

Tending the Garden: A Post-Trial Primer for Chiefs of Criminal Law

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A wise Staff Judge Advocate (SJA) once said that “managing the post-trial process of a criminal law office is like tending a garden.” This short statement captures the essence of the successful management of the post-trial process. If the chief of criminal law and his office tend to the post-trial process daily, making sure each step is given the appropriate attention, the process will remain manageable. If, however, the post-trial process is attended to sporadically or left unattended for weeks, it will quickly become overwhelming.

As a new chief of criminal law one of the most challenging tasks you will face is managing the post-trial process of your office. For most new chiefs of criminal law, the post-trial process is uncharted territory. If your only criminal law experience is as a trial counsel (TC), virtually all of the post-trial process will be new territory. Even former defense counsel (DC), who are familiar with requesting deferment of punishment, and Rules for Courts-Martial (RCM) 1105 and 1106 submissions, will find the post-trial world of a chief of criminal law much larger and more diverse than that of a DC.

The task of managing an office’s post-trial process can also be challenging because it can be difficult to see its significance. The purpose of the pretrial process is obvious—to get a conviction—but after the trial is over, the objective is more elusive. Finally, the post-trial process is challenging because there is so much to it. In a run of the mill post-trial process² the criminal law office will have to: create and organize a record of trial (ROT),³ produce eight documents,⁴ ensure that the ROT is reviewed by four individuals,⁵ serve the post-trial recommendation and addendum (if it contains new matter) on the accused and his counsel,⁶ receive and organize the matters submitted by defense, get the convening authority (CA) to take action,⁷ and mail the original ROT and two identical copies to the reviewing or appellate authority.⁸

The purpose of this article is to explain the post-trial process and identify some of the process’s common pitfalls and methods of avoiding those pitfalls. This article addresses the post-trial process in four parts. The first part discusses the post-trial process in general, focusing on the purpose of the process and briefly discussing all the stops along the way, including the subject of post-trial delay. The second part reviews the process from the adjournment of the trial to authentication of the record. The third part examines the process from the authentication of the ROT to the SJA addendum. The final part examines the CA action, the promulgating order, the process of placing Soldiers on excess leave, and final action.

Post-Trial Processing in General and Post-Trial Delay

As the chief of criminal law you are responsible for ensuring the execution of all of the necessary steps to complete the post-trial process. One error in the process can cause all subsequent actions taken to have to be repeated.⁹ Additionally,

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² The term “run of the mill post-trial process” contemplates the processing of a record of trial where the accused is convicted and receives a punishment that includes confinement and a punitive discharge. Also, this includes one where the accused has requested deferment of some or all of the adjudged sentence.

³ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1103(b)(1) (2005) [hereinafter MCM].

⁴ The DA Form 4430, Department of the Army Report of the Result of Trial, the DD Form 2707, Confinement Order, responses to defense deferment requests, the post-trial recommendation, the addendum to the post-trial recommendation, the action, the promulgating order, excess leave documents. U.S. Dep’t of Army, DA Form 4430, Department of the Army Report of Result of Trial (Sept. 2002); U.S. Dep’t of Defense, DD Form 2707, Confinement Order (Sept. 2005).

⁵ MCM, *supra* note 3, R.C.M. 1103(I)(1)(B) (Trial Counsel), R.C.M. 1103(I)(1)(B) (Defense Counsel), R.C.M. 1104(b)(1)(A) (the Accused), R.C.M. 1104(a)(2)(A) (Military Judge).

⁶ *Id.* R.C.M. 1106(f), R.C.M. 1106(f)(7).

⁷ *Id.* R.C.M. 1107(a).

⁸ *Id.* R.C.M. 1111(a)(1); THE CLERK OF COURT’S POST-TRIAL ADMINISTRATIVE PROCESSING OF GENERAL COURTS-MARTIAL AND BCD SPECIAL COURTS-MARTIAL para. 1-8a(1) (23 Aug. 2004) [hereinafter THE CLERK OF COURT’S HANDBOOK].

⁹ If an appellate court rules that the post-trial recommendation was incorrect and prejudiced the accused, the court will most likely order a new post-trial recommendation. If a new post-trial recommendation is ordered, then a new action and promulgating order will also be necessary.

throughout the post-trial phases a processing-time clock constantly ticks. Although the *Dunlap*¹⁰ ninety-day post-trial processing requirement has long been a thing of the past,¹¹ the *Moreno*¹² 120-day-clock has, at least in some regards, taken its place. The Army Court of Criminal Appeals (ACCA) decisions in *United States v. Collazo*¹³ and *United States v. Chisholm*,¹⁴ and the Court of Appeals for the Armed Forces (CAAF) decision in *United States v. Tardif*,¹⁵ have continued to emphasize the need to process records of trial in a speedy fashion.¹⁶

As you prepare to take responsibility for the post-trial process of your office there are several references you should both read and have available. First, there are five resources that will be invaluable to you: *The Clerk of Court's Handbook for Post-Trial Administration*; the *Manual for Courts-Martial (MCM)* (RCM 1101 through RCM 1210); the Uniform Code of Military Justice (UCMJ) (articles 57 through 67; and Appendix 16); Army Regulation (AR) 27-10 *Military Justice* (Chapters 5 and 12); and the Military Justice Manager's Post-Trial outlines and Post-Trial New Developments outline from the Army Judge Advocate General's School. These resources will provide you with detailed information regarding the post-trial process, examples of how to word certain documents, suggestions on improving your office's processes, and updates of the most recent statutory, regulatory, and case-law driven changes to the post-trial process. Second, make use of the human resources in your office. Talk with your court-reporters, post-trial noncommissioned officer (NCO), and enlisted Soldiers. It is important to know the experience level of your post-trial staff, and take advantage of it when possible or make allowances for it when necessary.

Part I: Overview

When examining post-trial processing, it can be helpful to divide it into three phases: adjournment to authentication; receipt of the authenticated ROT to addendum; action to final action. Appendix A of this article is a diagram or road map of the post-trial process.¹⁷ Each event that is necessary for a successful post-trial process is accounted for in the diagram and will be discussed briefly in this section of the article and more in-depth in later sections.

Phase one of the post-trial process is dominated by the TC and the court reporter (CR), but like all phases of post-trial processing, there are plenty of opportunities for the chief of criminal law to get involved. The first event in the post-trial process occurs after the judge announces that the trial is adjourned.¹⁸ As soon as the trial is adjourned, the TC is responsible for producing the Report of the Result of Trial, Department of the Army (DA) Form 4430.¹⁹ A copy of this document must be provided to the CA, the immediate commander of the accused, and (if applicable) the commander of the confinement facility where the accused is sent.²⁰ Also, a copy of DA Form 4430 must accompany the military prisoner to his place of confinement.²¹ The TC is also responsible for producing a confinement order, Department of Defense (DD) Form 2707. According to RCM 1101(b)(2), "A commander of the accused may order the accused into post-trial confinement . . . [and] may delegate this authority to the trial counsel."²² There is no requirement that the commander delegate his authority to order

¹⁰ *Dunlap v. Convening Authority*, 48 C.M.R. 751 (C.M.A. 1974).

¹¹ *United States v. Banks*, 7 M.J. 92 (1979); *United States v. Jenkins*, 38 M.J. 287 (1993); *United States v. Bell*, 46 M.J. 351 (1997).

¹² *United States v. Moreno*, 63 M.J. 129 (2006).

¹³ 53 M.J. 721 (2000). In addition to the ACCA decision in *Collazo*, the Court of Appeals for the Armed Forces (CAAF) has weighed in on the issue of undue delay in the post-trial process. In *United States v. Tardif*, 57 M.J. 219 (2002), the CAAF held that prejudice was not a prerequisite for relief under Article 66(c).

¹⁴ 58 M.J. 733 (Army Ct. Crim. App. 2003).

¹⁵ *Tardif*, 57 M.J. 219 (holding that prejudice was not a prerequisite for relief under Article 66(c)).

¹⁶ In addition to relief, chiefs of criminal law in the Army still face the Army clerk of court's quarterly processing time report. The quarterly processing time report tracks the pretrial and post-trial processing time for every command Army wide. It is widely understood that being at the bottom of this report will likely draw, at a minimum, unwanted attention from your SJA.

¹⁷ The attached diagram was initially composed by Colonel Michael J. Hargis while instructing at the U.S. Army Judge Advocate General's School in 1997.

¹⁸ MCM, *supra* note 3, R.C.M. 1101.

¹⁹ *Id.* R.C.M. 1101(a), U.S. DEPT. OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-29a (6 Sept. 2005) [hereinafter AR 27-10]. The DA Form 4430 is available through the Electronic Judge Advocate War-fighting System (e-JAWS), <http://www.jagcnet.army.mil/> (follow "e-JAWS" hyperlink under "Members Only Areas").

²⁰ MCM, *supra* note 3, R.C.M. 1101(a).

²¹ AR 27-10, *supra* note 19, para. 5-29(a).

²² *Id.*

confinement in writing, but the TC should verify that the commander wants to delegate this authority. An example of a routine delegation order is enclosed at Appendix B.

The next step during phase one is responding to deferment requests. If the defense requests deferment, the CA must respond in writing to the request.²³ Because deferment only postpones the running of the accused's sentence until action, it only affects those punishments which go into effect before action is taken. Thus, an accused can request deferment of confinement, forfeitures (both adjudged and automatic),²⁴ or reduction.²⁵

As soon as the trial has adjourned, the process of preparing the ROT begins. Although RCM 1103(b)(1)(A) expressly states that "the trial counsel shall under the direction of the military judge cause the record of trial to be prepared," preparation of the ROT is usually the responsibility of the CR and chief of criminal law.²⁶ The TC is responsible for reviewing the ROT for accuracy (to include reviewing the transcript and the evidence) before it is sent to the military judge (MJ) for authentication.²⁷

At the same time the TC is reviewing the ROT, the DC should be given his opportunity to examine the record before authentication.²⁸ According to RCM 1103(i)(1)(B), the DC "shall be permitted . . . to examine the record before authentication."²⁹ The requirement to permit DC to review the ROT is not absolute. If an "unreasonable delay will result"³⁰ this requirement may be bypassed.³¹

Once the TC and DC have reviewed the ROT for correctness and submitted their proposed corrections (errata), the record is sent to the MJ for authentication. The forwarding of the ROT for authentication marks the end of the first phase. Generally, the first phase is the longest in the post-trial process, with most of the time being consumed by the preparation of the ROT.

Phase two of the post-trial process is dynamic and will involve the chief of criminal law, the DC, the MJ, and the SJA. It begins with the return of the ROT from the MJ and ends at the SJA addendum. During this phase the post-trial recommendation is prepared or revised, defense submissions are received, and an addendum is completed.

The first step in phase two really is not a step, but a pause. At the beginning of phase two the criminal law office is waiting to receive the authenticated ROT from the MJ. Although the office is waiting for the ROT to be returned, this should not be an idle time. During this part of phase two (if not sooner), the chief of criminal law should prepare and submit for the SJA's review the proposed Staff Judge Advocate Post-Trial Recommendation (SJAR), addendum, action, and promulgating order. The secret to an efficient post-trial process is being proactive. Your office should prepare and review the documents before they are needed. The time after the ROT has been prepared and has been sent for authentication is often a good time to prepare the SJAR, addendum, action, and promulgating order.³² The SJA can review the documents with a copy of the

²³ MCM, *supra* note 3, R.C.M. 1101(c).

²⁴ Deferment of adjudged forfeitures is governed by UCMJ article 57a, while deferment of automatic forfeitures is governed by UCMJ article 58b. UCMJ arts. 57a, 58b (2005).

²⁵ *Id.*

²⁶ *But see* United States v. Chisholm, 58 M.J. 733 (Army Ct. Crim. App. 2003) (discussing in detail the military judge's authority and responsibilities regarding the preparation of the ROT).

²⁷ MCM, *supra* note 3, R.C.M. 1103(i)(1)(A).

²⁸ *Id.* R.C.M. 1103(i)(1)(B).

²⁹ *Id.*

³⁰ *Id.*

³¹ United States v. Maxwell, 56 M.J. 928, 929 (2002). In *Maxwell*, the ACCA stated that the government has an obligation to forward the record of trial to the military judge without defense errata where the DC exceeds the local defense standards for errata. In *Maxwell*, the government waited fifty-one days for defense errata when the local defense standard for errata was five days. In addition to considering *Maxwell* to determine when to forward a record of trial without DC errata, chiefs of criminal law should also consider the standard established in *The Rules of Practice Before Army Courts-Martial*. THE RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL para. 27(d) (1 Jan. 2001) (establishing a minimum standard of 150 pages of review per calendar day).

³² Pre-positioning the SJAR, addendum, action, and promulgating order is important to an efficient post-trial process. By preparing these documents before they are necessary, the post-trial process is faster and generally contains fewer errors. It is not necessary to wait until after the record of trial has been sent to the military judge to prepare the SJAR, addendum, action, and promulgating order. They can be prepared as soon as the sentence is announced. The advantage to waiting for a complete record of trial is that the record of trial can be used to check the accuracy of the information in the documents. It is also important to remember that pre-positioning the documents does not mean they will not change after they have been prepared. Shell addendums, by their

ROT so that he is comfortable that the SJAR is accurate and the action is appropriate.

If the MJ returns the authenticated ROT, the SJA must sign and date the SJAR. A copy of the authenticated ROT and the SJAR must be served on the accused.³³ The DC is entitled to have access to the authenticated ROT and a copy of the SJAR.³⁴ Once the accused has received both the authenticated ROT and a copy of the SJAR, he has ten days to submit clemency matters under RCM 1105.³⁵ The accused may request an additional twenty days to submit clemency matters.³⁶ The DC has ten days from the service of the authenticated ROT³⁷ and the SJAR to submit comments on the SJAR under RCM 1106.³⁸

Once defense submits RCM 1105 and 1106 matters, the chief of criminal law should review them. The purpose of this review is to determine if the accused or DC have claimed legal error, or if there is any claim in the defense submissions that should be verified. The chief of criminal law should then forward the submissions to the SJA and discuss whether the addendum needs to respond to any matters raised in the defense submissions, or whether it should simply account for all the documents that were a part of the defense matters. Finally, as part of the government's obligation to protect the ROT, the chief of criminal law and SJA should review defense matters for issues of ineffective assistance of counsel.³⁹

The addendum should be modified to account for the documents in the defense submissions. More importantly, it must address any legal errors raised by the accused or counsel.⁴⁰ If the addendum is used to raise new matter (generally in response to some factual assertion in the defense matters), then the addendum must be served on the accused and counsel, and defense is entitled to ten days (plus an additional twenty days if requested) to respond to the new matter.⁴¹ Phase two ends with the SJA addendum.

Phase three begins with the SJA preparing to bring the SJAR and addendum, the defense's written submissions, the result of trial, and the proposed action to the CA.⁴² Once the CA has signed the initial action, the promulgating order can be completed. Next, a copy of the CA's action or promulgating order must be served on the accused or DC.⁴³ It is important to note that once the action has been served on the accused or the accused's counsel, the CA can no longer make changes to the action that are adverse to the Soldier.⁴⁴ It is also at this time that the compilation of the ROT is finalized, to include completing the Court-Martial Data Sheet (DD Form 494)⁴⁵ and the Court-Martial Chronology Sheet (DD Form 490, often referred to as the blue coversheet).⁴⁶ Next, copies of the promulgating order and ROT are mailed to the Clerk of Court for the ACCA or may be reviewed by a local judge advocate, depending on the level of court-martial and the severity of the punishment approved.⁴⁷

nature, must be changed to account for or respond to defense submissions. Thus, each shell document must be reviewed initially, and again before it is signed.

