleged in the specification. *See, e.g., United States v. Mobley,* 31 M.J. 273 (C.M.A. 1990).

APPENDIX B: PLEADING NON-CAPITAL FEDERAL CRIMES UNDER ARTICLE 134, CLAUSE 3

CHARGE: VIOLATION OF THE UNIFORM CODE OF MILITARY JUSTICE, ART. 134.

[Violation of U.S. Code]

Specification: In that SGT John Jones, U.S. Army, did, at Fort Bragg, North Carolina, a military installation within the special maritime and territorial jurisdiction of the United States, between on or about 1 October 2003 and 30 November 2003, unlawfully bring into the United States a firearm he obtained while deployed to Iraq during Operation Iraqi Freedom, to wit: a folding-stock AK-47 assault rifle with bayonet, in violation of 26 U.S.C. §5844, [such conduct being prejudicial to good order and discipline in the armed forces].

[Assimilated State Law]

Specification: In that SPC Joseph Jones, U.S. Army, did, at Fort Hood, Texas, a military installation within the special maritime and territorial jurisdiction of the United States, on or about 4 February 2004, unlawfully enter a 2001 Honda Accord automobile, the property of SSG John M. Smith, with intent to commit a criminal offense therein, to wit: larceny of one car radio, in violation of §30.04 of the Texas Penal Code, and 18 U.S.C. §13, [such conduct being prejudicial to good order and discipline in the armed forces].

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APPENDIX C: RECENT UCMJ AMENDMENTS

I. ARTICLE 43, UCMJ—STATUTE OF LIMITATIONS.

A. Amended by the DoD Authorization Act for Fiscal Year 2004, 24 Nov 03.

B. Provides extended limitations period for "child abuse" offenses.

1. Art. 120, rape and carnal knowledge.

2. Art. 124, maiming.

3. Art. 125, sodomy. The amendment reads, "Sodomy in violation of section 925 of this title (article 126)." Clearly, this is a typographical error.

4. Art. 128, aggravated assault or battery. Simple assault is not included.

5. Art. 134, assault with intent to commit murder, voluntary manslaughter, rape, or sodomy.

6. Art. 134, indecent assault.

7. Art. 134, indecent acts or liberties with a child.

C. SPCMCA must receive charges NLT victim's 25th birthday.

D. Retroactivity. Application to acts committed before 24 Nov 03.

1. Amendment does not address.

2. *Ex Post Facto Clause* precludes application if previous limitations period expired. *Stogner v. California*, 539 U.S. 607, 123 S. Ct. 2446 (2003).

3. May extend limitations period that had not expired on 24 Nov 03. *See Stogner*, 123 S. Ct. at 2453.

II. ARTICLE 111—DRUNKEN OR RECKLESS OPERATION.

A. Amended by the DoD Authorization Act for Fiscal Year 2004, 24 Nov 03.

B. Punishes blood alcohol content (BAC) "equal to or exceeding" applicable limit.

C. BAC limit in U.S. is the lesser of:

1. State law BAC limit.

2. 0.10 grams alcohol per 100 mL blood or 210 L breath.

D. "BAC limit" definition slightly modified.

E. References to "maximum" BAC limit eliminated.

III. ARTICLE 119A—DEATH OF INJURY TO UNBORN CHILD (CREATED 1 APR 04).

A. Created by the Unborn Victims of Violence Act of 2004 (Laci and Connor's Law), 1 Apr 04.

B. Provides separate punishment for death/injury to an unborn child caused by the following offenses against the mother:

1. Art. 118, murder.

2. Art. 119(a), voluntary manslaughter.

3. Art. 119(b)(2), involuntary manslaughter during commission of offense directly affecting the person of the victim ("misdemeanor manslaughter"). This does <u>not</u> include Art. 119(b)(1), involuntary manslaughter by culpable negligence.

4. Art. 120(a), rape.

5. Art. 124, maiming.

6. Art. 126, arson.

7. Art. 128, assault.

C. "Unborn child." A member of the species *homo sapiens*, at any stage of development, who is carried in the womb.

D. *Mens rea*. Art. 119a does not require proof of:

1. Knowledge, or negligent lack of knowledge, regarding pregnancy of victim of underlying offense.

2. Intent to kill or injure unborn child.

3. Any *mens rea* beyond that required for underlying offense.

4. But, attempted or intentional killing of unborn child punished under Arts. 80, 118, 119(a), not under Art. 119a.

E. Exemptions. Art. 119a does not cover:

1. Consensual abortion of unborn child.

2. Medical treatment of mother or unborn child.

3. Death or injury caused by unborn child's mother.

F. Punishment.

1. "Consistent with" conduct causing the same injury or death to mother.

2. Death penalty not authorized.

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53D GRADUATE COURSE

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MAJ ROBERT BEST
SEPTEMBER 2004

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53D GRADUATE COURSE

SENTENCING AND CORRECTIONS

I. PRESENTENCING PROCEDURES. RCM 1001.

A. Basic Procedures. **RCM 1001(a)(1)**.

1. Matters to be presented by the government. The Trial Counsel's case in "aggravation." **RCM 1001(b)**. Counsel may present:

a) Service data relating to the accused from the charge sheet.

b) Personnel records reflecting the character of the accused's prior service.

c) Prior convictions.

d) Circumstances directly relating to or resulting from the offense(s).

e) Opinion evidence regarding past duty performance and rehabilitative potential.

2. Defense counsel presents the case in extenuation and mitigation. **RCM 1001(c)**.

3. Rebuttal and surrebuttal. **RCM 1001(d)**.

4. Additional matters. **RCM 1001(f)**.

5. Arguments. **RCM 1001(g)**.

6. Rebuttal argument at MJ's discretion. **RCM 1001(a)(1)(F)**.

B. Matters Presented by the Prosecution. **RCM 1001(b)**.

1. Service data relating to the accused taken from the charge sheet. **RCM 1001(b)(1)**.

a) Name, rank and unit or organization.

b) Pay per month.

c) Current service (initial date and term).

d) Nature of restraint and date imposed.

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.

2. Personnel records reflecting character of prior service. **RCM 1001(b)(2).**

a) "*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. 5-28*b* implements RCM 1001(b)(2).

b) AR 27-10, para. 5-28*a* illustrates, in a non-exclusive manner, those items qualifying for admissibility under RCM 1001(b)(2) and (d).

c) 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. 5-28*b*. 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.

(1) *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).

(2) *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.

(3) *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].

(4) *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 admissible under RCM 1001(b)(2) *not* RCM 1001(b)(3).

(5) *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).

d) Article 15s.

(1) Ordinarily, to be admissible in sentencing, the proponent must show that that the accused had opportunity to consult with counsel and 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).

(2) *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.

(3) *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 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.

(4) *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.

(5) *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.

(6) *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.

(7) *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.

e) Letters of Reprimand.

(1) *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.

(2) *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.)

(3) *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 M.R.E. 403 was not abused.

f) Caveats.

(1) 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).

(2) 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)).

(3) *United States v. Vasquez*, 54 M.J. 303 (2001). Plea-bargaining statements are not admissible (M.R.E. 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).

g) Defects in documentary evidence. *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 evidence on the document or attached thereto 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*.

h) 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).

3. Prior convictions - civilian and military. **RCM 1001(b)(3).**

a) 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."

(1) *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).

(2) 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).

b) Use of prior conviction.

(1) *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).

(2) *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.

(3) *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.

c) Military judge must apply the M.R.E. 403 balancing test. *United States v. Glover*, 53 M.J. 366 (2000).

d) Pendency of appeal. RCM 1001(b)(3)(B).

(1) Conviction is still admissible.

(2) Pendency of appeal is admissible as a matter of weight to be accorded the conviction.

(3) 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.

e) Authentication under Section IX of MRE required.

f) "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).

g) Methods of proof.

(1) DA Form 2-2 (Insert Sheet to DA Form 2-1, Record of Court Martial Convictions).

(2) DD Form 493 (Extract of Military Records of Previous Convictions).

(3) Promulgating order (an order is not required for a SCM. (RCM 1114(a)(3))).

(4) 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.

(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).

(5) Arraignment calendar.

(a) *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).

(b) *United States v. Mahaney*, 33 M.J. 846 (A.C.M.R. 1991). Civilian conviction is not self-authenticating because not under seal.

(6) 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.

(7) 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:

(a) MRE 803(6), records of regularly conducted activity; or

(b) MRE 801(d)(2), admission by party opponent.

4. 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).

a) ". . . [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).

b) Three components – "Evidence in aggravation includes, but is not limited to":

(1) 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."

(2) 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."

(3) 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."

c) *United States v. Nourse*, 55 M.J. 229 (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).

d) *United States v. Patterson*, 54 M.J. 74 (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. *But see 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)

e) *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.

f) *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.

g) *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.

h) *United States v. Duncan*, 48 M.J. 797 (N-M. Ct. Crim. App. 1998). Testimony by therapist that victim's testimony became progressively more traumatizing for the victim admissible.

i) *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.

j) *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.

k) *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.

l) *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.

m) *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.

n) *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.

o) *United States v. Streetman*, 43 M.J. 752 (A.F. Ct. Crim. App. 1995). Accused ordered to submit urine sample as part of random urinalysis. Accused dragged out time in which he had to supply sample, and court notes efforts to stall taking of urine specimen to maximize time available for body to rid itself of substance was proper matter in aggravation.

p) *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.

q) *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."

r) *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.

s) *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.

t) *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.

u) *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."

v) *United States v. Warner*, 59 M.J. 573 (A.F. Ct. Crim. App. 2003). Appellant was tried and convicted at a general court-martial of assault and battery upon a child under 16 years of age (lesser included offense of aggravated assault). On sentencing, the government called Dr. B to testify to the extent of the injuries upon the victim child. On appeal the appellant argued the evidence was inadmissible because the panel found the appellant not guilty of the greater offense and therefore contradicted the findings. The court found that the evidence was proper aggravation under 1001(b)(4) and did not contradict the findings. Dr. B did not testify to the degree of force necessary to produce death or grievous bodily harm.

w) *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."

x) *United States v. Skoog*, No. 9601723 (Army Ct. Crim. App. 1997). Evidence from expert on post-traumatic stress disorder did not directly relate to or result from offenses of which accused convicted, where expert only reviewed stipulations of expected testimony. The expert witness never interviewed the victim, and since the victim did not testify the expert never observed the victim's demeanor or her reaction to recounting the indecent acts of which the accused was convicted.

y) *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 "Mil. R. Evid. 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.

z) *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.

aa) *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).

bb) *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.

5. Opinion evidence regarding past duty performance and rehabilitative potential. **RCM 1001(b)(5).**

a) What does "rehabilitative potential" mean?

(1) The term "rehabilitative potential" means potential to be restored to "a useful and constructive place in *society*." **RCM 1001(b)(5).**

(2) *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).

(3) *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).

(4) *United States v. Graham*, 46 M.J. 583 (A.F. Ct. Crim. App. 1997). Court-martial may consider whether accused lied on stand as matter affecting rehabilitative potential.

b) Foundation for opinion testimony. **RCM 1001(b)(5)(B).**

(1) 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).

(2) *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.

(3) 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.

(4) *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.

(5) *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).

c) What's a proper bases of opinion testimony? **RCM 1001(b)(5)(C).**

(1) 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).

(2) *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).

d) What's the proper scope of opinion testimony? **RCM 1001(b)(5)(D).**

(1) 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."

(2) 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).

(a) *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."

(b) *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.

(c) *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 were improper because they linked the witness' opinion on rehabilitative potential with award of a punitive discharge.

e) 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).

(1) *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."

(2) *United States v. Griggs*, 59 M.J. 712 (A.F. Ct. Crim. App. 2004). 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 Air Force Court 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.

f) Specific acts? RCM 1001(b)(5)(E) and (F).

(1) 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).

(2) 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).

g) Future Dangerousness.

(1) *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).

(2) *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.

(3) *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).

h) 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).

i) 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.

6. Matters admitted into evidence during findings. **RCM 1001(f)**.

a) **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.

b) Statements from providence inquiry.

(1) *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.

(2) *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.

(3) *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.

(4) *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.

(5) 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.

c) Evidence relating to any mental impairment or deficiency of accused. *United States v. Jones*, 46 M.J. 535 (N-M. Ct. Crim. App. 1997).

7. "Aggravation evidence" in stipulations of fact.

a) *United States v. Glazier*, 26 M.J. 268 (C.M.A. 1988).

(1) Inadmissible evidence may be stipulated to (subject to RCM 811(b) "interests of justice" and no government overreaching).

(2) Stipulation should be unequivocal that all parties agree stipulation is "admissible."

b) *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.

c) *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.

8. **Three-step process for analyzing sentencing matter presented by the prosecution per RCM 1001(b):**

a) Does the evidence fit one of the enumerated categories of RCM 1001(b)?

b) Is the evidence in an admissible form? *United States v. Bolden*, 34 M.J. 728 (N.M.C.M.R. 1991).

c) 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).

9. 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).

C. The Case in Extenuation and Mitigation. **RCM 1001(c)**.

1. Matters in extenuation. **RCM 1001(c)(1)(A).**

a) Explains circumstances surrounding commission of the offense, including those reasons that do not constitute a legal justification or excuse.

b) *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.

2. Matters in mitigation. **RCM 1001(c)(1)(B).**

a) 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.

b) *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.

c) *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.

d) *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.

e) *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.

f) Retirement benefits.

(1) *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.

(2) *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."

(3) *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.

(4) *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."

(5) *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.

(6) *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.

(7) *But see 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."

(8) *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.

3. Statement by the accused. **RCM 1001(c)(2).**

   a) Sworn statement. **RCM 1001(c)(2)(B).**

(1) Subject to cross-examination by trial counsel, military judge, and members.

(2) Rebuttable by:

(a) Opinion and reputation evidence of character for untruthfulness. RCM 608(a).

(b) Evidence of bias, prejudice, or any motive to misrepresent. RCM 608(c).

(c) Extrinsic evidence of prior inconsistent statements. RCM 613.

b) Unsworn statement by accused. **RCM 1001(c)(2)(C).**

(1) May be oral, written, or both.

(2) May be made by accused, counsel, or both.

(3) Matters covered in unsworn statement.

(a) *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."

(b) *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.

(c) *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.

(d) *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.

(e) *United States v. Sowell*, 59 M.J. 954 (N-M. Ct. Crim. App. 2004). Military judge did not abuse his discretion when he prevented the accused from telling the panel in her unsworn that a co-accused was acquitted at an earlier court-martial. Although *Grill* permits an accused to comment on sentences or a decision not to prosecute co-accuseds, a statement that a co-accused was acquitted amounts to telling the members that their findings are wrong, improperly implying that they should reconsider their findings.

(f) *United States v. Johnson*, 59 M.J. 666 (A.F. Ct. Crim. App. 2003). Military judge did not err in precluding appellant from mentioning, in his unsworn statement, that he passed a polygraph indicating he had no knowledge of the seventeen pounds of marijuana that the members had just convicted him of wrongfully

possessing. The military judge ruled that MRE 707 precluded the evidence and the evidence did not go to "extenuation." Additionally, the military judge saw no logical purpose for seeking to introduce the evidence other than to impeach the findings. The court agreed finding no abuse of discretion.

(4) When the accused makes an unsworn statement, he does not become a witness:

(a) 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).

(b) *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.

(c) *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.

(5) *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.

(6) *United states v. Kasper*, ACM 34351, 2001 CCA LEXIS 351, (A.F. Ct. Crim. App. Dec 28, 2001), *rev'd on other grounds*, 58 M.J. 314 (2003). The military judge instructed the defense that he would give the *Friedmann* instruction if the appellant, during her unsworn, said that her commander could administratively discharge her or made any sentence comparisons. The Air Force Court affirmed.

(7) *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."

c) 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).

d) If accused made an unsworn statement, government may only rebut statements of fact.

(1) *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.

(2) *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.

(3) *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.

(4) *United States v. Thomas*, 36 M.J. 638 (A.C.M.R. 1992). Unsworn, accused commented on his upbringing, pregnant girlfriend, reasons for enlisting in the Army, 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.

e) Relaxed rules of evidence. **RCM 1001(c)(3)**. *See United States v. Boone*, 49 M.J. 187, 198 n.14 (1998). The military judge may relax the rules of evidence when defense puts on case in extenuation and mitigation, but otherwise inadmissible evidence still not admitted at sentencing. Issue is one of authenticity and reliability of the evidence. *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); *United states v. Lowe*, 56 M.J. 914 (N-M. Ct. Crim. App. 2002).

4. 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.

5. Mental Impairment. *United States v. Jones*, 46 M.J. 535 (N-M. Ct. Crim. App. 1997). Though mental deficiency did not rise to level of a defense, it is relevant as additional matter at sentencing. *See also United States v. Doss*, 57 M.J. 182 (2002) (noting that defense counsel was ineffective for failing to present "extant" psychological evidence).

6. Rebuttal. **RCM 1001(d)**.

a) *United States v. Hursey*, 55 M.J. 34 (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.

b) *United States v. Reveles*, 41 M.J. 388 (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).

c) *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.

d) *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.

e) *United States v. Roth*, 52 M.J. 187 (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.

f) *Horner* and *Ohrt* apply to government rebuttal witnesses. *See United States v. Pompey*, 32 M.J. 547 (A.F.C.M.R. 1990).

g) 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 judge had begun to deliberate was not a bar to reopening the taking of evidence for rebuttal.

h) *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.

i) *United States v. Saferite*, 59 M.J. 270 (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.

7. 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).

8. Witnesses. **RCM 1001(e)**.

a) Who must the government bring?

(1) *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.

(2) *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.

D. Argument. **RCM 1001(g)**.

1. *United States v. Bolkan*, 55 M.J. 425 (2001). In sentencing argument, the defense counsel asked the panel not to give the accused confinement or a punitive discharge, and that if the panel must choose between confinement and a discharge, then it should give the accused a discharge. The CAAF reiterated the rule that when an accused asks the sentencing authority to remain on active duty, it is error for the defense counsel to concede the appropriateness of a punitive discharge. The court assumes that the military judge erred in not inquiring into whether the counsel's argument properly reflected the accused's desire, but finds harmless error.

2. *United States v. Pineda*, 54 M.J. 298 (2001). During sentencing argument, the defense counsel stated, "perhaps a bad-conduct discharge, and I don't like asking for one, but I'm practical it's going to happen . . . [is] appropriate in this particular case." The CAAF found it was error for the counsel to concede the appropriateness of a bad-conduct discharge, but found, after applying a *Strickland v. Washington*, 466 U.S. 668 (1984), ineffective assistance of counsel analysis, that the accused failed to prove he was prejudiced by this improper argument.

3. *United States v. Jenkins*, 54 M.J. 12 (2000). During sentencing argument, the TC argued that the accused "lied on the stand" and "has no rehabilitative potential" repeatedly referring to him as a "thief" and a "liar." Because the defense counsel did not object to the argument, the CAAF applied a "plain error" analysis, finding no plain error. The military judge's limiting instruction on the accused mendacity, cured any possible error.

4. *United States v. Baer*, 53 M.J. 235 (2000). The Assistant Trial Counsel (ATC) 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 defense objected

on the grounds of improper argument. The CAAF stated that such "Golden Rule arguments" are impermissible, however, when viewing the ATC's argument in its entirety, the court found "no basis for disagreeing with the lower court's conclusion that the . . . argument was not calculated to inflame the members' passions." The majority opinion 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." In a concurring opinion, Judge Effron (joined by Judge Sullivan) believed the argument, viewed in context, was improper and that the military judge erred in allowing it.

5. *United States v. Garren*, 53 M.J. 142 (2000). Trial counsel argued at sentencing – after the accused's unsworn statement asserted he did not believe he had anything to do with offenses – that the accused "is not accepting responsibility for what he has done." Trial counsel's comment on the evidence, the charges, and the accused's unsworn statement were fair comment.

6. *United States v. Stargell*, 49 M.J. 92 (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.

7. *United States v. Weisbeck*, 48 M.J. 570 (Army Ct. Crim. App. 1998), *rev'd on other grounds*, 50 M.J. 461 (1999). An accused is only to be sentenced at a court-martial for the offenses of which he is convicted, and not for uncharged or other offenses of which he is acquitted. It is improper argument for trial counsel to refer the panel to other acts of child molestation, of which the accused was tried and acquitted at a previous court-martial. The prior incidents, although admissible on the merits under MRE 404(b), were not a proper basis for which to increase the accused's sentence.

8. *United States v. Fortner*, 48 M.J. 882 (N-M. Ct. Crim. App. 1998). Trial counsel 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.

9. *United States v. Thomas*, 44 M.J. 667 (N-M. Ct. Crim. App. 1996). Trial counsel argued "CNO . . . has zero tolerance policy for anyone who uses . . . drugs." The court examined for plain error and found none in light of lenient sentence imposed. BUT, the court admonished

that given different facts, it would not hesitate to take corrective action when necessary.

10. *United States v. Hampton*, 40 M.J. 457 (C.M.A. 1994). Stipulation of expected testimony admitted during presentencing stated that in witness' opinion, 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." Citing *Ohrt*, CMA held that even if trial counsel's misstatement is characterized as a reasonable inference drawn from the expected testimony, such argument is still improper.

11. *United States v. Cantrell*, 44 M.J. 711 (A.F. Ct. Crim. App. 1996). Trial counsel argued accused had not been influenced by previous punishments in series of prior court-martial and civilian convictions. The court found no improper use of civilian convictions as they were used to show character of accused.

12. *United States v. Terlep*, 57 M.J. 344 (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 CAAF 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.

13. *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 judge's inquiry as "invasive," however, found no prejudice.

14. *United States v. Barrazamartinez*, 58 M.J. 173 (2003). Trial counsel's argument mentioned America's "war on drugs" and referred to the appellant as "almost a traitor." The defense counsel did NOT object to the TC's argument. The CAAF held that the "war on drugs" comment did not inject the command into the deliberation room; America's war on drugs was a matter of common knowledge. As for the traitor comment, after noting that the "Trial Counsel's reference to Appellant as 'almost a traitor' gives us pause," the court found that the TC said

"almost" and the term "traitor," which was used only once, was done so in the common (i.e., one who abuses a trust), not Constitutional, sense; therefore, there was no error.

15. *United States v. Melbourne*, 58 M.J. 682 (N-M. Ct. Crim. App. 2003). Trial counsel's argument asking sentencing authority to imagine the victim's "fear, pain, terror, and anguish as victim impact evidence" was not improper. *Compare United States v. Baer*, 53 M.J. 235 (2000) (improper to ask the sentencing authority to place themselves in the shoes of the victim).

16. *United States v. Rodriguez*, 60 M.J. 87 (2004). During her sentencing argument, the TC stated, "These are not the actions of somebody who is trying to steal to give bread so his child doesn't starve, sir, some sort of a [L]atin movie here. These are actions of somebody who is showing that he is greedy." The DC objected to the TC's use of the term "steal" and on the ground that TC was commenting on pretrial negotiations. The DC did not object to the reference to "[L]atin movie." The Navy-Marine Court could discern no logical basis for the comment and found the comment improper and erroneous. The court also stated that the comment was a gratuitous reference to race, but not an argument based on racial animus, nor likely to evoke racial animus. The court then tested for prejudice and found none. Based on the specific facts of the case, including the nature of the improper argument and that it occurred before a MJ alone during sentencing, there was no prejudice to a substantial right of the appellant. While race is different, the CAAF declines the appellant's invitation to adopt a *per se* prejudice rule in cases of argument involving unwarranted references to race.

17. *United States v. Garcia*, 57 M.J. 716 (N-M. Ct. Crim. App. 2002), *reversed on other grounds*, 59 M.J. 447 (2004). The appellant was convicted of conspiracy to commit robbery, robbery and countless other related offenses and sentenced to 125 years confinement. During the trial counsel's sentencing argument, the TC recommended specific periods of confinement per offense resulting in a total recommended period of confinement of 86 years. The TC also argued:

> Gentlemen, [sic] you have convicted him after his pleas of not guilty on every charge and every specification, every single one. It was not until after the government's case that Staff Sergeant Garcia decided to take responsibility for his actions….

> Go back to when you heard him take the stand. You probably noticed each other's faces. A lot of people did. Go back and capture that feeling again when you heard a Staff NCO say, "I held a gun to Chesney's head in his ear." Do you remember that? Do you remember when he said that? We were hoping against hope when he gets up on that stand to have logical explanation, something, maybe something way down deep inside everybody in this jury box was thinking, "Doggone, it's a Staff Sergeant in the Marine Corps. Give me something buddy. What have you got?"
>
> It's all a big mistake? No way….

Id. at 728-29. The defense counsel objected to the specific term of confinement per offense but otherwise failed to object. On appeal, the appellant argued that the itemization was improper and the quoted language amounted to improper comment on constitutional right to plead not guilty. The court found no error in the itemization. As for the quoted language, applying a plain error standard of review, the court found no error, characterizing the argument as "a comment about the appellant's explanation for his actions and his true criminal character." Additionally, the court noted that the TC was "simply pointing out that appellant had no excuse or justification for his criminal behavior."

E. Permissible Punishments. **RCM 1003**.

1. 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.

2. Forfeiture of pay and allowances. **RCM 1003(b)(2).**

a) 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.

b) 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:

(1) Confinement of MORE THAN 6 months, or death, or

(2) ANY confinement **AND** a punitive discharge.

c) 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).

d) 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:

(1) fourteen (14) days after sentencing, or

(2) the date on which the CA approves the sentence.

e) 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).

f) *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.

g) *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.

h) *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.

i) *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.

j) 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).

k) 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).

3. Fine. **RCM 1003(b)(3).**

a) *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.

b) *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.

c) *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.

d) *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.

e) *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.

4. Reduction in grade. **RCM 1003(b)(4); UCMJ art. 58a.**

a) "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

(1) a dishonorable or bad conduct discharge;

(2) confinement; or

(3) hard labor without confinement,

reduces that member to pay grade E-1."

b) 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. 5-28*e*.

c) NAVY. The Navy and Marine Corps' implementing regulation provides for automatic reduction to the grade of E-1 on conviction at court-martial and sentence that includes, whether suspended or not, EITHER a punitive discharge OR confinement in excess of ninety days or three months. JAGMAN, 0152c(1).

d) 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).

e) 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.

f) *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.

g) 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).

5. 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).

6. 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.

7. Confinement. **RCM 1003(b)(7)**.

a) 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.

b) *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.

c) 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*.

d) 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.

8. Punitive Separation. **RCM 1003(b)(8)**.

a) Dismissal.

(1) 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) *United States v. Stockman*, 43 M.J. 856 (N-M. Ct. Crim. App. 1996). Accused warrant officer sentenced to dismissal by court-martial, but at time of trial accused was not a *commissioned* warrant officer; therefore, only authorized punitive separation was dishonorable discharge. The court defined critical issue as accused's status at time of trial, which was non-commissioned warrant officer. The court recognized no difference in severity of punishment as between dismissal and dishonorable discharge, noted intent of court-martial to separate accused from service, and converted adjudged dismissal to dishonorable discharge.

b) DD is available to non-commissioned warrant officers or enlisted.

c) BCD is available only to enlisted.

9. Death. **RCM 1003(b)(9).**

a) Death may be adjudged in accordance with RCM 1004 (mechanics, aggravating factors, votes). *Loving v. United States*, 517 U.S. 748 (1996).

b) Specifically authorized for thirteen different offenses, including aiding the enemy, espionage, murder, and rape.

c) 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.

d) *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."

e) *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).*

f) 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."

10. Maximum Punishment. *See* Manual for Courts-Martial, Appendix 12.

a) Generally – lesser of jurisdiction of court or punishment in Part IV.

b) Offenses not listed in the Table of Maximum Punishments.

(1) Included or related offenses.

(2) United States Code.

c) Habitual offenders. **RCM 1003(d).**

(1) Three or more convictions within one year – DD, TF, one year confinement.

(2) Two or more convictions within three years – BCD, TF, three months confinement.

(3) Two or more offenses which carry total authorized confinement of 6 months automatically authorizes BCD and TF.

11. 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.

12. Prior NJP for same offense.

a) *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.

b) *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.

c) *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.

d) *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."

e) *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).

f) *United States v. Minyen*, 57 M.J. 804 (C.G. Ct. Crim. App. 2002). The appellant 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.

13. 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.

F. Instructions. **RCM 1005**.

1. *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.

2. *United States v. Hopkins*, 55 M.J. 546 (A.F. Ct. Crim. App. 2001), *aff'd*, 56 M.J. 393 (2002). The military 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."

3. *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.

4. *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).

5. *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 15's 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.

6. *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 "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.

7. *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.

8. *United States v. Eatmon*, 47 M.J. 534 (A.F. Ct. Crim. App. 1997). The military judge's sentencing instructions that "[M]ilitary confinement is corrective rather than punitive," did not mislead panel members into thinking confinement akin to summer camp, as contended by the defense on appeal. While not a standard instruction, the judge's instructions as a whole were fair, complete, impartial, and not misleading.

9. *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.

10. *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.

11. *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.

12. *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.

13. *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.

14. *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).

15. *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.

G. Sentence Credit.

1. *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.

2. *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."

3. *United States v. Southwick*, 53 M.J. 412 (2000). The accused presented evidence at her trial that she was subject to pretrial punishment. The judge was not asked for, nor did he give, any pretrial punishment credit. The CAAF held that the accused made the choice not to request credit but instead take the issue directly to the members.

4. *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.

5. *United States v. Chapa III*, 57 M.J. 140 (2002). Failure to raise RCM 305(k) credit waives the issue, absent plain error.

6. *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.

7. *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.

8. *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.

9. *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."

10. *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:

> *[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.

11. *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).

12. *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)).

13. *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.

14. *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).