³³ MCM, *supra* note 3, R.C.M. 1104(b)(1)(A); R.C.M. 1106(f)(1).

³⁴ *Id.* R.C.M. 1104(b)(1)(A); R.C.M. 1106(f).

³⁵ *Id.* R.C.M. 1105(c)(1).

³⁶ *Id.*

³⁷ Service of the record of trial means service in accordance with RCM 1104(b). *Id.* R.C.M. 1104(b).

³⁸ *Id.* R.C.M. 1106(f)(5).

³⁹ *United States v. Gilley*, 56 M.J. 113 (2001). In *Gilley*, the DC counsel included three letters in the RCM 1105 clemency matters which were harmful to the accused's clemency petition, causing the record of trial to be returned for a new post-trial clemency petition and SJAR. *Id.* at 125.

⁴⁰ MCM, *supra* note 3, R.C.M. 1106(d)(4).

⁴¹ *Id.* R.C.M. 1106(f)(7).

⁴² *Id.* R.C.M. 1107(b)(3)(A).

⁴³ *Id.* R.C.M. 1107(h).

⁴⁴ *Id.* R.C.M. 1107(f)(2).

⁴⁵ U.S. Dep't of Defense, DD Form 494, Court-Martial Data Sheet (Oct. 1984).

⁴⁶ U.S. Dep't of Defense, DD Form 490, Chronology Sheet (May 2000).

⁴⁷ General courts-martial cases (even those resulting in acquittals) and special courts-martial which have a punishment that includes a bad conduct discharge (BCD) or confinement of one year must be sent to the ACCA Clerk of Court. MCM, *supra* note 3, R.C.M. 1111(b)(1); AR 27-10, *supra* note 19, para. 5-42a. Special courts-martial (SPCM) cases that do not meet the above threshold must still receive a judge advocate review, but the review can be done locally. An attorney for the command that convened the court-martial may conduct the review. See MCM, *supra* note 3, R.C.M. 1112; AR 27-10, *supra* note 19, para. 5-42b.

Although you might think the post-trial process is complete once your office has mailed the ROT, it is not. If the accused receives less than a year of confinement, he may return to the unit after serving his term of confinement while awaiting resolution of his appeal. A convicted Soldier who is pending a punitive discharge can be enormously disruptive to a unit. To resolve this issue, commands can place Soldiers on voluntary excess leave or involuntary excess leave, depending on the circumstances.⁴⁸ Also, in those cases where the Soldier does not receive a term of confinement adequate to have him transferred to a regional confinement facility or Fort Leavenworth, you may find your office having to provide the accused appellate notice and execute the final action after appellate review has been completed.

Even the briefest overview of the post-trial process reveals a labyrinth of administrative challenges, replete with opportunities for error. By breaking the process down to its basic components it can be visualized, and thus, more easily executed. After becoming comfortable with the post-trial process, chiefs of criminal law should share this knowledge with their TC and enlisted Soldiers. Many of the post-trial errors that occur in the field, especially excessive delays, do not originate with the chief of criminal law. Despite their best efforts, chiefs of criminal law cannot be everywhere at one time. They must rely on other members of the criminal law section to properly execute the post-trial process. The only way that can happen is if every member of the criminal law section has a working knowledge of the post-trial process.⁴⁹

Post-Trial Delay

Understanding the large-scale order and flow of the post-trial process is the first step to making it accurate, efficient, and timely. This understanding is particularly important to the timeliness of the process. Days, weeks, or months can be lost while a ROT languishes in an in-box waiting for someone to determine where it must go next. Military appellate courts have emphasized the importance of a timely post-trial process for decades,⁵⁰ but for Army practitioners, the issue took on new importance on 27 July 2000. On that date, the ACCA decided *United States v. Collazo*.⁵¹

In *Collazo*, a panel convicted the accused of carnal knowledge and rape.⁵² The panel sentenced him to a reduction to Private (PVT) E-1, forfeiture of all pay and allowances, eight years of confinement, and a dishonorable discharge. After trial the government took over ten months to authenticate the ROT and over a year to take initial action.⁵³

In *Collazo* the court began its discussion of the post-trial delay in the case with the statement that “[t]en months to prepare and authenticate a 519-page record of trial is too long.”⁵⁴ The court pointed out that it was the post-trial delays like those in *Collazo* that caused the Court of Military Appeals (COMA) to adopt the *Dunlap* ninety-day rule, a rule which governed military practice from 1974 to 1979.⁵⁵ Next, the ACCA held that despite the absence of any prejudice to the accused, “fundamental fairness dictates that the government proceed with due diligence to execute a Soldier’s regulatory and statutory post-trial processing rights and to secure the CA’s action as expeditiously as possible, given the totality of the circumstances in that Soldier’s case.”⁵⁶ The court concluded that the government failed to meet the fundamental fairness standard and reduced the accused’s confinement by four months.

⁴⁸ U.S. DEPT. OF ARMY. REG. 600-8-10, LEAVES AND PASSES paras. 5-19, 5-20 (1 July 1994) [hereinafter AR 600-8-10].

⁴⁹ A professional development class on post-trial processing could go a long way toward educating the officers and enlisted personnel in your criminal law section and thus reducing processing time.

⁵⁰ *Dunlap v. Convening Authority*, 48 C.M.R. 751 (C.M.A. 1974); *United States v. Banks*, 7 M.J. 92 (C.M.A. 1979); *United States v. Clevidence*, 14 M.J. 17 (C.M.A. 1982); *United States v. Hudson*, 46 M.J. 226 (1997).

⁵¹ 53 M.J. 721 (Army Ct. Crim. App. 2000).

⁵² *Id.* at 723.

⁵³ *Id.* at 724. In addition to the post-trial delay in *Collazo*, the government committed several other post-trial errors. The government failed to give DC counsel the opportunity to review the record of trial before sending it to the military judge for authentication, and failed to serve DC with a copy of the authenticated record of trial before the convening authority took action. Additionally, the government failed to provide the accused or counsel a copy of the action in a timely manner.

⁵⁴ *Id.* at 725.

⁵⁵ *Id.* Under the *Dunlap* rule, the government was required to complete the post-trial process within ninety days or face the possibility of the charges being dismissed. *Id.*

⁵⁶ *Id.* at 726.

Since *Collazo*, the ACCA has decided over a score of memorandum opinions,⁵⁷ and nine published opinions, where it granted “*Collazo* relief.”⁵⁸ The minimum length of delay necessary to cause *Collazo* relief to be granted is unclear. The ACCA standard is flexible and fact-dependent. Relief has been granted in a case where the post-trial process took as little as five and a half months⁵⁹ and has been denied in a case where the process took over nine months.⁶⁰ The amount of *Collazo* relief the ACCA has given also varies, ranging from as little as ten days⁶¹ to as much as six months.⁶²

Although the ACCA has put pressure on chiefs of criminal law to improve post-trial processing, the court has also created a flexible standard that allows for reasonable delay. In *Collazo* and its progeny, the ACCA set no hard and fast number of days by which a ROT must be completed; all the court requires is that under the totality of the circumstances, the government proceeds with “due diligence.” This flexible standard allows chiefs of criminal law the opportunity to explain and document the government’s efforts to complete the post-trial process in a timely manner.

It is important to remember that the ACCA’s principle resource for determining whether the government was diligent in the post-trial process is the ROT; thus, any efforts to advance the process must be in the record. The court will already know and take into consideration the length of the ROT, the time it took to authenticate it, and the time to action. The court will also be aware of any written requests for delay by the defense that have been included in the record.⁶³ Other than this information, however, the court will not know the steps your office has taken to ensure it was being diligent unless it has been documented in the record. Documentation can be done by a memorandum for record (MFR) attached to the ROT describing the government’s post-trial processing efforts, or by a notation in the comments section of the chronology, DD Form 490. Additionally, the government can document its efforts in the SJAR, or in the addendum responding to RCM 1105/1106 allegations of untimely post-trial processing. When deciding what information to include in a memorandum, it is probably wise to err on the side of detail. Efforts to get an increase in CR support, use of 27D paralegals and attorneys to type sections of the record, and delays caused by mission requirements may all be relevant. The ACCA has described four specific acceptable reasons for lengthy post-trial delay: excessive defense delay in the submission of RCM 1105 matters, post-trial absence or mental illness of the accused, exceptionally heavy military justice post-trial workload, and unavoidable delay due to operational deployments.⁶⁴

Although documenting a criminal law office’s post-trial processing efforts in a particular case is relatively easy, capturing that information can be challenging. The government’s post-trial processing efforts will involve several members of the criminal law section and, in most cases, will span several months. If a systematic method is not put in place to gather this information as it occurs, much of it will be lost. One method to achieve this objective is to use a log sheet that accounts

⁵⁷ United States v. Sprattley, No. 20010191 (Army Ct. Crim. App. Jan. 22, 2003); United States v. Melendez, No. 9901054 (Army Ct. Crim. App. Feb. 8, 2002); United States v. Goodenough, No. 9900564 (Army Ct. Crim. App. May 7, 2002); United States v. Bundy, No. 20000473 (Army Ct. Crim. App. Nov. 25, 2002); United States v. Conley, No. 9900183 (Army Ct. Crim. App. Nov. 27, 2002); DA form 4917-R, “Advice of Appellate Rights; United States v. Hernandez, No. 9900776 (Army Ct. Crim. App. Feb. 23, 2001); United States v. Sharp, No. 9701883 (Army Ct. Crim. App. Apr. 16, 2001); United States v. Acosta-Rondon, No. 9900458 (Army Ct. Crim. App. Apr. 30, 2001); United States v. Bradford, No. 9900366 (Army Ct. Crim. App. May 16, 2001); United States v. Hansen, No. 20000532 (Army Ct. Crim. App. May 10, 2001); United States v. Pershays, No. 9800729 (Army Ct. Crim. App. June 12, 2001); United States v. Brown, No. 9900216 (Army Ct. Crim. App. July 13, 2001); United States v. Sharp, No. 9701883 (Army Ct. Crim. App. Apr. 16, 2001); United States v. Holland, No. 9901168 (Army Ct. Crim. App. Aug. 1, 2001); United States v. Stevens, No. 9900666 (Army Ct. Crim. App. Aug. 1, 2001); United States v. Bass, No. 9801511 (Army Ct. Crim. App. Aug. 3, 2001); United States v. Boulton, No. 20000018 (Army Ct. Crim. App. Aug. 16, 2001); United States v. Myers, No. 9900329 (Army Ct. Crim. App. Aug. 16, 2001); United States v. Sharks, No. 9900770 (Army Ct. Crim. App. Aug. 16, 2001); United States v. Tualalelei, No. 9900795 (Army Ct. Crim. App. Nov. 10, 2001); United States v. Marlow, No. 9800727 (Army Ct. Crim. App. Aug. 31, 2000); United States v. Fussell, No. 9801022 (Army Ct. Crim. App. Oct. 20, 2000).

⁵⁸ United States v. Harms, 58 M.J. 515, 516 (Army Ct. Crim. App. 2003); United States v. Chisholm, 58 M.J. 733 (Army Ct. Crim. App. 2003); United States v. Maxwell, 56 M.J. 929 (Army Ct. Crim. App. 2002); United States v. Hutchison, 56 M.J. 756 (Army Ct. Crim. App. 2002); United States v. Paz-Medina, 56 M.J. 501 (Army Ct. Crim. App. 2001); United States v. Devalle, 55 M.J. 648 (Army Ct. Crim. App. 2001); United States v. Nicholson, 55 M.J. 551 (Army Ct. Crim. App. 2001); United States v. Bauerbach, 55 M.J. 501 (Army Ct. Crim. App. 2001).

⁵⁹ United States v. Hansen, No. 20000532 (Army Ct. Crim. App. May 10, 2001). The record of trial in *Hansen* was 137 pages long and it took the government a little over five months to complete the post-trial process. The Army court reduced the accused’s sentence by one month due to the post-trial delay.

⁶⁰ United States v. Scaggs, No. 20000056 (Army Ct. Crim. App. Feb. 12, 2002).

⁶¹ *Acosta-Rondon*, No. 9900458.

⁶² *Sharp*, No. 9701883.

⁶³ Any written requests for delay in the post-trial process should be included in the record of trial and should be accounted for on the Court-Martial Data Sheet.

⁶⁴ United States v. Bauerbach, 55 M.J. 501, 507 (Army Ct. Crim. App. 2001); United States v. Maxwell, 56 M.J. 928 (Army Ct. Crim. App. 2002). In *Maxwell*, the Army court included the government’s failure to press the defense to complete its errata in a timely fashion in determining whether the government had proceeded with due diligence.

for everything that is done to move the ROT forward. This document should be known to every member of the criminal law section. Any efforts that are made to advance the post-trial process should be listed. This log could then be used to produce the MFR or addendum that explains the delay in a particular case. An example of such a log is at Appendix C.

If, after examining the post-trial process in a particular case, it is determined that the government failed to proceed with due diligence, that error can be corrected. The ACCA has authorized and even encouraged convening authorities to grant preemptive *Collazo* relief. In *United States v. Hudson*,⁶⁵ the SJA believed that the government failed to proceed with due diligence during the post-trial process, and so he recommended the CA reduce the accused's three years of confinement by six months. The ACCA applauded this correction and recommended it as a method for handling excessive unexplained post-trial delay.⁶⁶ If this technique is to be used, it is important to make it clear in the SJAR or addendum, and in the action, that the CA is granting *Collazo* relief.

Although the ACCA has put greater pressure on criminal law offices to produce timely records of trial, the standard of review is not unduly onerous. The court requires nothing more than due diligence; most criminal law offices meet that standard. By taking steps to document these efforts, chiefs can avoid losing hard-earned sentences to *Collazo* relief.

In addition to accounting to the ACCA for post-trial delay, an Army court decision may make it necessary to account to the MJ as well. In *United States v. Chisholm*,⁶⁷ the ACCA directed more vigorous involvement of MJ's in the post-trial process than had existed before. In *Chisholm*, the accused was convicted of rape, conspiracy to commit rape, obstruction of justice, and making a false official statement.⁶⁸ He was sentenced to four years of confinement, total forfeiture of all pay and allowances, reduction to PVT E-1, and a bad conduct discharge (BCD).⁶⁹ The preparation of the ROT took just under one year to complete.⁷⁰ During this time the accused's DC made numerous written requests to the government for a "date certain" regarding the completion of the ROT.⁷¹ In one of the requests, the DC asked the CA for a post-trial 39(a) session to resolve the delay issue.⁷² The CA denied this request. Defense counsel next sought relief from the MJ. The MJ ordered the government to give daily updates to the DC regarding the completion of the ROT.⁷³ Prior to the MJ's authentication, the DC submitted clemency matters on behalf of the accused requesting relief due to the post-trial delay.⁷⁴ This request was denied, as was a later request for the same relief. The CA took action in the case a year and five months after the sentence was announced.⁷⁵

The ACCA ultimately granted three months sentence relief to the accused based on post-trial delay,⁷⁶ but the relief granted in this case is not the most significant part of the decision. In *Chisholm*, the ACCA announced its expectations of MJ's during the post-trial process, reaching the conclusion that MJ's have the authority to grant an array of relief for post-trial delay to include sentence credit.⁷⁷ In reaching its decision the court focused on language in the UCMJ and the RCM that make the TC responsible for the preparation of the ROT "under the direction of"⁷⁸ the MJ.⁷⁹ The court also referred to earlier opinions from the COMA that confirmed the MJ's authority over a court-martial until that judge authenticates the ROT.⁸⁰

⁶⁵ No. 9801086 (Army Ct. Crim. App. July 5, 2001) (unpublished).

⁶⁶ *Id.* at 1.

⁶⁷ 58 M.J. 733 (Army Ct. Crim. App. 2003).

⁶⁸ *Id.* at 734.

⁶⁹ *Id.*

⁷⁰ *Id.* at 735.

⁷¹ *Id.* at 734.

⁷² *Id.*

⁷³ *Id.* at 735.

⁷⁴ *Id.*

⁷⁵ *Id.* at 736.

⁷⁶ *Id.* at 739.

⁷⁷ *Id.* at 736–37.

⁷⁸ UCMJ art. 38(a) (2002); MCM, *supra* note 3, R.C. M. 1103(b)(1)(A).

⁷⁹ *Chisholm*, 58 M.J. at 736–37.

⁸⁰ *Id.*

Based on its interpretation of the UCMJ, RCMs, and case law, the ACCA concluded that MJs have “a shared responsibility”⁸¹ with SJAs to ensure records of trial are prepared in a timely fashion. To fulfill that responsibility, the ACCA suggested that MJs make sua sponte inquiries regarding the status of records of trial that have not been completed within 90 to 120 days.⁸² The court has also tasked MJs with granting relief when the MJ concludes the post-trial process has not met the *Collazo* standard of due diligence. This relief could range from:

- (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.⁸³

In addition to the ACCA putting pressure on chiefs of criminal law and SJAs, the CAAF has also demonstrated concern regarding post-trial processing time. In two decisions, *United States v. Tardif*⁸⁴ and *United States v. Moreno*,⁸⁵ the CAAF made it clear that untimely post-trial processing will not be tolerated. In *Tardif*, the CAAF upheld the practice established in *Collazo* of courts of criminal appeal reviewing cases involving prolonged post-trial delay to determine if sentence relief is appropriate under Article 66(c) of the UCMJ.⁸⁶ Although *Tardif* made *Collazo* relief the standard across the Department of Defense, it appears that the CAAF was unsatisfied by the results. This dissatisfaction is apparent in the *Moreno* decision.

In *Moreno*, the appellant claimed that he had been denied his due process right to a timely review and appeal to his court-martial conviction. The basis of this claim was that the post-trial delay in the case was 1688 days, from sentencing to a decision by the court of criminal appeals.⁸⁷ On appeal, the government argued that the delay in the case was not unreasonable.⁸⁸ To say that the CAAF disagreed is putting it mildly. The CAAF cited the facts in *Moreno* to illustrate a growing problem in the area of post-trial delay.⁸⁹ In its effort to stem the tide of untimely post-trial processing, the CAAF adopted a new standard for evaluating claims of unreasonable post-trial delay as legal error.

Under this new standard appellate courts will first examine whether “a due process analysis is triggered by a facially unreasonable delay.”⁹⁰ If the delay is facially unreasonable then the court will analyze claims of post-trial delay in accordance with the *Barker v. Wingo*⁹¹ test.⁹² The *Barker v. Wingo* test weighs four factors, with no factor having any greater significance than any other. The four factors are: the length of the delay, the reasons for the delay, the appellant’s assertion of the right to timely review and appeal, and prejudice. What is perhaps the most significant part of the *Moreno* decision is the time frame that the CAAF placed on the term “facially unreasonable delay.” According to the CAAF, “we will apply a presumption of unreasonable delay that will serve to trigger the *Barker* four factor analysis where the action of the CA is not taken within 120 days of the completion of trial.”⁹³

Moreno and *Tardif* clearly delineate the two post-trial delay hurdles that chiefs of criminal law have to overcome. *Moreno* describes under what circumstances post-trial delay rises to the level of legal error under Article 59(a).⁹⁴ *Tardif*, on

⁸¹ *Id.*

⁸² *Id.* at 737.

⁸³ *Id.* at 738–39.

⁸⁴ 57 M.J. 219 (2003).

⁸⁵ 63 M.J. 129 (2006).

⁸⁶ UCMJ art. 66(c) (2005).

⁸⁷ *Moreno*, 63 M.J. at 135.

⁸⁸ *Id.*

⁸⁹ *Id.* at 142.

⁹⁰ *Id.* at 136.

⁹¹ 407 U.S. 514, 530 (1972).

⁹² *Moreno*, 63 M.J. at 135.

⁹³ *Id.* at 142.

⁹⁴ UCMJ art. 59(a) (2005).

the other hand, describes when service courts should remedy post-trial delay using their Article 66(c)⁹⁵ authority to evaluate the appropriateness of a sentence. Based on *Moreno* and *Tardif*, chiefs of criminal law should understand that the post-trial delay must be taken just as seriously as pretrial delay. To the greatest extent possible, no case should take longer than 120 days to process from sentence to action. Even if a case is processed in less than 120 days, it still may be vulnerable to an attack under *Tardif*, so diligence is necessary even when processing times are below 120 days. If a case is going to take over 120 days to process, then the criminal law office has to document all delays and be prepared to defend its post-trial process.

The ACCA and the CAAF have increased the pressure to create a timely ROT by making relief for an untimely record more immediate.⁹⁶ Chiefs of criminal law must take all steps possible to protect their offices' hard-won convictions and sentences. Systems must be in place to document all efforts to progress and accelerate the post-trial process in every case. Additionally, chiefs of criminal law should plan how they will prove to the MJ that the government has acted with due diligence. Ideally, chiefs of criminal law should avoid making themselves—or worse, the SJA—the government's principal witness for explaining the steps taken to ensure a timely post-trial process. A possible method for avoiding this is to make your post-trial NCO the government's principal witness for post-trial issues.

Part II: Sentence Adjudged to Authentication

The first phase of the post-trial process is generally the longest and is marked by heavy involvement of the TC. During this phase, five events usually occur: the DC gives notice to the accused of his post-trial and appellate rights, the TC produces the report of the result of trial, the CA responds to deferment requests by the accused, the CR produces the ROT, and the MJ authenticates the record. Of these five events, four of them usually involve the TC. Thus, it is important that once the chief of criminal law understands the events occurring during phase one, that understanding is passed on to the TC.

Appellate Rights

The first event in phase one is notifying the accused of his post-trial and appellate rights which is the responsibility of the MJ and DC.⁹⁷ Thus, the TC's only responsibility in this matter is ensuring it happens. The required content of the appellate rights advisement is described in RCM 1010⁹⁸ and DA Pamphlet 27-9, *The Military Judge's Benchbook*.⁹⁹ The advice must be delivered both orally and in writing, and the accused and the DC must state on the record that the advice has been given.¹⁰⁰ Both the DC and the accused must sign a copy of the written advice, and the advice must be attached to the ROT as an appellate exhibit. The advice informs the accused of the following three rights: to submit matters to the CA prior to action, to appellate review and the right to withdraw from appellate review, to apply to the Judge Advocate General of his service for relief if he is not entitled to review by the court of criminal appeals or a review under RCM 1201(b)(1), and to the assistance of counsel in the exercise of the foregoing rights.¹⁰¹

It could be argued that notice under RCM 1010 does not occur during the post-trial process (because it occurs prior to adjournment), and so a discussion of this requirement has no place in a post-trial primer. The reason for including such a discussion is that failure to ensure proper notice under RCM 1010 could affect the timely and efficient execution of the post-trial process. For example, if an accused has multiple DC on a case, especially if one of those counsel is a civilian, it is critical to establish which DC will be responsible for post-trial matters. Valuable time can be lost trying to determine which counsel has this responsibility.¹⁰² Additionally, the written post-trial and appellate rights advice often contains important information beyond the required advice from RCM 1010, such as whether the accused wants the authenticated ROT he is

⁹⁵ *Id.* art. 66(c).

⁹⁶ It seems clear that in *Chisholm*, the ACCA made good on a promise it made in *United States v. Collazo*. *United States v. Chisholm*, 58 M.J. 733 (Army Ct. Crim. App. 2003). In *Collazo*, the court intimated that if SJAs did not fix the Army's problem with post-trial delay, the court would be forced to consider more drastic (*Dunlap*-like) measures. *United States v. Collazo*, 53 M.J. 721 (Army Ct. Crim. App. 2000).

⁹⁷ MCM, *supra* note 3, R.C.M. 1010.

⁹⁸ *Id.*

⁹⁹ U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (15 Sept. 2002) (incorporating C1 and C2).

¹⁰⁰ MCM, *supra* note 3, R.C.M. 1010.

¹⁰¹ *Id.*

¹⁰² Determining who is responsible for the accused's post-trial representation is important because that is the individual who must receive the SJAR. If the wrong counsel is served, the ten day RCM 1106 clock will not begin to run, and action cannot be taken. *Id.* R.C.M. 1106.

entitled to under RCM 1104(b)(1)(B) to be served on himself or on his DC.¹⁰³ Finally, if the ROT does not reflect that the accused has received his mandated post-trial and appellate advice, it will be an issue on appeal. One of the TC's many responsibilities is to protect the record. Therefore, the TC must ensure that the accused is properly advised.

Report of the Result of Trial

The next event in phase one is the production of the report of the result of trial. The requirement to produce a report of the result of trial comes from RCM 1101(a)¹⁰⁴ and AR 27-10.¹⁰⁵ The format comes from DA Form 4430. Rule for Courts-Martial 1101(a) requires the TC to promptly notify the accused's commander, the CA (or his or her designee), and the commander of the confinement facility of the findings and sentence in a case. Army Regulation 27-10, para. 5-29 expands on RCM 1101(a), requiring the TC to include all pretrial confinement credit and the social security numbers of any co-accused in the report of result of trial. Army Regulation 27-10, para. 5-29 also requires the TC to ensure that a copy of the report of result of trial is provided to finance in a timely manner. Department of the Army Form 4430 establishes the format for the report of result of trial which includes all the information required by RCM 1101(a) and AR 27-10, para. 5-29.

The report of the result of trial is an important document if for no other reason than its potential to affect the rest of the post-trial process. In cases where errors have occurred in the post-trial recommendation, those errors can often be traced back to the report of result of trial. Additionally, the confinement facility relies on the report of result of trial to determine the accused's minimum release date. If the result of trial is incorrect, the accused may be released before serving his full sentence. Alternatively, if the report omits sentence credit, an accused may remain in confinement longer than required.

Fortunately for chiefs of criminal law and TCs, the report of result of trial is easy to produce, and can be created from any computer equipped with PureEdge.¹⁰⁶ To ensure the DA Form 4430 is properly completed, the TC should have a blank form at counsel table. As issues such as the number of days of judge-ordered administrative credit are resolved, the TC can complete the form in writing. After the trial is over, the TC or a 27D paralegal can transfer the hand-written information to a computer. After completing the DA Form 4430, the TC must sign it and serve it on the accused's immediate commander, the CA or his designee (usually the SJA), the commander of the confinement facility (if confinement was adjudged), and the finance and accounting office if there is a reduction in rank or forfeitures (either adjudged or automatic).¹⁰⁷

Accounting for Evidence

Another important event during phase one, which occurs almost immediately after the sentence is announced, but can have a dramatic effect later in the post-trial process, is accounting for evidence. Although you will not find this step explicitly described in the RCMs or AR 27-10, it is implicit in both and critical to creating a complete ROT. Rule for Courts-Martial 1103(b)(2)(D)(v) states that "[e]xhibits, or with the permission of the MJ, copies, photographs, or descriptions of any exhibit which were received in evidence and any appellate exhibit" are necessary to a complete ROT. The time to account for evidence is not when reviewing the verbatim transcript (although it is necessary to do it at that time as well); rather, it is at the close of the proceedings. The TC must ensure that all the exhibits in a case are accounted for and they have clarified on the record when photos or descriptions of a piece of evidence are being substituted for the actual piece of evidence.

¹⁰³ It is important to recognize that according to RCM 1104(b), the accused and counsel are entitled to only one copy of the authenticated record of trial. *Id.* R.C.M. 1104(b). Rule for Courts-Martial 1104(b) requires that a copy of the authenticated record of trial be served on the accused, but the accused can, and often does, request that the DC in the case receive the authenticated record of trial. *Id.* It is also important to remember that under RCM 1106(f)(3), upon request by counsel for the accused, the government shall provide the DC with a copy of the record of trial to assist in the preparation of RCM 1106 matters. *Id.* R.C.M. 1106(f)(3). Thus, in most cases it makes sense to serve both the accused and counsel with a copy of the authenticated record of trial.

¹⁰⁴ *Id.* R.C.M. 1101(a).

¹⁰⁵ AR 27-10, *supra* note 19, para. 5-29.

¹⁰⁶ The Army is replacing the FormFlow program and forms with e-forms in .xml format using Silanis Technology's PureEdge program. See Press Release, Silanis Technology, Inc., Silanis Awarded U.S. Army Enterprise License (Jan. 18, 2005), available at <http://www.silanis.com/news/press-release/2005/silan-is-awarded-us-army-enterprise-license.html>.

¹⁰⁷ MCM, *supra* note 3, R.C.M. 1101(a); AR 27-10, *supra* note 19, para. 5-29b.

Deferments

The next likely event in phase one is responding to a deferment request. This event is the most intellectually challenging of all the events in phase one. The other events during phase one require at most an accurate accounting of events. Responding to deferment requests requires the chief of criminal law and the SJA to advise the CA on a number of statutes,¹⁰⁸ which the ACCA has described as “technical and complicated.”¹⁰⁹ As a result of these somewhat unclear statutes, there have been a number of service court and CAAF cases on the subject of deferments.¹¹⁰

Before getting into the complicated aspects of deferments, it is necessary to discuss the basics. Deferments are a postponement of the running of certain punishments an accused received at court-martial or by operation of law.¹¹¹ The CA can defer any punishment that has gone into effect prior to action, including confinement, forfeitures, and reduction in rank.¹¹² Confinement goes into effect immediately after the sentence is announced,¹¹³ while forfeitures and reductions in rank do not begin until two weeks after the announcement of the sentence.¹¹⁴ For an accused to get a deferment, he must request it in writing and demonstrate why “the interests of the accused and the community in deferral outweigh the community’s interests in imposition of the punishment on its effective date.”¹¹⁵ Rule for Courts-Martial 1101(c)(3) lists a number of factors that should be considered when determining whether a deferment request should be granted.¹¹⁶ The CA must respond to the request in writing, stating the basis for denying the accused’s request.¹¹⁷ Although a denial of a defense deferment request may be conclusory,¹¹⁸ it should at least list the RCM 1101(c)(3) factors that the CA considered in reaching his or her deferment decision.¹¹⁹ The deferment request and the CA’s response must be attached to the ROT.¹²⁰ If the CA grants a request for deferment, it must be included in the action.¹²¹

Deferment requests must be responded to in a timely fashion. Although neither the MCM nor the UCMJ establishes a specific time frame, the ACCA stated in *United States v. Sebastian*¹²² that a deferment request must be acted upon as soon as the CA is available. It is particularly important to act on deferment requests prior to a punishment going into effect (assuming the request is received before the punishment begins to run). A diligent DC will often provide the government with notice of the defense’s intent to request deferment of confinement prior to the sentencing hearing. Trial counsel must know to inform the chief of criminal law that the defense will be requesting deferment of confinement, if it is adjudged. The chief of criminal law should then make the necessary arrangements through the SJA to have the CA act on the request the day the sentence is announced. Alternatively, the chief should prepare an MFR to be attached to the ROT explaining why the CA could not act on the request immediately.