15. *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."

H. Deliberations and Voting. **RCM 1006**.

1. What May be Considered. **RCM 1006.**

a) Notes of the members.

b) Any exhibits.

c) Any written instructions.

(1) Instructions must have been given orally.

(2) Written copies, or any part thereof, may also be given to the members unless either party objects.

d) Pretrial agreement (PTA) terms.

(1) 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.

(2) *United States v. Schnitzer*, 41 M.J. 603 (Army Ct. Crim. App. 1994). 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.

2. Deliberations and Voting on Sentence. **UCMJ art. 52, RCM 1006.**

a) Number of votes required:

(1) Death – unanimous.

(2) Confinement for more than ten years – at least three-fourths of the members.

(3) All other sentences – at least two-thirds of the members.

b) *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.

c) *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 then

could, collectively or individually, recommend clemency. The judge made clear individual rights of members to recommend clemency.

d) *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).

I. Announcement of sentence. **RCM 1007**.

1. Sentence worksheet is used to put the sentence in proper form (*See* Appendix 11, MCM, Forms of Sentences).

2. President or military judge makes announcement.

a) *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.

b) *United States v. Goddard*, 47 M.J. 581 (N-M. Ct. Crim. App. 1997). 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. Polling prohibited (MRE 606; RCM 1007(c)).

J. Impeachment of Sentence. **RCM 1008**.

1. Policy: Strong policy against the impeachment of verdicts.

a) Promotes finality.

b) Encourages full and free deliberation.

2. General rule: Deliberative privilege – court deliberations are privileged (MRE 509). *United States v. Langer*, 41 M.J. 780 (A.F.C.C.A. 1995) (observing that post-trial questionnaire purportedly intended for feedback to counsel improperly invaded members' deliberative process).

3. 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).

a) Outside influence (e.g. bribery, jury tampering).

b) Extraneous prejudicial information.

(1) *United States v. Witherspoon*, 16 M.J. 252 (C.M.A. 1983) (holding that it was improper for court member visit to crime scene).

(2) *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).

(3) *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).

(4) *United States v. McNutt*, 59 M.J. 629 (Army Ct. Crim. App. 2003). Military judge's comments during a "bridge the gap session" indicating he considered "good time credit" in arriving at the adjudged seventy-five days of confinement (i.e., he wanted appellant to serve sixty days confinement) is not competent evidence of "extraneous prejudicial information improperly brought to the attention of the sentencing authority" authorizing impeachment of the sentence. Military judges are

presumed to know about the Army policies concerning good-conduct time.

c) Unlawful command influence.

(1) *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).

(2) *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).

(3) *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 all 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.

4. 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).

5. *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 constitute extraneous prejudicial information, but

"general and common knowledge that a court member brings to deliberations is an intrinsic part of the deliberative process."

6. *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.

K. Reconsideration of Sentence. **RCM 1009**.

1. Time of reconsideration.

a) May be reconsidered any time before the sentence is announced.

b) After announcement, sentence may not be increased upon reconsideration unless sentence was less than mandatory minimum.

c) *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.

2. Procedure for reconsideration.

a) Any member may propose reconsideration.

b) Proposal to reconsider is voted on in closed session by secret written ballot.

3. Number of votes required.

a) With a view to increasing sentence – may reconsider only if at least a majority votes for reconsideration.

b) With a view to decreasing sentence – may reconsider if the following vote:

(1) For death sentence, only one vote to reconsider required.

(2) For sentence of life or more than tem years, more than one-fourth vote for reconsideration.

(3) For all other sentences, more than one-third vote for reconsideration.

4. 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.

II. CORRECTIONS

A. References.

1. U.S. Dep't of Defense, Dir. 1325.4, Confinement of Military Prisoners and Administration of Military Correctional Programs and Facilities, 17 August 2001.

2. U.S. Dep't of Defense, Instr. 1325.7, Administration of Military Correctional Facilities and Clemency Parole Authority, 17 July 2001.

3. U.S. Dep't of Army, Reg. 190-47, The Army Corrections System, 5 April 2004.

4. U.S. Dep't of Army, Reg. 15-130, Army Clemency and Parole Board, 23 October 1998.

5. USDB Reg. 15-1, Directorate of Classification, 1 June 1990.

6. USDB Reg. 600-1, Manual for the Guidance of Inmates, 1 August 2002.

B. History.

1. Why a military prison?

a) Consistency.

b) Deterrence (especially of desertion).

c) Prisoner mixing.

d) Rehabilitation / return to duty.

e) Mobilization asset.

2. Development of the USDB (United States Disciplinary Barracks).

a) Settling on Leavenworth. 1871 MAJ Thomas Barr, JA, convinced the War Dept. to request approval from Congress for funding. Originally planned to be built at Rock Island, IL, the USMP (United States Military Prison) was completed 21 May 1875 at Leavenworth, KS.

b) The USMP changed to USDB in 1915.

c) USDB was under civilian control twice (1895 - 1906 and 1929 - 1940). It is run by DA but accepts prisoners from all services.

3. Modern History.

a) Three-tier system (IDFs, RCFs , and USDB) has become a two-tier system.

b) The old USDB held 1777 inmates and had a staff of 734 (military and civilian).

c) The "New" USDB holds 512 inmates (not including 200 trustees) and has a staff of 445 personnel.

C. Organization.

1. DoD establishes three levels:

a) Level one - 1 yr. or less (level one or two at Service discretion).

b) Level two - 7 years or less (but up to 10 years in some cases).

c) Level three - more than 7 years (USDB).

2. Current "two-tiered" system:

   a) Regional Confinement Facilities (RCFs): up to 7 years (and assess prisoners with sentences up to 10 years).

      (1) Issues of access, trial prep.

      (2) Deterrence to pretrial confinement?

      (3) Assessment of alternatives, *e.g.*, contracting out.

   b) USDB: greater than 7 years; all services; (no females).

   c) As of October 2000, the Miramar Consolidated Brig (Navy) became the Level 2 and Level 3 facility for all females.

3. Additional location: transfer to federal system (BOP).

   a) Historic practice.

   b) Increased urgency since March 1995.

   c) MOU with BOP sets criteria:

      (1) Appellate review final.

      (2) No death cases.

      (3) No purely military cases.

      (4) "Representative mix" of prisoners.

      (5) Tap on the shoulder; no due process.

   d) Vitek cases (state procedures for transferring prisoners from a prison complex to a mental hospital without procedural due process held unconstitutional, 445 U.S. 480 (1980)) are different: some process is due.

4. Where they go:

a) CONUS RCFs: Fort Knox, KY; Fort Lewis, WA; Fort Sill, OK.

b) OCONUS CFs: Coleman Barracks, Mannheim, Germany; Camp Humphreys, Korea.

c) Other service CFs; local civilian CFs.

5. Internal Discipline.

a) Discipline and Adjustment (D&A) Boards.

b) Four Levels of Infractions (see Manual for the Guidance of Inmates (MGI) for details).

D. Parole and Clemency (DoD Dir. 1325.4, USDB Reg. 600-1).

1. Parole -- Conditional release; still in "confined" status.

a) Eligibility.

(1) Approved, unsuspended discharge or separation.

(2) Minimum of 12 months confinement.

(a) Serve at least one-third, minimum six months.

(b) Sentences of 30 years to life: minimum of 10 years (20 years if offense occurred after 16 Jan 00).

(3) Excludes "good time."

(4) LWOP (Life Without Parole) and Death inmates ineligible.

(5) Once considered, inmate will be considered annually by service board unless transferred to the FBOP.

(6) Inmate may waive parole consideration.

b) Process.

(1) Requested by inmate.

(2) Reviewed by Disposition Board.

(3) Commandant reviews.

(4) Decision in D.C. by Clemency and Parole Board; consists of 5 members including Field Grade Judge Advocate (JA).

c) Considerations in making decision.

(1) Nature, circumstances of offenses (case summary prepared by USDB CJA).

(2) Military, civilian record.

(3) Confinement record.

(4) Victim impact.

(5) Protection of society, welfare of society.

(6) Impact on good order and discipline.

(7) Personal appearance by inmate.

d) Revocation.

(1) Standard – violation of condition of parole.

(2) Suspension of parole.

(3) Preliminary interview.

(4) Revocation hearing. Art. 72(a) requires that special court-martial convening authority preside over hearing. Issue, raised in United States v. Connell, 42 M.J. 462 (1995), is whether the SPCMCA is neutral and detached, as required in Morrissey v. Brewer, 408 U.S. 471 (1972).

(5) Forfeiture of credit for service of sentence on parole.

e) Inmates accepting parole waive all time abatements and remain on parole until maximum release date.

2. Clemency.

a) Eligibility depends on length of sentence – eligible if sentenced to 12 months or more confinement.

(1) 1 to less than 10 years – NLT 9 months or within 30 days after action (whichever is later).

(2) 10 to less than 20 years – NLT 24 months.

(3) 20 to less than 30 years – NLT 3 years.

(4) 30 years thru life – NLT 5 years (10 years for offenses occurring after 16 Jan 2000).

(5) LWOP – 20 years after confinement and at least every three years thereafter (only the Service Secretary can grant clemency, but subordinate clemency authorities can deny clemency).

(6) Death – Not eligible.

(7) Unless otherwise noted, once considered after the initial review, the inmate will be considered annually regardless of the site of incarceration. The inmate may waive clemency review.

b) Procedure.

(1) Automatic consideration by Disposition Board.

(2) Clemency and Parole Board decides.

(3) Note: only Service Secretary can *grant* clemency for sentences that include LWOP.

c) A reduction in confinement will adjust the inmate's minimum release date (MRD).

3. Mandatory Supervised Release (DoDI 1325.7, para.6.20)

a) For prisoners who turn down parole.

b) Released on MRD and under supervision until Maximum Release Date.

c) Violation of the terms and conditions of release may result in confinement until Maximum Release Date. Parole revocation procedures apply.

4. Return to Duty/Restoration.

a) Services "shall operate" RTD programs.

b) Effectively mothballed.

c) No plans for restoration program in new USDB.

5. Good Conduct Time (a.k.a. “Good Time”) – Administrative credit resulting in day-for-day reduction in sentence.

a) Eligibility – All inmates except:

(1) Inmates sentenced to death.

(2) Inmates serving a life sentence.

b) Procedure.

(1) Accrues at the time of confinement.

(2) Calculated to determine minimum release date (MRD).

(3) Rates.

(a) Less than 1 year – 5 days/month.

(b) 1 year to less than 3 years – 6 days per month.

(c) 3 years to less than 5 years – 7 days per month.

(d) 5 years to less than 10 years – 8 days per month.

(e) 10 years to less than life – 10 days per month.

(4) Work abatement time available for employment (not currently available at Naval facilities).

(a) 1 to 5 months – 1 day per month.

(b) 6 to 10 months – 2 days per month.

(c) 11 to 15 months – 3 days per month.

(d) 16 to 20 months – 4 days per month.

(e) 21 to 25 months – 5 days per month.

(f) AI/SA – 6 days per month.

(g) Trustee level 6 for 6 months – 7 days per month.

(5) Additional good conduct credit available for participation in certain confinement programs (NTE 3 days per month for the first year and NTE 5 days per month thereafter).

(6) Prisoners' calculations: better to seek parole or wait to "MRD out?"

6. What we offer: rehabilitation, ordered environment, “enforced contemplation.”

a) Evolution of rehabilitation philosophy.

b) Sex offender program.

c) Mental health counselors.

E. Prisoner Profile.

1. Fewer of them, longer sentences.

2. Long-term trend away from military crimes.

3. Recent trend away from drug crimes.

4. Trend toward sex crimes and nonviolent (i.e., property) crimes.

F. Assessing the System as Counsel.

1. Common concerns.

a) What's worth bargaining for: thinking ahead when drafting stipulations, calling witnesses and bargaining for time.

b) The shifting role of the CJA.

2. As a trial counsel.

a) Building a record.

b) Sentencing stipulations.

c) Victim-witness liaison.

d) Dealing for seven years and a day.

3. As a defense or appellate counsel.

a) Clamming up at the DB.

b) Coach clients for the future.

c) Parole rights.

d) Trends, fads in rehabilitation, treatment.

4. As a legal advisor.

a) Issue: Do/should commanders and Convening Authorities (CAs) care about destination of convicted soldiers?

b) Issue: To what extent should likely destination of soldier affect terms of pretrial agreement, action on 1105 matters/clemency requests?

G. The Future.

1. The new USDB – smaller capacity, smaller staff, less money.

2. Officers and cadets serving at Level I and II facilities.

3. Trend was: fewer prisoners, stiffer sentences. It may be reversed with the PCFs now sending AWOL/Deserters back to units (FORSCOM only).

4. Army as "executive agent" for corrections. But becoming “purple”: joint service cadre at facilities (Mannheim, the USDB); joint service for female inmates.

5. Consistency among services: philosophy, facilities, and programs.

6. Mandatory Supervision Upon Release – DoD in process of publishing implementation guidance to address the "parole or Minimum release date" decision.

7. No pressure to RTD.

8. RCFs: staffing, resources, programs, class action and equal protection. With greater populations comes need for more available opportunities for the inmates.

9. Impact of federal transfers.

a) On prisoner morale, expectations, cohesion.

b) On good order and discipline.

III. CONCLUSION.

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53D GRADUATE COURSE

POST-TRIAL PROCEDURES AND APPEALS

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MAJ ROBERT BEST

SEPTEMBER 2004

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53D GRADUATE COURSE

POST-TRIAL PROCEDURES AND APPEALS

"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 (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 (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 (1999).

"We have become increasingly concerned with what we view as a lack of attention to the post-trial process. For instance, the convening authority's action in this case purports to implement appellant's automatic reduction to E-1 under Article 58a, UCMJ, 10 USC §858a. This is curious since appellant was already at grade E-1 at the time of trial." *United States. v. Williams,* 57 M.J. 1, 4 n.5 (2002).

"The low standard of military justice practice and advocacy that this record demonstrates cannot be tolerated in the administration of the Uniform Code of Military Justice. At every stage of appellant's case there have been multiple failings, denying appellant justice. . . . Had the military judge, acting SJA, and appellate counsel recognized that the 'record must speak the truth,' the 'train wreck' that is the record before this court could have been avoided." *United States v. Pulido*, No. 20011043, slip op. at 5 and 7 (Army Ct. Crim. App. Mar. 19, 2004) (unpublished opinion) (quoting *United States v. Kulathungam*, 54 M.J. 386, 388 (2001)).

I. REFERENCES.

A. UCMJ, articles 55-76a.

B. Manual for Courts-Martial (2002 Edition), United States, Chapters XI, XII and Appendices 13-20.

C. Dep't of Army, Regulation 27-10, Legal Services: Military Justice, Chapter 5 (6 September 2002).

D. Francis A. Gilligan and Frederic I. Lederer, *Court-Martial Procedure*, 1999 (vol 2), Chapter 24.

E. The Clerk of Court's Handbook for Post-Trial Administration (23 August 2004).

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 post-trial recommendation (PTR a.k.a. SJAR).

M. PTR, authenticated ROT served on accused / DC.

N. Accused / DC submits clemency petition (R.C.M. 1105 matters) and response to PTR (R.C.M. 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. Rule for Courts-Martial 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. R.C.M. 1103(b)(1).

3. Review ROT for errata. *United States v. Ayers*, 54 M.J. 85 (2000). On appeal, appellant alleged that the ROT was not truly authenticated since the assistant trial counsel (ATC) was permitted to execute the authentication. The ATC signed the authentication document which 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 in order 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 R.C.M. 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. R.C.M. 1104(b)(1), 1106(f)(3). *See generally*, Paragraph (F) of the Discussion to R.C.M. 502(d)(5).

B. Rule for Courts-Martial 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 – R.C.M. 1010).

2. Deferment of confinement / reduction / forfeitures. R.C.M. 1101(c).

3. Examination of the record of trial. R.C.M. 1103(b)(3)(c).

4. Submission of matters: R.C.M. 1105; 1106(f)(4), (7); and 1112(d)(2). *See also* UCMJ, art. 38(c).

5. Right to appellate review and waiver thereof, in writing, within specified time period. R.C.M. 1110.

6. Examine Staff Judge Advocate's post-trial recommendation (PTR). R.C.M. 1106(f).

7. *See also United States v. Palenius*, 2 M.J. 86, 93 (C.M.A. 1977).

a) Advice re: 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. 525 (A.C.M.R. 1990).

d) Maintain an attorney-client relationship. R.C.M. 1106(f)(2) (for substitute counsel); *United States v. Schreck*, 10 M.J. 226 (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).

e) *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. . . ."

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 (1995). *See also, United States v. MacCulloch*, 40 M.J. 236 (C.M.A. 1994); *United States v. Brownfield*, 52 M.J. 40 (1999); and *United States v. Lee*, 52 M.J. 51 (1999). *See also* Section XXVIII *infra*.

1. *United States v. Gilley*, 56 M.J. 113 (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 (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.

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. Note – Since 1998, R.C.M. change only requires CA to consider written submissions.

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 R.C.M. 1201(b)(1).

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 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, determine, on the record, who is responsible for post-trial matters.

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* R.C.M. 502(d)(5). *See also*, AR 27-10, para. 5-29.

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. R.C.M. 1101(b)(2). Note – Summary Court Officer (SCO) may NOT order a service member 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 [e.g., confinement]."

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." R.C.M. 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. R.C.M. 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). 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. Court noted other matters of record supporting decision to deny deferment.

b) *Longhofer v. Hilbert*, 23 M.J. 755 (A.C.M.R. 1986).

c) *See also United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992).

d) *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. Court reviewed facts and determined that deferment was not appropriate.

e) *United States v. Edwards*, 39 M.J. 528 (A.F.C.M.R. 1994). Accused not entitled to relief (no reasons for denial) where deferment would have expired before appellate review. AFCMR recommends that DC ask for "statement of reasons" or petition for redress under Art. 138.

f) *United States v. Sebastian*, 55 M.J. 661 (Army 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.

C. Deferment of Forfeitures.

1. Accused may request, in writing, deferment of forfeitures.

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]."

3. Applies to adjudged forfeitures (Art. 57(a)(2), UCMJ; R.C.M. 1101(c)) AND automatic forfeitures (Art. 58b(a)(1), UCMJ)). *United States v. Lundy*, 60 M.J. 52 (2004).

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." R.C.M. 1101(c)(3).

5. CA's action on deferment request MUST be in writing and a copy provided to the accused.

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. R.C.M. 1103(b)(3)(D).

7. CA must specify why forfeitures are not deferred. *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. *See also United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992).

8. *United States v. Brown*, 54 M.J. 289 (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 (2002). Nine days after being sentenced, the accused submitted a request asking for deferment of forfeitures and reduction in grade. 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. They noted the absence of "new matter" and the non-inflammatory nature of the SJA's memo in affirming.

D. Waiver of Forfeitures.

1. Accused may request waiver of automatic forfeitures (Art. 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." R.C.M. 1101(d)(2).

4. CA's action on waiver request MUST be in writing and a copy provided to the accused.

5. CA's written action on waiver request is subject to judicial review for abuse of discretion. The request and action thereon MUST be attached to the record of trial. R.C.M. 1103(b)(3)(I).

6. Waiver of forfeitures is authorized as soon as they become effective. Need not wait until action.

7. *United States v. Nicholson*, 55 M.J. 551 (Army Ct. Crim. App. 2001). SJA advice stating that waiver request prior to action is premature and must be submitted as part of the R.C.M. 1105 submissions is incorrect. The convening authority may waive and direct payment of any automatic forfeitures when they become effective by operation of Article 57(a). Automatic forfeitures go into effect fourteen days after the sentence is announced. *See also United States v. Kolodjay*, 53 M.J.732 (Army Ct. Crim. App. 2000). Within two weeks of his conviction, accused submitted a request for deferment and waiver of forfeitures. The SJA did not bring the request to the CA until five months later, at action. The CA approved the deferment retroactively (the court discussed but did not rule on whether this was

appropriate or not), and granted waiver for six months beginning on the date the sentence was adjudged. The CA's action, however, was ambiguous and contradictory. Returned for clarification.

E. Deferment of Reduction in Rank. Processed like a request for deferment of confinement or forfeitures. *See* VIB and VIC *supra*.

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." R.C.M 1102(b)(1); and

2. Art. 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." R.C.M. 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." R.C.M. 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. R.C.M. 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." R.C.M. 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) (post-action hearing held in accused's absence found "improper and . . . not a part of the record of trial").

D. Limitations. R.C.M. 1102(c). *See United States v. Boland*, 22 M.J. 886 (A.C.M.R. 1986), *pet. denied*, 23 M.J. 400 (C.M.A. 1987). 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. Humpherys*, 57 M.J. 83 (2002). Post-trial 39(a) session held by MJ to question two panel members about a rater-ratee relationship which 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. 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.

2. *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 39(a) hearing and entered findings consistent with pleas of accused. Though technical violation of R.C.M. 922(a) occurred, MJ commended for using post-trial session to remedy oversight.

3. *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 UP of R.C.M. 1102 would have been an appropriate course of action had the MJ or SJA caught the mistake.

4. *United States v. Kulathungam*, 54 M.J. 386 (2001). Proceeding in revision to correct erroneous omission of findings from the record and to formally announce findings appropriate. Omission was the only procedural deviation by the MJ during the court. 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.

5. *United States v. Mayfield*, 45 M.J. 176 (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 proceeding in revision, at which accused acknowledged he had made request in writing and that JA trial had been his intent all along. Note – shows that it does not matter how the post-trial proceeding is labeled, as he called it a post-trial 39(a) session, though the court characterizes it as a proceeding in revision. CAAF reverses the Navy Court, which had found the failure to formally request JA to be a jurisdictional error.

6. *United States v. Avery*, Army 9500062 (17 May 1996)(unpub.). 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."

7. *United States v. Gleason*, 43 M.J. 69 (1995). Proceeding in revision is inappropriate to correct erroneous sentencing instruction. Proper procedure is a rehearing. UCMJ, art. 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*, 22 U.S.C.M.A. 78, 81, 46 C.M.R 78, 81 (1972).

8. *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.

9. *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 R.C.M. 1102(d)." Such a post-trial session could have been used to reconsider the erroneous findings of guilty and re-determine the sentence. *See* R.C.M. 1102(b), (c), and (e). As requested by the trial defense counsel, the convening authority could have also ordered a rehearing on sentence and avoided this issue. *See* R.C.M. 1107(e)(1)." *Id.* at 673-4, n.1.

10. *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 39(a) session to assess facts and determine any possible prejudice. Findings affirmed; sentence set aside and rehearing authorized.

11. *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.

12. *United States v. Baker*, 32 M.J. 290 (C.M.A. 1991). MJ held a post-trial 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 (Army Ct. Crim. App. 1997) (error for court to re-convene two minutes after adjourned to state they had also adjudged a bad-conduct discharge).

13. *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.

14. *United States v. Jackson*, 34 M.J. 1145 (A.C.M.R. 1992). MJ held post-trial 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*, 22 U.S.C.M.A. 78, 81, 46 C.M.R 78, 81 (1972).

15. *United States v. Miller*, 47 M.J. 352 (1997). MJ abused his discretion when he denied the accused's request for delay of a post-trial 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.

16. *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 39(a) session.

17. *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.

18. *United States v.* LePage, 59 M.J. 659 (N-M. Ct. Crim. App. 2003). Military judge erroneously admitted NJP action (PE 3) and considered evidence in arriving at a punitive discharge. At a post-trial 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 R.C.M. 1009 addressing reconsideration of sentences. Held – the military judge could have corrected the error under R.C.M. 1102 at a post-trial 39(a) session since the erroneous admission of the evidence "substantially affect[ed] the sufficiency of the sentence."

19. MJ may, any time until authentication, "reconsider any ruling other than one amounting to a finding of not guilty." R.C.M. 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. *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. 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. Rule for Courts-Martial 1103 and the discussion list what must be included in or attached to the ROT. The rule is supplemented by AR 27-10, Chpt. 5, Sec. V, JAGMAN Sec. 0120, and AF Reg 111-1, para. 15-8.

D. For a special court-martial, the transcript is verbatim if a BCD is adjudged, confinement is greater than six months, or forfeiture for more than six months.

E. Summary court-martial records are governed by R.C.M. 1305. *See* Appendix 15, MCM and DD Form 2329.

F. Acquittals: Still need a ROT (summarized).

G. If 39(a) session called – court is called into session – a ROT is required. *See* R.C.M. 1103(e). For example, accused is arraigned and subsequent to arraignment, charges are withdrawn and dismissed – prepare a summarized ROT.

H. What if a verbatim ROT cannot be prepared? *See* R.C.M. 1103(f). *But see United States v. Crowell, supra* (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. Cundini*, 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 R.C.M. 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; session 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* R.C.M. 702(g)(2) and Art. 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 fails. MJ attempts 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 argues *ex parte* motion telephonically to MJ. Defense complains that record is 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 (citation omitted).

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 equals substantial omission.

11. *United States v. Chollet*, 30 M.J. 1079 (C.G.C.M.R. 1990). Several bench conferences have "inaudible" sections. "We believe that these inaudible portions were substantial omissions which, along with other non-transcriptions, render the record non-verbatim." Court does not approve the BCD.

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 inadvertently destroyed, resulting in loss of counsel's arguments, a brief Art. 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 (1998). ROT does not contain R.C.M. 1105 / 1106 submissions from CDC and request for deferment or the CA's action thereon. Held – No error for failing to include the R.C.M. 1105 / 1106 submissions (CDC did not submit written matters, but made an oral presentation to the CA). 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. 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. Taite*, No.9601736 (Army Ct. Crim. App., Nov. 14, 1997). ROT originally missing three defense exhibits (photo of post office (crime scene), and 2 stipulations of expected testimony not transcribed). Government re-created the stipulations, but could not replicate the photo. Held – non-verbatim ROT. If missing exhibit cannot be re-created, a description may be substituted pursuant to a certificate of correction (R.C.M. 1103(b)(2)(D)(v); R.C.M. 1104(d)). In the meantime, action set aside to

prepare substantially verbatim ROT for CA. If cannot do so, can only approve SPCM punishment.

16. *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 50 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 received a discharge. A complete ROT should include a verbatim transcript. If the government cannot provide a verbatim ROT they 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.

17. *United States v. Henthorn, Jr.*, 58 M.J. 556 (N-M. Ct. Crim. App. 2003). Record of trial (ROT) which omitted approximately 24 pornographic images considered by the MJ on sentencing results in a deficient ROT and presumed prejudice to the appellant; however, said prejudice is rebuttable. 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 GP; 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 defense counsel was aware of the MJ's proposed handling of the images (i.e., ordered sealed in NCIS case file); and neither defense counsel or appellate defense counsel questioned the nature of the omitted documents

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. R.C.M. 1103(i)(1)(A).

K. Unless unreasonable delay will result, DC will be given an opportunity to examine the ROT before authentication. R.C.M. 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 Rules for Courts-Martial. Not authorized in AR 27-10.

M. Military Judges Duties / Responsibilities. *United States v. Chisholm*, 58 M.J. 733 (Army Ct. Crim. App. 2003), *aff'd*, 59 M.J. 151 (2003) (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 R.C.M. 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. 151, 152 (2003).

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. Art. 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 30 days is prolonged absence). *But see United States v. Batiste*, 35 M.J. 742 (A.C.M.R. 1992) (15 day leave does not equal prolonged absence); R.C.M. 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 R.C.M. 1104(a)(2)(B). *See United States v. Gibson*, 50 M.J. 575, 576 (N-M. Ct. Crim. App. 1999); *United States v. Garman*, 59 M.J. 677, 680 (Army Ct. Crim. App. 2003).

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) Query: OCONUS judges on CONUS leave, TDY?

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. R.C.M. 1104(b).

1. UCMJ, art. 54(c) requires such service as soon as the ROT is authenticated.

2. In *Cruz-Rijos, supra*, 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. *United States v. Garcia*, 37 M.J. 621 (A.C.M.R. 1993) (SJA prepared certification that all allied documents were true copies of originals – sufficient substitute for original documents).

E. Rules for correcting an authenticated ROT. Certificate of correction process. Correction to make the ROT conform to the actual proceedings. R.C.M. 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. R.C.M. 1106(a).

G. If defense time for errata is unreasonable, MJ can authenticate without errata. R.C.M. 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) (DC's failure to submit matters under R.C.M. 1105 and failure to mention under R.C.M. 1106(f) that MJ strongly recommended suspension of the BCD amounted to ineffective assistance). *See* R.C.M. 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 (2001) (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 R.C.M. 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 (1998) (while oral submissions to CA by CDC not improper, CAAF expressed a preference for written submissions, at least to document the oral presentation).

B. Accused can submit anything, but the CA need only consider written submissions. *See* R.C.M. 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 DC's, what are your options here? DC should provide a complete summary of the accused's R.C.M. 1105 matters – highlight for the CA the key documents/submissions.

C. Time periods.

1. GCM or SPCM—due on later of 10 days after service of PTR on BOTH DC and the accused and service of ROT on the accused.

2. SCM—within 7 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. 1986). *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 R.C.M. 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), *pet. denied*, 58 M.J. 184 (2003). Failure to submit matters in a timely manner (i.e., 10 days UP of Article 60, UCMJ and R.C.M. 1105 or 10 plus 20 if extension granted) 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 R.C.M. 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 to *United States v. Stephens*, 56 M.J. 391 (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 R.C.M. 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.

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 (MFR) which 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*, 17 U.S.C.M.A. 158, 37 C.M.R. 422 (1967).

F. Claims of post-trial cruel and unusual punishment.

1. *United States v. Roth*, 57 M.J. 740 (Army Ct. Crim. App. 2002), *aff'd*, 58 M.J. 239 (2003) (summary disposition). Claims of post-trial cruel and unusual punishment in violation of the Eight 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. Secondly, 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 (2003). 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 Convening Authority (CA) already granted clemency. The court 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.