¹⁰⁸ UCMJ arts. 57, 57a, 58b (2005).

¹⁰⁹ *United States v. Kolodjay*, 53 M.J. 732, 735 (Army Ct. Crim. App. 2000).

¹¹⁰ *Id.*; *United States v. Paz-Medina*, 56 M.J. 501 (Army Ct. Crim. App. 2001); *United States v. Brown*, 54 M.J. 289 (2000); *United States v. Emminizer*, 56 M.J. 441 (2002); *United States v. Zimmer*, 56 M.J. 869 (Army Ct. Crim. App. 2002).

¹¹¹ MCM, *supra* note 3, R.C.M. 1101(c)(1). An accused may face reductions in grade or forfeitures that are mandated by statute when he or she receives certain punishments at a court-martial.

¹¹² *Id.*

¹¹³ UCMJ art. 57(b).

¹¹⁴ *Id.* art. 57(a)(1).

¹¹⁵ MCM, *supra* note 3, R.C.M. 1101(c)(3).

¹¹⁶ In accordance with RCM 1101(c)(3), the convening authority must consider the following when deciding whether to grant a deferment:

[T]he 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; the accused’s character, mental condition, family situation, and service record.

Id. R.C.M. 1101(c)(3).

¹¹⁷ *Id.*; *United States v. Zimmer*, 56 M.J. 869 (Army Ct. Crim. App. 2002); *United States v. Sloan*, 34 M.J. 4 (C.M.A. 1992).

¹¹⁸ *United States v. Schneider*, 38 M.J. 387 (C.M.A. 1993).

¹¹⁹ *Zimmer*, 56 M.J. 869.

¹²⁰ MCM, *supra* note 3, R.C.M. 1103(b)(3)(D).

¹²¹ *Id.* R.C.M. 1107((f)(4)(E)); THE CLERK OF COURT HANDBOOK, *supra* note 8, para. 2-51.

¹²² 55 M.J. 661 (Army Ct. Crim. App. 2001).

Deferment requests regarding forfeitures and reductions generally require less intensive coordination because, assuming the DC submits the request the day the sentence is announced, the CA has two weeks to act on the request. Nonetheless, the TC must still inform her chief of criminal law, who will then coordinate for the CA to respond to the defense request. Requests for deferment of forfeitures have become commonplace in most jurisdictions. Criminal law offices should have a standard operating procedure (SOP) in place to ensure a timely response to all deferment requests.

The most challenging aspect of deferments is unraveling the relationship between forfeitures, deferments, and waivers. This issue generally surfaces when the CA wants to provide some financial support to the accused's dependents. Ensuring the accused's dependents receive financial support can be confusing. In many cases, two kinds of forfeitures must be addressed, adjudged, and automatic. In order to overcome both types of forfeitures, the CA will often have to employ a combination of deferments, waiver, and suspension or commutation of the accused's sentence. To aid in understanding the following discussion, a graphic depiction of the process is included at Appendix D.

In any case where an accused has requested deferment or waiver of forfeitures for the benefit of his dependents, it is important to determine what type of forfeitures are involved. The accused could have been sentenced to adjudged forfeitures, automatic forfeitures or both. The type of forfeitures involved affects what must be done to ensure the accused's dependents receive financial support. For example, if the accused's case only involves adjudged forfeitures, the CA cannot use a waiver to provide for the accused's dependents. However, if the accused's case only involves automatic forfeitures, then waiver could be used to benefit the dependents.

The type and amount of forfeitures in a case can be determined by looking at the sentence. Adjudged forfeitures are part of the announced sentence.¹²³ Thus, the duration and amount of adjudged forfeitures will be stated in the sentence. Although automatic forfeitures are not announced as part of the sentence, they are based on the sentence.¹²⁴ If an accused receives a punishment that includes confinement greater than six months, or confinement and a punitive discharge, then automatic forfeitures apply.¹²⁵ The automatic forfeitures will last as long as the accused is in confinement, and the amount of forfeitures will depend on the type of court-martial which tried the accused.¹²⁶ If the accused was tried by a special court-martial (SPCM), he will forfeit two-thirds pay per month, while at a general court-martial (GCM) he will forfeit all pay and allowances.¹²⁷

After determining what type of forfeitures are involved in a case, the chief of criminal law can chart the actions that must be taken to provide the amount of support deemed appropriate by the CA. As illustrated at Appendix E, chiefs of criminal law should establish two lines of analysis, one for adjudged forfeitures and one for automatic forfeitures. Adjudged forfeitures can be deferred and/or suspended or disapproved.¹²⁸ Automatic forfeitures can be deferred and/or waived.¹²⁹ Both types of forfeitures can be deferred from fourteen days after a sentence is announced until action. The CA can waive automatic forfeitures anytime from fourteen days after the sentence is announced until action (for a maximum of six months). Waiver can only be used to the benefit of the dependents of the accused; thus, if the accused has no dependents, a waiver cannot be used. A CA can suspend or disapprove adjudged forfeitures (thus commuting the sentence to no forfeitures) in his action. It is important to remember if there are adjudged and automatic forfeitures, both types of forfeitures must be neutralized or the accused's dependents will not receive any money. Another facet that must be considered is the accused's end of time in service (ETS) date. Once the accused is convicted, his pay and allowances will stop upon his ETS date.¹³⁰ Finally, if a deferment or waiver is granted, it is absolutely critical that the finance office receive the paperwork necessary to adjust the Soldier's pay. If finance does not get the necessary paperwork from the criminal law section the deferment or waiver will have no effect. Below are three examples of common forfeiture situations and possible solutions. All three examples assume that the accused's ETS date is far enough in the future that it is not a concern.

¹²³ MCM, *supra* note 3, R.C.M. 1003(b)(2).

¹²⁴ UCMJ art. 58b(a)(1) (2005).

¹²⁵ *Id.* art. 58b(a)(2).

¹²⁶ *Id.* art. 58b(a)(1).

¹²⁷ *Id.*

¹²⁸ *Id.* arts. 57(a)(2), 60(c)(2).

¹²⁹ *Id.* arts. 58b(a)(1), 58b(b).

¹³⁰ DOD FINANCIAL MANAGEMENT REGULATION, vol. 7A, ch. 3, secs. 030206, 030207 and ch. 48, sec. 480802 (2002).

Scenario One: Assume an individual is sentenced at a GCM to three years of confinement, total forfeiture of all pay and allowances, and a punitive discharge. Also assume the CA wants to provide the maximum amount of support to the dependents of the accused, and the accused has submitted a request for deferment of adjudged and automatic forfeitures.

Based on the above facts the CA must defer the adjudged and automatic forfeitures.¹³¹ This will allow the accused's dependents to receive all the pay and allowances that would be due the accused if he were a PVT E-1. Deferment of adjudged and automatic forfeitures will only partially achieve the CA's objective, however, because the deferment expires at action.¹³² The CA must take additional steps to prevent the adjudged and automatic forfeitures from going into effect at action. To remove the adjudged forfeitures, the CA can either suspend or disapprove them. The only method for affecting automatic forfeitures after action is by waiver. So, if a CA wants to maximize the support going to an accused's dependents, the CA should waive automatic forfeitures at action.

Scenario Two: At a GCM an accused's sentence is four years of confinement and a BCD. The CA only wants to give the family three months of pay and allowances. In this fact pattern, the CA can use his waiver power starting fourteen days after the sentence is announced and ending three months after it begins. Deferment, disapproval, and suspension do not apply to this scenario because there were no adjudged forfeitures. Thus, the only forfeitures to be overcome are the automatic forfeitures, and that can be done with a waiver.

Scenario Three: The accused was convicted at a BCD SPCM of assaulting his wife. He is sentenced to four months confinement, reduction to PVT E-1, two-thirds forfeiture of pay per month for four months, and a BCD. The CA wants to provide the support he can, but the accused refuses to submit a deferment request. The post-trial process takes four and a half months, so by the time of action the accused is on voluntary excess leave. Based on the above facts, the accused would face adjudged and automatic forfeitures for four months. This is a troubling fact pattern because the CA cannot provide any support through the forfeitures in this case. In order for a CA to defer any punishment, the accused must request deferment.¹³³ Without a deferment request, there is no way for the CA to affect the adjudged forfeitures until action. By the time the CA takes action in this case, the accused is out of confinement and thus there are no automatic forfeitures to waive at action. Additionally, the accused is on voluntary excess leave pending his appeal and is not entitled to any pay.¹³⁴ If the CA were to suspend or disapprove forfeitures at action that money would go to the accused. If the CA tried to waive the automatic forfeitures before action, that effort would have no effect because the adjudged forfeitures would still be in place. In this scenario the only support the Army will be able to provide is through transitional compensation, since the crime the accused committed was one of domestic violence.¹³⁵

The above discussion amply supports the ACCA's conclusion that the relationship between adjudged and automatic forfeitures, deferments, and waivers is technical and complicated. It is easy to become confused while trying to ensure the CA's forfeiture objectives are achieved. Organization is the key to preventing confusion in this area.

Production of the Record of Trial

The next event in phase one is the production of the ROT. This event generally occupies the greatest amount of time during the post-trial process and can be a significant management challenge for a chief of criminal law. New chiefs of criminal law will likely have read ROTs before, but probably put little thought toward what must go into the record. When addressing the production of the ROT, it makes sense to begin with a discussion of what must go into the record. Rule for Courts-Martial 1103, AR 27-10, paragraph 5-40, and DD Form 490 describe what must go into a ROT.

¹³¹ It is important to remember that a convening authority can defer an accused's forfeitures, but the only way to constructively direct those deferred forfeitures to the dependents of the accused is to make the deferment itself contingent on the accused's establishing and maintaining an allotment for the benefit of those dependents. Such an allotment requirement should be described in any deferment approval signed by the convening authority. An example of such a deferment approval is at Appendix K.

¹³² UCMJ art. (a)(2); MCM, *supra* note 3, R.C.M. 1101(6).

¹³³ MCM, *supra* note 3, R.C.M. 1101(c)(2).

¹³⁴ U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION para. 3-14 (19 Dec. 1986).

¹³⁵ U.S. DEP'T OF DEFENSE, INSTR., TRANSITIONAL COMPENSATION FOR ABUSED DEPENDENTS 1342.24 (23 May 1995); U.S. DEP'T OF ARMY, REG. 608-1, ARMY COMMUNITY SERVICE CENTER (20 Oct. 2003).

Rule for Courts-Martial 1103 breaks down the content of the ROT into three categories: the transcript; other matters; and matters attached to the record.¹³⁶ The transcript will be either verbatim or summarized. Verbatim transcripts are required in all cases where the adjudged sentence includes a punitive discharge, any punishment in excess of six months, or forfeiture of pay greater than two-thirds pay per month.¹³⁷ Summarized transcripts will be required in all other cases. Although the case law in this area has stated that verbatim only means substantially verbatim,¹³⁸ and “insubstantial omissions from a record of trial do not affect its characterization as a verbatim transcript,”¹³⁹ military appellate courts appear to have a strict view of what is a substantial omission. Missing side bar conferences with the MJ¹⁴⁰ and arguments concerning court member selection have both been held to be substantial omissions.¹⁴¹ If the government is unable to provide a verbatim record, there is a presumption of prejudice to the accused,¹⁴² and the maximum sentence the government can approve is one that includes no more than six months of any punishment, no forfeitures greater than two-thirds pay per month, and no punitive discharge.¹⁴³

In addition to a transcript, the record must contain other documents. In order to be complete, the record must include the following: the original charge sheet, a copy of the convening order and amendments, requests for trial by MJ alone or panel, the original dated signed action (of course, to be added after the CA takes action), and exhibits (with the permission of the MJ; this includes copies, photographs, and descriptions of exhibits received into evidence).¹⁴⁴ A failure to include any of the above items requires the Army court or the CAAF to determine if the missing item represents a substantial omission.

The likelihood of accidentally providing an incomplete ROT is greater than that of producing a non-verbatim transcript. A record with a non-verbatim transcript will be apparent when the chief of criminal law or TC reads the transcript. It is more likely that the failure to include a copy of an exhibit will go unnoticed until appeal. Thus, it is important that TC and chiefs of criminal law make a copy or take a picture of every exhibit to be attached to the record. If the Army court or the CAAF determines that a particular missing document or exhibit has rendered the record substantially incomplete,¹⁴⁵ the remedy could be the same as that for a non-verbatim ROT, or if the omission affects the findings, the affected charges will be dismissed.¹⁴⁶

Finally, the additional documents that should accompany the ROT are the matters attached to the ROT. Such matters include: the Article 32 investigation, the SJA’s pretrial advice, the record of a former hearing, written special findings from the MJ, exhibits that were marked but never received into evidence, RCM 1105 matters or a waiver of such matters, any deferment requests and the CA’s action on them, explanations of any substituted authentication or failure to serve the ROT on the accused, the SJAR, any RCM 1106 matters, any written recommendations for clemency, any statement of why it was impracticable for the CA to act, conditions on suspended sentences, any waiver or withdrawal of appellate review, and any record of a vacation proceeding.¹⁴⁷ It should be noted that failure to include the above items with the ROT will not render the record incomplete. In such cases, the record may be returned as not ready for appellate review; however, the government will not be prevented from approving punishments in excess of six months or sentences which include a punitive discharge.

Review of the Record of Trial

After the ROT is transcribed and compiled (to the extent possible at this stage of the post-trial process), it must be reviewed by the TC and the DC. This last part of phase one is usually called errata. Rule for Courts-Martial 1103(i)

¹³⁶ MCM, *supra* note 3, R.C.M. 1103(b)(2).

¹³⁷ *Id.* R.C.M. 1103(b)(2)(B)(i) and (ii).

¹³⁸ *United States v. Henry*, 53 M.J. 108, 110 (2000); *United States v. Gray*, 7 M.J. 296, 297 (1979).

¹³⁹ *Gray*, 7 M.J. at 297.

¹⁴⁰ *Id.* at 298.

¹⁴¹ *United States v. Sturdivant*, 1 M.J. 256 (C.M.A. 1976).

¹⁴² *United States v. White*, 52 M.J. 713, 715 (Army Ct. Crim. App. 1999).

¹⁴³ MCM, *supra* note 3, R.C.M. 1103(f).

¹⁴⁴ *Id.* R.C.M. 1103(b)(2)(D)(v).

¹⁴⁵ *White*, 52 M.J. at 715.

¹⁴⁶ *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981).

¹⁴⁷ MCM, *supra* note 3, R.C.M. 1103(b)(3).

describes the government's obligations regarding errata. The TC must personally examine the ROT prior to authentication and make those changes necessary to ensure an accurate ROT.¹⁴⁸ How a TC accounts for changes to the ROT varies from installation to installation. In some jurisdictions the TC make pen and ink changes to the actual ROT, while in other jurisdictions the TC fills out an "errata sheet"¹⁴⁹ and forwards that sheet with the ROT for the judge's consideration.

In addition to the TC reviewing the ROT, the DC must also be given a reasonable opportunity to review the ROT and make suggested changes.¹⁵⁰ Rule for Courts-Martial 1103(i) does not establish a set amount of time that the DC must be given to review the ROT. The Rule merely requires that the DC be given a reasonable opportunity to review the ROT.¹⁵¹ Chiefs of criminal law should work out what they believe "reasonable" is with the senior defense counsel (SDC) in their area. In *United States v. Maxwell*,¹⁵² the agreement between the chief of criminal law and the SDC provided five days for the DC to review the ROT. If the chief of criminal law and the SDC cannot agree on what is a reasonable opportunity to review a ROT, then the government must establish its own standard and be prepared to defend it to the MJ and on appeal. At a minimum, DC should be given twenty-four to forty-eight more hours to complete the review of the ROT than is given to the TC. Also, service of the ROT should be made on the DC personally (rather than on support personnel) with documentation. Additionally, a MFR should be made regarding the trial schedule of the DC at the time the record was served.¹⁵³

Authentication

The final step in phase one is the authentication of the ROT. Authentication is required in all cases that include a conviction.¹⁵⁴ This step can be done in one of two ways. The first and most common method is to have the MJ who presided over the court-martial authenticate the record. The second method is called substituted authentication and is used when the MJ is unable to authenticate the ROT. In substituted authentication, the TC authenticates the record.

In the vast majority of cases, the MJ will authenticate the ROT. When preparing a ROT to be authenticated, chiefs of criminal law must ensure that all the MJ's involved in the case are authenticating their portion of the ROT.¹⁵⁵ Although many courts-martial have a single MJ presiding over the proceedings from arraignment through any post-trial session, some do not. The most common scenario where two MJ's have presided over a case occurs when one judge conducts the arraignment and another presides over the trial. Even though the first judge only conducted the arraignment, he still must authenticate that portion of the ROT over which he presided. Failure to do so may cause the Army court or the CAAF to return the record for authentication.¹⁵⁶

In addition to ensuring that all the MJ's involved in the case authenticate their portion of the ROT, chiefs of criminal law must be concerned with post-trial processing time. Unless otherwise accounted for, time spent getting the ROT authenticated is time against the government. Criminal law offices must keep track of how long it is taking the MJ to authenticate the ROT and include that information in any memorandum, SJAR, or addendum that explains the post-trial delay in the case.

Getting the ROT authenticated can be complicated when dealing with a MJ who is not stationed at your installation. Many of the smaller posts have itinerant judges who are only at that installation when there is a court-martial. These judges often travel a great deal, so it is not acceptable to hold records of trial until these judges are next at your installation (unless the time is very short—under five days is a good rule of thumb). Also, because these judges travel so much, it may not be enough to send the record to the judge's office. Many of these judges will do several trials back-to-back which can cause

¹⁴⁸ *Id.* R.C.M. 1103(i)(1)(A).

¹⁴⁹ In jurisdictions that use an errata sheet, the TC notes where he believes the record is incorrect and how it should be corrected.

¹⁵⁰ MCM, *supra* note 3, R.C.M. 1103(i)(1)(B).

¹⁵¹ *Id.*

¹⁵² 56 M.J. 929 (Army Ct. Crim. App. 2002).

¹⁵³ The above-mentioned suggestions are necessary only when the chief of criminal law and SDC cannot agree on what a reasonable opportunity is under RCM 1103(i)(1)(B).

¹⁵⁴ *Id.* Rule for Courts-Martial 1104(a) states that authentication by a military judge is required in all general court-martial cases and in all cases in which the sentence includes a bad conduct discharge, confinement for more than six months, or forfeitures for more than six months. MCM, *supra* note 3, R.C.M. 1104(a). Army Regulation 27-10 states that "[t]he record of trial in a SPCM will be authenticated in the same manner as that of a GCM." AR 27-10, *supra* note 19, para. 5-43b. Rule for Courts-Martial 1305 describes the authentication process for summary courts-martial. MCM, *supra* note 3, R.C.M. 1305.

¹⁵⁵ MCM, *supra* note 3, R.C.M. 1104(a)(2)(A).

¹⁵⁶ *United States v. Johnson*, 58 M.J. 140 (2003).

them to be away from their office for weeks. The best course of action is to verify the location of the judge, call the judge and inform him you are sending the ROT for authentication. After ensuring that the judge has received the record, call every week or so (depending on the length of the record) and document those calls. These steps will help demonstrate the government has done all it can to speed the post-trial process along.

On rare occasions, it may be necessary to do a substituted authentication. This method of authentication is to be used when “the military judge cannot authenticate the record of trial because of the military judge’s death, disability, or absence.”¹⁵⁷ If it becomes necessary to use substituted authentication, the reason should be included in the ROT.¹⁵⁸ Accounting for the reason why substituted authentication is necessary can be done in the TC’s authentication document or in an MFR included in the ROT.

The only genuinely controversial aspect of substituted authentication is the question of when a MJ’s absence is long enough to necessitate a substituted authentication. Military courts have held that when a MJ leaves active duty¹⁵⁹ or has a permanent change of station,¹⁶⁰ substituted authentication can be used. A harder question arises when the MJ is on leave. The Navy and Army appellate courts have addressed this issue.¹⁶¹ The Navy court has held that a thirty-day leave is adequate to permit substituted authentication.¹⁶² The Army Court of Military Review (ACMR) has held that a fifteen-day delay due to the MJ’s leave is not adequate to permit a substituted authentication.¹⁶³

Counsel should be cautious when using substituted authentication. The Discussion section of RCM 1104(a)(2)(B) states, “substituted authentication is authorized only in emergencies.”¹⁶⁴ Additionally, the cases in this area emphasize that one of the purposes of the having the MJ authenticate the ROT is “to preclude perceptions of impropriety in the authentication process.”¹⁶⁵ Based on the Discussion to RCM 1104(a)(2)(B) and the cases in this area, substituted authentication should only be used in exceptional circumstances; the MJ should be unable to authenticate the record for at least thirty days.

Part III: Authentication to Addendum

Phase two of the post-trial process begins with the receipt of the authenticated ROT from the MJ, and includes serving the accused and DC with the signed SJAR and authenticated record, receiving and reviewing defense RCM 1105 and 1106 matters, and completing the SJA’s addendum.

This phase, unlike phase one, is dominated by the actions of the chief of criminal law and the SJA. The initial part of phase two is a lull, while the government waits for the MJ to return the authenticated ROT. However, rather than simply waiting, the government should spend this time ensuring that the groundwork for the remainder of the post-trial process has been properly laid. The chief of criminal law should review the drafts of the SJA’s Post-Trial Recommendation (SJAR), the addendum, the action, and the promulgating order. Doing so will ensure that the process moves forward quickly once the MJ authenticates the ROT.

When the MJ completes his review of the ROT, he forwards the authenticated record to the SJA office.¹⁶⁶ In accordance with RCM 1104(b), when the government receives the authenticated ROT it must be served upon the accused.¹⁶⁷ Ideally, the criminal law office should serve the SJAR on the accused at the same time. The accused has ten days (plus a possible additional twenty days) from the service of the SJAR and authenticated ROT to submit his clemency matters; it is important

¹⁵⁷ MCM, *supra* note 3, R.C.M. 1104(a)(2)(B).

¹⁵⁸ *Id.* R.C.M. 1103(b)(3)(E).

¹⁵⁹ *United States v. Parker*, 54 M.J. 700, 710 (Army Ct. Crim. App. 2001).

¹⁶⁰ *United States v. Lott*, 9 M.J. 70, 71 (C.M.A. 1980); *United States v. White*, 12 M.J. 643, 645 (A.F.C.M.R. 1981).

¹⁶¹ *United States v. Walker*, 20 M.J. 971 (N.M.C.M.R. 1985); *United States v. Batiste*, 35 M.J. 742 (A.C.M.R. 1992).

¹⁶² *Walker*, 20 M.J. 971.

¹⁶³ *Batiste*, 35 M.J. at 744.

¹⁶⁴ MCM, *supra* note 3, R.C.M. 1104(a)(2)(B) discussion.

¹⁶⁵ *Batiste*, 35 M.J. 742; *United States v. Myers*, 2 M.J. 979 (A.C.M.R. 1976); *United States v. Cruz-Rijos*, 1 M.J. 429 (C.M.R. 1976).

¹⁶⁶ MCM, *supra* note 3, R.C.M. 1104(b).

¹⁶⁷ *Id.*

to remember that the ten-day time period does not begin to run until both the SJAR and authenticated ROT have been served.¹⁶⁸ Thus, timely certified service of both the SJAR and the authenticated ROT is of the essence.¹⁶⁹

The Staff Judge Advocate's Recommendation (SJAR)

One of the most important documents of the post-trial process is the SJAR.¹⁷⁰ The SJAR provides the CA with a summary of the results of the court-martial, the accused's service record, and the SJA's personal recommendation regarding the case.¹⁷¹ Although at times the SJAR can seem like little more than a summary of events, its importance should not be underestimated. Chiefs of criminal law and the SJA must keep in mind that the SJAR is a congressionally-mandated event that must occur prior to action in any GCM or SPCM where the sentence includes a punitive discharge.¹⁷²

Although the SJAR is signed and served during phase two, the chief of criminal law should prepare the SJAR during phase one. Typically, the information necessary to complete the SJAR is available almost immediately after trial. Therefore, in most cases, the government can have the SJAR prepared and ready to be signed and dated as soon as the authenticated record returns.¹⁷³ Once signed and dated, the SJAR and authenticated ROT can be served on the accused.¹⁷⁴

The required contents of the SJAR are described in RCM 1106(d), and includes the findings and sentence in the case, any recommendations for clemency made by the sentencing authority, a summary of the accused's service record,¹⁷⁵ a statement of the nature and extent of any pretrial restraint, obligations under any pretrial agreements, and a specific recommendation as to the action in the case.¹⁷⁶

Although it should be easy to execute an accurate and complete SJAR, every year the ACCA or CAAF returns cases due to errors in this document. The errors have included: failing to properly reflect charges of which the accused was acquitted,¹⁷⁷ or charges that were dismissed by the MJ or government;¹⁷⁸ failing to accurately reflect the sentence adjudged; omitting a clemency recommendation made at the time the sentence is announced;¹⁷⁹ and failing to accurately report the accused's prior awards and decorations,¹⁸⁰ prior misconduct,¹⁸¹ or pretrial restraint.¹⁸² Erroneous information in the SJAR

¹⁶⁸ *Id.* R.C.M. 1105(c)(1).

¹⁶⁹ *The Clerk of Court Handbook* provides several formats for certificates of service. THE CLERK OF COURT HANDBOOK, *supra* note 8.

¹⁷⁰ It should be remembered that an SJAR is not required in every case. According to RCM 1106(a), an SJAR is required "[b]efore the convening authority takes action under RCM 1107 on a record of trial by general court-martial or a record of trial by special court-martial that includes a sentence to a bad-conduct discharge or confinement for one year." MCM, *supra* note 3, R.C.M. 1106(a).

¹⁷¹ *Id.*

¹⁷² UCMJ art. 60(d) (2005).

¹⁷³ Technically, the SJAR can be prepared immediately after trial; however, if it is done too early, there is a chance that information may change as the process goes on. Further, many SJAs are unwilling to review the document too far in advance.

¹⁷⁴ As you establish the SOP for your office, consider establishing a twenty-four-hour rule for having the SJAR signed and mailed along with the authenticated record of trial after receiving the record of trial from the military judge.

¹⁷⁵ The SJAR summary of the accused's service record must include: length of service, character of service, and any awards or decorations received by the accused. Also, the SJAR must summarize any prior non-judicial punishment and any previous convictions.

¹⁷⁶ MCM, *supra* note 3, R.C.M. 1106(d).

¹⁷⁷ *United States v. Lindsey*, 56 M.J. 850 (Army Ct. Crim. App. 2002).

¹⁷⁸ *United States v. Gunkle*, 55 M.J. 26 (2001).

¹⁷⁹ *United States v. Paz-Medina*, 56 M.J. 501 (Army Ct. Crim. App. 2001).

¹⁸⁰ In *United States v. Demerse*, 37 M.J. 488 (C.M.A. 1993), the Court of Military Appeals held that omission of Vietnam awards and decorations from a SJAR was plain error. Omission of awards and decorations however, does not automatically equate to plain error. Since *Demerse*, courts have analyzed prejudice from the omission of awards on a case-by-case basis. For example, the Navy-Marine Court of Criminal Appeals recently distinguished the omission of a Navy Achievement Medal from the omission of combat medals. *United States v. Eastman*, 2000 CCA LEXIS 167 (N.M. Ct. Crim. App. 2000) ("The award was not for Vietnam service or combat related duties. While we do not intend to demean the award in any sense, we have concluded that it would not have had the potential impact on the convening authority as the awards omitted in *Demerse* or *Barnes* could have had."); *see also* *United States v. McKinnon*, 38 M.J. 667 (A.C.M.R. 1993) (omission of all awards from PTR not plain error); *United States v. Leslie*, 49 M.J. 517 (N-M. Ct. Crim. App. 1998) (omission of CIB from prior Army service from SJAR not prejudicial).

¹⁸¹ *United States v. Wellington*, 58 M.J. 420 (2003)..

¹⁸² *United States v. Wheelus*, 49 M.J. 283, 289 (1998) (stating that the SJA's failure to report details of pretrial restraint was not prejudicial where the pretrial restraint issue was not the thrust of clemency request); *United States v. Allison*, 56 M.J. 606, 607 (C.G. Ct. Crim. App. 2001) (granting appellant sentence

can lead the CA to believe the accused was convicted of more than actually occurred at trial or that the accused's military record is less favorable than it truly is, potentially having an impact on the CA's decision regarding clemency. If an error is found, an appellate court may send the case back for a second SJAR and action.¹⁸³ Moreover, in some cases, the appellate court may simply award sentence relief to the accused.¹⁸⁴ To prevent such errors and ensure a complete and accurate SJAR, a systematic approach to the SJAR should be adopted. A common method of ensuring the accuracy of the SJAR begins with reading the record and tabbing the following information: any charge sheets, any passages which involved the consolidation of charges, announcement of the findings, announcement of the sentence, findings worksheet, sentencing worksheet, the accused's enlisted record brief (ERB) or officer enlisted brief (ORB), and any motions that involved pretrial restraint. Once the record has been tabbed, it is an easy matter to review the SJAR against the record. It is important to remember that the courts that will be reviewing your office's post-trial process will be doing so by examining your records of trial. The only way to ensure your SJAR is accurate is by comparing it to the ROT.