G. Appellate counsel access to defense files. *United States v. Dorman*, 58 M.J. 295 (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. R.C.M. 1106 requires a written SJA recommendation 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, IO, 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. Gutierrez*, 57 M.J. 148 (2002). Chief of Justice, MAJ W, who testified on the merits in opposition to a defense motion to dismiss for lack of speedy trial and who later becomes the SJA, is disqualified from participating in the post-trial process. Error for MAJ W to prepare the PTR and the subsequent addendum. The court noted "Having actively participated in the preparation of the case against appellant, MAJ [W] was not in a position objectively to evaluate the fruits of her efforts." *Id.* at 149.

b) *United States v. Barry*, 57 M.J. 799 (Army Ct. Crim. App. 2002). Wrong SJA providing initial advice to CA and then ambiguous/unclear action because Division Rear Cdr signed action over a soldier assigned to the Division and signed as Commander of the Division and not the Division Rear.

c) *United States v. Johnson-Saunders*, 48 M.J. 74 (1998). The Assistant TC, as the Acting Chief of Military Justice, wrote 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. Held – ATC disqualified to write the SJAR. No waiver and plain error; returned for a new SJAR and action. The Court stated what may become 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 (1998). CoJ wrote the SJA's PTR. Dispute 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 avoids the issue; if there was error, it was harmless because the PTR recommended 6 months clemency, which the CA approved.

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*, 23 U.S.C.M.A. 329, 49 C.M.R. 663 (1975). *United States v. McCormick*, 34 M.J. 752 (N.M.C.M.R. 1992) (PTR insufficient if prepared by a disqualified person, even if filtered through and adopted by the SJA). *See* R.C.M. 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) (PTR must come from one free from *any* connection with a controversy); United *States v. Edwards*, 45 M.J. 114 (1996). Legal officer (non-judge advocate) disqualified from preparing PTR because he had 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. Waiver did not apply, because defense did not know at time it submitted its post-trial matters.

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 (2003). SJA whose initial SJAR is 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 (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." TC prepares and SJA concurs; CAAF returns for new SJA PTR and action).

6. R.C.M. 1106(c). When the CA has no SJA or SJA is disqualified (unable to evaluate objectively and impartially), CA must request assignment of an/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 DON'T write PTRs/SJARs. *United States v. Crenshaw*, Army 9501222 (Army Ct. Crim. App. 1996) (unpub.). 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 SJA PTR? The SJA. *United States v. Finster*, 51 M.J. 185 (1999), where a non-qualified individual signed the SJA PTR the court concluded there was manifest prejudice.

C. Form and content: a *concise* written communication to assist in the exercise of command prerogative in acting on the sentence.

1. Findings and sentence. *United States v. Russett*, 40 M.J. 184 (C.M.A. 1994). Requirement for the SJA to comment on the 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) (CMA disapproved findings on two specs omitted from PTR). *See also*, *United States v. Sanchez*, 54 M.J. 874 (Army 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 (Army 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 2 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 v. 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 (Army Ct. Crim. App. 1995) (unpub.); *United States v. Bernier*, 42 M.J. 521 (C.G.C.M.R. 1994); *United States v. Zaptin*, 41 M.J. 977 (N-M. Ct. Crim. App. 1995). *United States v. Gunkle*, 55 M.J. 26 (2001). The PTR incorrectly stated findings. 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 R.C.M. 1105/6

submissions BUT did mention the judge's favorable rulings. The Court found no error.

2. Any clemency recommendations by the MJ or panel. R.C.M. 1106(d)(3)(b) [1995 change]. Do it here, not at the addendum stage.

a) *United States v. Paz-Medina*, 56 M.J. 501 (Army 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 "Because 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 (2002) (error for failing to serve DC with PTR prior to action when PTR omitted clemency recommendation from sentencing authority).

3. Summary of accused's service record. *See United States v. Austin*, 34 M.J. 1225 (N.M.C.M.R. 1992).

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. Barnes*, 44 M.J. 680 (N-M. Ct. Crim. App. 1996). "There is no 'hard and fast rule' as to what errors or omissions in a post-trial recommendation so seriously affect the fairness and integrity of the proceedings as to require appellate relief." Accused, USMC staff sergeant with 14 years' service, no record of disciplinary problems, convicted of single use of marijuana. PTR failed to mention his Navy Commendation Medal, awarded for meritorious combat less than a year before trial. Court called the medal a "significant and worthy personal achievement. The failure to include these matters in the [PTR] deprives the [CA] of important information . . . and may well have affected the outcome of his sentence review. . . It is difficult to determine how a CA would have exercised his broad discretion if all of the information required by R.C.M. 1106(d)(3) had been available to him before he took his action." Here, the failure was prejudicial error, requiring a new PTR and action. Defense did a good job on appeal in showing value of NAVCOM by offering Navy Instruction setting forth criteria for the award.

g) *United States v. Brewick,* 47 M.J. 730 (N-M. Ct. Crim. App. 1997). SJA PTR failed to list SW Asia service awards. Held – waiver 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).

h) *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 SJA PTR by inclusion of complete nonjudicial punishment actions in lieu of summarizing them).

i) *United States v. Mack*, 56 M.J. 786 (Army Ct. Crim. App. 2002). SJA's PTR 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 R.C.M. 1105 submission. We are aware of no authority to support the appellant's position, and we decline to establish such authority." *Id*.

j) *United States v. Wallace*, 58 M.J. 759 (N-M. Ct. Crim. App. 2003). There is no controlling precedence that requires specific mention of a prior Honorable Discharge in the SJAR. Counsel should be aware, however, that R.C.M. 1106(d)(3)(C) requires "[a] summary of the accused's service record. To include length and character of service, awards and decorations received, and any records of nonjudicial punishment and previous convictions."

k) *United States v. Wellington*, 58 M.J. 420 (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 (R.C.M. 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.

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."

c) *United States v. Allison*, 56 M.J. 606 (C.G. Ct. Crim. App. 2001). SJA's PTR failed to mention accused was subject to over four months of pretrial restriction. "In the interest of judicial economy," Court reduced accused's confinement from 18 months to 11 months, affirming the remaining punishment.

d) *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 *Wheelus*, 49 M.J. 283 (1988), accused failed to "make some colorable showing of possible prejudice" that would warrant relief. Some confinement disapproved on other grounds – that the accused was held in confinement beyond his proper release date.

e) *United States v. Miller*, 56 M.J. 764 (A.F. Ct. Crim. App. 2002). SJA's PTR failed to mention 3 days of PTC. Held – attachments to PTR (e.g., Report of Result of Trial and Personal Data Sheet) both stated 3 days of PTC; therefore, no error. Even if error, applying *Wheelus*, 49 M.J. 283 (1988), 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.

f) *United States v. Green*, 58 M.J. 855 (Army Ct. Crim. App. 2003). SJAR which erroneously stated "none" regarding pretrial restraint and which improperly stated the terms of the pretrial agreement did not rise to the level of plain error warranting relief by the court.

5. CA's obligation under any pretrial agreement. *See United States v. Green*, 58 M.J. 855 (Army Ct. Crim. App. 2003), *supra*.

6. Specific recommendations as to action.

7. NOTHING ELSE!!!

8. 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 R.C.M. 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 1105 submission not discussed in SJA

recommendation; addressed for first time in addendum. No proof that addendum was served on DC. Action set aside.

9. Additional appropriate matters may be included in the recommendation even if taken from outside the record. R.C.M. 1106(d)(5). *See United States v. Due*, 21 M.J. 431 (C.M.A. 1986). *See also 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 PTR. *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 SJA's PTR. *See* R.C.M. 1106(f). *It is extremely self-defeating and short-sighted for the government not to follow this advice.*

2. List each enclosure (petitions for clemency, etc.) that goes to the CA on the PTR/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 CG "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 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 (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 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 court 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 R.C.M. 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. 312 (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 R.C.M. 1106, a remand will usually be in order." *Id.* at 325, quoting *U.S. v. Hill*, 27 M.J. 293, 296 (C.M.A. 1988). *See also*, *United States v. Reed*, 33 M.J. 98 (C.M.A. 1992); *United States v. Hamilton*, 47 M.J. 32 (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.

a) *United States v. Pate*, 54 M.J. 501 (Army 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 R.C.M. 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 can not 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 (N-M. 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 R.C.M. 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) (PTR dated nine days before authentication of the ROT. Although the Court found no prejudice, they cautioned counsel in the field that "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), *pet. denied*, 58 M.J. 203 (2003). Despite erroneous SJAR which advised the CA that the appellant was convicted of two offenses dismissed for sentencing purposes by the Military Judge, no corrective action was required when the appellant failed to make "some colorable showing of possible prejudice."

3. Waived absent plain error. **Rule for Courts-Martial 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 *Powell* (*United States v. Powell*, 49 M.J. 460, 463 (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 (Army Ct. Crim. App. 2003), *pet. granted*, 2004 CAAF LEXIS 590 (June 21, 2004). 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 (Army Ct. Crim. App. 2000). *E.g., United States v. Hammond*, 2004 CCA LEXIS 147 (Army Ct. Crim. App. June 29, 2004) (applying plain waiver analysis and finding it when SJAR misstated the maximum confinement as life without eligibility for parole when it was only six years).

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* R.C.M. 1106(e).

G. Service of PTR on DC and the accused. R.C.M. 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 PTR 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 (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 PCSd, new counsel never appointed, and OSJA never tried to serve PTR. CAAF finds accused "was unrepresented in law and in fact" during this stage. Fact that R.C.M. 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 R.C.M. 1106. *United States v. Williams*, 57 M.J. 1 (2002) (error for failing to serve DC with PTR prior to action when PTR omitted clemency recommendation from sentencing authority).

b) *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 error but accused failed to make "some colorable showing of possible prejudice." Relief granted on other basis.

c) *United States v. Williams*, 57 M.J. 1 (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.

d) *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 Rule for Courts-Martial (R.C.M.) 1107(d)(4) and 1103(c)(1). The court, after noting that R.C.M. 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 R.C.M. 1107(d)(4) and 1103(c)(1) which 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, R.C.M. 1105 and R.C.M. 1106 submissions serve different purposes. R.C.M. 1105 submissions are the accused's submissions where R.C.M. 1106 focuses on submission by the accused's counsel.

3. If it is impracticable to serve the accused for reasons including but not limited to the transfer of the accused to a distant place, his AWOL, 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 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) Mailing of recommendation is not impracticable where all parties are located in CONUS and the accused has provided a current mailing address. *United States v. Smith*, 37 M.J. 583 (N.M.C.M.R. 1993).

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 an opportunity to submit post-trial matters.

d) *United States v. Ray*, 37 M.J. 1053 (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), *pet. denied*, 58 M.J. 289 (2003). Failure to serve record of trial 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 (1998), to cite to any errors or omissions in the SJAR that he would have brought to the Convening Authority's attention had he been given the opportunity to do so.

4. The accused may designate at trial *which counsel* shall be served with the PTR or may designate such counsel in writing to the SJA before the PTR is served. Absent such a designation, the priority for service is: civilian counsel, individual military counsel and then detailed counsel.

5. 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. *But see United States v. Johnson*, 26 M.J. 509 (A.C.M.R. 1988).

a) Substitution of counsel problems. R.C.M. 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 (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 ETSd) 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, test for prejudice.

(2) *United States v. Howard*, 47 M.J. 104 (1997). Rejecting an invitation to overrule *Miller*, the CAAF restates 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. Edwards*, 9 M.J. 94 (C.M.A. 1980) (permission of the accused not found in record); *United States v. Lolagne*, 11 M.J. 556 (A.C.M.R. 1981) (accused's permission presumed under the circumstances).

(5) *United States v. Hood*, 47 M.J. 95 (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 v. Washington* analysis.

(6) *United States v. Johnston,* 51 M.J. 185 (1999). The convening authority must insure that the accused is represented during post-trial. Submission of R.C.M. 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 PTR.

(1) *United States v. Cornelious*, 41 M.J. 397 (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).

(5) *United States v. Leaver*, 36 M.J. 133 (C.M.A. 1992).

6. 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 Submission. R.C.M. 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), required service of PTR on the DC 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 PTR on both DC and accused and service of authenticated ROT on accused, whichever is later.

3. SJA may approve delay for R.C.M. 1105 (not R.C.M. 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 R.C.M. 1105 v. 1106 matters. See R.C.M. 1105(c)(1) and 1106(f)(3). Key – serve accused and counsel the authenticated ROT and PTR AT THE SAME TIME.

I. Staff Judge Advocate's Addendum. R.C.M. 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 United States v. McKinley,* 48 M.J. 280 (1998) and Judge Cox's statement in response 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 give no rationale or analysis – mere disagreement and comment on the need for corrective action sufficient.

b) *United States v. Welker*, 44 M.J. 85 (1996). Although error for SJA not to respond to defense assertions of legal errors made in post-trial submissions, CAAF looked to record and determined there was no merit to the allegation of error raised by the Defense in the 1105/6 submissions. Consequently, held no prejudice to the accused by the SJA's failure to comment on the allegation of error raised by the Defense. Reaffirms 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 (1996) (comments on preparation of ROT were "trivial"); *United States v. Hutchison*, 56 M.J. 756 (Army 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 (Army Ct. Crim. App. 2002) (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 R.C.M. 1106 and state whether corrective action is needed.

a) *United States v. Hill*, 27 M.J. 293 (C.M.A. 1988).

b) *United States v. Moore*, 27 M.J. 656 (A.C.M.R. 1988).

c) *United States v. Williams-Oatman*, 38 M.J. 602 (A.C.M.R. 1993) ("consideration of inadmissible evidence" is sufficient allegation of legal error).

d) *United States v. Hutchison*, 56 M.J. 756 (Army Ct. Crim. App. 2002). Unsupported claim of onerous and illegal pretrial punishment which was not raised at trial after specific Article 13 inquiry by Military Judge 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. Addenda containing "new matter" must be served on the defense. R.C.M. 1106(f)(7).

a) *United States v. Leal*, 44 M.J. 235 (1996). If the additional information is not part of the record, *i.e.*, transcript, consider it to be new matter. Not enough that it's "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 (2000). New action not required where defense, on appeal, fails to proffer a possible response to the unserved 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). In two post-trial memos the SJA advised the CA about the MJ's qualifications, experience, likelihood of accused's waiving administrative separation board, and minimizing effects of BCD. Court disapproved BCD because all of this was obviously outside the record and should have been served on accused with opportunity to comment. Remedy -- set aside BCD.

c) *United States v. Norment*, 34 M.J. 224 (C.M.A. 1992).

d) *United States v. Harris*, 43 M.J. 3 (Army Ct. Crim. App. 1995) (addendum referred first time to an Art. 15; new review and action required).

e) *United States v. Sliney*, No. 9400011 (Army Ct. Crim. App. 1995) (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).

f) *United States v. McCrimmons*, 39 M.J. 867 (N.M.C.M.R. 1994). Reference in addendum to 3 thefts, which formed basis for court-martial ("demonstrated by his past behavior that he is not trustworthy"), not "new matter."

g) *United States v. Heirs*, 29 M.J. 68 (C.M.A. 1989). The SJA erred by erroneously advising the CA in the addendum to the PTR 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.

h) *United States v. Trosper*, 47 M.J. 728 (N.M. Ct. Crim. App. 1997) CSM's memo to CG that he gave little weight to accused's alleged remorse was not served on DC. Court finds the memo did not constitute new matter, but simply a fair comment on the offense, and was not from outside the record. Even if new matter, NMCCA relies on the requirement from *United States v. Chatman*, 46 M.J. 321 (1997) that appellant demonstrate what he would have submitted to deny, counter, or explain the new matter. Appellate DC failed to do this and simply repeated the same argument trial defense counsel submitted during clemency.

i) *United States v. Cornwell*, 49 M.J. 491 (1998). CG asks the SJA whether the command supports the accused's request for clemency. The SJA calls the accused's commanders, then verbally relays their recommendations against clemency for the accused to the CG. The SJA then does an MFR to that effect, attaching it to the ROT. The CAAF says the SJA's advice to the CG is not new matter in the addendum under R.C.M 1106(f)(7), but may be matter under R.C.M. 1107(b)(3)(B)(iii) of which the accused's is not charged with the knowledge thereof. Again, even if such, CAAF says the defense did not indicate what they would have done in response, so *Chatman* standard not met.

j) *United States v. Anderson*, 53 M.J. 374 (2000). The submission of a note from the chief of staff to the convening authority which states "Lucky he didn't kill the SSgt. He's a thug, Sir." was new matter.

k) *United States v. Gilbreath*, 57 M.J. 57 (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 [Defense Counsel] also could have made a persuasive argument that the staff judge advocate's recommendation that the convening authority defer to the judgment of the members was also legally improper." *Id.* at 62.

l) *United States v. Gilbreath*, 58 M.J. 661 (A.F. Ct. Crim. App. 2003). Insertion in the SJA's addendum of a statement of inability to locate appellant to serve her with post-trial documents constitutes "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 R.C.M. 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 (1997) (appellant must "demonstrate prejudice by stating what, if anything, would have been submitted to 'deny, counter, or explain' the new matter."), the court noted that the inability to locate appellant could be perceived by the Convening Authority (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 court found prejudice and determined that its charter to "do justice" mandated a new SJAR and action in the case. Id. at 665.

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.

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 PTR 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 *Foy* 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 insure 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 (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 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.

K. Common PTR, addendum errors:

1. Inaccurately reflects charges and specifications (especially dismissals, consolidations).

2. Inaccurately reflects the maximum punishment.

3. Omits, misapplies pretrial confinement (*Allen*, R.C.M. 305(k) credit).

4. Omits, misapplies Article 15 (*Pierce*) credit.

5. Approves greater than 2/3 forfeitures for periods of no confinement.

6. Approves (in Special Courts-Martial) forfeitures and fines (cumulatively) in excess of the court's jurisdictional limit.

7. Extraneous (and often erroneous) information – *Stick to the Basics!!*

XII. ACTION BY CONVENING AUTHORITY. ARTICLE 60, UCMJ; RCM 1107.

A. Who may act: The convening authority. *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. 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.

2. *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.

3. *United States v. Cortes*, 29 M.J. 946 (A.C.M.R.), *pet. denied*, 31 M.J. 420 (C.M.A. 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."

4. *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.

5. *United States v. Mack*, 56 M.J. 786 (Army Ct. Crim. App. 2002). Installation Chaplain and staff officer to the CA stole over $73,000.00 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. Court 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, Court found accused waived the issue of CA as accuser absent plain (clear and obvious) error.

6. *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 the Judge Advocate General for return to another SJA and CA for a PTR and action. Court noted that their opinion doesn't mean that the CA in question is 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 (1999).

7. *United States v. Barry*, 57 M.J. 799 (Army 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) [hereinafter 10th Mtn (L)] at all times relevant hereto, was convicted at a GCM convened by the Commander, 10th Mtn (L); however, action in his case was taken by the Commander, 10th Mtn (L)(R), who signed as Commander, 10th Mtn (L). Because of the apparent 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 (Army Ct. Crim. App. 2003).

8. *United States v. Gudmundson*, 57 M.J. 493 (2002). Convening Authority (CA) who testifies on a controverted matter in a case is 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.

9. *United States v. Davis*, 58 M.J. 100 (2003). Convening Authority (CA) disqualification falls into two categories: category one 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; category two is where the CA exhibits or displays *an* inelastic attitude toward the performance of his or her post-trial duties or responsibility. 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 CA's "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 reflect 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 revered, the action set aside and the case remanded for a new review and action by a different CA.

10. *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 Rule for Courts-Martial 1107(a) allow for a different Convening Authority 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 is 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 R.C.M. 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 an other than official interest or was he a member of the court-martial?

C. When to Act?

1. Cannot act before R.C.M. 1105(c) time periods have expired or submissions have been waived.

2. *United States v. Lowe*, 58 M.J. 261 (2003). Prejudicial error for the Convening Authority (CA) to act on the case prior to service of the SJAR on the appellant's defense counsel as required by R.C.M. 1106(f)(1). The plain language of R.C.M. 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 R.C.M. 1106(f), a more expeditious course would be to recall and modify the action rather than resort to three years of appellate litigation. The former would appear to be more in keeping with principles of judicial economy and military economy of force.

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. *Must consider*:

a) Result of trial,

b) SJA recommendation, and

c) Accused's written submissions.

d) 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." *United States v. Davis*, 33 M.J. 13 (C.M.A. 1991).

e) Failure to consider two letters submitted by DC requires new review and action. *United States v. Dvonch*, 44 M.J. 531 (A.F. Ct. Crim. App. 1996).

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*, Army 9500238 (Army Ct. Crim. App. June. 10, 1996) (memo op on reconsideration). 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 R.C.M. 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.

> *Moral of story:* Even if the Government is not at fault, accused may get new PTR 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 have considered recommendation of 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. *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 (2002). CA properly considered accused's preenlistment 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 personal appearance to 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. No action on not guilty findings.

6. No action approving a sentence of an accused who lacks the capacity to understand or cooperate in post-trial proceedings.

E. Action on findings not required but permissible. *See* Manual for Courts-Martial (2002 Edition), United States, Appendix 16. Absent specific action on findings, the CA impliedly approves the correct findings reported in the SJA's post-trial recommendation.

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* Art. 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 (Army 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 (Army Ct. Crim. App. 2002). SJA's PTR erroneously stated findings and CA implicitly approved the findings as reported by the SJA. PTR 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 12 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 R.C.M. 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 R.C.M. 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 the footnote to the above quoted language, the Court referred to 35 cases out of 19 jurisdictions, covering a 15-month period, with erroneous PTRs.

3. *United States v. Saunders III*, 56 M.J. 930 (Army Ct. Crim. App. 2002). The SJAR erroneously advised the Convening Authority that the appellant was convicted of six specifications of violating a no-contact order, as opposed to five, and adultery (i.e., Spec 1 of Chg I and Spec 2 of Addt'l Chg I respectively). Applying *United States v. Wheelus*, 49 M.J. 283 (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.

F. Action on sentence must:

1. *Explicitly state approval or disapproval.*

a) *United States v. Schiaffo*, 43 M.J. 835 (Army 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. Note the problem:

> "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."

b) Common Problem. *See United States v. Reilly*, No. 9701756 (Army Ct. Crim. App., June 12, 1998) and *United States v. Scott*, No. 9601465 (Army Ct. Crim. App., June 12, 1998). Both cases involved

errors by the SJA in preparing the CA's action. While the SJA PTR correctly said the CA could approve TF, E1, 15 months and a BCD, the CA's action said "only so much of the sentence as provided for reduction to E1, TF and confinement for 15 months is approved, *and except that portion extending to the Bad Conduct Discharge*, shall be executed." Promulgating order had same ambiguity. Held – returned to CA for a new, unambiguous action.

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. Court distinguishes this case from *United States v. Smith*, 44 M.J. 788 (N-M. Ct. Crim. App. 1996) stating "Unlike *Smith*, there is nothing 'illegal, erroneous, incomplete or ambiguous' in the original action." *Id*. at 756.

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 8 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 R.C.M. 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. Koljbornsen*, 56 M.J. 805 (C.G. Ct. Crim. App. 2002). Appellant, convicted at a GCM of one specification of failure to obey a lawful general order and 14 specifications of possession of child pornography, was sentenced to a DD, 12 months confinement, and reduction to E-1. The pretrial agreement required the Convening Authority (CA) to suspend any confinement in excess of ten months and to defer the forfeitures in the case until action and thereafter waive forfeitures for an additional six months. Prior to action, the SJA provided the CA with two SJARs, the first recommending approval of ten months confinement and suspension of two months and the second, recommending approval of three and one-half months confinement. 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." The action further stated "the execution of that part of the sentence extending to confinement in excess of 3 months is suspended for 12 months, at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action." 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 BCD, confinement for three months, and reduction to E-1. As for the forfeitures issue, finance had not taken any forfeitures prior to action, therefore, the court treated the forfeitures prior to action to have been "deferred" by virtue of the CA's action. In choosing to act on the case itself, the court noted their concern that any clarifying action by the CA which resulted in an increase in confinement (i.e., up from three months) could be seen as an illegal post-trial increase in confinement.

c) *United States v. Shoemaker*, 58 M.J. 789 (A.F. Ct. Crim. App. 2003). At action the first time, the Convening Authority (CA) approved only 30 days confinement of a 3 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, 7 months out of the year contain 31 days resulting in a potential sentence greater than that originally approved, in violation of R.C.M. 810(d). Rather than return the case for a third SJAR and action, the court only approved 30 days confinement.

d) *United States v. Mitchell*, 58 M.J. 446 (2003). Appellant was tried and convicted at a GCM of, among other offenses, 5 drug distribution specifications and sentenced to a bad conduct discharge, 10 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 dishonorable discharge, 6 years confinement, and reduction to E-1. 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, Art. 63, UCMJ, and R.C.M. 810(d)(1) were not violated. The CAAF reversed, as to sentence, finding that a dishonorable discharge is more severe than a bad conduct discharge 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 bad conduct discharge, 6 years confinement, and reduction to E-1.

3. *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 (Army Ct. Crim. App. 1997). At a GCM, the accused was sentenced to 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 Army Court 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. *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 (1996). CA lawfully converted panel's BCD and 12 month sentence to 24 *additional* months' confinement and no BCD, acting in response to request that accused be permitted to retire. Commutation must be clement, "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 R.C.M. 1107(d)(1) that a BCD can be converted to 6 months of confinement. *See also United States v. Mitchell*, 56 M.J. 936 (Army Ct. Crim. App. 2002), *supra*.

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 46 months (suspended for 12 months) to 14 months, 6 days (suspended for 36 months). Sentence was for 10 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* R.C.M. 1107(d)(1)). Also significant that approved confinement was 22 months less than accused sought in his clemency petition.

7. *United States v. Emminizer*, 56 M.J. 441 (2002). Error for SJA in PTR 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 PTR and action.

8. *May reassess sentence*. If a convening authority 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 (2000). The convening authority 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. Bridges*, 58 M.J. 540 (C.G. Ct. Crim. App. 2003). Appellant convicted of two specifications of indecent acts with a child, one specification of rape of a child under twelve, and one specification of forcible sodomy upon a child under twelve, and sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for twenty-two years, and a DD. At action, the Convening Authority (CA) disapproved the findings related to one specification of indecent acts and forcible sodomy 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 Coast Guard Court held that the CA erred in attempting to reassess the sentence after dismissing two very serious specifications. 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.

b) *United States v. Meek*, 58 M.J. 579 (C.G. Ct. Crim. App. 2003). Appellant convicted of unauthorized absence (UA) terminated by apprehension (a lesser-included offense of the original desertion charge), missing movement by design, and wrongful use of marijuana and sentenced to reduction to E-1, seventy-five days confinement, and a BCD. At action, the Staff Judge Advocate (SJA) recommended disapproval of the UA charge, a recommendation based on a pretrial agreement where the Government agreed to withdraw and dismiss the desertion charge. 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 Court Guard Court 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 charge of desertion. Believing that the military judge would not have adjudged the same sentence without the UA charge and that the CA would not have approved the adjudged sentence had he properly reassessed the sentence, the court took remedial action, rather than returning the case for a new recommendation and action, approving only so much of the sentence as provided for reduction to E-1, sixty days confinement, and a BCD.

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 Convening Authority'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 Convening Authority expressly state all applicable credits in the action).

2. AR 27-10 (para. 5-31a) 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 193)), 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* R.C.M. 1107(f)(1) and 1103(b)(2)(D)(iv).

I. Contents of action. *See* 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."

1. AR 27-10 (para. 5-31) says do not designate a place of confinement. AR 190-47 controls.

2. JAGMAN Section 0123e "*Designation of places of confinement*. The convening authority of a court-martial sentencing an accused to confinement is a competent authority to designate the place of temporary custody or confinement of naval prisoners."

3. AF Reg 111-1, para. 15-10a. "Designated Confinement. Normally, a place of confinement . . . will be named in the . . .[CA's] action."

K. What if an error is discovered after action is taken? R.C.M. 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 *Schiaffo supra*).

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. CA must direct in post-trial action award of any R.C.M. 305(k) credit for illegal pretrial confinement. In the interest of discouraging deliberate or negligent disregard of the rules, CMA returns action to CA for correction. *United States v. Stanford*, 37 M.J. 388 (C.M.A. 1993).

2. Message, Headquarters, Department of Army, DAJA-CL, Subject: Sentence Credit (221600Z June 94). Effective 1 Aug. 94, CA actions will state number of days of sentence credit for ALL types of pretrial confinement.

3. "The convening authority will show in his or her initial action all credits against a sentence to confinement, either as adjudged or as 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." AR 27-10, para. 5-31a.

4. *McCray v. Grande*, 38 M.J. 657 (A.C.M.R. 1993). Sentence, for purposes of commutation, begins to run on date announced.

5. *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.

6. *United States v. Muirhead,* 48 MJ 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 R.C.M. 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 Court simply affirmed the unambiguous dollar amount.

M. Post-trial deals. *United States v. O'Lean*, 59 M.J. 561 (C.G. Ct. Crim. App. 2002). Convening authority (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. From sentence to action:

1. The 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 90 days of the end of trial or a presumption of prejudice arises).