Military appellate courts have emphasized importance of the SJAR,¹⁸⁵ and in particular the identity of its author.¹⁸⁶ It might seem unnecessary to emphasize that the SJAR must be done by a qualified SJA,¹⁸⁷ but there are enough cases reported in which the SJA was not the author of the SJAR that it bears mentioning. In situations where it is necessary for the deputy SJA to sign the SJAR (due to the absence or disqualification of the SJA) the deputy should sign as the acting SJA and not as the deputy.

Chiefs of criminal law must be sensitive to the low standard for reversible error with regard to the SJAR. This low standard exists despite what appears to be contrary language in RCM 1106(f)(6). Rule for Courts-Martial 1106(f)(6) states, "Failure 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."¹⁸⁸ Despite the broad language of RCM 1106(f)(6) and similar language in UCMJ Article 60(c), the normally high standard for plain error is dramatically lower when it comes to matters which might affect the CA's clemency decision. The CAAF has established a standard for prejudice of clemency matters of "some colorable showing of possible prejudice."¹⁸⁹ Further, the CAAF has encouraged service courts to "moot claims of prejudice"¹⁹⁰ by using the service courts' Article 66(c) power to grant relief.¹⁹¹ This is an important distinction for chiefs of criminal law and the TCs to understand. The appellate courts will not be as forgiving of post-trial errors as they would be of trial errors. The appellate courts understand that trial errors are made in the heat of the moment and are part of the dynamic nature of trial practice. There is no heat of the moment in the post-trial process, and the vast majority of errors during this time—particularly in the SJAR—are attention to detail errors. The court will have little patience for these errors.

Service of the Authenticated Record and SJAR

Rule for Courts-Martial 1104 requires that the government serve the authenticated record upon the accused.¹⁹² However, if the accused cannot be located, his copy shall be forwarded to his DC.¹⁹³ Rule for Courts-Martial 1106 requires that the government serve the SJAR upon both the accused and his DC.¹⁹⁴ The accused may request that his copy of the record and

relief for SJA's failure to include information on pretrial restriction in SJAR); *United States v. Holman*, 23 M.J. 565 (A.C.M.R. 1986) (stating that it was error for SJA to incorrectly report that appellant served time in pretrial confinement, however appellant suffered no prejudice).

¹⁸³ *Wheelus*, 49 M.J. at 289.

¹⁸⁴ *Id.*

¹⁸⁵ *United States v. Boatner*, 43 C.M.R. 216 (1971); *United States v. Cunningham*, 44 M.J. 758 (1996); *United States v. Finster*, 51 M.J. 185 (1999).

¹⁸⁶ *Cunningham*, 44 M.J. at 763.

¹⁸⁷ In addition to being the convening authority's SJA, the SJA must be qualified. Rule for Courts-Martial 1106(b) discusses some of the bases regarding the disqualification of an SJA. In cases where the SJA is required to review his own work or testimony, the SJA is usually disqualified from participating in the SJAR. *United States v. Engle*, 1 M.J. 387 (C.M.A. 1976); *United States v. Gutierrez*, 57 M.J. 148 (2002).

¹⁸⁸ MCM, *supra* note 3, R.C.M. 1106(f)(6).

¹⁸⁹ *Wheelus*, 49 M.J. at 288.

¹⁹⁰ *Id.* at 289.

¹⁹¹ UCMJ art. 66(c) (2005).

¹⁹² MCM, *supra* note 3, R.C.M. 1104b(1)(C).

¹⁹³ *Id.*

¹⁹⁴ *Id.* R.C.M. 1106(f).

the SJAR be served upon his DC.¹⁹⁵ Requesting service upon the DC is a common practice in many jurisdictions. Given the likelihood that a copy of the record will be going to the DC anyway, it is usually best, as a matter of practice, to simply serve the authenticated record, and the SJAR, on both the accused and his DC.

Either the TC or a member of the criminal law staff should serve the authenticated record and the SJAR. The government should require the defense representative that receives the authenticated record to sign a notice of receipt (examples of such receipt documents are contained in the Clerk of Court Post-Trial Handbook, figures 2-2 through 2-6).¹⁹⁶ In the event that the authenticated record and the SJAR are mailed to either the accused or his counsel, the material should be mailed first class with return receipt requested. In either case, the CR should make the notice of receipt or the return receipt part of the record.¹⁹⁷ This will serve as proof of receipt in the event of any challenge. Moreover, the notice starts the clock for processing the accused's post-trial submissions.¹⁹⁸

If either party identifies errors in the authenticated ROT, the following process should be observed. The party raising the issue should forward a statement of the alleged error or inaccuracy and a proposed correction to the MJ.¹⁹⁹ The MJ will give notice of the proposed changes to all parties. The parties will be given an opportunity to review the proposed correction and respond. The MJ will then issue a certificate of correction. The certificate will in turn be authenticated by the parties in the same manner as the original record was authenticated. The certificate of correction and notice of the accused's receipt of the certificate of correction is then attached to the ROT.²⁰⁰

As discussed previously, the accused then has ten days from receipt of the SJAR or the authenticated ROT to submit RCM 1105 and 1106 matters. In addition to the initial ten days, a twenty-day extension may be granted for good cause.²⁰¹ New chiefs of criminal law should not read the "for good cause" requirement in RCM 1105(c)(1) too literally. Defense counsel routinely request extensions for RCM 1105 and 1106 matters with little more than a form letter. There are three arguments that support liberally granting defense requests for extension. First, only the CA is empowered to deny the defense request.²⁰² Convening authorities are universally very busy; it is hard to envision a circumstance that would justify taking up the SJA's and the CA's valuable time for the purpose of denying a request for an extension on RCM 1105 and 1106 matters. Second, defense delays do not count against the government's processing time, so why not grant the extension?²⁰³ Third, if the CA denies the request and the accused and counsel do not submit any matters, the appellate courts may conclude that the CA's decision to deny the extension was an abuse of discretion and send the ROT back for a new SJAR and action.

Once the accused and his counsel receive the authenticated ROT and the SJAR, they will typically submit RCM 1105 and 1106 matters. Rule for Courts-Martial 1105 states that after a sentence is adjudged in any courts-martial, the accused may submit matters to the CA that "may reasonably tend to affect the CA's decision whether to disapprove any findings of guilty or to approve the sentence."²⁰⁴ Rule for Courts-Martial 1106 allows the DC to respond in writing to the SJAR, rebutting "any matter in the recommendation believed to be erroneous, inadequate, or misleading, and [commenting] on any other matter."²⁰⁵

In most cases, the defense submissions are served on the government as a single submission, often called the defense RCM 1105 and 1106 matters or clemency packet. It is important for chiefs of criminal law to keep in mind that the defense does not have to submit their RCM 1105 and 1106 matters at the same time. Under RCM 1105 and 1106, the defense is entitled to a period of ten days to submit matters. Thus, the defense may submit RCM 1105 matters five days after receiving the authenticated ROT and the SJAR, and still have five additional days to submit RCM 1106 matters. Because of the

¹⁹⁵ *Id.*

¹⁹⁶ THE CLERK OF COURT'S HANDBOOK, *supra* note 8, figs. 2-2 to 2-6.

¹⁹⁷ MCM, *supra* note 3, R.C.M. 1104(b)(1)(B).

¹⁹⁸ *Id.* R.C.M. 1105(c)(1).

¹⁹⁹ *Id.* R.C.M. 1104(d).

²⁰⁰ *Id.* R.C.M. 1104(d)(2), (3).

²⁰¹ *Id.* R.C.M. 1105(c)(1).

²⁰² *Id.* R.C.M. 1105(c)(1).

²⁰³ *United States v. Maxwell*, 56 M.J. 928 (2002).

²⁰⁴ MCM, *supra* note 3, R.C.M. 1105.

²⁰⁵ *Id.* R.C.M. 1106(f)(4).

emphasis on speedy post-trial processing, chiefs of criminal law may receive defense RCM 1105 matters, assume they are RCM 1105 and 1106 matters, and seek CA action prematurely. Thus, it is important to make sure that the defense submissions you receive are the complete RCM 1105 and 1106 submissions, especially when seeking CA action before the ten-day period for defense submissions has expired.

As discussed above, the time frame for submission of clemency matters is triggered by service of the authenticated ROT or the SJAR, whichever is later. If the accused has not submitted a clemency packet by that time, it is technically permissible to go ahead and present the case to the CA for initial action. However, taking action without a clemency packet may have ramifications. Appellate courts have repeatedly described RCM 1105 as “the accused's last best chance for clemency.”²⁰⁶ Therefore, they tend to view with suspicion any action taken when the accused did not submit matters pursuant to RCM 1105 and 1106. In some cases, appellate courts have returned the case to allow the accused to submit matters.²⁰⁷ As such, it is important to be very careful about taking action without RCM 1105 and 1106 matters, even if the time period for submissions has expired. In some cases, it may be best to allow the accused an additional extension for the submission of matters.²⁰⁸ However, if you decide to send the case to the CA for initial action after the one extension, be sure the record reflects that the accused and counsel were on notice of the final date that action would be taken if no matters were submitted.

When faced with the above situation, the chief of criminal law should contact the DC (both in writing and by telephone) prior to the thirtieth day, and advise the DC that no matters have been received and inform the DC of the date on which the SJA will take the case to the CA for initial action. Clearly inform the DC that matters will be accepted up to that date, but that no further extensions will be granted. This information should be conveyed in writing and copies should be furnished to the SDC or the regional defense counsel (RDC), if necessary. Additionally, this memorandum should be inserted into the ROT.

SJAR Addendum

After receiving defense submissions (or after the period of time for defense submissions has expired), the SJA has the opportunity to supplement his SJAR with an addendum. It is imperative that the chief of criminal law and the SJA read all of the defense RCM 1105 and 1106 matters. Reading this material is critical to drafting the addendum and is important to ensuring that the DC has not inadvertently included matters which might actually be harmful to the accused.²⁰⁹ The addendum generally serves three purposes: accounting for defense submissions, responding to allegations of legal error, and providing the CA with new matters that the SJA feels is relevant to the clemency determination. Although an addendum is not necessary in all cases (in fact, it is only required if defense makes an allegation of legal error), the better practice is to create one in every case.

One reason for creating an addendum to the SJAR in every case is to account for all defense submissions and establish that the CA considered them prior to taking action. The government is required to establish in the ROT that the CA considered all the matters submitted by the defense.²¹⁰ The ACMR in *United States v. Hallums* stated that it “will not ‘guess’ as to whether clemency matters prepared by the DC were attached to the recommendation. . . . There must be some tangible proof the CA did, in fact, have these matters presented to him.”²¹¹ By executing an addendum that specifically lists the defense matters considered by the CA, and then ensuring defense matters are included in the ROT, chiefs of criminal law can prove that defense matters were considered by the CA.

²⁰⁶ *United States v. Gilley*, 56 M.J. 113, 124 (2001) (citing *United States v. MacCulloch*, 40 M.J. 236, 239 (C.M.A. 1994)).

²⁰⁷ *United States v. Beckelic*, ACM No. 27973, 1990 CMR LEXIS 56 (Jan. 5, 1990) (returning case for new action where SJA denied appellant's request for an extension submitted after the expiration of the ten day period).

²⁰⁸ *Maxwell*, 56 M.J. 928. In *Maxwell*, the CAAF did not hold the government accountable for post-trial delay that occurred due to the Defense's failure to submit RCM 1105 and 1106 matters in a timely fashion.

²⁰⁹ See *Gilley*, 56 M.J. 113. In *Gilley* the record of trial was returned for a new RCM 1105 and 1106 submission, SJAR, and action due to ineffective assistance of counsel. The ineffective assistance of counsel was based on DC's submission of letters from the accused's family that undercut the accused's petition for clemency. *Id.* at 125. Although it is not generally the government's responsibility to protect the accused from himself, it is the government's job to protect the record. If there is material in the defense submissions that will likely be harmful to the accused, to prevent a claim of ineffective assistance of counsel, chiefs of criminal law should ensure that the accused wants the questionable material considered by the convening authority.

²¹⁰ *United States v. Hallums*, 26 M.J. 838, 841 (A.C.M.R. 1988).

²¹¹ *Id.*

In addition to accounting for defense submissions, the addendum should be used to respond to allegations of legal error. Allegations of legal error can be raised by any of the material submitted by defense under RCM 1105; regardless of where the defense raises its allegations, the SJA must respond.²¹² Because the SJA has an affirmative duty to respond to any defense allegation of legal error, raising and responding to legal error has resulted in considerable appellate litigation. Failure to identify and respond to legal error may prejudice the accused.²¹³ Therefore, when the government receives RCM 1105 and 1106 submissions, they should be carefully reviewed to determine if legal error has been raised.²¹⁴ If the accused's submissions are vague or unclear regarding legal error, clarification should be sought from the DC. If the DC fails to clarify the matter, it is probably best to assume he is raising legal error and respond accordingly.²¹⁵ Also, look closely at the accused's submissions to ensure that he is not raising a claim of ineffective assistance of counsel during the post-trial process. Staff judge advocates need to be aware of this issue and be prepared to contact the SDC or RDC to get the accused effective assistance of counsel.

When legal error is raised, the SJA must state whether he believes the CA needs to take corrective action. This response is almost always in an addendum to the SJAR, because legal errors are almost always raised in defense RCM 1105 and 1106 matters.²¹⁶ The response need not include any analysis or rationale for the SJA's response.²¹⁷ Rather, the response may consist of a short statement of agreement or disagreement. In most cases, the simple response is the best approach.²¹⁸ Appendix F contains an example of an addendum which responds to an allegation of legal error.

Finally, the addendum can be used to present the CA with additional information which the SJA believes is relevant to the CA's action. The SJA may believe this additional information is necessary to respond to a claim made by the defense in the RCM 1105 and 1106 matters, or is relevant to clemency. If this new information meets the definition of "new matter" in the Discussion section of RCM 1106(f)(7), then the addendum must be served on the accused and the DC, and they must be allowed an additional ten days (plus a possible twenty days) to respond.²¹⁹ New matter is defined as "discussion of the effect of new decisions on issues in the case, matter from outside the ROT, and matters not previously discussed."²²⁰ This definition is vague, and unfortunately the courts have not created a more comprehensive definition.²²¹ As such, familiarity with the case law is the best means for counsel to learn to identify new matter.²²² The failure to allow the accused to respond

²¹² MCM, *supra* note 3, R.C.M. 1106(d)(4).

²¹³ See *United States v. Welker*, 44 M.J. 85 (1994) (citing *United States v. Hill*, 27 M.J. 293, 296-97 (1988)) (stating that in most instances, failure of the SJA to prepare an SJA recommendation and responding to any legal error intimated by the accused will be prejudicial and will require remand of the record to the convening authority for preparation of a new recommendation); *United States v. Craig*, 28 M.J. 321 (C.M.A. 1989) (SJA failure to respond to post-trial assertion of legal error is tested for prejudice). See also *United States v. Harris*, 52 M.J. 665 (Army Ct. Crim. App. 1999); (*United States v. Green*, 44 M.J. 93, 95 (1996) (stating that when the SJA fails to comment on legal error, the appellate court may either return the case for a new SJAR and action or where appropriate, the appellate court may determine prejudiced on its own).

²¹⁴ *United States v. McKinley*, 48 M.J. 280 (1998) (holding that the accused failed to raise issue of selective prosecution in MCM, *supra* note 3, R.C.M. 1105 matters, therefore, SJA not required to respond).