2. The current rule: if prejudice, relief mandated. *United States v. Banks*, 7 M.J. 92 (C.M.A. 1976).

a) *United States v. Bigelow*, 57 M.J. 64 (2002). Two hundred and forty-four (244) days after trial, the CA took action in the accused's case, approving the sentence as adjudged. The Record of Trial (ROT) was 593 pages. The AFCCA affirmed the findings and sentence, finding that the 244-day time frame from trial to action was explained and was not inordinate under the circumstances of the case, citing, among other reasons, the length of the ROT, the location of the key participants (i.e., the TC, TDC, and MJ were assigned to three different bases in Europe), and the numerous errors in the record requiring multiple errata reviews and corrections by the MJ. The AFCCA went on to add that even if the delay were unexplained or inordinate, the appellant failed to show specific prejudice that would warrant relief. *United States v. Bigelow*, 55 M.J. 531 (A.F. Ct. Crim. App. 2001). Held – the delay in post-trial processing was "'neither unexplained nor inordinate'," affirming the decision of the AFCCA. The CAAF did not address the lack of prejudice to the appellant.

b) *United States v. Williams*, 55 M.J. 302 (2001). An extraordinary delay of 753 days to complete the post-trial process, from sentence to action does NOT warrant relief absent prejudice. Appellant failed to show prejudice. The CAAF however reiterated that "[d]elay will not be tolerated if there is any indication that appellant was prejudiced as a result."

c) *United States v. Williams*, 42 M.J. 791 (N-M. Ct. Crim. App. 1995). Record lost for 5 years after trial. Accused's BCD was never executed but he did serve 50 days confinement per a PTA. Main argument on appeal – lost employment opportunities because his company could not bid for government contracts given that he was still on active duty (appellate leave). Court found this insufficient, especially in light of his plea of guilty, but did grant sentence relief, refusing to affirm the BCD. Chides USN severely, saying not result of "inexperienced sailors or Marines" but "the inattention, dereliction, or incompetence of legally trained personnel." Suggests that someone "be held accountable for the delays" under Art. 98. *Id.* at 794.

d) *United States v. Jenkins*, 38 M.J. 287 (C.M.A. 1993). Claims of lost employment opportunity, inability to participate in state programs for home buying by veterans, and lost accrued leave, all resulting from post-trial delay not sufficient to warrant relief from findings and sentence.

e) *United States v. Giroux*, 37 M.J. 553 (C.M.A. 1993). Court cautions supervisory judge advocates to avoid over-emphasizing the importance of court-martial processing time to their SJAs (parties entered in post-trial agreement whereby accused would accept responsibility for post-trial processing time in exchange for clemency from CA).

f) *United States v. Richter*, 37 M.J. 615 (A.C.M.R. 1993). Delay of five months from authentication to action did not prejudice accused.

g) *United States v. Dupree*, 37 M.J. 1089 (N.M.C.M.R. 1993). Delay before CA action warrants relief only if delay is unjustified and inordinate, and there is some demonstrable prejudice to the accused.

h) *United States v. Greening*, 54 M.J. 831 (C.G. Ct. Crim. App. 2001) (post-trial delay absent prejudice does not entitle accused to relief).

i) *United States v. Tardif*, 55 M.J. 666 (C.G. Ct. Crim. App. 2001), *rev'd and remanded*, 57 M.J. 219. The appellant was convicted of AWOL and two specifications of assault on a child under the age of 16 and 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 precedence 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.

j) *United States v. Dezotell*, 58 M.J. 517 (N-M. Ct. Crim. App. 2003). Although the post-trial processing in appellant's case took nearly 14 months, the appellant failed to allege any prejudice resulting from the delay. Acknowledging its authority under *United States v. Tardif*, 57 M.J. 219 (2002), the court declined to grant relief absent a showing of prejudice.

k) *United States v. Khamsouk*, 58 M.J. 560 (N-M. Ct. Crim. App. 2003). Twenty-month delay from sentence to action did not warrant relief for dilatory post-trial processing. Commenting on the delay, the court noted that there was a "reasonable, although not entirely satisfactory explanation for the delay in the CA's [Convening Authority's] action." *Id.* at 562. Over half of the 20-month delay was attributed to the Military Judge (MJ) who took 13 months to authenticate the record of trial. After finding that the MJ's delay was a reasonable explanation why the CA could not act in the case at an earlier time, the court went on to point out that the defense counsel could have sought a post-trial 39(a) session to demand speedy post-trial processing since the MJ still controlled the case. Rather than complain or seek relief, neither the appellant nor his counsel raised post-trial processing as an issue until after receiving the Staff Judge Advocate's post-trial recommendation.

l) *United States v. Wallace*, 58 M.J. 759 (N-M. Ct. Crim. App. 2003). Delay of 290 days in appellant's guilty plea case does not warrant relief for dilatory post-trial processing. Failing to cite any prejudice other than delay itself, the court elected not to exercise its power to grant relief, noting that "relief pursuant to Article 66(c), UCMJ [for post-trial delay] should only be granted under the most extraordinary of circumstances." *Id.* at 775. Of significance was the appellant's post-trial silence (i.e., failure to complain regarding the post-trial processing).

> [N]either Appellant nor trial defense counsel raised the issue of delay with the military judge or the SJA [Staff Judge Advocate] or the CA [Convening Authority] during the entire post-trial processing period. Appellant raises it for the first time on appeal. . . . Appellant's lengthy silence is strong evidence that he suffered no harm and that this is not an appropriate case for this court to exercise its Article 66(c), UCMJ, authority.

Id.

3. Army Court of Criminal Appeals 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 (Army Ct. Crim. App. 2000). The Army Court has come up with a new method for dealing with post-trial processing time 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 (Army Ct. Crim. App. 2001). The only allegation of error was undue delay in the post-trial process. Defense sought relief in accordance with *United States v. Collazo*, 53 M.J. 721 (Army Ct. Crim. App. 2000). Applying *Collazo*, the court 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 Criminal Law 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 R.C.M. 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.C.C.A 2001) (ten months to prepare 459-page ROT – too long; sentence reduced by two months).

d) *United States v. Maxwell*, 56 M.J. 928 (Army 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 – 14 months from trial to action in a case where the ROT is only 384 pages is an excessive delay that warrants relief under *Collazo*, 53 M.J. 721 (Army Ct. Crim. App. 2000) and *Bauerbach*, 55 M.J. 501 (Army Ct. Crim. App. 2001). Note – Appellant failed to cite any prejudice resulting from the delay, however, the ACCA, in exercise of its Article 66, UCMJ, 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 (Army Ct. Crim. App. 2002) (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 (Army 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 (Army 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 Convening Authority reduced the appellant's confinement by 30 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*, 59 M.J. 634 (Army Ct. Crim. App. 2003). Failure 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 CCA), in a case with no actual prejudice to the appellant, constitutes waiver. Although prejudice is not a prerequisite to granting relief under Article 66(c), UCMJ, the court will carefully scrutinize claims of dilatory post-trial processing when no timely objection is made especially in light of its 10 published opinions in this area, 32 memorandum opinions, and the continued emphasis on post-trial placed by the JAG School and military conferences.

g) *United States v. Garman*, 59 M.J. 677 (Army 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.

4. Reality: Clerk of Court will inquire after 90 days.

5. Post-Action Delay – Forwarding of ROT to Appellate Court for Review.

a) *United States v. Tardif*, 58 M.J. 714 (C.G. Ct. Crim. App. 2003). Confinement reduced from 24 months to 19 months because of the 115-day delay in dispatching the record of trial to the Coast Guard HQ for appellate review.

b) *United States v. Harms*, 56 M.J. 755 (Army Ct. Crim. App. 2002). Appellant was convicted at a SPCM of assaulting a noncommissioned officer and two specifications of communicating a threat. He was sentenced to forfeit $600.00 pay per month for three months, reduction to E-1, confinement for three months and a BCD. Action in the appellant's guilty plea case, a case with a 77 page Record of Trial (ROT), was taken on 4 December 1997. The Clerk of Court did not receive the ROT until 18 August 2000, approximately 988 days after action, nearly three years later. Appellant argued that a 32-month delay in forwarding the ROT was error warranting sentence relief in his case. The Court disagreed. Held - absent actual prejudice, post-action (as opposed to post-trial but pre-action) delay will not result in relief. "At present we decline to extend the remedy fashioned in *Collazo* to such cases. We will continue to evaluate cases such as appellant's for prejudice under Article 59(a), UCMJ." *Id*. at 756. On remand (post-*Tardif*), modified in part. Previous findings affirmed but only so much of the sentence as provides for a BCD affirmed. 58 M.J. 515 (Army Ct. Crim. App. 2003).

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 R.C.M. 1108). *See*:

1. AR 27-10, para. 5-34;

2. JAGMAN, section 0129; and

3. AF Reg 111-1, para. 15-19.

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 six-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). The accused asked for assistance in supporting his dependents. Court 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, paragraph 5-34, on a sliding scale from 3 months in a SCM to 2 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." Court, 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 may be barred in the Army by AR 27-10)).

4. Suspension of period of confinement in conjunction with an approved discharge should coincide with serving the unsuspended portion of confinement. *United States v. Koppen*, 39 M.J. 897 (A.C.M.R. 1994).

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. 1998 Change to R.C.M. 1109.

B. 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.

C. *United States v. Connell*, 42 M.J. 462 (1995), *cert. denied*, 516 U.S. 1094, 116 S. Ct. 818, 133d L. Ed. 2d. 762 (1996).

D. *United States v. Miley*, 59 M.J. 300 (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 R.C.M. 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 R.C.M. 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. 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 R.C.M. 1107(h). On written application of the accused, the CA may extend this period for good cause, for not more than 30 days. *See* R.C.M. 1110(f)(1).

C. The accused has the right to *consult* with counsel before submitting a waiver or withdrawal. R.C.M. 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. 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 72 hour "cooling off" period; re-contact after initial request to waive/withdraw.

3. The accused may only file a waiver within 10 days after he or DC is served with a copy of the action (or within period of extension not to exceed 30 days).

4. *United States v. Smith*, 44 M.J. 387 (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) (Art. 61(a) permits such waiver "within 10 days after the action . . . is served on the accused or on defense counsel." R.C.M. 1110(f) must be read in this context. Clearly the R.C.M. cannot supersede a statute, but careful reading of the R.C.M. 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. The accused may file a *withdrawal* at any time before appellate review is completed.

6. 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 (R.C.M. 1112).

D. Other special courts-martial and summary courts-martial will be reviewed by a Judge Advocate under R.C.M. 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 R.C.M. 1110.

2. Each special court-martial in which the accused has waived or withdrawn appellate review under R.C.M. 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. 5-45*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 R.C.M. 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 General Court-Martial Convening Authority (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 R.C.M. 1201(b)(2). R.C.M. 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 14 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 R.C.M. 1209 has been rendered in the case. *If on the date of final judgment a servicemember is not on appellate leave* and more than 6 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.

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* The Clerk of Court's Handbook for Post-Trial Administration.

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). Rule for Courts-Martial 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 Rule for Courts-Martial 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, however, 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 court 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 court 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 (Art. 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, Art. 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, Army Court 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). 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 (Army 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 (Army Ct. Crim. App. 2002).

8. *United States v. Ragard*, 56 M.J. 852 (Army 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 (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 (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 Navy-Marine Court 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 (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 Army Court 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 Army Court 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, Art. 63, UCMJ, and R.C.M. 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. 973 (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. Pinegree*, 39 M.J. 884 (A.C.M.R. 1994) (inappropriately severe sentenced 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 (Army 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-accuseds received).

12. *United States v. Van Tassel*, 38 M.J. 91 (C.M.A. 1993). Standard of review of post-trial evidence of insanity is whether reviewing court is convinced beyond a reasonable doubt that factfinders would have no reasonable doubt that accused did not suffer from severe mental disease or defect so that accused lacked substantial capacity either to appreciate criminality of conduct or conform conduct to requirements of law, if offenses occurred before effective date of statute making lack of mental responsibility affirmative defense to be proven by defense.

13. *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.

14. *United States v. Fagan*, 58 M.J. 534 (Army Ct. Crim. App. 2003), *rev'd*, 59 M.J. 238 (2004). The lower court was correct in holding that *United States v. Ginn*, 47 M.J. 236 (1997)[1] provides the proper analytical framework for

[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

dealing with a post-trial affidavit raising a claim of cruel and unusual punishment. The court, however, erred in holding that it could grant relief at its level "in lieu of ordering a *DuBay* hearing (U*nited States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (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' factfinding 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 (2004). Finally, the lower court erred in finding a conflict, "where none exists", between *Ginn* and *United States v. Wheelus*, 49 M.J. 283 (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.

15. *United States v. Campbell*, 57 M.J. 134 (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.)?

16. *United States v. Hutchison*, 57 M.J. 231 (2002). Sentence review limited to determining appropriateness of sentence. Consideration of whether civilian

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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).

criminal prosecution was "appropriate" is an improper consideration for the CCA.

17. *United States v. Perron*, 58 M.J. 78 (2003). Appellate courts (i.e., CCAs) can not 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.

18. *United States v. Holt*, 58 M.J. 227 (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 PEs 16 (victim's letter) and 17-19, 21, 24, 26, 29-32, and 34 (copies of cancelled checks, debt collection documents, and a pawn ticket) 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.

19. *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 Convening Authority 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.

20. *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, 51 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 Convening Authority's (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*, NMCM No. 200101326, 2002 WL 1791911 (31 Jul 2001) (slip op. at 10) (unpub.)). Upon remand, the CA's Staff Judge Advocate (SJA), LtCol B prepared an SJAR that 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, rather, it was a directive. 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, disapproving the BCD.

21. Extraordinary Writs and Government Appeals.

D. Cases reviewed by TJAG (Art. 69(a)).

1. Those GCMs when the approved sentence does not include a dismissal, DD, or BCD, or confinement for a year or more (Art. 69(a)).

2. Those cases where a JA finds, under R.C.M. 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 (R.C.M. 1112(g)(l)).

3. Cases which have been finally reviewed, but not reviewed by a CCA or TJAG (per R.C.M. 1201(b)(1)), may *sua sponte* or upon application of the accused under Art. 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 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, 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 Art. 67.

F. *United States v. Jones*, 39 M.J. 315 (C.M.A. 1994). Power of CAAF usually does not include making sentence-appropriateness determinations. Province of the Courts of Criminal Appeals.

G. Abatement *Ab Initio*. *United States v. Rorie*, 58 M.J. 399 (2003). Appeal to the CAAF (before it CMA) UP of 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 since1953. 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.

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 R.C.M. 1112(g)(1) or 1201(b)(1).

B. *Berry v. Judges of U.S. Army C.M.R.*, 37 M.J. 158 (C.M.A. 1993). Conviction not final until expiration of Art. 71(c) filing period. Abatement of proceedings appropriate when accused died before end of period.

C. *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*, 2002 CCA LEXIS 186 (Army Ct. Crim. App. 2002) (findings and sentence set aside based on accused's death prior to final action). *But see United States v. Rorie*, 58 M.J. 399 (2003) (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 since1953).

D. Finality and execution of sentences.

1. A DD or BCD may be ordered executed only after a final judgment within the meaning of R.C.M. 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 R.C.M. 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. Niles*, 39 M.J. 878 (A.C.M.R. 1994). Petition for new trial not favored and, absent manifest injustice, will not normally be granted. *See also United States v. Humpherys*, 57 M.J. 83 (2002).

XXVIII. ASSERTIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

A. *United States v. Lewis*, 42 M.J. 1 (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 Army Court of Criminal Appeals' procedures for handling IAC allegations, originally set out in *United States v. Burdine*, 29 M.J. 834 (A.C.M.R. 1989), *review denied*, 32 M.J. 249 (C.M.A. 1990). 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 in failure to secure accused's approval of waiver 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). DC 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. 766 (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. Sander*, 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 (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; court also find IAC in counsel's trial performance).

K. *United States v. Key*, 57 M.J. 246 (2002) (w/out 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. *United States v. Mazer*, 58 M.J. 691 (N-M. Ct. Crim. App. 2003). Defense counsel was not ineffective by failing to request deferment of forfeitures when the defense's submission highlighted, for the Convening Authority, the appellant's poor

financial situation. More importantly, the appellant did not allege that he directed his counsel to seek deferment and counsel thereafter ignored his request. Assuming *arguendo* that failure to seek deferment prior to action was deficient performance by counsel, the appellant failed to establish any prejudice stemming from the deficient performance.

N. *Diaz v. The Judge Advocate General of the Navy*, 59 M.J. 34 (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 (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*.

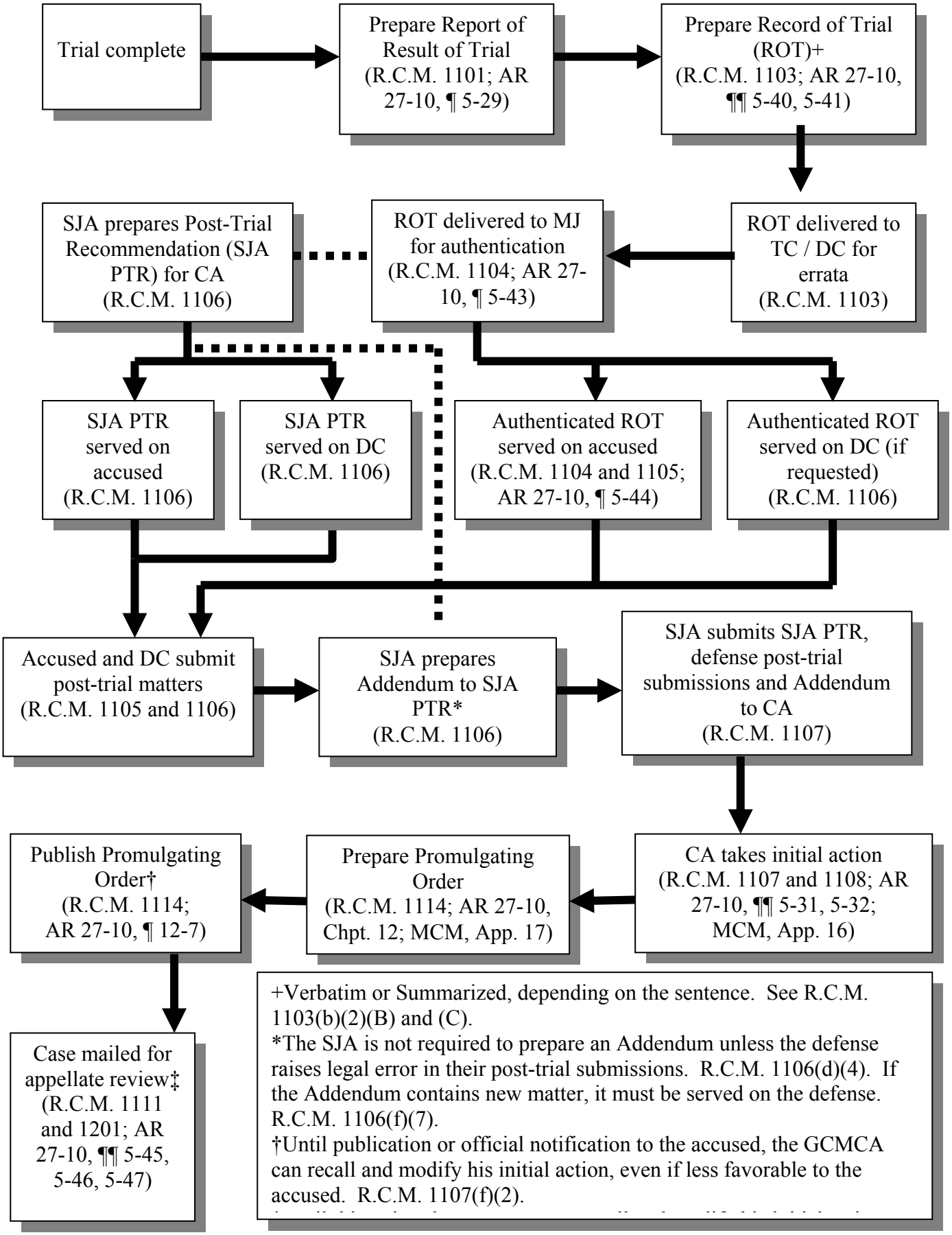
A. *Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990). Moore successfully appealed his rape convictions before NMCMR and sought release from confinement pending the government's appeal to C.M.A. Held –

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* R.C.M. 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



DESKBOOK

Volume III

Criminal Law Department

2004 - 2005

53rd GRADUATE COURSE

CRIMINAL LAW DESKBOOK

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VICTIM/WITNESS ASSISTANCE

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MAJ Deidra J. Fleming
October 2004

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53D GRADUATE COURSE

VICTIM/WITNESS ASSISTANCE

Outline of Instruction

I. REFERENCES.

A. Primary.

1. Victim Rights Clarification Act of 1997, 18 U.S.C. § 3510 (2003).

2. Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 1503, 1505, 1510, 1512-1515, 3146, 3579, 3580 (1988).

3. Victims of Crime Act of 1984, 42 U.S.C. §§ 10601-10603 (1988).

4. Victims' Rights and Restitution Act of 1990, 42 U.S.C. §§ 10606-10607 (2003).

5. 38 U.S.C. §1311-1314 (2003) (Dependency and Indemnity Compensation).

6. 10 U.S.C. §1059 (2003) (Transitional Compensation).

7. DoD Directive (DoD Dir.) 1030.1, Victim and Witness Assistance (April 13, 2004).

8. DoD Instruction (DoDI) 1030.2, Victim and Witness Assistance Procedures (June 4, 2004).

9. Dep't of Army, Reg. 27-10, Military Justice, ch. 18 (6 September 2002).

10. Dep't of Air Force Instruction (AFI) 51-201, Victim and Witness Assistance, ch. 7 (25 April 1997).

11. SECNAVINST 5800.11A, Victim and Witness Assistance Program (16 June 1995).

12. Marine Corps Order 5800.15A, Victim and Witness Assistance Program (VWAP) (3 September 1997).

B. Secondary.

1. Douglas K. Mickle, *The Army's Victim/Witness Assistance Program*, ARMY LAW., November 1994, at 3.

2. Warren G. Foote, *State Compensation for Victims of Crime*, ARMY LAW., March 1992, at 51.

3. Warren G. Foote, *Victim-Witness Assistance*, ARMY LAW., June 1991, at 63.

4. OTJAG POC: LTC (Ret) Charles Cosgrove, 1777 North Kent Street, 10th Floor, Rosslyn,, VA 22209-2194; 703-588-6748 (Voice), 703-588-0144 (FAX); charles.cosgrove@hqda.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.

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.

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 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 where practical, 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. Establish Victim-Witness Assistance Council, to extent practicable, at "each significant military installation."

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 18.

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 V, below.

B. DD Forms (See Appendices).

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.

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, DD Form 2873 (appendices)

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 (recommended).

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 January or each year, SJA of each command having GCM jurisdiction must report:

1. The number of persons who received DD Forms 2701, 2702, 2703.

2. SJA's will obtain data for their reports from subordinate commands attached or assigned to their GCM jurisdiction for military justice purposes, including supported reserve component units.

3. Negative reports are required.

4. Use DD Form 2706.

5. Forward report through MACOM channels to Criminal Law Division, , HQDA, The Judge Advocate General, 1777 North Kent Street, 10th Floor, Rosslyn, VA 22209.

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. 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 (23 May 1995); DoD Instruction 1342.24, Change 1 (May 1997); AR 608-1, *Army Community Service*, (20 November 2003).

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. UCMJ, art 58b.

1. "Waiver" of forfeitures of pay and allowances to dependents.

2. Maximum period is six months.

3. Request does not have to be made by accused; may be made by dependents or someone (VWL) on behalf of dependents.

G. UCMJ, art. 139.

1. Redress of injuries to property.

2. Willful damage or theft.

3. No conviction is required.

VII. 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.

F. See Appendix 2 for further analysis of these changes

VIII. CASELAW 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 (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 (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.

IX. CONCLUSION.

53D GRADUATE COURSE

VICTIM/WITNESS ASSISTANCE

APPENDICES

1. DD Form 2873 (Military Protective Order) and attached memorandum.

2. Changes to Manual for Courts-Martial, United States, Mil. R. Evid. 615 (2002) (including analysis to Mil. R. Evid. 615; Notes of Federal Rules Advisory Committee to F.R.E. 615; Commentary by Professor Saltzburg in United States Code Service; and Comment by Professor Saltzburg, et.al. in Federal Rules of Evidence Manual).

3. Changes to Transitional Compensation Rules contained in National Defense Authorization Act of 2004 and OTJAG Crim Law Information Paper Concerning Same

4. Victim-Witness Checklist (Appendix D, AR 27-10)

5. DD Form 2701, Initial Information for Victims and Witnesses of Crime.

6. DD Form 2702, Court-Martial Information for Victims and Witnesses of Crime.

7. DD Form 2703, Post-Trial Information for Victims and Witnesses of Crime.

8. DD Form 2704, Victim/Witness Certification and Election Concerning Inmate Status.

9. DD Form 2705, Victim/Witness Notification of Confinee Status.

10. DD Form 2706, Annual Report on Victim and Witness Assistance.

11. EXSUM from DoD Task Force Report on Care for Victims of Sexual Assault, April 2004.

12. EXSUM from DA Task Force Report on Sexual Assault Policies, 27 May 2004.

APPENDIX 1

MILITARY PROTECTIVE ORDER AND MEMORANDUM

APPENDIX 2

MRE 615 -- Expanding Exceptions to the Sequestration Rule

Effective 15 May 2002

1. The rule: Part III of the Manual for Courts-Martial, United States, is amended in Mil. R. Evid. 615 by striking the period at the end of the rule and adding ", or (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."

2. Changes to Appendix 22, the Analysis Accompanying the Military Rules of Evidence (Part III, MCM).

c. The analysis to Mil. R. Evid. 615 is amended by adding at the end the following new paragraph:

"*2002 Amendment*: These changes are intended to extend 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), giving crime victims '[t]he right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial,' and the Victim Rights Clarification Act of 1997, 18 U.S.C. § 3510, which is restated in subsection (5). For the purposes of this rule, the term 'victim' includes all persons defined as victims in 42 U.S.C. § 10607(e)(2), which means 'a person that 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. 'The victim's right to remain in the courtroom remains subject to other rules, such as those regarding classified information, witness deportment, and conduct in the courtroom. Subsection (4) is intended to capture only those statutes applicable to courts-martial."

3. Notes of Advisory Committee on 1998 amendments. The amendment is in response to: (1) the Victim's Rights and Restitution Act of 1990, 42 U.S.C. § 10606, which guarantees, within certain limits, the right of a crime victim to attend the trial; and (2) the Victim Rights Clarification Act of 1997 (18 U.S.C. § 3510).

4. Commentary by Saltzburg in USCS

In 1990, Congress enacted the "Victim of Crime Bill of Rights," 42 USCS § 10606, which provides several protections for victims of crime. This statute was enacted partly in response to a concern that victim-witnesses would be routinely excluded from criminal proceedings. Accordingly, subdivision (b)(4) of the Victim's Bill of Rights establishes the right "to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial." It is clear that Congress intended in the Victim's Bill of Rights to create an exception to Rule **615** for crime victims. Under 42 USCS § 10606(b)(4), a Trial Judge has no right to automatically exclude every victim-witness, as would be the case under Rule **615.** Instead, the Judge must determine whether the testimony of the victim will be not only affected but "materially affected" by hearing other testimony. Given the public access to information, especially in high profile criminal cases, a Trial Judge will be hard-pressed to conclude that a victim's presence at trial will "materially affect" their testimony.

As part of another package furthering victim's rights, Congress enacted "The Victim Rights Clarification Act of 1997." The law adds section 3510 to Title 18, and provides that notwithstanding any other law or Rule (including of course Rule **615)**, a Court "shall not order any victim of an offense excluded from the trial of a defendant accused of that offense because such victim may, during the sentencing hearing, make a statement or present any information in relation to the sentence." After the Victim Rights Clarification Act, the Trial Court has no authority to exclude a victim from trial on the ground that the victim's presence at trial might taint his testimony at a sentencing proceeding.

Because Rule **615** has essentially been superseded by legislation at least in the area of sequestration of crime victims, the Supreme Court approved an amendment to Rule **615** that adds an exception to the Rule **615** sequestration power for any person "whose presence is authorized by statute." Unless Congress acts to change or reject the Supreme Court's proposal, this change will become effective on December 1, 1998.

5. Comment by Saltzburg et al. in Federal Rule of Evidence Manual:

Victims of crime

The December 1, 1998, amendment to Rule **615** described in the Official Text, supra, provides an exception to sequestration for crime victims in accordance with victim rights legislation.

Federal Rule **615** could obviously have an impact on a victim of a crime in the context of a criminal trial. The victim will often be a witness, and will often have an emotional and psychological interest in attending all trial proceedings. Such a victim is subject to sequestration under the terms of Rule **615.** The exceptions to Rule **615,** as they stand at this writing, are essentially inapplicable to crime victims; the victim is not a party, and it would be the rare case where the prosecutor could show that the victim fit the exception

to Rule **615** for a witness whose presence prior to his testimony is essential to the presentation of the case.

In 1990, Congress enacted the "Victim of Crime Bill of Rights," 42 U.S.C. § 10606, which provides several protections for victims of crime. This statute was enacted partly in response to a concern that victim-witnesses would be routinely excluded from criminal proceedings. Accordingly, subdivision (b)(4) of the Victim's Bill of Rights establishes the right "to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial." (It is to be noted that subdivision (c) of the statute states that no cause of action or defense is created from the failure of the government to accord the enumerated rights.) N 21

> N 21 42 U.S.C. § 10606 provides several protections for victims of crime. The statute provides in full as follows:
>
> 10606 Victims rights
>
> (a) Best efforts to accord rights. Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that victims of crime are accorded the rights described in subsection (b).
>
> (b) Rights of crime victims. A crime victim has the following rights:
>
> (1) The right to be treated with fairness and with respect for the victims dignity and privacy.
>
> (2) The right to be reasonably protected from the accused offender.
>
> (3) The right to be notified of court proceedings.
>
> (4) The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.
>
> (5) The right to confer with an attorney for the Government in the case.
>
> (6) The right to restitution.

> (7) The right to information about the conviction, sentencing, imprisonment, and release of the offender.
>
> (c) No cause of action or defense. This section does not create a cause of action or defense in favor of any person arising out of the failure to accord to a victim the rights enumerated in subsection (b).

It is clear that Congress intended in the Victim's Bill of Rights to create an exception to Rule **615** for crime victims. This exception, which is narrowly tailored to take account of the interests of crime victims and is more recently enacted than the Rule, takes precedence over Rule **615.**

As we read 42 U.S.C. § 10606 (b)(4), a Trial Judge has no right to automatically exclude every victim-witness, as would be the case under Rule **615.** Instead, the Judge must determine whether the testimony of the victim will be not only affected but "materially affected" by hearing other testimony. The use of the word "materially" imposes a difficult task on a Trial Judge, especially in light of the ordinary discovery that is mandated in criminal cases. Fed. R. Crim. P. 16 does not require the government to reveal names of witnesses or to disclose the expected nature of their testimony. Nor does it require the government to produce statements of witnesses. The Jencks Act, 18 U.S.C. § 3500, does not require the government to turn over statements of testifying witnesses until they have given direct examination. Recent attempts to expand discovery through the rulemaking process were unsuccessful. Thus, a Trial Judge called upon to determine the effect of other testimony on a victim often will be largely in the dark unless the Judge believes it is fair to consider an ex parte, in camera submission by the government, or the government is prepared to reveal names and expected testimony of witnesses prior to trial. Many Judges will be uncomfortable with an ex parte, in camera submission, and many prosecutors will be reluctant to provide the defense with expanded discovery simply to enable a ruling on a sequestration matter. Since the victim of crime is an important witness in most cases, and since exploring inconsistencies between a victim's testimony and that of other witnesses is a crucial part of the defense in many cases, a Trial Judge might conclude that if the victim hears trial testimony, the victim's testimony would be materially affected. This is especially likely if the Judge concludes that elimination of inconsistencies in the testimony of various witnesses would be a material change in the prosecution's case. Thus, even under the statute, victims of crime will sometimes be sequestered - just not as often as would be the case under Rule **615.** Sequestration would not be appropriate in high profile trials, however. In those cases, a victim-witness will hear about courtroom testimony through a variety of sources, and a Judge would be hard-pressed to find that the victim's testimony would be materially affected by her presence in the courtroom.

Even if sequestration is ordered under the statute, this does not mean that crime victims should be sequestered for any substantial part of a criminal trial. Any conscientious prosecutor dealing with a victim who wishes to be present at public Court proceedings related to that victim's harm should, under subdivision (a) of the statute

(requiring officials of the Justice Department to make their best efforts to protect victims' rights), make his or her best effort to call the victim first and then argue that the victim has a right to remain in the courtroom during the rest of the trial. The argument is that, once the victim's testimony is completed, there no longer is a good reason to exclude the victim. In some rare cases, the Trial Judge may conclude that there may be a need for the defendant to recall the victim, that the evidence presented in the interim would materially affect the victim's testimony on recall, and that the defendant should not be compelled to decide whether to elicit additional testimony at the outset of the government's case. In such cases, the prosecutor who called the victim as the first witness would have satisfied the statutory requirement of best efforts, even though the victim might be excluded from the courtroom even after testifying. In most cases, however, the victim should be able to remain in the courtroom after testifying.

Should a prosecutor fail to seek to have the victim testify first, the Judge should exercise the power conferred by Rule 611(a) to control the order of proof, and require the victim to be the first witness if the victim has expressed a desire to attend the trial. The Judge could even call the victim as the first witness by using the power conferred by Rule 614, although it is difficult to believe that this ought to be a preferred procedure.

Whether the prosecutor requests or the Judge orders that the victim testify first, the result is that in all but the most unusual cases the victim should be able to be present during virtually the entire trial. This result is consistent with Congress' goals in enacting the Victims' Bill of Rights.

In the Oklahoma City bombing trial, United States v. McVeigh, the defendant sought to exclude victims on the ground that they planned to testify at the sentencing hearing. The defense argued that the victims' presence at the trial would materially affect their testimony at the later proceeding. The Trial Judge agreed with the defendant and entered an order excluding from the trial any victims who planned to give victim impact statements at the sentencing hearing. This left the victims in a quandary: to attend the trial, they would essentially have to waive their right to give a victim impact statement at the sentencing hearing.

Congress responded with legislation entitled "The Victim Rights Clarification Act of 1997." The law adds section 3510 to Title 18, and provides that notwithstanding any other law or Rule (including of course Rule **615)**, a Court "shall not order any victim of an offense excluded from the trial of a defendant accused of that offense because such victim may, during the sentencing hearing, make a statement or present any information in relation to the sentence."

After the Victim Rights Clarification Act, the Trial Court has no authority to exclude a victim from trial on the ground that the victim's presence at trial might taint his testimony at a sentencing proceeding. At any rate, it is quite unlikely that a victim's presence at trial would ever taint her sentencing hearing testimony. The issues at trial and sentencing are so different that the risks of taint are remote.

Because Rule **615** has essentially been superseded by legislation at least in the area of sequestration of crime victims, the Advisory Committee on the Federal Rules of Evidence has proposed that the Rule be amended. The Advisory Committee's proposal reads:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person whose presence is authorized by statute.
>
> The intent of the proposal is to accommodate both the existing Victim's Rights legislation, as well as any future legislation, such as the current proposal in Congress to provide crime victims an absolute right of presence in the courtroom. The above proposal to amend Rule **615** has been approved by the Judicial Conference and submitted to the Supreme Court. If the Supreme Court approves the amendment, and Congress does not act, the amendment will become effective on December 1, 1998.

APPENDIX 3

P.L. 108-106

National Defense Authorization Act for Fiscal Year 2004

Subtitle G--Domestic Violence

SEC. 571. TRAVEL AND TRANSPORTATION FOR DEPENDENTS RELOCATING FOR REASONS OF PERSONAL SAFETY.

Section 406(h) of title 37, United States Code, is amended by adding at the end the following new paragraph:

`(4)(A) If a determination described in subparagraph (B) is made with respect to a dependent of a member described in that subparagraph and a request described in subparagraph (C) is made by or on behalf of that dependent, the Secretary may provide a benefit authorized for a member under paragraph (1) or (3) to that dependent in lieu of providing such benefit to the member.

`(B) A determination described in this subparagraph is a determination by the commanding officer of a member that--

`(i) the member has committed a dependent-abuse offense against a dependent of the member;

`(ii) a safety plan and counseling have been provided to that dependent;

`(iii) the safety of the dependent is at risk; and

`(iv) the relocation of the dependent is advisable.

`(C) A request described in this subparagraph is a request by the spouse of a member, or by the parent of a dependent child in the case of a dependent child of a member, for relocation.

`(D) Transportation may be provided under this paragraph for household effects or a motor vehicle only if a written agreement of the member, or an order of a court of competent jurisdiction, gives possession of the effects or vehicle to the spouse or dependent of the member concerned.

`(E) In this paragraph, the term `dependent-abuse offense' means an offense described in section 1059(c) of title 10.'.

SEC. 572. COMMENCEMENT AND DURATION OF PAYMENT OF TRANSITIONAL COMPENSATION.

(a) COMMENCEMENT- Paragraph (1)(A) of section 1059(e) of title 10, United States Code, is amended by striking `shall commence' and all that follows and inserting `shall commence--

`(i) as of the date the court-martial sentence is adjudged if the sentence, as adjudged, includes a dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances; or

`(ii) if there is a pretrial agreement that provides for disapproval or suspension of the dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances, as of the date of the approval of the court-martial sentence by the person acting under section 860(c) of this title (article 60(c) of the Uniform Code of Military Justice) if the sentence, as approved, includes an unsuspended dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances; and'.

(b) DURATION- (1) Paragraph (2) of such section is amended by striking `a period of 36 months' and all that follows through `12 months' and inserting `a period of not less than 12 months and not more than 36 months, as established in policies prescribed by the Secretary concerned'.

(2) Policies under subsection (e)(2) of section 1059 of title 10, United States Code, as amended by paragraph (1), for the duration of transitional compensation payments under that section shall be prescribed under such subsection not later than six months after the date of the enactment of this Act.

(c) TERMINATION- Paragraph (3)(A) of such section is amended by striking `punishment applicable to the member under the sentence is remitted, set aside, or mitigated' and inserting `conviction is disapproved by the person acting under section 860(c) of this title (article 60(c) of the Uniform Code of Military Justice) or set aside, or each such punishment applicable to the member under the sentence is disapproved by the person acting under section 860(c) of this title, remitted, set aside, suspended, or mitigated'.

(d) EFFECTIVE DATE- The amendments made by this section shall apply only with respect to cases in which a court-martial sentence is adjudged on or after the date of the enactment of this Act.

SEC. 573. EXCEPTIONAL ELIGIBILITY FOR TRANSITIONAL COMPENSATION.

(a) AUTHORITY- Section 1059 of title 10, United States Code, is amended by adding at the end the following new subsection:
`(m) EXCEPTIONAL ELIGIBILITY FOR DEPENDENTS OF FORMER MEMBERS-

(1) The Secretary concerned, under regulations prescribed under subsection (k), may authorize eligibility for benefits under this section for dependents and former dependents of a former member of the armed forces in a case in which the dependents or former dependents are not otherwise eligible for such benefits and the Secretary concerned determines that the former member engaged in conduct that is a dependent-abuse offense under this section and the former member was separated from active duty other than as described in subsection (b).

`(2) In a case in which the Secretary concerned, under the authority of paragraph (1), authorizes benefits to be provided under this section, such benefits shall be provided in the same manner as if the former member were an individual described in subsection (b), except that, under regulations prescribed under subsection (k), the Secretary shall make such adjustments to the commencement and duration of payment provisions of subsection (e), and may make adjustments to other provisions of this section, as the Secretary considers necessary in light of the circumstances in order to provide benefits substantially equivalent to the benefits provided in the case of an individual described in subsection (b).

`(3) The authority of the Secretary concerned under paragraph (1) may not be delegated.'.

(b) EFFECTIVE DATE- The authority under subsection (m) of section 1059 of title 10, United States Code, as added by subsection (a), may be exercised with respect to eligibility for benefits under that section only for dependents and former dependents of individuals who are separated from active duty in the Armed Forces on or after the date of the enactment of this Act.

SEC. 574. TYPES OF ADMINISTRATIVE SEPARATIONS TRIGGERING COVERAGE.

Section 1059(b)(2) of title 10, United States Code, is amended by inserting `, voluntarily or involuntarily,' after `administratively separated'.

SEC. 575. COMPTROLLER GENERAL REVIEW AND REPORT.

(a) REVIEW- During the two-year period beginning on the date of the enactment of this Act, the Comptroller General shall review and assess the progress of the Department of Defense in implementing the recommendations of the Defense Task Force on Domestic Violence. In reviewing the status of the Department's efforts, the Comptroller General should specifically focus on--

(1) the efforts of the Department to ensure confidentiality for victims and accountability and education of commanding officers and chaplains; and

(2) the resources that the Department of Defense has provided toward such implementation, including personnel, facilities, and other administrative support, in order to ensure that necessary resources are provided to the organization within the Office of

the Secretary of Defense with direct responsibility for oversight of implementation by the military departments of recommendations of the Task Force in order for that organization to carry out its duties and responsibilities.

(b) REPORT- The Comptroller General shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report on the results of the review and assessment under subsection (a) not later than 30 months after the date of the enactment of this Act.

SEC. 576. FATALITY REVIEWS.

(a) ARMY- (1) Part II of subtitle B of title 10, United States Code, is amended by adding at the end the following new chapter:

`CHAPTER 375--MISCELLANEOUS INVESTIGATION REQUIREMENTS AND OTHER DUTIES

`Sec.
`4061. Fatality reviews.

`Sec. 4061. Fatality reviews

`(a) REVIEW OF FATALITIES- The Secretary of the Army shall conduct a multidisciplinary, impartial review (referred to as a `fatality review') in the case of each fatality known or suspected to have resulted from domestic violence or child abuse against any of the following:

`(1) A member of the Army on active duty.

`(2) A current or former dependent of a member of the Army on active duty.

`(3) A current or former intimate partner who has a child in common or has shared a common domicile with a member of the Army on active duty.

`(b) MATTERS TO BE INCLUDED- The report of a fatality review under subsection (a) shall, at a minimum, include the following:

`(1) An executive summary.

`(2) Data setting forth victim demographics, injuries, autopsy findings, homicide or suicide methods, weapons, police information, assailant demographics, and household and family information.
`(3) Legal disposition.

`(4) System intervention and failures, if any, within the Department of Defense.

`(5) A discussion of significant findings.

`(6) Recommendations for systemic changes, if any, within the Department of the Army and the Department of Defense.

`(c) OSD GUIDANCE- The Secretary of Defense shall prescribe guidance, which shall be uniform for the military departments, for the conduct of reviews by the Secretary under subsection (a).'.

(2) The tables of chapters at the beginning of subtitle B, and at the beginning of part II of subtitle B, of such title are each amended by inserting after the item relating to chapter 373 the following new item:
4061'.

(b) NAVY AND MARINE CORPS- (1) Chapter 555 of title 10, United States Code, is amended by adding at the end the following new section:

`Sec. 6036. Fatality reviews

`(a) REVIEW OF FATALITIES- The Secretary of the Navy shall conduct a multidisciplinary, impartial review (referred to as a `fatality review') in the case of each fatality known or suspected to have resulted from domestic violence or child abuse against any of the following.

`(1) A member of the naval service on active duty.

`(2) A current or former dependent of a member of the naval service on active duty.

`(3) A current or former intimate partner who has a child in common or has shared a common domicile with a member of the naval service on active duty.

`(b) MATTERS TO BE INCLUDED- The report of a fatality review under subsection (a) shall, at a minimum, include the following:

`(1) An executive summary.

`(2) Data setting forth victim demographics, injuries, autopsy findings, homicide or suicide methods, weapons, police information, assailant demographics, and household and family information.

`(3) Legal disposition.
`(4) System intervention and failures, if any, within the Department of Defense.

`(5) A discussion of significant findings.

`(6) Recommendations for systemic changes, if any, within the Department of the Navy and the Department of Defense.

`(c) OSD GUIDANCE- The Secretary of Defense shall prescribe guidance, which shall be uniform for the military departments, for the conduct of reviews by the Secretary under subsection (a).'.

(2) The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

`6036. Fatality reviews.'.

(c) AIR FORCE- (1) Part II of subtitle D of such title is amended by adding at the end the following new chapter:

`CHAPTER 875--MISCELLANEOUS INVESTIGATION REQUIREMENTS AND OTHER DUTIES
`Sec.
`9061. Fatality reviews.

`Sec. 9061. Fatality reviews

`(a) REVIEW OF FATALITIES- The Secretary of the Air Force shall conduct a multidisciplinary, impartial review (referred to as a `fatality review') in the case of each fatality known or suspected to have resulted from domestic violence or child abuse against any of the following:

`(1) A member of the Air Force on active duty.

`(2) A current or former dependent of a member of the Air Force on active duty.

`(3) A current or former intimate partner who has a child in common or has shared a common domicile with a member of the Air Force on active duty.

`(b) MATTERS TO BE INCLUDED- The report of a fatality review under subsection (a) shall, at a minimum, include the following:

`(1) An executive summary.

`(2) Data setting forth victim demographics, injuries, autopsy findings, homicide or suicide methods, weapons, police information, assailant demographics, and household and family information.

`(3) Legal disposition.

`(4) System intervention and failures, if any, within the Department of Defense.

`(5) A discussion of significant findings.

`(6) Recommendations for systemic changes, if any, within the Department of the Air Force and the Department of Defense.

`(c) OSD GUIDANCE- The Secretary of Defense shall prescribe guidance, which shall be uniform for the military departments, for the conduct of reviews by the Secretary under subsection (a).'.

(2) The tables of chapters at the beginning of subtitle D, and at the beginning of part II of subtitle D, of such title are each amended by inserting after the item relating to chapter 873 the following new item:

9061'.

(d) APPLICABILITY- Sections 4061, 6036, and 9061 of title 10, United States Code, as added by this section, apply with respect to fatalities that occur on or after the date of the enactment of this Act.

SEC. 577. SENSE OF CONGRESS.

It is the sense of Congress that--

(1) the Secretary of Defense should develop a Department of Defense strategic plan for domestic violence that incorporates the core principles of domestic violence intervention identified by the Defense Task Force on Domestic Violence in its third annual report under section 591(e) of the National Defense Authorization Act for Fiscal Year 2000 (Public Law 106-65; 10 U.S.C. 1562 note); and

(2) the Secretary of each military department should establish and support a Victim Advocate Protocol as recommended by the Defense Task Force on Domestic Violence.

INFORMATION PAPER

DAJA-CL 22 December 2003

SUBJECT: Changes to Transitional Compensation Program (10 USC 1059) and Travel Benefits

1. **Purpose**. To provide information to Staff Judge Advocates, victim witness liaisons and Family Advocacy Program (FAP) managers concerning recent changes to the Transitional Compensation Program and travel benefits.

2. **Discussion**.

a. The National Defense Authorization Act (NDAA) (PL 108-136, signed 24 Nov 03) made multiple changes to the Transitional Compensation statute (10 USC 1059).

b. Section 572(a)(i), NDAA changes the eligibility date for receipt of Transitional Compensation (TC) in court-martial proceedings. A qualifying family member may now receive TC as of **date of sentencing** if the adjudged sentence includes a dismissal, DD, BCD, or total forfeitures.

c. Section 572(a)(ii), NDAA addresses a narrow category of cases that involve a pretrial agreement (PTA) that provide for suspension or disapproval of the dismissal, DD, BCD, or total forfeitures. While such PTAs are not common, when they do occur, this section delays the eligibility date for TC until approval of the sentence by the convening authority and only where the sentence approved under such a pretrial agreement includes an unsuspended dismissal, DD, BCD or total forfeitures.

d. Section 574, NDAA amended the TC statute to authorize TC in both voluntary (Chapter 10) and involuntary administrative separations.

e. Section 572 (TC available upon sentencing) changes were effective for all courts-martial in which the sentence was adjudged on or after the date of enactment, 24 November 2003. Section 574 change (administrative separation proceedings) was also effective 24 November 2003.

f. Section 571, NDAA provides for travel and transportation of dependents in cases of domestic violence. Section 573, NDAA provides for TC in exceptional cases. However, both of these sections require Secretarial action (implementing regulations) to be effective. The Army Times article of 15 December 2003 incorrectly suggests that they are effective immediately.

3. **Full Text**. Full text of amendments is reproduced at the Enclosure [included previously].

Prepared By: Mr. Cosgrove /703-588-675
In coordination with CFSC, and OTJAG Ad Law
Approved by: COL Condron, Chief, Crim Law

APPENDIX 4

Appendix D
Victim/Witness Checklist

D-1. Victim checklist

a. Coordinate with installation/community casualty working group and the U.S. Army Criminal Investigation Command Survivor Point of Contact in death cases (18-2c).

b. Ensure that victims are provided the name, location, and telephone number of the VWL (para 18-8b).

c. Inform the victim of the right to receive the services described in chapter 18 (secs III and V) and provide a Victim and Witness Information Packet (para 18-9b).

d. Inform the victim of the following rights (para 18-10):

(1) The right to be treated with fairness, dignity, and a respect for privacy.

(2) The right to be reasonably protected from the accused offender.

(3) The right to be notified of court proceedings.

(4) The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial, or for other good cause.

(5) The right to confer with the attorney for the Government in the case.

(6) The right to restitution, if appropriate.

(7) The right to information regarding conviction, sentencing, imprisonment, and release of the offender from custody.

e. Inform the victim of the availability of emergency medical and social care and, when necessary, provide appropriate assistance in securing such care (para 18-12a).

f. Inform abused dependent victims of the availability of medical care for injuries resulting from abuse if the sponsor received a dishonorable or bad conduct discharge or dismissal for an offense involving abuse of the dependent victims.

g. Assist the victim in obtaining financial, legal, and other social service support by informing the victim of the military and/or civilian programs that are available to provide

counseling, treatment, and other support, to include available compensation through Federal, State, and local agencies (para 18-12b).

h. Inform dependents of soldiers who are victims of abuse by the military spouse or parent of the possibility of payment of a portion of the disposable retired pay of the soldier under 10 U.S.C. 1408 or payment of transitional compensation benefits under 10 U.S.C. 1059 (para 18-12b(7)).

i. Inform a victim that families of soldiers may be eligible for transportation and shipment of household goods regardless of the character of the soldier's discharge (para 18-12b(8)).

j. Inform the victim of the various means available to seek restitution (Article 139, UCMJ; other remedies, such as claims, private lawsuits, or any State compensation programs) and of appropriate and authorized points of contact (para 18-16b).

k. Inform a victim concerning the stages in the military criminal justice system, the role that they can be expected to play in the process, and how they can obtain additional information concerning the process and the case (para 18-13).

l. Inform a victim that the victim may receive notice of the following significant events in the case (para 18-14a):

(1) The status of the investigation of the crime, to the extent that it will not interfere with the conduct of the investigation, the rights of the accused, or the rights of other victims or witnesses.

(2) The apprehension of the suspected offender.

(3) The preferral or dismissal of charges.

(4) The initial appearance of the suspected offender before a judicial officer at a pretrial confinement hearing or at an Article 32, UCMJ , investigation.

(5) The scheduling of each court proceeding that the victim is either required or entitled to attend and of any scheduling changes.

(6) The detention or release from detention of an offender or suspected offender.

(7) The acceptance of a plea of guilty or the rendering of a verdict.

(8) The opportunity to provide evidence in aggravation of financial, social, psychological, and physical harm.

(9) The result of trial.

(10) If the sentence includes confinement, the probable parole date.

(11) General information regarding the corrections process, including information about forms of release from custody, and the offender's eligibility for each.

(12) The right to request notice of the offender's confinement or parole status.

(13) The opportunity to submit a victim impact statement to the Army Clemency and Parole Board.

m. Advise a victim that ordinarily the victim may consult with a Government representative concerning the following decisions (para 18-15):

(1) Decisions not to prefer charges.

(2) Decisions concerning pretrial restraint.

(3) Pretrial dismissal of charges.

(4) Negotiations of pretrial agreements and their terms.

n. Advise a victim that all noncontraband property that has been seized or acquired as evidence will be safeguarded and returned as expeditiously as possible. Inform a victim of applicable procedures for requesting return of property. (See para 18-16a .)

o. Inform the victim that the victim's interests are protected by criminal sanctions; that any attempted intimidation, harassment, or other tampering should be promptly reported to military authorities; and that their complaints will be promptly investigated and appropriate action will be taken (para 18-19).

p. Inform the victim that, within the guidelines of R.C.M. 701(e) and upon request, the VWL may act as an intermediary between the victim and representatives of the Government and the defense for the purpose of arranging witness interviews in preparation for trial (para 18-19d).

q. Use best efforts to apprise a victim's chain of command of the necessity for the victim's testimony (and the inevitable interference with and absence from duty) (para 18-18).

r. Inform a victim that, upon request, reasonable steps will be taken to inform an employer should the victim's innocent involvement in a crime or in the subsequent military justice process cause or require absence from work (para 18-20).

s. Inform the victim that, upon request, reasonable steps will be taken to explain to a creditor when the victim, as a direct result of an offense or of cooperation in the investigation or prosecution of an offense, is subjected to serious financial hardship (para 18-20).

t. Inform the victim of the availability of a separate waiting area (para 18-19c).

u. Inform the victim of, and provide appropriate assistance to obtain, available services such as transportation, parking, child care, lodging, and court-martial translators/interpreters (para 18-23).

v. Inform the victim that witnesses requested or ordered to appear at Article 32 investigations or courts-martial may be entitled to reimbursement for their expenses under Articles 46 and 47, UCMJ; R.C.M. 405(g); AR 37-106; and chapter 5 of this regulation (para 18-21).

w. Assist the victim in obtaining timely payment of witnesses fees and related costs and coordinate with local finance officers for establishing procedures for payment after normal duty hours if necessary (para 18-21).

x. For the trial counsel or designated Government representative.

(1) No later than after trial if the offender is sentenced to confinement, advise the victim of the offender's place of confinement and the offender's projected minimum release date and determine whether the victim desires to be notified of the offender's confinement or parole status changes or consideration for parole or clemency by using DD Form 2703 (para 18-14b).

(2) In all cases, record the victim's election regarding notification of changes in confinement status using DD Form 2704. Give one copy to the victim; forward one copy of the form to the commander of the gaining confinement facility; forward one copy of the form to the Army's central repository, Headquarters, Department of the Army, Office of the Deputy Chief of Staff, G-3 , U.S. Army Military Police Operations Agency (ATTN: DAMO-ODL), 4401 Ford Avenue, Suite 225, Alexandria, VA 22302-1432 (para 18-14b).

(3) Do not attach DD Form 2704 to any portion of a record to which the offender has access (para 18-14b).

y. Process the victim's requests for investigative reports or other documents under applicable Freedom of Information or Privacy Act procedures. However, in appropriate cases, the SJA may otherwise authorize release of a record of trial to a victim when necessary to ameliorate the physical, psychological, or financial hardships suffered as a result of the criminal act. (See para 18-24 .)

D-2. Witness checklist

a. Coordinate with installation/community casualty working group and the U.S. Army Criminal Investigation Command Survivor Point of Contact in death cases (para 18-2c).

b. Ensure that witnesses are provided the name, location, and telephone number of the VWL (para 18-8b).

c. Inform each witness of the right to request the services described in this chapter (secs IV and V) and provide a Victim/Witness Information Packet (DD Forms 2701 and 2702) when necessary or requested (para 18-9b).

d. Inform a witness concerning the stages in the military criminal justice system, the role that they can be expected to play in the process, and how they can obtain additional information concerning the process and the case (para 18-17b).

e. Inform the witness regarding notification of the following significant events in the case (para 18-17):

(1) The status of the investigation of the crime, to the extent that it will not interfere with the conduct of the investigation, the rights of the accused, or the rights of other victims or witnesses.

(2) The apprehension of the suspected offender.

(3) The preferral or dismissal of charges.

(4) The initial appearance of the suspected offender before a judicial officer at a pretrial confinement hearing or at an Article 32, UCMJ , investigation.

(5) The scheduling (date, time, and place) of each court proceeding that the witness is either required or entitled to attend and of any scheduling changes.

(6) The detention or release from detention of an offender or suspected offender.

(7) The acceptance of a plea of guilty or the rendering of a verdict after trial.

(8) The result of trial.

(9) If the sentence includes confinement, the probable parole date.

(10) General information regarding the corrections process, including information about forms of release from custody, and the offender's eligibility for each.

(11) In appropriate cases, inform the witness of the right to request notice of the offender's confinement or parole status.

(12) Inform the witness that the witness' interests are protected by criminal sanctions, that any attempted intimidation, harassment, or other tampering should be promptly reported to military authorities, and that complaints will be promptly investigated and appropriate action will be taken (para 18-19).

(13) Inform the witness that the VWL may act as an intermediary between a witness and representatives of the Government and the defense for the purpose of arranging witness interviews in preparation for trial, within the guidelines of R.C.M. 701(e) and upon request (para 18-19d).

(14) Use best efforts to apprise a witness' chain of command of the necessity for the witness' testimony (and the inevitable interference with and absence from duty). (See para 18-18 .)

(15) Inform a witness that, upon request, reasonable steps will be taken to inform an employer should the witness' innocent involvement in a crime or in the subsequent military justice process cause or require absence from work (para 18-20).

(16) Inform the witness that, upon request, reasonable steps will be taken to explain to a creditor when the witness, as a direct result of an offense or of cooperation in the investigation or prosecution of an offense, is subjected to serious financial hardship (para 18-20).

(17) Inform the witness of the availability of a separate waiting area (para 18-19c).

(18) Inform the witness of, and provide appropriate assistance to obtain, available services such as transportation, parking, child care, lodging, and court-martial translators/interpreters (para 18-23).

(19) Inform the witness that witnesses requested or ordered to appear at Article 32 investigations or courts-martial may be entitled to reimbursement for their expenses under Article 46 and 47, UCMJ; R.C.M. 405(g); AR 37-106; and chapter 5 of this regulation (para 18-21).

(20) Assist the witness in obtaining timely payment of witnesses fees and related costs and coordinate with local finance officers for establishing procedures for payment after normal duty hours if necessary (para 18-21).

f. For the trial counsel or designated Government representative.

(1) No later than after trial if the offender is sentenced to confinement advise the witness of the offender's place of confinement and the offender's projected minimum release date.

(2) In all cases, advise the witness regarding the right to be notified of the offender's confinement or parole status changes or consideration for parole or clemency by using DD Form 2703 (para 18-17).

g. For the VWL or designated Government representative.

(1) In all cases, complete DD Form 2704 regarding the witness' election regarding notification of changes in confinement status and give one copy to the witness; forward one copy of the form to the commander of the gaining confinement facility; and forward one copy of the form to the Army's central repository, Headquarters, Department of the Army, Office of the Deputy Chief of Staff, G-3 , U.S. Army Military Police Operations Agency (ATTN: DAMO-ODL), 4401 Ford Avenue, Suite 225, Alexandria, VA 22302-1432 (para 18-17).

(2) Do not attach DD Form 2704 to any portion of a record to which the offender has access (para 18-17b).

h. Process a witness' request for investigative reports or other documents under applicable Freedom of Information or Privacy Act procedures (para 18-24).