²¹⁵ *United States v. Zimmer*, 56 M.J. 869 (Army Ct. Crim. App. 2002).

²¹⁶ Counsel should be aware that legal error need not be raised specifically in RCM 1105 submissions as long as it is raised before the deadline for submission of the matters. Chiefs of criminal law need to also remember that an accused and his counsel can submit RCM 1105 matters anytime after the sentence is announced. In most cases, RCM 1105 matters will not be received until after the accused and his counsel have been served with the authenticated record of trial. This is typically true because the DC often uses the authenticated record to support the clemency petition. In some cases however, the accused may submit matters prior to receiving the authenticated record.

²¹⁷ *McKinley*, 48 M.J. 280. In accordance with *McKinley* the following passage should be an adequate response to an allegation of legal error, "I have considered the defense allegation of legal error regarding _____. I disagree that there was legal error. In my opinion, no corrective action is necessary."

²¹⁸ *Id.*; *United States v. Broussard*, 35 M.J. 665 (A.C.M.R. 1992).

²¹⁹ When an addendum is used which does not contain new matter, it does not have to be served on the accused and the accused's counsel. Thus, if the addendum does no more than state the SJA's agreement or disagreement with the accused's allegations or merely accounts for defense RCM 1105 and 1106 matters, then it need not be served on the accused. The following language is typical of an addendum which does not insert new matter;

The matters submitted by the defense are attached to this Addendum and are hereby incorporated by reference. Nothing contained in the defense submissions warrants further modification of the opinions and recommendations expressed in the Staff Judge Advocate's Recommendations. Of course, you must consider all written matters submitted before you determine the appropriate action to be taken in this case.

United States v. Catrett, 55 M.J. 400 (2001).

²²⁰ MCM, *supra* note 3, R.C.M. 1106(f)(7), R.C.M. 1107(b)(3)(B)(iii).

²²¹ *United States v. Anderson*, 53 M.J. 374, 377 (2001).

²²² See, e.g., *United States v. Gilbreath*, 57 M.J. 57 (2002) (finding that the SJA's statement that, "After hearing all matters, the jury determined a bad conduct discharge was appropriate and as such I recommend you approve the sentence as adjudge" was new matter); *United States v. Catalani*, 46 M.J. 325, 327-28 (1997) (holding that the SJA's statement that "all of the matters submitted for your consideration in extenuation and mitigation were offered by the

to new matter may constitute reversible error.²²³ Therefore, it is essential that the SJA either avoid new matter or ensure that it is identified and served upon the accused.

It is also important to recognize that new matter is not always raised in the addendum or by the SJA staff. New matter may be injected by members of the accused's chain of command or by those working for the CA.²²⁴ Therefore, the TC and the SJA should educate commanders on new matter so that it will not be injected into the case without the SJA's knowledge. Since new matter does not pose any problem as long as the accused is given an opportunity to respond, it is an issue best identified and dealt with early on in the process.

Part IV: Action to Final Action

Phase three of the post-trial process includes: signing and publishing the action; finalizing and signing the promulgating order; mailing the complete ROT with copies; placing an accused on excess leave (when necessary); notifying the accused of appellate decisions; and signing the final action. Although this is the final phase of the post-trial process, it is as important as the two previous phases and mistakes at this time are just as capable of creating reversible error as mistakes at any other stage of the process.

Phase three begins when the SJA receives the accused's 1105 and 1106 matters and prepares the case for presentation to the CA for initial action.²²⁵ Prior to taking initial action, the CA must consider the result of trial, the recommendation of the SJA, and any matters submitted by the accused pursuant to RCM 1105 and 1106.²²⁶ The CA may also consider the ROT, the personnel records of the accused, and other such matters as the CA deems appropriate.²²⁷ Although the CA is permitted to consider matters outside of the ROT, the CA must be cautious; information from outside the ROT may constitute new matter.²²⁸ If the CA considers new matter when taking initial action, the new matter must be served upon the accused and the accused must be given an opportunity to rebut.²²⁹ It is important to note that the definition of new matter under RCM 1107 is broader than that under RCM 1106. Under RCM 1106, new matter only includes written material, while new matter under RCM 1107 includes any matters the CA considers that are "adverse to the accused from outside the record, with knowledge of which the accused is not chargeable."²³⁰

The SJA is responsible for packaging and presenting the result of trial, the SJAR, the addendum, and clemency submissions for review by the CA. Care should be taken to ensure that those matters which must be reviewed prior to action, and those matters deemed appropriate for review, are organized so that they can be easily located and reviewed by the CA. Additionally, recall that the CA is not required to review anything other than written submissions.²³¹ Therefore, if the

defense at trial; and the senior-most military judge in the Pacific imposed a sentence that, in my opinion, was both fair and proportionate to the offense committed" is new matter); *United States v. Chatman*, 46 M.J. 321, 323 (1997) (referring to the accused's inadmissible second positive urinalysis is new matter); *United States v. Leal*, 44 M.J. 235, 236 (1996) (discussing the GOLOR not introduced at trial is new matter); *United States v. Norment*, 34 M.J. 224 (C.M.A. 1992) (holding that the SJA's statement that he investigated accused's claims of court member misconduct and found no basis in fact for them is new matter); *United States v. Young*, 26 C.M.R. 232, 233 (C.M.A. 1958) (stating that the SJA's written opinion that the appellant had "forced on society the burden of caring for his illegitimate offspring" constitutes new matter).

²²³ *Chatman*, 46 M.J. 321 (stating that an accused who is not served with new matter will be granted relief if he makes a colorable showing of possible prejudice); *United States v. Narine*, 14 M.J. 55, 57 (C.M.A. 1982) (stating that insertion of misleading or erroneous new matter could be prejudicial).

²²⁴ *Anderson*, 53 M.J. at 377-78 (stating that a note attached to SJAR by chief of staff commenting on the case constitutes new matter).

²²⁵ In accordance with RCM 1107(b)(2), the convening authority may not take action until the accused has been provided the opportunity to present matters pursuant to RCM 1105 and 1106. As discussed above, the accused must submit RCM 1105 matters within ten days of receiving the authenticated record of trial or the SJAR, whichever is later. If the accused has not submitted matters within this time frame and the convening authority or SJA has not granted an extension, then the convening authority may take action as soon as practical. Likewise, if the accused has waived the right to submit post-trial matters in accordance with RCM 1105(d), then the convening authority may take action as soon as practical.

²²⁶ While the convening authority is required to consider the clemency packet, neither the UCMJ nor the case law requires the action to restate the matters considered by the convening authority. Nonetheless, actions often indicate that the convening authority considered the result of trial and the recommendation of the SJA. The action may also indicate that the CA considered the post-trial submissions of the accused. However, this is not required. *United States v. Stephens*, 56 M.J. 391, 392 (2002).

²²⁷ MCM, *supra* note 3, R.C.M. 1107(b)(3).

²²⁸ *Id.* R.C.M. 1107(b)(3)(B)(iii).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* R.C.M. 1105(b)(1).

accused's RCM 1105 clemency packet contains other forms of media, such as video or audio tapes, the CA may view them but is not required to do so.²³²

Action

Taking action essentially requires the CA to approve the findings and/or sentence of the court-martial. Rule for Courts-Martial 1107 governs the CA's action and grants him wide latitude to approve or disapprove, in whole or in part, both the findings and sentence.²³³ With regard to findings, the CA may approve or disapprove all of the findings.²³⁴ If the CA seeks to approve all the findings, he is not required to expressly comment on the findings in the action. In other words, the CA does not have to specifically state that he has approved the findings; by not commenting on the findings, the CA has approved them in whole.²³⁵ The CA may also dismiss individual findings of guilt. If the CA disapproves a finding of guilt to a particular charge or specification, he may approve a finding of guilty to a lesser-included offense of the disapproved charge or specification.

If the CA disapproves any finding, he or she should also adjust the sentence to negate the impact of the disapproved findings. This standard requires that the new sentence place the accused in the position he would have occupied if no error had occurred.²³⁶ Moreover, to ensure that the record supports the CA's decision, the SJAR should reflect the factors considered by the CA in arriving at a new sentence.²³⁷ If the CA disapproves the findings, the disapproval must be stated in the action.²³⁸ The action should also state that the disapproved charges are dismissed, unless a rehearing is ordered.²³⁹ In the event that a rehearing is ordered, the action must briefly state the reasons why the findings were disapproved.²⁴⁰

The CA has similarly wide latitude with regard to the sentence. The CA may either approve or disapprove the sentence as a whole.²⁴¹ He may also modify any part of the sentence and approve the sentence as modified.²⁴² The only limitation on this power is that the CA cannot modify a sentence to increase the accused's punishment as adjudged by the court-martial. If there is a pretrial agreement, the CA must ensure his action is in conformity with that agreement.

In all other cases, a CA should approve the sentence which is warranted by the circumstances of the offense and appropriate for the accused. The CA should consider all relevant factors including the possibility of rehabilitation, the accused's clemency packet, and the potential deterrent effect of the sentence. The action should also account for any credit for legal or illegal pretrial confinement.

Although it is easy to understand the purpose of the action, and the CA's power at this stage of the post-trial process, it is sometimes difficult to envision what the action should look like (especially if it contains something unusual like deferred or suspended punishments). The action must state whether the sentence was approved or disapproved. The action must also indicate that the appropriate parts of the approved sentence are to be executed.²⁴³ If any part of the sentence is to be

²³² Regardless of the accused's submissions, the convening authority must consider the result of trial and the recommendation of the SJA Advocate prior to taking action. *Id.* R.C.M. 1107(b)(3). As such, the CA will not be able to take action at least until the result of trial and the SJAR are completed.

²³³ *Id.* R.C.M. 1107.

²³⁴ The CA may for any reason, or no reason, dismiss a specification and/or charge, change a finding of guilty to a lesser-included offense, or order a rehearing on a charge.

²³⁵ *United States v. Diaz*, 40 M.J. 335 (C.M.A. 1994). The action need not state that the findings are approved. "A convening authority who does not expressly address findings in the action impliedly acts in reliance on the statutorily required recommendation of the SJA, and thus effectively purports to approve implicitly the findings as reported to the convening authority by the SJA." *Id.* at 337.

²³⁶ *United States v. Reed*, 33 M.J. 98 (C.M.A. 1991) (citing *United States v. Hill*, 27 M.J. 293, 296 (C.M.A. 1988)).

²³⁷ *Id.*

²³⁸ MCM, *supra* note 3, R.C.M. 1107(f).

²³⁹ *Id.* R.C.M. 1107(f)(3).

²⁴⁰ *Id.*

²⁴¹ *Id.* R.C.M. 1107(b)(1).

²⁴² An example of changing one punishment to another without increasing the punishment would be to change a punitive discharge to six months confinement. Additionally, the CA could change a punishment of confinement to a punishment of hard labor without confinement. However, punishment may not be changed to a type of punishment which could not be adjudged by the given level of court-martial. Thus, at a special court-martial, a sentence to six months confinement could not be changed to a dishonorable discharge.

²⁴³ *Id.* R.C.M. 1107(f)(4).

suspended, the suspension should be reflected in the action.²⁴⁴ The action need not provide any reason for suspending execution of any part of the sentence. Appellate courts often err on the side of caution and return erroneous or ambiguous actions for clarification.²⁴⁵ Therefore, it is crucial to be clear and accurate in drafting the action. The forms for various types of actions are contained in Appendix 16 of the *MCM*. These formats are accurate and time tested; therefore, they should be used whenever possible. The information in the action should be carefully checked against the ROT, the result of trial, and the SJAR, to ensure that they are all accurate and consistent.²⁴⁶

Once the CA has taken action, a copy of the action must be served on the accused or the DC.²⁴⁷ When an action is served, it is said to be published.²⁴⁸ The CA may recall and modify the action at any time before it is published.²⁴⁹ If the action has been published, the CA may still modify the action provided the record has not yet been forwarded to the review authority. However, an action changed or modified after service on the accused may not be modified in any way which is less favorable to the accused.

B. The Promulgating Order

After initial action is taken and while the record is being prepared for shipment, the promulgating order must be signed. The promulgating order publishes the result of trial and the CA's action on the findings and sentence to those individuals and organizations listed at paragraph 12-7b of AR 27-10.²⁵⁰ It is important to remember that the promulgating order is one of the few post-trial documents that must still be created when the accused is acquitted. It should also be remembered that promulgating orders for acquittals must be distributed to those individuals and organizations listed in paragraphs 12-7b and 12-7c of AR 27-10.²⁵¹ The promulgating order must identify the type of court-martial and command by which it was convened and contain a summary of the charges and specifications on which the accused was arraigned.²⁵² It must also indicate the accused's pleas, and the findings or disposition of each charge and specification. Finally, it must contain the sentence and the CA's action on the sentence. The promulgating order is dated the same day as the initial action, however, it must identify the dates on which the sentence was adjudged.²⁵³ When stating the action taken by the CA, it is best to simply cut and paste the action in its original form. The action may be summarized; however, doing so increases the chances for error. An example of a promulgating order is in AR 27-10, figure 12-1.²⁵⁴

After the promulgating order has been signed, copied, and placed in the ROT, the record should be complete and ready for mailing to the reviewing or appellate authority. When mailing the record, it is important to use first class certified mail.²⁵⁵ If the record gets lost in the mail, the criminal law office must have a means of establishing that it mailed the record in a timely fashion and by a timely method.

C. Disposition of the Record of Trial

When action has been taken and served upon the accused or the DC, the CA must forward the action and the ROT to the

²⁴⁴ *Id.*

²⁴⁵ See *United States v. Madden*, 32 M.J. 17 (C.M.A. 1990) (case returned for new action where the convening authority's intent to approve discharge is unclear); *United States v. Johnson*, 29 M.J. 288 (C.M.A. 1989) (case returned for new action where the convening authority failed to approve suspension of discharge discussed in SJAR).

²⁴⁶ For a detailed discussion of the proper disposition of the record of trial, see *THE CLERK OF COURT'S HANDBOOK*, *supra* note 8, paras. 1-7, 1-8, and ch. 3.

²⁴⁷ *MCM*, *supra* note 3, R.C.M. 1107(h).

²⁴⁸ *Id.* R.C.M. 1107(f)(2).

²⁴⁹ Thus, if after the CA takes action the SJA discovers an error in the action where the convening authority has approved a punishment less severe than was intended, that error can be corrected by a new action provided the action has not been published.

²⁵⁰ *Id.* R.C.M. 1114(a)(2).

²⁵¹ AR 27-10, *supra* note 19, paras. 12-7(b), (c).

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* fig. 12-1.