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PROFESSIONAL RESPONSIBILITY

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Major Carissa D. Gregg
Major Jon S. Jackson

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53RD GRADUATE COURSE

PROFESSIONAL RESPONSIBILITY FOR SUPERVISORS

Outline of Instruction

I. REFERENCES.

A. Primary.

1. Army Regulation 27-26, *Legal Services - Rules of Professional Conduct For Lawyers* (1 May 92).

2. Dep't of the Air Force, TJAG Policy No. 26, *Rules of Professional Conduct* (February 4, 1998).

3. Dep't of the Navy, JAGINST 5803.1B, *Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General* (February 11, 2000).

4. Coast Guard Military Justice Manual, COMDTINST M5810.1D Art. 6.C.1 (August 17, 2000).

5. American Bar Association Model Rules of Professional Conduct.

6. The ABA Standards for Criminal Justice.

7. The ABA Code of Judicial Conduct.

B. Secondary.

1. AR 27-1, Judge Advocate Legal Services (30 Sep 96).

2. AR 27-3, The Army Legal Assistance Program (21 Feb 1996).

3. AR 27-10, Military Justice (6 Sep 2002).

4. American Bar Association Annotated Model Rules of Professional Conduct .

5. American Bar Association Model Code of Professional Responsibility.

6. OTJAG Standards of Conduct Office, *Professional Responsibility Notes* (published periodically in THE ARMY LAWYER). Also, check JAGC.Net for SOCO Professional Responsibility Opinions and Notes.

II. INTRODUCTION.

III. SELECTED ETHICAL ISSUES.

A. Confidentiality (Rule 1.6).

1. General rule. A lawyer shall not reveal any information relating to the representation of a client.

a. No distinction between confidences and secrets.

b. Applies to information obtained prior to formation of attorney-client relationship.

c. Applies after death of client. *Swidler & Berlin v. United States,* 66 U.S.L.W. 4538 (U.S. Jun. 25, 1998) (No. 97-1192).

d. The Supreme Court of Oregon upheld a one-year suspension from the practice of law of a National Guard attorney who improperly disclosed military personnel information to the press. TJAG revoked his credentials to practice law for the Army in connection with the case. *In Re Lackey*, 333 Ore. 215; 37 P.3d 172 (2002)

e. Applies when reporting suspected judicial or lawyer misconduct. The Supreme Court of the State of Washington upheld a six-month suspension form the practice of law for attorney Schafer's disclosure of client confidences, concerning a judge, to the FBI, the prosecutor's office, the IRS and the press. *In Re Disciplinary Proceeding against Schafer*, (April 17, 2003) available at JACNET.

2. Exceptions to confidentiality.

a. Permissive.

(1) A client may consent to disclosure of confidences (Rule 1.6). *See also* AR 27-3, para. 4-8a.

(2) Disclosure is also authorized in order to carry out the representation.

(3) Disclosure is permitted to establish a claim or defense in a controversy with a client.

(4) Air Force Rules.

Air Force Rule 1.6(b)(1) leaves to the discretion of the lawyer (*i.e.*, lawyer *may* reveal…) the disclosure of information a lawyer reasonably believes necessary to prevent a client from committing a crime which is likely to result in imminent death or substantial bodily harm, or which will substantially impair the readiness or capability of a military unit, vessel, aircraft, or weapon system.

b. **Mandatory** for Navy/Marine Corps and Army.

Rule 1.6(b)(1) mandates disclosure of (*i.e.*, lawyer *shall* reveal…) information a lawyer reasonably believes necessary to prevent a client from committing a crime which is likely to result in imminent death or substantial bodily harm, or to prevent a client from committing a crime which will substantially impair the

readiness or capability of a military unit, vessel, aircraft, or weapon system.

c. There is no authority for revealing information of other potential offenses or past offenses under the Rules.

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

1. **Directly adverse to the current client.** A lawyer shall not represent a client if the representation of the client will be directly adverse to another client unless:

a. The lawyer reasonably believes the representation will not adversely affect the other relationship, and

b. Each client consents after consultation (Rule 1.7(a)).

c. If a conflict develops after representation has been undertaken, the attorney must seek to withdraw.

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.*, 256 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. Imputed Disqualification (Rule 1.10). Lawyers working in the same military law office are not automatically disqualified from representing a client. A *functional analysis* is required. Army policy may discourage representation of both parties in certain instances. AR 27-3, para. 4-9c. (Representation of both parties in a domestic dispute **discouraged**).

f. 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 Rule 1.7). *See* ABA Standards for Criminal Justice 4-3.5(b). *See also United States v. Newak*, 24 M.J. 238 (C.M.A. 1987) (counsel's joint representation of co-accused constituted ineffective assistance of counsel).

(2) Consult your respective service policy on how to handle the co-accused situation. In the Army, consult AR 27-10 and USATDS SOP. 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. 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 (Rule 1.7(b)). **Example:** Defense counsel materially limited by loyalty to Army - result is ineffective assistance of counsel. *United States v. Bryant*, 35 M.J. 739 (A.C.M.R. 1992).

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 (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 (Rule 1.9).

C. 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 affect 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.

      (1) Good cause to withdrawal may arise when a Reserve Component Officer is ordered to active duty for more than 30 days. Army Regulations generally prohibits Judge Advocates from practicing law in the private sector while on active duty.

(2) An attorney of the JALS will not engage in private law practice without the prior written approval of TJAG. . This requirement does not apply to RC members of the JALS unless they are ordered to active duty for more than 30 consecutive days. See AR 27-1, Judge Advocate Legal Services, paragraph 4-3.

D. Handling Evidence or Contraband (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 *(See* USATDS SOP, para 1-13).

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, Rule 3.4(a)). *United States v. Rhea*, 33 M.J. 413 (C.M.A. 1991) (defense counsel have duty to surrender evidence which implicates their clients).

c. If a lawyer receives **contraband**, the lawyer has no legal right to possess it and must always surrender it to lawful authorities. (Comment, 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, 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 in to the proper authorities.

(1) Do not dispose of it or conceal it.

(2) Do not 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.

d. There is no protection from court-ordered disclosure.

E. Client perjury (Rule 3.3; ABA Formal Opinion 57-353 (1957)).

1. **Former ABA position.** Allow client to testify in narrative form and not use the testimony in argument.

2. **Current position.** A lawyer who knows that his or her client intends to testify falsely must . . .

a. Advise the client not to do so and explain the consequences of doing so, <u>including the lawyer's duty to disclose.</u>

b. Attempt to withdraw (if the lawyer's efforts to dissuade the client from testifying falsely are unsuccessful).

c. Limit examination to truthful areas <u>or</u> do not call the client to testify at all.

d. If above not possible, disclose to the tribunal the client's intention to commit perjury.

e. If perjury has already been committed, persuade the client to rectify it.

f. Disclose the perjury if unsuccessful.

3. A lawyer "knows" that a client intends to testify falsely if the accused has admitted facts to the lawyer that establishes guilt and the lawyer's independent investigation establishes that the admissions are true, but the accused insists on testifying. (Comment, Rule 3.3).

4. A lawyer may also refuse to offer evidence that the lawyer reasonably believes is false. (Rule 3.3(c)).

F. The Service As The Client (Rule 1.13).

1. The respective service, acting through its duly authorized officials, is the client. Army lawyers may be authorized to represent individual clients as legal assistance attorneys or trial defense service lawyers.

2. Attorney-client relationship exists between the lawyer and the service -

a. As represented by the commander or head of the organization.

b. As to matters within the scope of the official business of the organization.

c. Commander or head or organization cannot invoke attorney-client privilege for his or her own benefit.

(1) Communications between a commander and an SJA may be disclosed to the commander's superiors and to investigators appointed by the superior.

(2) Advice to a commander form the SJA is protected form disclosure to opposing civilian counsel. However, the same advice may be disclosed to the commander's superior or delegated investigators if there are allegations of impropriety or misconduct.

(3) DA IG investigators commonly interview legal advisors and often the SJA's testimony is critical to the resolution of an allegation of impropriety or cmiscoundut. See the CSA Summary (October 2002), The Army as Client, LTC Craig Meredith, available at JAGCNET.

3. If a commander engages in unlawful activity, or intends to act, or refuses to act in some manner that violates his or her legal obligation and may be imputed to the Army, the lawyer shall proceed as is reasonably necessary in the best interest of the Army. This may include:

a. Ask the official to reconsider.

b. Advise that a separate legal opinion be sought.

c. Advise official that his personal legal interests are at risk and he should consult counsel.

d. Advise that the lawyer has an ethical obligation to preserve the ethical interests of the service and must consider discussing the matter with supervisory lawyers.

e. Refer the matter to or seek guidance from higher authority.

4. In no event may the lawyer participate or assist in any unlawful activity. If the official persists, the lawyer may terminate representation with respect to the matter in question.

5. The lawyer has an obligation to clarify the lawyer's role. The lawyer must identify the service as the client when it is apparent that the service's interests are adverse to that of the officer, employee or official. (Rule 1.13(e)).

6. An SJA may not serve as the personal legal advisor to a commander on matters of alleged misconduct without the approval of the TJAG.

G. Communications with Third Parties.

1. A lawyer shall not discuss a case with another party who is represented by an attorney, except as authorized by law (Rule 4.2). *See* Army Professional Responsibility Committee Opinion 93-2.

a. A lawyer may not accomplish communication indirectly through an agent or encourage clients to contact opposing parties.

b. Communication with a party concerning matters outside the representation is permissible.

2. Rule 4.2 permits a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have the authority to take or recommend action in the matter, provided the sole purpose of the lawyer's communication is to address a policy issue, including settling the controversy. (ABA Formal Opinion 97-408)

   a. The lawyer must give government counsel reasonable advance notice of his intent to communicate.

   b. This affords the government counsel the opportunity for consultation with the officials to determine the advisability of entertaining the communication.

3. A lawyer is not precluded from communicating with a person who is not represented by counsel (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, Rule 4.3). *In re Pautler*, Case No. 01SA129, -P.3d-(Col. 2002).

H. Ex Parte Discussions with Military Judge (Army Rule 3.5).

1. A lawyer shall not communicate *ex parte* with a judge or court member except as permitted by law.

2. Example. Military judge initiates discussion with trial counsel on his performance in a suppression hearing *during a continuance in the case.* This was an improper *ex parte* communication between counsel and judge. *United States v. Copening*, 34 M.J. 28 (C.M.A. 1992).

3. Example. During an overnight recess, assistant trial counsel talked with the president of the panel about general military justice topics. It was unprofessional conduct to communicate privately with a member concerning a case prior to or during trial except as permitted by law. Though this conversation was not about the matter pending before court and did not violate letter of law, it was contrary to spirit of both legal and ethical prohibitions against improper contact with members. Because of the conversation's length and topic, it was improper. Military judge properly excused president. Trial counsel and military judge got praise for prompt and responsible action. *United States v. Hamilton*, 41 M.J. 22 (C.M.A. 1994).

IV. OVERVIEW OF AR 27-1 INVESTIGATIONS – PROFESSIONAL RESPONSIBILITY COMPLAINTS.

A. Reporting Requirements.

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 must report the violation (Rule 8.3).

a. Knowledge = actual knowledge or knowledge inferred from the circumstances.

b. Substantial = material matter of clear and weighty importance and does not refer to the quantum of evidence presented.

2. Rule 8.3 does not require disclosure of information protected under Rule 1.6. (confidentiality). For example, in cases where there is an attorney-client relationship between an attorney and the offending attorney, usually in a legal assistance or TDS setting, the attorney does not have to report his client (the offending attorney).

B. Professional misconduct defined (Rule 8.4).

1. Violating or attempting to violate the Rules of Professional Conduct, or knowingly assisting or inducing another to do so;

2. Committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;

   a. Not all criminal offenses constitute professional misconduct.

   b. Concept of offenses involving moral turpitude is rejected under Rule 8.4.

3. Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation;

4. Stating or implying an ability to influence improperly a government agency or official; or

5. Knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

C. 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.

D. Processing Complaints (AR 27-1, Chap. 7, *See* Appendix A, Processing Chart).

1. Supervisory lawyers at all levels are responsible for reviewing all alleged or suspected violations of the Army Rules of Professional Conduct for Lawyers, or other applicable ethical standards that come to their attention.

a. Any credible alleged or suspected violation that raises a substantial question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer shall be reported through technical channels to the Chief, Standards of Conduct Office.

(1) Credible = reasonable belief that a violation occurred.

(2) Allegations may be resolved at the local level if there is no credible evidence of misconduct. Maintain a copy of any response sent to complainant and all associated documentation in office files.

b. Several supervisory JAs review allegations up to and including TAJAG before a formal preliminary screening inquiry (PSI) is ordered.

(1) Each level conducts a credibility check.

(2) No credible evidence – process stops.

(3) Credible evidence – forward up the chain.

2. Preliminary Screening Inquiry.

a. Purpose: To assist senior supervisory JAs in determining whether the questioned conduct occurred and, if it did, whether it constituted a violation of AR 27-26, or other applicable ethical standards.

(1) Not intended to constitute an ethical investigation that most licensing authorities normally require lawyers to report.

(2) But, it is the responsibility of the subject to know and comply with the reporting requirements of their licensing jurisdiction.

b. Procedures.

(1) OTJAG tasking to conduct an inquiry.

(2) Senior Supervisory JA (MACOM SJA or other JA in an equivalent supervisory position) appoints PSI officer (senior to subject).

(3) PSI officer.

(a) Procedures set forth in AR 27-1 or AR 15-6 for informal investigations.

(b) Determine facts and circumstances of alleged or suspected violation.

(i) Can delegate a subordinate officer to gather facts, question individuals, and collect documents.

(ii) PSI officer must independently review the facts.

(c) PSI officer provides written report to Senior Supervisory JA.

(i) Summarize facts.

(ii) Provide conclusions as to whether a violation occurred.

(a) Preponderance of the evidence.

(b) Evidence points to a particular conclusion as being more probably than any other conclusion.

(iii) Recommend corrective or disciplinary action, if appropriate.

(iv) Attach any documentary evidence or witness statements.

c. Senior Supervisory JA action.

(1) Determine if the report is complete, if not return to PSI officer.

(2) Action on a complete report.

(a) If no violation occurred, coordinate with Chief, SOCO and close the case and notify subject and complainant in writing and provide a copy of the report and correspondence to TJAG.

(b) If only a minor or technical violation.

(i) Determine if counseling is appropriate.

(ii) If so, coordinate with SOCO and refer a copy of the report to the subject for comment.

(iii) Ensure counseling takes place.

(iv) Inform the complainant in writing of final action.

(v) Provide copy of PSI report and subsequent correspondence to TJAGSA.

(c) More than a minor or technical violation.

(i) Refer the PSI report to OTJAG for further action.

(ii) OTJAG will refer the file to the subject for comment.

E. OTJAG Action.

1. TAJAG action.

a. Return the file to the senior supervisory JA for further inquiry.

b. Appoint a new inquiry officer for a supplemental inquiry.

c. Determine there was no violation and return to Chief, SOCO to close.

d. Determine that minor or technical violation occurred and either take appropriate action or direct referral to appropriate supervisory JA for specified action.

e. Determine a substantial violation is clearly shown, take appropriate action and refer the file to TJAG for possible referral to state bar.

f. Determine a substantial violation appears to have been committed and refer the file to the Professional Responsibility Committee for an opinion.

2. TJAG action.

a. If TAJAG or the PRC committee refers the file, determine the appropriate action to be taken.

b. Determine whether the conduct should be reported to the subject's licensing authority.

(1) Notify subject of intended action.

(2) Allow subject 10 days to show cause.

F. Due Process.

1. If action is to be taken at OTJAG.

a. Subject will get a reasonable time (usually 14 to 21 days) to provide comments.

b. Extensions may be granted for good cause by Chief, SOCO.

c. Failure to provide comments in the time provided will constitute waiver.

2. The subject is responsible to know and comply with the requirements of his or her licensing jurisdiction. The finding of even a minor or technical violation may trigger a reporting requirement imposed by subject's licensing authority, even if the initiation of the inquiry didn't.

G. Filing And Release Of Information.

1. SOCO maintains the files.

a. No PSI necessary – 3 years.

b. PSI conducted – 10 years.

(1) Shortened to 5 years pending approval of National Archives and Records Administration unless:

(a) Subject remains in JALS, or

(b) Is the subject of another monitoring, open, or founded file within 5 years of the closed date.

(2) Shortened to 3 years if unfounded or inquiry-not-warranted.

(3) One year after subject leaves JALS (founded files will be kept a minimum for 5 years after the closed date).

2. TJAG or TAJAG may file substantiated allegation in Career Management Information File (CMIF).

a. Relevant to individual's potential as a member of JALS.

b. Documents available to personnel managers.

(1) Subject provided notice IAW AR 600-37.

(2) Opportunity to rebut filing.

3. Release.

a. Release IAW with AR 25-55 and AR 340-1.

b. Normally, will not release outside DoD.

c. May release to civilian licensing authority if serious professional misconduct.

d. No public interest in investigation documents of prosecutor misconduct. *Mueller v. United States Department of Air Force*, 63 F. Supp. 2d 738; 1999 U.S. Dist LEXIS 14331. The documents were exempt from FOIA release because the requested documents would constitute a clearly unwarranted invasion of privacy.

e. May release to decision-makers within DoD.

(1) Promotion to Colonel/General.

(2) Involuntary Separation for professional dereliction.

V. APPLICABLE STANDARDS.

A. Application.

1. Military Rules of Professional Conduct apply to all judge advocates and civilian attorneys working under disciplinary authority of The Judge Advocate General. (Army rules apply to all attorneys whether military or civilian.)

2. Civilians.

a. The Army rules apply to civilian attorneys practicing before tribunals conducted pursuant to the UCMJ and the Manual for Courts-Martial.

b. The Navy rules apply to civilian counsel representing members of the service in any matter under the cognizance of TJAG.

c. The Air Force rules apply only to members of the Air Force, military and civilian, and not to Non-Air Force attorneys.

B. Effect of the Rules.

1. The Rules of Professional Conduct provide a basis for taking disciplinary action should a lawyer fail to comply with or meet the standard. The rules do not provide a basis for a civil cause of action against the attorney.

2. Attorneys must adhere to both the letter and spirit of the Rules.

3. Only the rules are binding. Comments to the Army and Navy rules, and discussion accompanying Air Force rules, provide guidance only in interpreting the rules, and are not binding themselves.

4. Rules are only one source of rules governing the conduct of judge advocates. *(See, e.g.,* UCMJ; Joint Ethics Regulation; JAGC Personnel Policies).

C. Other Sources of Ethical Rules.

1. Ethics code where licensed to practice law. "Every Army lawyer subject to these Rules is also subject to rules promulgated by his or her licensing authority or authorities." Rule 8.5.

2. Ethics code where practicing.

D. Conflict Rules.

1. **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 the issues remains unresolved, then:

a. Rules supersede rules of licensing jurisdiction in the performance of official duties.

b. Rules do not control if attorney is practicing in state or federal civilian courts.

2. **ABA Model Rule 8.5**, as amended August 1993. Disciplinary authority must make a choice of law:

a. For conduct in connection with a court action, apply the rules of the jurisdiction where the court sits.

b. For other conduct, apply the rules of the jurisdiction in which the lawyer principally practices.

E. 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 standard, follow the mandatory standard.

2. Consider practical alternatives.

a. Find the client new counsel.

b. Seek exception from state bar.

3. If conflict is irreconcilable, follow Rule as required by Military Rule 8.5.

VI. DUTIES OF SUPERVISORS AND SUBORDINATES.

A. Supervisors must ensure subordinates comply with Rules (Rule 5.1).

1. Includes non-lawyers under supervision (Rule 5.3). *See also* AR 27-3, para. 4-8b.

2. For Army attorneys: Staff judge advocates must ensure that lawyers under their supervision receive a minimum of three hours annual training on the Army Rules or other applicable ethical standards. *See* TJAG Policy Memorandum. *See also* AR 27-3, para. 2-4b (all attorneys authorized to provide legal assistance should receive some training in legal assistance since they may be called upon with little or no notice to perform such duties).

B. A supervisor assumes imputed responsibility for acts of subordinates if:

1. the lawyer orders or ratifies a subordinate's violation, **or**

2. the lawyer knows of the violation and fails to take remedial action to avoid or mitigate the consequences of a violation.

C. Subordinates are bound by the Rules of Professional Conduct (Rule 5.2).

1. Subordinate may rely on ethical judgment of a supervisor if the issue is subject to question.

2. If the ethical question can be answered only one way, subordinate must comply with the Rules even if supervisor directs a contrary course of conduct.

3. When representing individual clients, subordinates are required to exercise unfettered loyalty and professional independence (Rule 5.4(e)).

VII. CASE LAW IN PROFESSIONAL RESPONSIBILITY.

A. Impartiality of the Tribunal (Rule 3.5 and CANON 3 of ABA Code of Judicial Conduct).

1. Judges shall be patient, dignified, and courteous; plus, require the same of lawyers.

2. Judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice.

United States v. Quintanilla, 56 M.J. 37 (2001). **Facts**: The CAAF ruled that the military judge had abused his discretion when he failed to recuse himself *sua sponte* after his actions in the case created the appearance of bias. The judge created this appearance when he became involved in a series of out-of-court confrontations with a civilian witness that resulted in him becoming the subject of a stipulation of fact. Additionally, he engaged in an *ex parte* discussion with the trial counsel. The confrontations with the civilian witness involved the military judge using profanity towards and initiating physical contact with the witness. The *ex parte* discussion with the trial counsel involved a strategic decision on the order of questioning of a witness. The judge then failed to fully disclose the facts behind the witness confrontation on the record and gave no disclosure to the defense of the *ex parte* discussion.

Held: The CAAF ruled that the military judge's failure to fully disclose the facts behind these two encounters on the record deprived the parties of the ability to effectively evaluate and raise the issue of judicial bias. Therefore, the CAAF refused to find that the defense had knowingly waived this issue. With respect to the *ex parte* discussion with the trial counsel involving the order of questioning of a witness, the CAAF noted that the discussion involved more than a mere administrative discussion and was therefore inappropriate. In addressing an appropriate remedy, the CAAF stated that it was unable to determine if the appellant suffered prejudice due to the incomplete facts in the record of trial. Accordingly, they remanded the case for a *Dubay* hearing.

United States v. Butcher, 56 M.J. 87 (2001). **Facts**: The CAAF reviewed whether the military judge should have recused himself after the defense objected to his social interactions with the trial counsel that occurred during the trial. These social interactions involved the military judge and his wife attending a party at the trial counsel's house and the judge having the trial counsel as his doubles partner in a tennis match. There were no discussions about the appellant's case other than a comment by the military judge that the trial was lasting longer than he had anticipated.

Held: In their opinion, the CAAF reaffirmed that when reviewing a judge's decision on recusal, the standard of review they would apply is the abuse of discretion standard. In reviewing the judge's actions in the present case, the CAAF stated that they would "assume, without deciding, that the military judge should have recused himself…." However, after applying the three factors in Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988), the CAAF decided against reversal. In summary, the court found that: 1) "the risk of injustice to the parties" was greatly diminished since the judge's actions took place after the presentation of evidence and instructions on the merits; 2) "the risk that denial of relief will produce injustice in other cases" is unlikely since judges are "highly sensitive" to the problems caused by out-of-court

contact with the parties during litigation and, therefore, there is no need to send them a message by reversing this case; and 3) "the risk of undermining the public's confidence in the judicial process" was not a danger since the judge's conduct did not involve intimate personal relationships, extensive interaction, and occurred late in the trial.

B. Prosecutorial Conduct.

1. The duty of the prosecutor is to seek justice, not merely to convict. ABA Standard 3-1.2c; Air Force Standard 3-1.1c.

2. Prosecutors should not:

a. Intentionally misstate the evidence or mislead the jury as to the inferences it may draw from the evidence. Army Rule 3.4(e); ABA Standard 3-5.8(a); Air Force Standard 3-5.8(a).

b. 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. Army Rule 3.4(e); ABA Standard 3-5.8(b); Air Force Standard 3-5.8(b).

c. Make arguments calculated to inflame the passions or prejudices of the jury. ABA Standard 3-5.8c; Air Force Standard 3-5.8c.

d. Make arguments that would divert the jury from its duty to decide the case on the evidence. ABA Standard 3-5.8(d); Air Force Standard 3-5.8(d) (also prohibits arguments which inject issues broader than guilt or innocence of accused under controlling law, or makes predictions of the consequences of the court members' findings).

United States v. Thompkins, 58 MJ 43 (2003). **Facts**: The appellant was tried by a general court-martial composed of officer members for his involvement in a group brawl that resulted in a civilian bystander being wounded by gunfire, and for his disobedience of a subsequent no contact order. Pursuant to a defense motion, the military judge ruled that no government witnesses could talk about Airman Tabois and that the government could not produce evidence that the appellant lacked a driver's license at the time of the incident. Additionally, the judge suppressed one of the pictures of the shooting victim that the government planned to

introduce. During the assistant trial counsel's opening statement, the military judge sustained two defense objections to its argumentative nature. On two other occasions, the military judge *sua sponte* cautioned the assistant trial counsel not to make conclusions or to characterize the evidence. The assistant trial counsel's actions eventually caused the military judge to provide curative instructions to the panel regarding the nature of opening statements.

During the testimony of the shooting victim, the assistant trial counsel asked the victim how the removal of the bullet from his arm had impacted him, but withdrew the question in response to a defense objection. The assistant trial counsel then handed the victim the previously suppressed photograph and asked him to identify it. The military judge immediately called and Article 39(a) session at which she admonished the assistant trial counsel for his actions. The military judge denied the defense motion for a mistrial citing to the fact that the panel members had not seen the photograph and the errors in the opening statement were due to inexperience, not malice on the part of the assistant trial counsel. The military judge then instructed the members to ignore any mention of the suppressed photograph.

During a special agent's testimony concerning the investigation, he made reference to Airman Tabois. The military judge called another Article 39(a) session where she chastised trial counsel for not complying with her earlier ruling regarding not mentioning Airman Tabois. When the special agent resumed his testimony, he mentioned that the appellant had to move to the passenger side of a vehicle because he was not a licensed driver. Defense counsel objected to this reference and asked for another Article 39(a) session at which he renewed his motion for a mistrial. The military judge admonished trial counsel again, but denied the motion for a mistrial, deciding instead to issue another curative instruction and to prohibit trial counsel from conducting a redirect of the witness following defense counsel's cross examination.

Held: The CAAF stated that it only overturns a military judge's refusal to grant a mistrial if there is clear evidence of an abuse of discretion. In analyzing cases of prosecutorial misconduct, the court said analysis must focus on the overall effect of counsel's conduct on the fairness of the trial, and not on counsel's personal blameworthiness. Additionally, the court noted that a mistrial is a "drastic remedy" that should be used only to prevent "manifest injustice." In examining the overall effect of counsel's conduct in the present case, the CAAF felt that the ameliorative actions taken by the military judge insured the impartiality and fairness of the appellant's trial. Therefore, the military judge did not abuse his discretion by refusing to grant a mistrial. Decision affirmed.

C. Competence & Diligence (Rules 1.1 & 1.3).

Wiggins v. Smith, 123 S.Ct. 2527 (2003). **Facts**: Petitioner was convicted of capital murder by trial judge. He elected to be sentenced by a jury, which sentenced him to death. His public defenders moved to bifurcate the sentencing proceedings seeking to show that Wiggins did not kill the victim by his own hand and then, if necessary, to present a mitigation case. The trial judge denied the motion. Although, one of the petitioner's public defenders told the jury that they would hear about Wiggins' difficult life, the defense did not present any such evidence. Wiggins argued that his counsel were ineffective for failing to investigate and present mitigating evidence about his troubled background.

Held: In 7-2 opinion, Court reversed death penalty sentence due to ineffective assistance of counsel (IAC) in the sentencing proceeding. Applying the two-pronged test for IAC set forth in *Strickland v. Washington* (IAC = deficient performance + prejudice), Court held that the failure of Wiggins' defense counsel to conduct a presentence investigation into potential mitigating evidence for presentment during the sentencing proceeding fell below professional standards prevailing in the state of Maryland in 1989 (where Wiggins was tried). Those standards included retention of a forensic social worker to prepare a social history report. The Court found prejudice, -- a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different -- due to the powerful nature of the unpresented evidence: severe privation and abuse while in the custody of his alcoholic, absentee mother; and physical torment, sexual molestation, and repeated rape while in foster care. The Court refered to this type of evidence as "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability." Here, the failure to investigate "resulted from inattention, not reasoned strategic judgment." "Wiggins sentencing jury heard only one significant mitigating factor – that Wiggins had no prior convictions. Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance."

D. Confidentiality (Rule 1.6).

United States v. Dorman, 58 M.J. 295 (2003). **Facts**: Pursuant to his pleas, appellant was convicted of numerous drug related offenses. Once appellant's case was docketed at the Air Force Court of Criminal Appeals (AFCCA), he hired a civilian defense counsel to assist in his appeal process. As part of his preparation, the civilian counsel asked Dorman's trial defense counsel for her copy of the appellant's case file. The civilian defense counsel informed the trial defense counsel that he had a signed release from the appellant granting access to the entire file. Although the trial defense counsel initially indicated her willingness to cooperate, she eventually refused to release the file to the civilian defense counsel. This refusal was sustained by the AFCCA. In response, the civilian attorney filed a motion with the CAAF to compel production of the file.

However, before the CAAF could rule on the motion, the trial defense counsel produced the file and the motion was subsequently withdrawn.

Held: Prior case law held that in cases where the appellant raised an ineffective assistance of counsel claim against his trial defense counsel, that counsel had to provide appellate defense counsel reasonable access to the case file. In considering whether to expand this access to cases where no ineffective assistance of counsel claim was made, the CAAF focused on two established concepts of law. The first is that individuals accused of crimes have the right to the assistance of counsel through the completion of their appeal process. The second is that the duty of loyalty owed to a client by his trial defense counsel continues through the appeal process. In order to abide by these concepts of law, the CAAF held that trial defense counsel must provide reasonable assistance during the appellate process and must not interfere with the appellate defense counsel's representation of their former clients. In order to protect the trial defense counsel from violating their ethical duty of confidentiality when complying with its opinion in this case, the CAAF held that release of the case file is not required until trial defense counsel have received the client's written release. If trial defense counsel feel that release of certain information from a file would "create a material risk" to the client, they should inform the client of this and offer alternative solutions. Finally, the Court recognized that there may be situations where withholding of information may be appropriate. This could include information the lawyer was provided on a promise of confidence, or information whose release is restricted by statute or court order, such as classified information or documents covered by protective orders. To obtain these documents, the appellate counsel must go through the established procedures designated by the governing statute or court order. Despite the error by trial defense counsel, the CAAF affirmed the lower court's decision because the appellate defense counsel eventually received all of the requested information and the appellant failed to demonstrate material prejudice to any of his substantial rights.

E. Candor Toward the Tribunal (Rule 3.3).

United States v. Baker, 58 M.J. 380 (2003). **Facts**: During the defense case-in-chief of a contested special court-martial before officer members, the military judge conducted an Article 39(a) session to discuss the request of appellant's two defense counsel to be removed from the case. After confirming her suspicion (through a discussion on the record with both defense counsel) that the reason for the request to withdraw was due to the counsels' concerns about their client committing perjury, the military judge began a discussion with the appellant as to how the trial would proceed if he chose to testify. The military judge told the appellant he would have to testify without the assistance of counsel, would be cross-examined by trial counsel and questioned by members without the assistance of counsel, and that his defense counsel could not use anything he said in his testimony in their closing argument. The military judge refused to allow

either defense counsel off the case. Instead, she instructed both defense counsel to prepare a memorandum for the record outlining the situation both before and after the appellant's testimony. The military judge informed the appellant that these memoranda would be retained in counsels' files, but would become releasable if the appellant raised an ineffective assistance of counsel claim. Despite the military judge's instruction, neither defense counsel prepared such a memoranda. The appellant eventually testified in a narrative form, and responded to questions from both the trial counsel and the military judge.

Held: The CAAF adopted the standard that defense counsel must have a "firm factual basis" to believe their client is going to commit perjury before being required to take action under the ethical standards. Once this basis is satisfied, the court stated that the proper approach for defense counsel is to provide non-specific notice to the court that the client will testify in a narrative form without the assistance of counsel, and further, the defense counsel will not refer to any of his client's testimony during closing argument. Due to the fact that there was no direct evidence on the record as to why the defense counsel requested to withdraw and allowed their client to testify in a narrative form, and that counsel failed to complete the memoranda for record ordered by the court, the CAAF felt it was unable to determine whether the appellant was denied his right to effective assistance of counsel. As such, the CAAF set aside the decision of the service court and remanded the case for a *DuBay* hearing. The CAAF went on to proscribe helpful procedures for defense counsel and military judges in future cases when they are faced with client perjury issues in court.

F. Conflict of Interest.

United States v. Cain, 59 M.J. 285 (2004). **Facts**: Appellant was convicted pursuant to his pleas of two specifications of indecent assault in violation of Article 134, UCMJ. On initial review, the appellant alleged that he and his lead military defense counsel (MAJ S) had a coerced homosexual relationship that denied him effective assistance of counsel. The Army Court ordered a *DuBay* hearing to determine the underlying facts. The relevant facts found were: MAJ S and the appellant entered into a consensual sexual relationship shortly before the Article 32, UCMJ investigation; the relationship continued until the conclusion of the trial about six months later; appellant told several people about the relationship, including two civilian attorneys, who told appellant that he should fire MAJ S because counsel's behavior was unethical and illegal; appellant did not fire MAJ S because he believed that he was the best military defense counsel available; subsequently, MAJ S detailed CPT L to the case at appellant's request because appellant thought he should have two counsel (given that there were two trial counsel); after consulting with the appellant and MAJ S (both of whom initially wanted to contest the case) and thoroughly reviewing the facts, CPT L initiated negotiations with the Government regarding a pretrial agreement; per the PTA, the accused pled guilty and was found guilty by a military judge sitting as a

general court-martial; four days later, appellant's parents, without appellant's knowledge, sent a letter to the convening authority alleging that MAJ S pressured appellant into sexual favors; twelve days later, LTC F, the TDS XO, informed MAJ S of the allegation; the following morning, MAJ S killed himself, leaving a message that he never "forced" the appellant to have sex with him and that his suicide was not an admission of guilt.

Held: In reviewing the facts of the case along with results of the *DuBay* hearing, the CAAF concluded the appellant was caught between the fear of exposing Major S's conduct and the appellant's "'deep need . . . to believe his defense counsel would "save" him.'" The CAAF then discussed the various possible criminal and administrative consequences that both MAJ S and the appellant faced because of their sexual relationship, concluding that "Major S . . . engaged in a course of conduct with Appellant . . . which exposed both of them to the possibility of prosecution, conviction, and substantial confinement for the military crimes of fraternization and sodomy." Even if not tried by court-martial, the CAAF noted "the conduct initiated by Major S exposed him and Appellant to administrative proceedings that could have resulted in involuntary termination for homosexuality." The CAAF also noted the ethical considerations involving in the case, observing that MAJ S faced professional disciplinary action for his conduct with the appellant.

Notwithstanding the ethical considerations, however, the CAAF focused on possible criminal results of MAJ S's actions, holding that "[t]he uniquely proscribed relationship before us was inherently prejudicial and created a per se conflict of interest in counsel's representation of the Appellant." In so holding, the CAAF avoided the harder issue of the appellant's being required to show prejudice. In declaring that the relationship was a *per se* conflict, the CAAF suggested that the possible adverse consequences provided MAJ S with compelling motivation to place secrecy above trial strategy, thereby affecting his ability to provide objective advice to appellant on defense options. In reviewing Army Court's determination that even if there were a conflict that appellant waived it, the CAAF determined that neither civilian counsel whom appellant contacted "provided him with a detailed explanation of the relationship between the merits of the case and the attorney's ethical obligations." Therefore, "Appellant's conversations with the two civilian attorneys in this case did not involve the type of informed discussion of the specific pitfalls of retaining Major S that would demonstrate a knowing, intelligent waiver of the right to effective assistance of counsel."

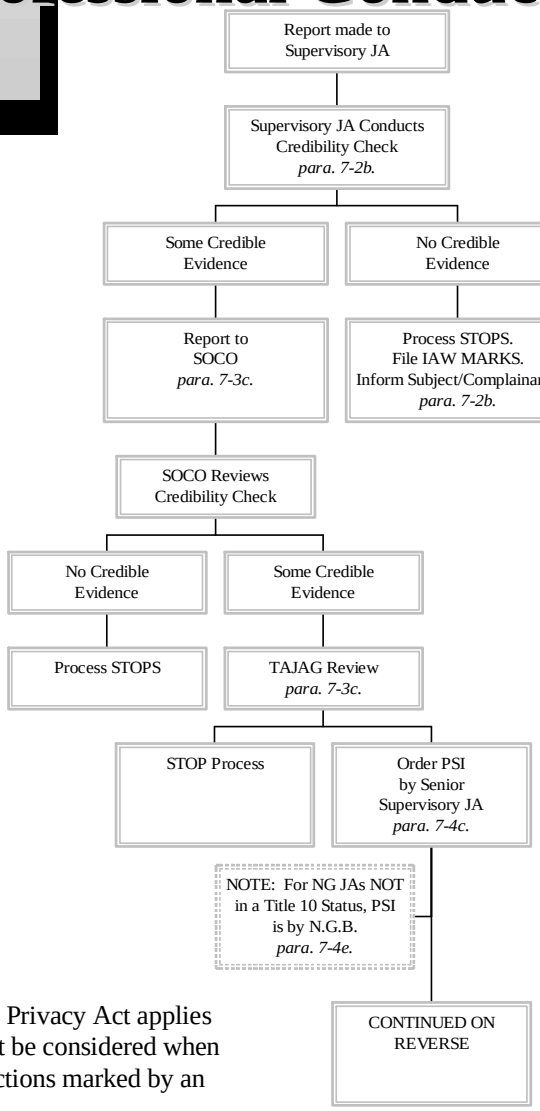
In its opinion, the CAAF did cite to *United States v. Babbit* (civilian counsel had a heterosexual relationship with his client) and sought to distinguish it from the case at bar. The CAAF noted that in *Cain*, MAJ S abused his military office, violated his duty of loyalty, fraternized, and committed the same criminal offense for which the appellant was on trial.

VIII. CONCLUSION.

APPENDIX A

Chapter 7, AR 27-1, 3 Feb 1995

Professional Conduct Inquiries



Notes

⇒Standard: Preponderance of Evidence (para. 7-3d.).

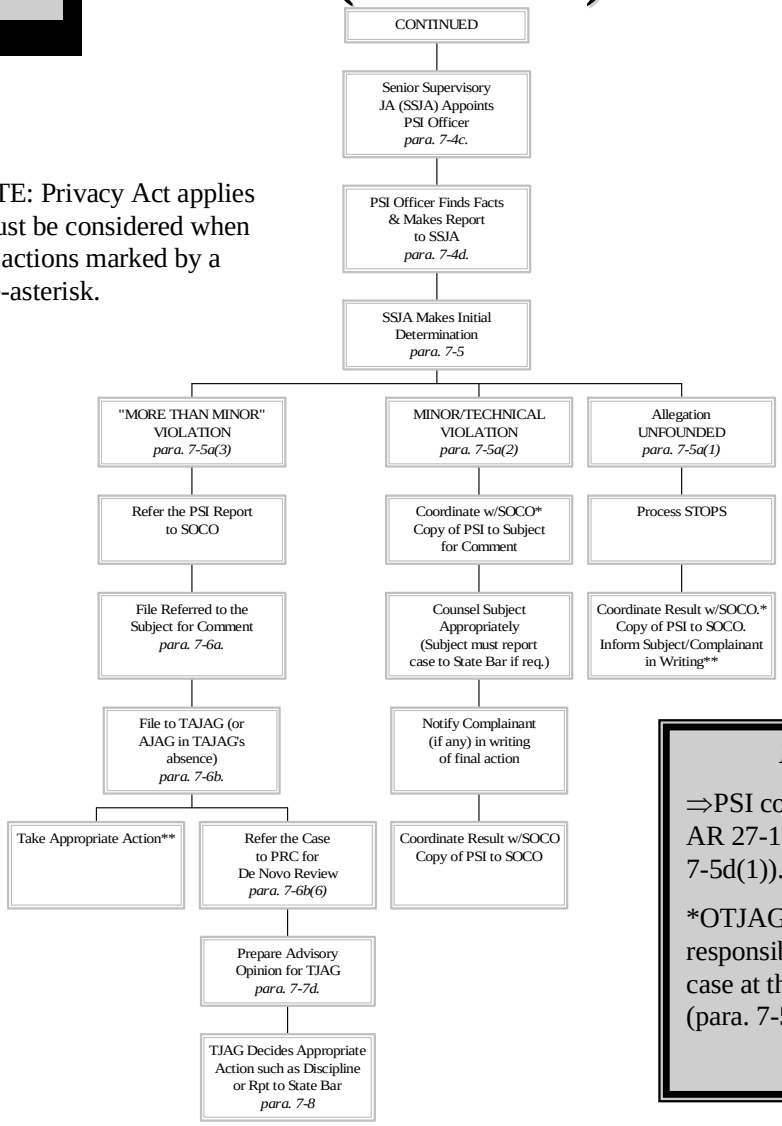
⇒Allegation is "credible" if info provides "reasonable belief." (para. 7-2b.)

*NOTE: Privacy Act applies and must be considered when taking actions marked by an asterisk.

Chapter 7, AR 27-1, 3 Feb 1995

Professional Conduct Inquiries (continued)

**NOTE: Privacy Act applies and must be considered when taking actions marked by a double-asterisk.



Notes

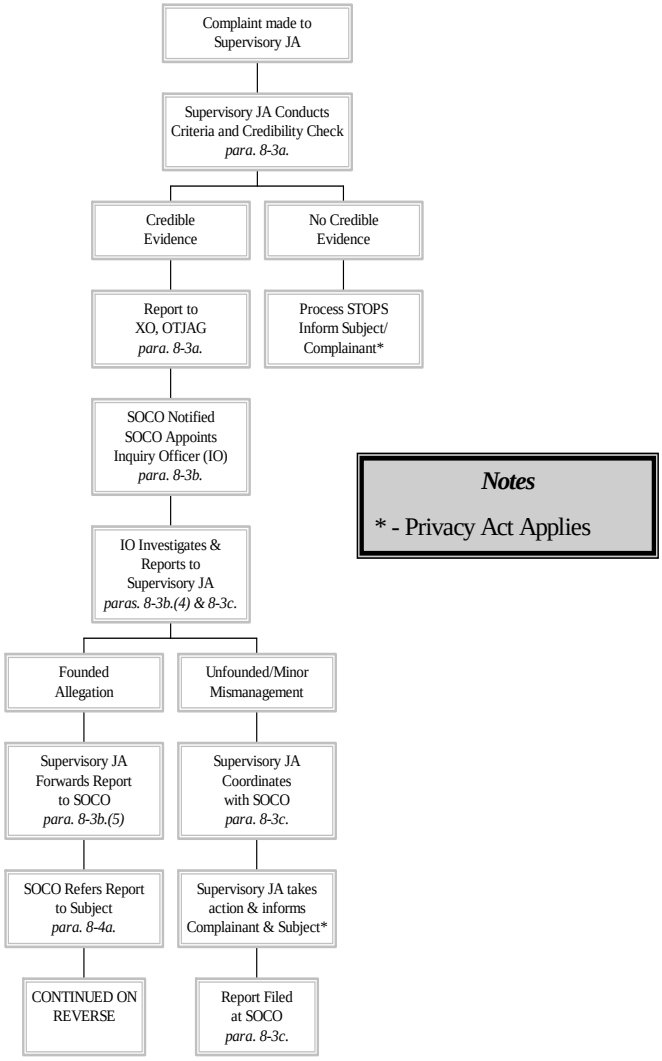
⇒PSI conducted IAW AR 27-1 & 15-6(para. 7-5d(1)).

*OTJAG may assume responsibility for the case at this point. (para. 7-5b.)

APPENDIX B

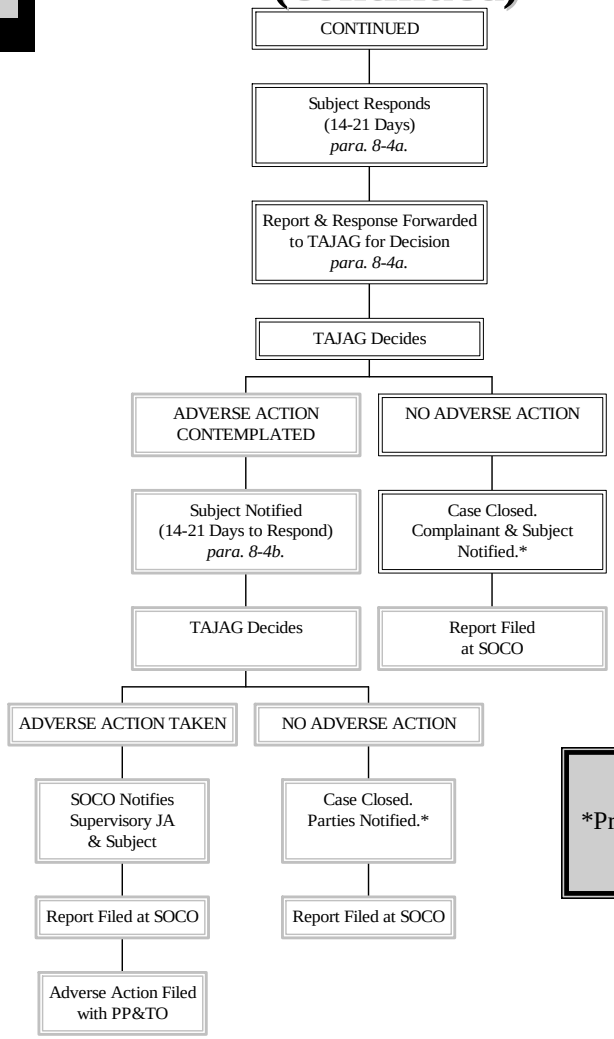
Chapter 8, AR 27-1, 3 Feb 1995

Mismanagement Inquiries



Chapter 8, AR 27-1, 3 Feb 1995

Mismanagement Inquiries (continued)



Notes

*Privacy Act Applies.

APPENDIX C

INFORMATION PAPER

DAJA-SC
30 Sep 2002

SUBJECT: ABA Changes Concerning Multijurisdictional Practice of Law

1. Purpose. To inform Army Lawyers of the ABA's new multijurisdictional practice position and its potential impact on JAs and SJAs. See http://www.abanet.org/cpr/mjp-home.html and http://www.crossingthebar.com/MJPUpdate92502.pdf.

a. On August 12, 2002, the ABA House of Delegates approved amendments to the ABA Model Rules of Professional Responsibility (MRs). As the state bars enact the changes, the new MRs will remove doubts about the authority of military attorneys to practice across state lines as they provide their clients legal assistance and defense services on active duty, in the reserves, and in the National Guard.

b. New MR 5.5 allows lawyers to establish an office or other systematic and continuous presence in a jurisdiction in which they are not licensed to practice when the legal services are authorized to be provided by *federal law or other law of the jurisdiction.*

c. The new rules lay out some ideas for managing both litigation/pro hac vice and foreign-attorney unauthorized practice of law, and generally permit any non-litigation work that is incident to work done for a client in the attorney's jurisdiction of admission.

d. The ABA's recognition of an attorney's ability to practice outside the state wherein the attorney is licensed comes with a price regarding where the attorney can be disciplined. New Rule 8.5 makes it clear that a lawyer practicing temporarily and permissibly in a host jurisdiction is subject to the disciplinary authority of the host jurisdiction. Concomitantly, the Model Rules of Disciplinary Enforcement were also amended to reinforce the expectation that the lawyer's home jurisdiction will impose reciprocal discipline when the lawyer is disciplined in the host jurisdiction.

f. SJAs and military lawyers have an increased responsibility to know all of the state and federal ethics rules that apply to their subordinate attorneys, and to ensure there are no conflicts. Develop a course of action

which satisfies all sets of ethics rules: (a) Army Rules in AR 27-26; (b) rules of the state(s) wherein licensed; (c) rules of the litigation forum; and (d) rules of the state in which practicing.

g. SJAs and military lawyers should communicate with local bars and participate in their programs in order to benefit from a heightened understanding of and goodwill for the practice of our military attorneys.

Mr. Eveland/DSN 425-6704/(703) 588-6704
Dean.Eveland@HQDA.army.mil

53d GRADUATE COURSE

UNLAWFUL COMMAND INFLUENCE

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LTC Patricia Ham

November 2004

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53d GRADUATE COURSE

UNLAWFUL COMMAND INFLUENCE

Outline of Instruction

I. INTRODUCTION.

II. REFERENCES.

A. Manual for Courts-Martial, United States (2002).

B. Uniform Code of Military Justice, arts 1, 25, 37, 98, 134 (para. 96a).

C. Dep't of Army, Reg. 27-10, Legal Services, Military Justice, paras. 5-9, 5-10c (6 September 2002).

III. PRIMARY SOURCES

A. Art. 37(a):

"No [convening] authority . . . nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge or counsel . . . [regarding] the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions . . .. No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or any member thereof, in reaching the findings or sentence in any case . . .."

B. Art. 37(b): May not comment on court-related duties "of any . . . member of a court-martial."

1. Art. 25(d)(2): Convening authority [CA] shall choose members "best qualified . . . by reason of age, education, training, experience, length of service, and judicial temperament."

2. Art. 98: "Any person who . . . (2) knowingly and intentionally fails to enforce or comply with any provision of [the UCMJ] regulating the proceedings before, during, or after trial of an accused**;** shall be punished as a court-martial may direct."

C. **Keys to understanding** unlawful command influence [UCI].

1. See the commander as a **judicial authority**. Commanders must think differently about justice matters than they do about operational matters.

2. **Independent Discretion** at every stage of proceedings.

3. **Individual treatment** of every case.

4. UCI may be **actual** or **apparent**.

5. The exercise of UCI is **not limited to commanders**.

D. **Framework** of analysis:

1. Stage

2. Actor

3. Harm

E. **Key populations.**

1. Panel members.

2. Subordinate commanders.

3. Witnesses.

F. Overview.

1. **Broad sweep:** "This Court has consistently held that any circumstance which gives even the appearance of improperly influencing the court-martial proceedings . . . must be condemned." *United States v. Hawthorne*, 22 C.M.R. 83, 87 (C.M.A. 1956).

2. **Narrow sweep:**

a. Art. 37 applies only to the ***adjudicative*** process of courts-martial, not the ***accusative*** process. *United States v. Drayton*, 45 M.J. 180 (1996). Relying on *United States v. Bramel*, 29 M.J. 958 (A.C.M.R.) *aff'd*, 32 M.J. 3 (C.M.A. 1990) (summary disposition).

b. Waiver now permitted during pretrial phase of courts-martial. *United States v. Drayton*, 45 M.J. 180 (1996).

IV. INDEPENDENT DISCRETION VESTED IN EACH COMMANDER.

Each judicial authority, at every level, is vested with independent discretion, which may not be impinged upon. There is no need to dictate dispositions to a lower-level commander because there are tools available to *lawfully* influence judicial matters.

A. Lawful command actions. Commanders MAY:

1. Personally dispose of a case if within commander's authority or any subordinate commander's authority. R.C.M. 306(c).

2. Send a case back to a lower-level commander for that subordinate's independent action. R.C.M. 403(b)(2), 404(b), 407(a)(2). Superior may not recommend to subordinate how to dispose of a case. R.C.M. 401(c)(2)(B).

3. Send a case to a superior commander with a recommendation for disposition. R.C.M. 401(c)(2)(A).

4. Withdraw subordinate authority on individual cases, types of cases, or generally. R.C.M. 306(a) (e.g. by rank: officers, senior NCOs; by crime: DUI, drugs, fraternization, trainee abuse).

5. Escalate a lower disposition.

a. "Except as otherwise provided in these rules, a superior competent authority may cause charges, whether or not referred, to be transmitted to that authority for further consideration, including, if appropriate, referral." R.C.M. 601(f). *Accord*, *United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983).

b. **Exceptions:**

(1) An *executed* Art. 15 for *minor* offenses. R.C.M. 907(b)(2)(D)(iv); MCM Part V, para 1e. *See United States v. Hamilton*, 36 M.J. 723 (A.C.M.R. 1993) (superior commander may prefer charge for a *major offense* even though accused already received Art. 15 for the offense).

(2) After evidence is presented at trial, extremely limited authority to escalate disposition, *e.g.*, urgent and unforeseen military necessity. Art. 47 (former jeopardy); R.C.M. 604(b), 907(b)(2)(C).

B. Recurring mistakes:

1. Advice before the offense (policy letters).

a. 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." *United States v. Martinez*, 42 M.J. 327, 331-334 (1995).

b. Improper for CG's physical fitness memo to include phrase "There is no place in the Army for illegal drugs or for *those who use them.*" *United States v. Rivers*, 49 M.J. 434 (1998). *See also United States v. Hawthorne*, 22 C.M.R. 83 (C.M.A. 1956) (Policy of GCM for soldiers with two prior convictions constitutes unlawful interference with subordinate's independent discretion.).

2. Policies that seem to set tone of inflexibility.

a. Suggests preferred type of disposition.

b. May intimidate witnesses.

(1) *See, e.g., United States v. Griffin*, 41 M.J. 607 (Army Ct. Crim. App. 1994). Division commander's 5-page policy letter on physical fitness and training addressed drugs in following two sentences:

> "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 inspections."

Result here (and not atypical elsewhere):

- defense extracted great deal (here and future cases).
- ACCA said it "would [not] require a military judge to undo the benefit to the accused of an excellent bargain extracted from the government."
- CA disqualified post-trial (even thought he withdrew drug specification as part of PTA). *But see United States v. Rivers*, 49 M.J. 434 (1998)

(corrective action by government and military judge saved case from UCI).

Other possible results:

- PTAs that address or waive UCI. *See United States v. Weasler*, 43 M.J. 15 (1995)(permissible to bargain away accusative stage UCI).

- Other CAs take action.

- "Acting" CA takes action.

- Liberal post-trial relief.

- Loss of convening authority powers (temp or permanent).

(2) *United States v. Bartley*, 47 M.J. 182 (1997) Lawyers drafted and 3-star convening authority (CA) signed poster that addresses "7 Defense Myths" about drug-related courts-martial. It was displayed in CA's waiting room and the SJA's outer office.

3. Advice after the offense.

a. *See United States v. Gerlich*, 45 M.J. 309 (1996). COL BDE commander/SPCMCA ordered subordinate (MAJ) to set aside Art. 15 after COL received letter from CG (who had received critical letter from IG) directing reinvestigation. Court set aside findings and sentence, notwithstanding COL's and MAJ's claims of continued independence, based on recognized "difficulty of a subordinate ascertaining for himself/herself the actual influence a superior has on that subordinate."

a. *But see United States v. Wallace*, 39 M.J. 284 (C.M.A. 1994). Superior learned of additional misconduct by the accused and told subordinate commander, "You may want to reconsider the Article 15 and consider setting it aside based on additional charges." Court, relying on fully developed record, agreed with judge that subordinate "exercised his own independent discretion when he preferred charges."

b. Reconciling *Gerlich* and *Wallace*?

- Truly new evidence in *Wallace* that prompted (or at least justified) the re-look.
- Quantitatively less command pressure in *Wallace*, more legitimately permissive language.
- Strong evidence of prior independence by subordinate in *Wallace* on the record.

V. CONVENING AUTHORITY AS ACCUSER.

A. Accuser is "person who signs and swears charges, any person who directs the charges nominally be signed and sworn to by another and any person who has an interest other than an official interest in the prosecution of the accused." UCMJ, art. 1(9).

1. Test is whether under the circumstances "a reasonable person would impute to [the convening authority] a personal feeling or interest in the outcome. *United States v. Gordon*, 2 C.M.R. 161, 166 (C.M.A. 1952); *United States v. Shelton*, 26 M.J. 787 (A.F.C.M.R. 1988); and *United States v. Dingis* , 49 M.J. 232 (1998).

2. Convening authority who possesses **more than an official interest** must forward the charges to a superior competent authority for disposition. UCMJ, art. 22(b), 23(b) (GCM and SPCM respectively); *United States v. Gordon*, 2 C.M.R. 161, 166 (C.M.A. 1952)(GCMCA was victim of burglary); *United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992)(accused attempted to blackmail GCMCA).

B. Exceptions:

1. Violations of general regulations. *United States v. Doyle*, 26 C.M.R. 82, 85 (C.M.A. 1958).

2. Nonjudicial punishment.

3. Summary Courts-Martial. R.C.M. 1302(b).

VI. INFLEXIBLE ATTITUDE MAY DISQUALIFY CONVENING AUTHORITY.

A. Pretrial (generally not disqualified).

1. Pretrial referral is a prosecutorial function. *Cooke v. Orser*, 12 M.J. 335, 343-44 (C.M.A. 1982).

2. *United States v. Treakle*, 18 M.J. 646, 654-55 (A.C.M.R. 1984) ("We do not agree . . . that a convening authority can be deprived of his statutory power to convene courts-martial and refer charges to trial based on lack of judicial temperament.").

B. Post-trial.

1. Accused is entitled "as a matter of right to a careful and individualized review of his sentence at the convening authority level. It is the accused's first and perhaps best opportunity to have his punishment ameliorated and to obtain the probationary suspension of his punitive discharge." *United States v. Howard*, 48 C.M.R. 939, 944 (C.M.A. 1974).

2. The presence of an inelastic attitude suggests that a convening authority (CA) will not adhere to the appropriate legal standards in the post-trial review process and that he will be inflexible in reviewing convictions because of his predisposition to approve certain sentences. *United States v. Fernandez*, 24 M.J. 77, 79 (C.M.A. 1987).

3. Still around. GCMCA said publicly that convicted airmen shouldn't "come crying" to him about their situations. CAAF took a different view. *United States v. Davis*, 58 M.J. 100 (2003).

4. Post-trial disqualification may be wise preemptive move. In *United States v. Crawford*, 47 M.J. 771 (C.G.Ct.Crim.App. 1997) the CA violated Art. 37's prohibition on censure of counsel when he told the DC, after trial in the presence of her client, that he "used" her and lied to her. That violation obviously had no effect on the trial, but likely would have disqualified the CA – given his evident temperament – from taking post-trial action. He disqualified himself, avoiding an issue.

5. Examples of problem areas:

   a. Division commander's letter stated that "all convicted drug dealers say the same things . . . drug peddling and drug use are the most insidious form of criminal attack on troopers . . . [s]o my answer to . . . appeals is, 'No, you are going to the Disciplinary Barracks . . for the full term of your sentence and your punitive discharge will stand.' Drug peddlers, is that clear?" CA held to be disqualified to perform review function. *United States v. Howard*, 48 C.M.R. 939, 94 (C.M.A. 1974).

   b. *United States v. Glidewell*, 19 M.J. 797 (A.C.M.R. 1985), *aff'd*, 23 M.J. 153 (C.M.A. 1986) (summary disposition). Allegation that GCMCA stated that he could not understand how a battalion commander could allow a soldier to be court-martialed and then testify at trial about the soldier's good character, led court to conclude GCMCA did not possess the requisite impartiality to perform post-trial review function; action set aside.

VII. COURT MEMBER SELECTION.

A. Article 25 Criteria. The **convening authority** chooses court members based on criteria of Article 25, UCMJ: **AGE, EDUCATION, TRAINING, EXPERIENCE, LENGTH OF SERVICE AND JUDICIAL TEMPERAMENT**.

1. *United States v. Upshaw*, 49 M.J. 111 (1998). Accused was not prejudiced by honest administrative mistake that resulted in systematic exclusion of E-6s from court member selection consideration. Effron J., dissenting: government was on notice of defect and must strictly comply with requirements of Article 25, UCMJ.

2. *United States v. White*, 48 M.J. 251 (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. Majority finds that criteria for command selection is compatible with article 25d criteria.

3. *United States v. Benson*, 48 M.J. 734 (A.F. Ct. Crim. App. 1998). Memorandum from SPCMCA directing subordinate commands to nominate only E-7s and above for court-martial of E-3 constituted impermissible shortcut for Article 25(b) criteria. SPCMCA testified that his policy was based on experience level of typical E-7, although he admits that he might find an E-5 with proper qualifications. The court also observed that the SPCMCA's apparent bottom line categorical exclusion of E-5s and below violates the line drawn by CAAF at the grade of E-2. *See United States v. Yager*, 7 M.J. 171 (C.M.A. 1979). Appearance of systemic exclusion of qualified persons will be resolved in accused's favor. Government failed to demonstrate by clear and convincing evidence that no impropriety occurred in the member selection process.

B. Staff Assistance.

1. Staff and subordinate assistance in compiling a list of eligible court members is permissible. *United States v. Gaspard*, 35 M.J. 678 (A.C.M.R. 1992).

2. Commander must beware, however, of subordinate nominations not in accordance with Article 25. *United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991)(improper for Division Deputy AG to develop list consisting solely of nominees who were supporters of "harsh discipline").

3. *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 court held that 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. *See also United States v. Simpson*, 55 M.J. 674 (Army Ct. Crim. App. 2001), *aff'd*, 58 M.J. 368 (2003) (convening authority excluded all members of U.S. Army Ordnance Center and School).

C. Replacement of panel also requires that the CA use **only** Article 25 criteria. Even then, the CA must avoid using improper motive or creating the appearance of impropriety.

1. *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986) ("the history of [art. 25(d)(2)] makes clear that Congress never intended for the statutory criteria for appointing court members to be manipulated" to select members with intent to achieve harsh sentences.)

2. *United States v. Redman*, 33 M.J. 679 (A.C.M.R. 1991) (replacement of panel because of "results that fell outside the broad range of being rational").

VIII. NO OUTSIDE PRESSURE.

A. Education: AR 27-10, para. 5-10*c*, "Court members . . . may never be oriented or instructed on their immediate responsibilities in court-martial proceedings except by . . . [t]he military judge . . .." *See also* UCMJ, art. 37(a) and R.C.M. 104 concerning permissible education.

United States v. Youngblood, 47 M.J. 338 (1997). Staff meeting at which Wing commander and SJA shared perceptions of how previous subordinate commanders had "underreacted" to misconduct and "shirked leadership responsibilities," created "implied bias" among three senior court members in attendance. Court focused on impact of remarks on receiver rather than intent of sender (Commander and SJA never testified). Specifically, the court weighed heavily the following factors: Despite the member's response that they could disregard the comments, the majority concluded it is "asking too much" to expect members to adjudge sentence without regard for potential impact on their careers.

J. Crawford dissenting: "This case is another example of the clash that sometimes arises between the need for good order and discipline and the need to maintain an impartial system of military justice."

"The primary responsibility for the maintenance of good order and discipline . . . is saddled on commanders. . . . [P]ersonal presentation of that subject by the commander is impressive, but that is as it should be. The question is not his influence but, rather, whether he chartered it through forbidden areas." Article 37(a)(1) permits instructional and informational military justice lectures. Selecting court members pursuant to Article 25 criteria "differs significantly from random selection of civilian jurors by voter-registration or driver's-license lists." Implied bias should be used only in "extreme situations," especially with the military's blue ribbon panel.

B. Command policy in the courtroom.

1. "[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]." MJ's sentencing instruction, which related Army policy regarding use of illegal drugs, implicated UCI concerns and constituted plain error which was not waived by the defense failure to object; sentence set aside. *United States v. Kirkpatrick*, 33 M.J. 132, 133 (C.M.A. 1991).

2. *United States v. Stoneman*, 57 M.J. 35 (2002). SPCMCA sent email to subordinate commanders "declaring war on all leaders not leading by example." 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, Cdr reiterated his concerns. After consulting with SJA, Cdr issued a second email to clarify the comments in the first. Cdr 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, defense counsel initially sought to stay proceedings until a new panel could be selected. After denial of this request, defense counsel challenged all panel members from the brigade based on implied bias and potential for unlawful command influence. After extensive voir dire, MJ denied the challenge using R.C.M. 912 as the framework. ACCA reviewed *de novo* and determined no abuse of discretion by military judge in denying challenges and the omission of specific findings of fact and conclusion that email did not constitute UCI were harmless. The Court remanded for a *DuBay* hearing. 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. Additionally, CAAF stressed that the ROT was insufficient to resolve a potential "appearance of unlawful command influence" issue.

3. *United States v. Baldwin*, 54 M.J. 308 (2001). Nine months after her court-martial, appellant filed affidavit alleging that GCMCA conducted OPDs and that 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). Appellant asserted that these actions constituted UCI. The Court held that appellant's post-trial affidavit was sufficient to raise the issue, but insufficient record on which to decide the issue. Decision of the Army court was set aside and the record returned for limited hearing on the UCI issue.

4. *United States v. Harvey*, 60 M.J. 611 (N-M. Ct. Crim. App. 2004). During closing arguments of counsel, convening authority who selected members and referred case to trial entered courtroom and sat in the gallery. MJ correctly ruled that this fact alone did not raise the issue of UCI. Defense counsel's request for mistrial was properly denied; defense declined any other remedy, including *voir dire* of members on issue. "[A]ny suggestion that the members were focused on [the convening authority] is just that, a suggestion, assumption or speculation without deeper meaning and not supported by the record." Court encouraged military judges "to inquire into such matters and make appropriate findings of fact and opinions." *Compare to United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979) (military judge abused his discretion in denying mistrial where accuser's (company commander) presence throughout proceedings was "ubiquitous" and commander engaged in "patent meddling in the proceedings").

C. In the deliberation room.

1. Commander, during staff meeting, indicated his dissatisfaction with the results of courts-martial. Four officers attending the meeting sat on court-martial panel that day. SJA made full disclosure, resulting in extensive voir dire of four officers; one of four officers was excused on peremptory challenge. Additional allegation was that president, one of the four officers at the meeting, improperly exerted superiority in rank during the sentence deliberations (see below). *United States v. Reynolds*, 40 M.J. 198, 200 (1994). Fractured court affirmed.

2. 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; *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).

3. *Compare United States v. Reynolds*, 40 M.J. 198 (1994) (comments by senior panel member sarcastically referring to junior officer's rank and that junior was "condoning the use of drugs" was merely open and robust expression of opinion). Waiver may have played role in ultimate decision.

4. *United States v. Dugan*, 58 M.J. 253 (2003). Panel member reminded the rest of the panel that the sentence would be reviewed by the GCMCA and needed to make sure the sentence sent a consistent message, especially since their names would be identified as panel members. CAAF remanded the case for a sentence rehearing.

5. *United States v. Toohey*, 60 M.J. __, 2004 CCA LEXIS 221 (N-M. Ct. Crim. App. Sep. 30, 2004). Member's threat during deliberations that, "if you don't reconsider this, I'm leaving," after members originally voted for lighter sentence than that ultimately adjudged "does not in any way raise the specter of unlawful command influence." Court reasoned that threat was an empty one; member did not sign, rate, or provide input into any other member's fitness reports, nor was he the senior member of the panel; and most importantly, there is "no indication that [the member] attempted to use his grade, or invoke the grade of some higher authority, to influence the other members." Comment merely demonstrated that "the sentencing deliberations became somewhat heated." The allegation was raised more than a year after trial and included in defense clemency submissions.

D. Command interference with the power of the Judge.

United States v. Tilghman, 44 M.J. 493 (1996). Unlawful command interference when commander placed accused into pretrial confinement in violation of trial judge's ruling. Remedy: 18 months credit ordered against accused's sentence.

IX. WITNESS INTIMIDATION.

A. Direct attempts to influence witnesses.

1. *United States v. Gore*, 60 M.J. 178 (2004). Military judge did not abuse her discretion by dismissing charges and specifications with prejudice due to command interference with defense witnesses. Although the case was a guilty plea, Court found that because the interference occurred prior to the servicemember's entry of pleas, the convening authority's interference with potential witnesses affected both the ability to contest the charges and present a sentencing case. It was within the MJ's discretion to determine that dismissal with prejudice was the appropriate remedy in light of the egregious conduct of the convening authority as that remedy was within the permissible range of remedies available. Government did not contest that UCI occurred and was merely challenging the remedy.

2. *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 pressured him not to testify. A petty officer also was harassed and advised not to get involved. Finding: unlawful command influence with regard to the petty officer. No command influence with regard to the officer, because JOPA lacked "the **mantle of command authority;"** instead unlawful interference with access to witnesses. Courts increasingly cite this case as one of UCI landmarks.

3. *United States v. Gleason*, 43 M.J. 69 (1995). After hearing incriminating tape of "almost God-like" SGM, linking him to contract killer, battalion commander (LTC) made clear he believed accused was guilty, characterized TDS as "enemy" and made clear that witnesses should not testify on SGM's behalf (none did). Court found that command influence infected entire process, overturning sentence AND conviction.

   - Vague "command climate" indictment.

   - 3-2 vote; arguably tenuous link between commander's statements and lack of witnesses.

   - Infrequently cited since.

4. *United States v. Levite*, 25 M.J. 334 (C.M.A. 1987). Chain of command briefed members of the command before trial on the "bad character" of the accused. 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 and sentence.

5. *United States v. Newbold*, 45 M.J. 109 (1996). Ship commander (LCDR) held all-hands formation at which he referred to four sailors accused of rape as "rapists," "scumbags" and "low-lifes." Repeated at additional formation and in meeting with woman crew members. Though no retraction, CAAF found no UCI because (a) he not a CA, (b) no panel members drawn from the ship in question [what about witnesses?], and (c) accused waived Art. 32 and pleaded guilty.

6. *United States v. Bartley*, 47 M.J. 182 (1997). Lawyers drafted and 3-star convening authority (CA) signed poster that addresses "7 Defense Myths" about drug-related courts-martial. It was displayed in CA's waiting room and SJA's outer office.

7. *United States v. Plumb*, 47 M.J. 771 (A.F.Ct. Crim. App. 1997) (worst case of government interference with witnesses the court has observed in its collective 90 plus years of military service).

B. Indirect or unintended influence. The most difficult and dangerous areas are those of communications, perceptions, and possible effects on the trial, despite good intentions.

1. *See United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984), *aff'd*, 23 M.J. 151 (C.M.A. 1986). CG, 3d Armored Division, 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." Accordingly, these comments unlawfully pressured court-martial members and witnesses.

2. *United States v. Griffin*, 41 M.J. 607 (Army Ct. Crim. App. 1994). "No place for drugs, or those who use them" buried in division commander's 5-page policy letter on physical fitness and training.

3. Command policies versus military justice policies*: United States v. Jameson*, 33 M.J. 669 (N.M.C.M.R. 1991); *United States v. Jones*, 33 M.J. 1040 (N.M.C.M.R. 1991). When two witnesses were relieved of drill sergeant duties immediately after testifying favorably for the accused charged with engaging in lesbian activities, the hesitancy of potential witnesses to testify in a companion or similar case was evidence of UCI.

X. PRETRIAL PUNISHMENT MAY RAISE UNLAWFUL COMMAND INFLUENCE.

A. Mass Apprehension. Berating and humiliating suspected soldiers utilizing a mass apprehension in front of a formation found to be unlawful command influence (attempt to induce severe punishment) and unlawful punishment. Violation of Art. 13; returned for sentence rehearing. *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987).

B. Pretrial Humiliation. Comments made by unit commander in front of potential witnesses that accused was a thief did not constitute unlawful command influence; no showing that any witnesses were persuaded or intimidate from testifying. It did, however, violate Art. 13. *United States v. Stamper*, 39 M.J. 1097 (A.C.M.R. 1994). *See also United States v. Stringer*, 55 M.J. 92 (2001).

See also United States v. Newbold, 45 M.J. 109 (1996). Ship commander rape as "rapists," "scumbags" and "low-lifes." CAAF found no UCI partly because (a) he not a CA, and (b) no panel members drawn from the ship in question.

XI. INDEPENDENT DISCRETION OF MILITARY JUDGE.

A. 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).

B. 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).

C. Questioning sentences.

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. Subtle pressures.

1. Improper for DSJA to request that the senior judge telephone the magistrate to explain the seriousness of a certain pretrial confinement issue. *United States v. Rice*, 16 M.J. 770 (A.C.M.R. 1983).

2. *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991). Senior judge's letter, written to increase sentence severity, subjected judges to UCI.

3. *United States v. Campos*, 42 M.J. 253 (1995). Army judge raised issue that his reassignment from position of senior judge was based on perception of his leniency. Based on extensive record, CAAF found no nexus between assignment of more senior judge and accused's trial, no abuse in judge's not recusing himself.

   Court: "we cannot countenance – indeed, we condemn – the calculated carping to the judge's judicial superiors about his sentencing philosophy," but no UCI found.

XII. REMEDIAL ACTIONS.

A. Raise Issue Immediately. ***Extremely important*** to litigate at trial level because:

1. Record built most efficiently here.

2. Courts will apply waiver.

   a. Not shy about applying Art. 37 to adjudicative phase only (see above).

b. Be wary of counsel who hedge their bets. *See, e.g., United States v. Hill*, 46 M.J. 567 (A.F.Ct.Crim.App. 1997), even if SJA's order thwarting defense counsel's efforts to have accused view crime scene amounted to UCI, the defense waived the issue by failing to raise until 12 months after trial.

B. Before trial – Command Directed.

1. ***United States v. Rivers,*** 49 M.J. 434 (1998) and *United States v. Biagase*, 50 M.J. 143 (1999) provide excellent examples of corrective action taken by the government to overcome acts of unlawful command influence.

2. Brief Witnesses. *United States v. Sullivan*, 26 M.J. 442 (C.M.A. 1988). In response to 1SG's criticism that those who testify on behalf of drug offenders contravene Air Force policy, the command instructed all personnel that testifying was their duty if requested as defense witnesses and transferred the 1SG to eliminate his access to the rating process.

3. Rescind or clarify letters and pronouncements. *See, e.g., United States v. Martinez*, 42 M.J. 327 (1995).

5. Transfer offending actors, or ensure no longer in witness rating chain.

6. Ban offenders from the courtroom.

C. At trial -- judge-directed.

1. *See Rivers and Biagase, supra.*

2. Automatic challenges for cause against those in the unit and no unfavorable character evidence permitted against the accused. GCMCA disqualified from taking action in case. *United States v. Giarratano*, 22 M.J. 388, 399 (C.M.A. 1986).

3. *United States v. Clemons*, 35 M.J. 770, 773 (A.C.M.R. 1992):

a. No aggravation witnesses.

b. Not allowed to attack accused's credibility by opinion or reputation testimony.

c. Defense given wide latitude with witnesses.

d. Accused allowed to testify about what he *thought* witnesses might have said on merits or E&M without cross-*examination.*

4. *United States v. Southers*, 18 M.J. 795, 796 (A.C.M.R. 1984).

a. Government barred from presenting evidence about accused's potential for further service.

b. Judge offered to sustain any challenge for cause v. any member who was present in command during period of UCI.

D. Post-trial. R.C.M. 1102: Anytime before authentication or action the military judge or convening authority respectively may direct a post-trial session to resolve any matter which affects the legal sufficiency of any findings of guilty or the sentence.

1. New recommendation and action ordered. *United States v. Howard*, 48 C.M.R. 939 (C.M.A. 1974).

2. *DuBay* hearing ordered. *United States v. Madril*, 26 M.J. 87 (C.M.A. 1988). *See also United States v. Rivers* 49 M.J. 434 (1998) (post-trial evidence gathered by military judge revealed no UCI by unit 1SG).

3. Findings and sentence overturned.

E. Remedial action may not work. Extremely important to litigate (at the trial court level) the adequacy of remedial actions.

XIII. METHODOLOGY OF ANALYSIS AND PROOF.

A. Framework for Analysis:

1. Stage of proceedings

2. Actor

3. Harm

4. Waiver

B. Raising the issue at the appellate level. **The 3 (arguably 4) prong test** comes from *Stombaugh*, 40 M.J. at 213, in which the CAAF adopted the test suggested by Judge Cox in his concurrence in *United States v. Levite*, 25 M.J. 334, 341 (C.M.A. 1987) (Cox, J. concurring). The test is:

1. **Sufficient evidence**. "Sufficient facts which, if true, constitute" UCI. This language reappears in *Ayala* and elsewhere, reiterating the same or similar language from many other sources. Earlier the court had held, for example, that the defense must produce "sufficient to render a reasonable conclusion in favor" of the allegation of unlawful command influence. *United States v. Cruz*, 20 M.J. 873, 885-886 (A.C.M.R. 1985), *rev'd in part on other grounds*, 25 M.J. 326 (C.M.A. 1987).

2. **The proceedings were unfair.**

3. **UCI is the proximate cause of the unfairness.** Prejudice is not presumed until the defense produces evidence of proximate causation between the acts constituting unlawful command influence and the outcome of the court-martial. *United States v. Reynolds*, 40 M.J. 198, 202 (C.M.A. 1994).

4. Not formally part of the test, but effectively so: the actor had the **"mantle of command authority."** *Stombaugh*, 40 M.J. at 211. This is effectively a screening criterion for further analysis: did the person said to have committed the UCI act with the "mantle …"? *Id.*

C. Burden does not shift to government unless defense meets "the initial burden of producing sufficient evidence to raise unlawful command influence." *United States v. Ayala*, 43 M.J. 296, 299 (1995). The burden of disproving [UCI] or proving that it did not affect the proceeding does not shift to the Government until the defense meets its burden of production." *Id.*

D. Appellate Standard – No UCI Beyond a Reasonable Doubt.

1. Once the issue of command influence is properly placed at issue, no reviewing court may properly affirm the findings and sentence unless [the court] is persuaded **beyond a reasonable doubt**: (1) that the predicate facts do not exist; or (2) that the facts do not constitute UCI; or (3) that the UCI did not affect the findings and sentence." *United States v. Biagase*, 50 M.J. 143 (1999).

2. "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*." *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994).

3. There must be more than "[command influence] in the air" to justify action by an appellate court. *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991), *cert. denied*, 112 S. Ct. 1473 (1992). *Accord Ayala*, 43 M.J. 296 (1995). Accused's friend submitted affidavit saying that after initial enthusiasm, most (6 of 7) of those he solicited for clemency recommendations demurred. Three judge majority (Cox, Gierke, Crawford) found it insufficient to shift burden. Key is that his affidavit lacked evidence that "anyone acting with the mantle of authority unlawfully coerced or influenced" any of the individuals approached.

4. A post-trial evidentiary hearing is not required if no reasonable person could view the opposing affidavits . . . and find the facts averred by appellant. *United States v. Dykes*, 38 M.J. 270, 172-73 (C.M.A. 1993).

5. "[T]he threshold triggering [a *DuBay*] inquiry is low, but it must be more than a bare allegation or mere speculation." *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994).

E. Raising the issue at the trial level. *United States v. Biagase*, 50 M.J. 143 (1999).

1. "The threshold for raising the issue at trial is low, but more than mere allegation or speculation." The evidentiary standard is the same as required to raise an issue of fact, *i.e*. "**some evidence**."

2. The accused must show facts which, if true, constitute UCI, and that the alleged UCI has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings.

3. Once raised, the burden shifts to the Government, which may rebut the defense case by proving "beyond a reasonable doubt" that "(1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not affect the proceedings"

F. Dismissal is last resort.

1. "If and only if the trial judge finds that command influence exists (because the defense successfully raised it, and the Government failed to disprove it) 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." *Jones*, 30 M.J. at 845. *Accord United States v. Thomas*, 22 M.J. 388 (1986), *United States v. Martinez*, 42 M.J. 333 (1995).

2. *United States v. Gore*, 60 M.J. 178 (2004). "Because the military judge here decided that the command influence could not be cured and dismissed the charges with prejudice, we . . . address a different issue than that presented in *Biagase* and *Rivers*, where the trial proceeded after remedial action by the military judge. We now consider whether the military judge erred in fashioning the remedy for the unlawful command influence that tainted the proceedings. We will review the remedy ordered by the military judge in this case for an abuse of discretion." It was within the MJ's discretion to determine that dismissal with prejudice was the appropriate remedy in light of the "egregious conduct of the CA that prejudiced Appellant's court-martial."

G. Recent reinforcement:

United States v Francis, 54 M.J. 636 (Army Ct. Crim. App. 2000). Appellant asserted that comments from his squad leader and platoon leader to other soldiers in his unit that they should not associate with appellant, and that appellant should be separated from rest of soldiers constituted UCI. He asserted that military judge erred by failing to shift the burden of persuasion to the government. The squad leader and platoon leader testified regarding their intent. Other soldiers testified regarding their interpretation of what they heard. These soldiers stated they were willing to testify on appellant's behalf; defense counsel stated he had no evidence of unfairness. Military judge found actions of squad and platoon leaders UCI, but there was no showing of how or why the proceedings were unfair. Nonetheless, the military judge put several *Rivers/Biagase* type remedial measures in place. The court found that the burden of persuasion never shifted because appellant failed to show "proximate cause" or "logical connection" between the actions of squad and platoon leaders and some unfairness at trial. The appellate court disagreed with the findings and legal analysis of the military judge, but reached the same conclusion. Based on conclusion that there was no UCI, the Court sharply criticized the remedial measures put into effect by the military judge.

H. Pretrial publicity and the standard.

U.S. v. Simpson, 58 M.J. 368 (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 and unfair pretrial publicity permeated 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." The Court held that the appellant did not meet his burden under *Biagase* that the statements were unlawful command influence and, alternatively, Government demonstrated that media stories and statements by senior officials did not taint the court-martial.

XIV. WAIVER.

A. *United States v. Drayton*, 45 M.J. 180 (1996); *United States v. Brown*, 45 M.J. 389 (1996). *Accord United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994). (Court unanimously affirms conviction, but two judges dissent from analysis.). Majority approach for future cases.

1. Forfeited if not raised at trial:

   a. Accuser disqualification;

   b. Commander coerced into signing charges, (charges are treated as unsworn); and

   c. Pressure to make a certain recommendation in the transmittal process.

2. Not waived by failure to raise at trial. Improper influence at:

   a. Referral;

   b. Trial; or

   c. Post-trial review.

3. Items in 1.(a) - (c) above are not waived if there is an allegation that the party was deterred by unlawful command influence from challenging the defects at trial. *But see United States v. Dingis*, 49 M.J. 232 (1998) where there was no indication that the alleged UCI prevented the accused from discovering this information prior to trial

B. **Old Rule**: UCI motion "is not waived by failure to raise it at trial." *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994), *United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983) (note, however, that it carefully sidesteps the applicability of Art. 37 to the adjudicative phase).

C. Not jurisdictional: "[E]ven in egregious case[s] of unlawful] command influence," the court has refused to find the error is jurisdictional. *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994) (citing *United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983)).

D. Unsettled Issue: *United States v. Reynolds*, 40 M.J. 198 (C.M.A. 1994) (2-1-1-1). Fractured court affirms conviction, but three judges struggle over whether accused can affirmatively halt/waive post-trial Article 39(a) inquiry into allegations of unlawful command influence in order to protect favorable PTA.

E. Waiver as Part of Pretrial Agreement.

United States v. Weasler, 43 M.J. 15 (1995). Accused had made (accurate) motion that acting commander improperly signed charges, at direction of commander who was going on leave, and therefore did not exercise independence. While government preparing to respond to motion, defense offered to plead guilty. Held: issue is waiveable by defense, so long as knowing, freely initiated. Strong disagreement in scathing concurrences from Judges Sullivan and Wiss, who suggest that majority setting standard of "tolerable" UCI.

XV. CURRENT ISSUES, PROJECTIONS, OPINIONS.

A. UCI is correctable.

B. UCI (at least accusative stage) is waiveable – expressly (*Weasler*) and by omission.

C. Contemporary concerns.

1. "Vision statements," "transition briefings," and policy letters.

2. Good faith paternalism: smothering advice on possible consequences of pet area of misconduct (*e.g.*, drugs, sexual harassment).

3. Deployments: Rear detachment commands pose > threats for UCI.

4. "High-profile" cases where senior military leadership make public comments regarding pending investigations and trials.

5. Commander's increased unfamiliarity with (and reduced confidence in) military justice system.

6. "Zero defects" as applied to courts-martial.

7. Mentoring properly regarding good order and discipline and the military justice system.

THE 10 COMMANDMENTS OF UNLAWFUL COMMAND INFLUENCE

COMMANDMENT 1:	**THE COMMANDER MAY NOT ORDER A SUBORDINATE TO DISPOSE OF A CASE IN A CERTAIN WAY.**
COMMANDMENT 2:	**THE COMMANDER MUST NOT HAVE AN INFLEXIBLE POLICY ON DISPOSITION OR PUNISHMENT.**
COMMANDMENT 3:	**THE COMMANDER, IF ACCUSER, MAY NOT REFER THE CASE.**
COMMANDMENT 4:	**THE COMMANDER MAY NEITHER SELECT NOR REMOVE COURT MEMBERS IN ORDER TO OBTAIN A PARTICULAR RESULT IN A PARTICULAR TRIAL.**
COMMANDMENT 5:	**NO OUTSIDE PRESSURES MAY BE PLACED ON THE JUDGE OR COURT MEMBERS TO ARRIVE AT A PARTICULAR DECISION.**
COMMANDMENT 6:	**WITNESSES MAY NOT BE INTIMIDATED OR DISCOURAGED FROM TESTIFYING.**
COMMANDMENT 7:	**THE COURT DECIDES PUNISHMENT. AN ACCUSED MAY NOT BE PUNISHED BEFORE TRIAL.**
COMMANDMENT 8:	**RECOGNIZE THAT SUBORDINATES AND STAFF MAY "COMMIT" COMMAND INFLUENCE THAT WILL BE ATTRIBUTED TO THE COMMANDER, REGARDLESS OF HIS KNOWLEDGE OR INTENTIONS.**
COMMANDMENT 9:	**THE COMMANDER MAY NOT HAVE AN INFLEXIBLE ATTITUDE TOWARDS CLEMENCY.**
COMMANDMENT 10:	**IF A MISTAKE IS MADE, RAISE THE ISSUE IMMEDIATELY.**

53rd GRADUATE COURSE

IMPROPER SUPERIOR-SUBORDINATE RELATIONSHIPS & FRATERNIZATION

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MAJ Jon S. Jackson

December 2004

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IMPROPER SUPERIOR-SUBORDINATE RELATIONSHIPS & FRATERNIZATION

Outline of Instruction

I. REFERENCES.

A. Army References.

1. Dep't of Army, Reg. 600-20, Personnel--General: Army Command Policy (13 May 2002)[hereinafter AR 600-20], implementing Message, 020804Z Mar 99, Headquarters, Dep't of Army, DAPE-HR-L, subject: Revised Policy on Relationships Between Soldiers of Different Ranks (2 Mar. 1999)[hereinafter DA Message].

2. Manual for Courts-Martial, United States [hereinafter MCM].

3. Former Dep't of Army, Pam. 600-35, Personnel--General: Relationships Between Soldiers of Different Rank (7 Dec 1993).

4. Dep't of Army, Pam. 600-35, Personnel--General: Relationships Between Soldiers of Different Rank (21 Feb 2001).

B. Navy, Marine Corps, and Air Force References.

1. U.S. Navy Regulations, 1990, Article 1165 - Fraternization Prohibited (as amended 25 Jan 1993).

2. OPNAVINST 5370.2B, Navy Fraternization Policy (27 May 1999).

3. Marine Corps Manual 1100.4 (as amended by HQMC, ALMAR 185/96, 130800Z May 96, subject: Marine Corps Manual (MCM) Change 3).

4. Department of Air Force Instruction 36-2909, Personnel: Professional and Unprofessional Relationships (1 May 1999).

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 [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 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 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 servicemembers 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, will not be 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, are not prohibited until 1 Mar 00.

(c) Relationships otherwise in compliance with this policy **will not** become prohibited under this policy solely because of the change in status of one party to the relationship (such as commissioning). While not expressed in the policy, this provision is NOT intended to allow continued officer / enlisted dating after the close of the grandfather period.

(d) RC/RC exclusion when the personal relationship is primarily due to civilian acquaintanceship, unless on AD or FTNGD other than 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.

(4) This subparagraph is 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 will be prohibited. This prohibition would apply 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, will be prohibited. The prohibition would apply 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 punitive. Violations could be punished as violations of Article 92, UCMJ.

D. **Commander's Analysis**: 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, conduct prejudicial to good order/discipline.

V. CASE LAW

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 ala, 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. There 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).

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. 736 (N.M.CtCrim.App. 2000). Contrary to his pleas, the appellant was convicted of maltreatment and fraternization in violation of Articles 93 and 134, UCMJ. The charges were the result of 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.

VI. CONCLUSION.