²⁵⁵ *Id.* para. 5-44.

reviewing or appellate authority.²⁵⁶ The appropriate reviewing authority depends upon the level of court-martial and the approved sentence. In a GCM, the ROT, the action, and ten copies of the promulgating order are forwarded to the Judge Advocate General²⁵⁷ unless the accused has waived appellate review pursuant to RCM 1110.²⁵⁸ Two additional copies of the ROT must be forwarded, along with the original record, if the sentence includes death, a dismissal, a dishonorable or bad-conduct discharge, or confinement for more than one year.²⁵⁹ In a GCM where the accused waives appellate review, the ROT is forwarded to the Office of the Judge Advocate pursuant to RCM 1112.²⁶⁰

In a SPCM where a bad conduct discharge has been approved, the original and two copies of the ROT, the action, and ten copies of the promulgating order are forwarded to the Judge Advocate General as described above. However, in SPCMs where the sentence does not include a bad-conduct discharge, the ROT, the action, and only four copies of the promulgating order are forwarded to the Office of the Judge Advocate General where a judge advocate will review the record pursuant to RCM 1112.²⁶¹

After the ROT has been mailed, chiefs of criminal law might be tempted to consider the post-trial process complete. This is not correct. It is important to remember that in most cases, additional steps must be taken even after the initial action. In cases that involve a conviction and where the accused has not waived appellate review, there will still be additional steps that may have to be executed by your office. For example, when an accused is convicted at court-martial and receives only a punitive discharge, the criminal law office that prosecuted that individual will be responsible for completing the final steps in the post-trial process. These final steps include placing the accused on excess leave, giving the accused notice of the results of his appeal, and taking final action in the case.

When an accused is punished by a court-martial, it is important to ensure that his military status is properly adjusted. Dishonorable and bad-conduct discharges do not become final until the case has completed the appellate process.²⁶² Therefore, while the CA may approve a sentence including a discharge, the CA may not order the discharge executed until the appellate review process is complete.²⁶³ Until the review is complete and the accused's discharge is executed, the accused remains on active duty. Unless the accused is in confinement, he is entitled to a minimum of one-third of one month's pay while serving on active duty, even if total forfeitures were adjudged.²⁶⁴ As such, if a sentence includes a discharge and total forfeitures, but no confinement or a very short period of confinement, then the accused will likely be returned to regular duty pending completion of the appellate review process.

In order to avoid having to pay the accused or return the accused to his unit (where he may very well cause disruption), the government can place the accused on voluntary excess leave (at the accused's request) or involuntary excess leave.²⁶⁵ This status allows the military to maintain jurisdiction over the accused until the review process is complete and the discharge is executed. To be eligible for voluntary excess leave, the accused must have been sentenced to a punitive discharge or dismissal, have served any adjudged confinement or had it deferred or suspended, and have not yet had his sentence approved.²⁶⁶ To place an accused on involuntary excess leave, the CA must notify the accused in writing that he or she is being considered for involuntary excess leave.²⁶⁷ The accused is then allowed seventy-two hours in which to submit a

²⁵⁶ MCM, *supra* note 3, R.C.M. 1111.

²⁵⁷ The only exception applies when the accused has waived appellate review pursuant to RCM 1110. *Id.*

²⁵⁸ *Id.* R.C.M. 1110(a).

²⁵⁹ *Id.* R.C.M. 1111(a).

²⁶⁰ *Id.* R.C.M. 1112(a)(1).

²⁶¹ *Id.* R.C.M. 1112(a).

²⁶² *Id.* R.C.M. 1113(c), R.C.M. 1209(b).

²⁶³ *Id.* R.C.M. 1113(c).

²⁶⁴ *United States v. Smith*, 47 M.J. 630 (Army Ct. Crim. App. 1997) (citing *United States v. Dewald*, 39 M.J. 901 (A.C.M.R. 1994); *United States v. Hatchell*, 33 M.J. 839, 840 (A.C.M.R. 1991) (stating that Soldiers serving on active duty pending appellate review entitled to one third of basic pay)).

²⁶⁵ AR 600-8-10, *supra* note 48, paras. 5-19 and 20. An accused can be placed on involuntary excess leave anytime after: the accused has received a sentence which includes a dismissal or punitive discharge; the accused is awaiting appellate review; the accused's confinement, which was served as part of an approved sentence, has been served, deferred, or suspended; the accused received a punitive discharge at trial and the convening authority has approved the punishment.

²⁶⁶ *Id.* para. 5-21c.

²⁶⁷ *Id.* paras. 5-19, 5-20.

response. If after receiving the accused's response the CA elects to go forward, then a DA Form 31²⁶⁸ is completed to place the accused on involuntary excess leave. The DA Form 31 is processed in accordance with normal leave procedures by the unit personnel office.²⁶⁹ Formats for notifying the accused and DA Form 31s should be prepared in advance so that they can be quickly executed following the accused's release from confinement. The accused's excess leave will usually end after the final judgment is issued and the accused's sentence is ordered executed.²⁷⁰

The last two steps of phase three are notifying the accused of the results of his appeal and taking final action. These steps may be unfamiliar even to an experienced chief of criminal law because most criminal law offices do not take these final steps. In most cases where the government has secured a conviction and confinement, the accused is sent to a regional confinement facility or Fort Leavenworth. Once the accused is transferred to a confinement facility, the CA for the confinement facility takes charge of the accused's post-trial process. Thus, criminal law offices at confinement facilities generally handle the last two steps in the post-trial process, while other criminal law offices rarely encounter these two steps.²⁷¹ The occasions where a criminal law office that is not associated with a confinement facility is likely to encounter these last two steps is when an accused is convicted and sentenced to a discharge and no confinement or very little confinement. In these cases, the accused will likely remain in the same unit he was in when court-martialed. Since the accused has not been transferred to a different GCM jurisdiction, the criminal law office which tried the accused will have to see the post-trial process through to the very end.

The first of these last two steps is notifying the accused of the decision of the ACCA. In accordance with RCM 1203(d)(2), "If the accused has the right to petition the Court of Appeals for the Armed Forces for review, the accused shall be provided with a copy of the decision of the Court of Criminal Appeals."²⁷² In addition to the notice of the court of criminal appeals decision, the accused must also receive a DA form 4917, Advice of Appellate Rights,²⁷³ five copies of DA Form 4918, Petition for Grant of Review,²⁷⁴ and a letter-size envelope with the CAAF Clerk of Court's address.²⁷⁵ There are different procedures that apply when an accused is present in the command or on excess leave; these procedures are discussed in detail in the *Clerk of Court Handbook*.²⁷⁶

Proper service of the decision of the ACCA is important in much the same way that proper service of the SJAR and authenticated ROT is important. When the accused is on excess leave he is entitled to sixty days from the date the ACCA decision (and all required documents) was mailed to respond.²⁷⁷ After the sixty days have passed, final action may be taken.²⁷⁸ However, if the notice procedures regarding the ACCA decision were somehow faulty, the accused could attack the final action in the case. Thus, properly documenting that the accused was provided notice of the ACCA decision is critical. Army Regulation 27-10, paragraph 13-9²⁷⁹ and the *Clerk of Court Handbook* section 7-1,²⁸⁰ do an excellent job describing the procedures that must be taken to ensure the proper documentation of this step.

After the accused has waived or exhausted his appellate review, the case is ready for the last step of the post-trial process—the final action.²⁸¹ Final action will be taken by Headquarters, Department of the Army in cases where the death

²⁶⁸ U.S. Dep't of Army, DA Form 31, Request and Authority for Leave (Sept. 1993).

²⁶⁹ AR 600-8-10, *supra* note 48, paras. 12-1, 12-5.

²⁷⁰ *Id.* para. 5-19d.

²⁷¹ It should be noted that even criminal law offices for confinement facilities do not always take the last two steps. In cases involving the death penalty, or the dismissal of an officer or cadet, Headquarters, Department of the Army will issue the final order. THE CLERK OF COURT HANDBOOK, *supra* note 8, para. 7-4a.

²⁷² MCM, *supra* note 3, R.C.M. 1203(d)(2).

²⁷³ U.S. Dep't of Army, DA Form 4917, Advice of Appellate Rights (Sept. 2002).

²⁷⁴ U.S. Dep't of Army, DA Form 4918, Petition for Grant of Review (Sept. 2002).

²⁷⁵ THE CLERK OF COURT HANDBOOK, *supra* note 8, para. 7-2 (DA Forms 4917 and 4918 are both available in e-JAWS).

²⁷⁶ *Id.* para. 7-1e.

²⁷⁷ MCM, *supra* note 3, R.C.M. 1203(d)(2).

²⁷⁸ *Id.* R.C.M. 1209(a)(1)(A).

²⁷⁹ AR 27-10, *supra* note 19, para. 13-9.

²⁸⁰ THE CLERK OF COURT HANDBOOK, *supra* note 8, para. 7-1.

²⁸¹ MCM, *supra* note 3, R.C.M. 1209(a).

penalty has been imposed or where an officer or cadet has been dismissed.²⁸² In all other cases, the final action will be taken by a GCMCA. There are two occasions where a final action will be necessary; one, when the appellate courts have modified a sentence, or two, when the accused was sentenced to a punitive discharge.²⁸³ Although a modified sentence after appellate review would certainly necessitate a new action, the principal need for a final action exists because CAs are unable to order executed punitive discharges or dismissals until after appellate review.²⁸⁴ Once appellate review is complete or waived, the punitive discharge or dismissal still must be ordered executed.

Conclusion

This article has demonstrated that the individual steps of the post trial process are not particularly complicated, once you have a thorough understanding of how the process works. In addition to this article, RCM 1101 through RCM 1210, Articles 57 through 76a of the UCMJ, AR 27-10 paragraphs 5-29 through 5-48, and the *Clerk of Court's Post-Trial Handbook* are important reading in order to gain an understanding of the overall post-trial process. By understanding the post-trial process and tending to it daily, not only should your office's post-trial process be successful, but it will remain manageable and allow you to devote more time to other important aspects of your office's mission.

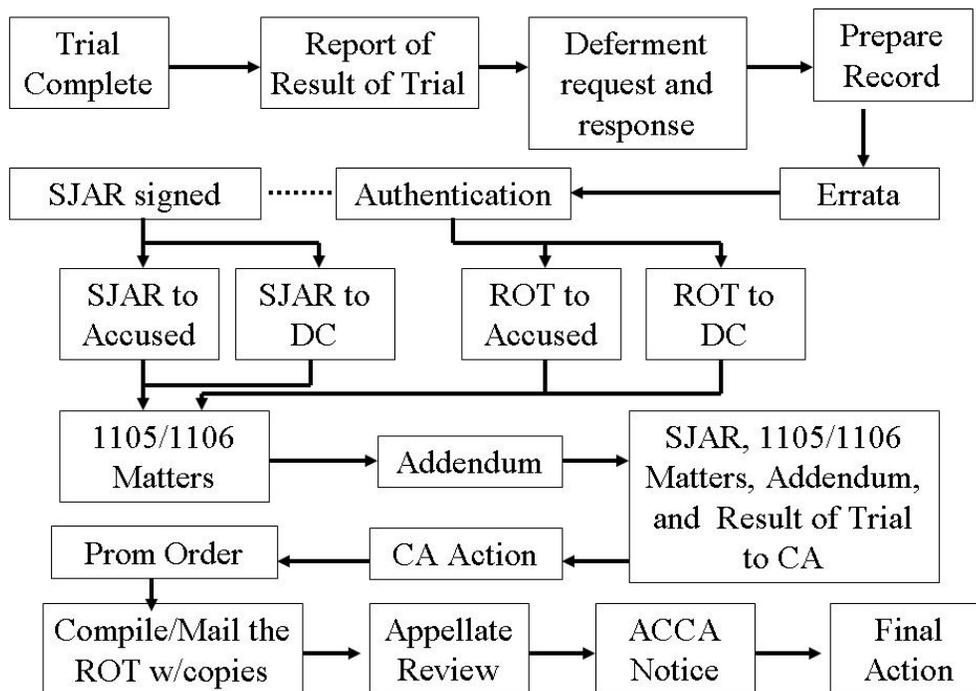
²⁸² THE CLERK OF COURT HANDBOOK, *supra* note 8, para. 7-4a.

²⁸³ *Id.*

²⁸⁴ MCM, *supra* note 3, R.C.M. 1113(c).

Appendix A

Diagram of Post-Trial Process²⁸⁵



²⁸⁵ This diagram was initially composed by Colonel Michael J. Hargis while instructing at the U.S. Army Judge Advocate General's School in 1997.

Appendix B

Sample Delegation of Confinement Authority

AAAA-JA (27-10e)

1 January 2007

MEMORANDUM FOR RECORD

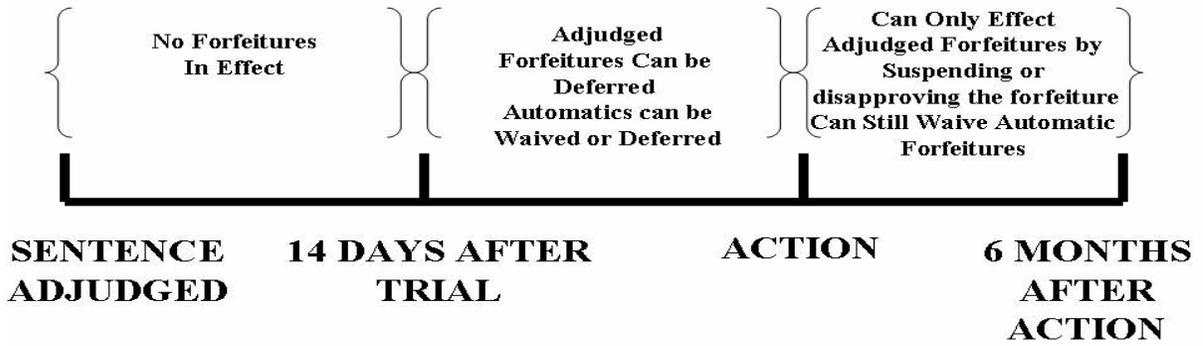
SUBJECT: Delegation of Confinement Authority

In accordance with Rule for Court-Martial 1101(b)(2), I delegate the authority to order soldiers from Headquarter and Headquarters Company, 82d Airborne Division in to post-conviction confinement to the HHC Trial Counsel, Captain David Johnston.

ROBERT C. THEODEN
CPT, IN
Commanding

Date:

Appendix D
Affecting Forfeitures



Appendix E

Forfeiture Work sheet

1. The first step in achieving the Convening Authority's objectives with regard to an accused's forfeitures is to determine what forfeitures apply and the steps that may be taken to remove those forfeitures if that is what the Convening Authority desires.
2. Determining what forfeitures apply:
 - a. Adjudged forfeitures.
 1. Were there any adjudged forfeitures?
 - (a) If no, go to the automatic forfeitures Question.
 - (b) If yes, how much for how long? _____
 - b. Automatic forfeitures.
 1. Did the sentence include confinement in excess of 6 months?
 - (a) If yes, go to question 3.
 - (b) If no, go to question 2.
 2. Did the sentence include confinement and a punitive discharge?
 - (a) If yes, go to question 3.
 - (b) If no, then there are no automatic forfeitures.
 3. At what type of court-martial was the accused tried?
 - (a) If the accused was tried at a special court-martial, he will forfeit two-thirds of his pay for however long he is confined (these forfeitures begin 14 days after the sentence is announced).
 - (b) If the accused was tried at a general court-martial, he will forfeit all pay and allowances for however long he is confined (these forfeitures begin 14 days after the sentence is announced).
 - c. What is the accused ETS date? _____ Note: the accused's ETS date will end all pay to the accused. Any steps to remove forfeitures become moot after the accused's ETS date because after ETS there is no pay to forfeit.
3. Charting forfeitures
 - a. List the type, amount, length of time of forfeitures, and the accused's ETS date in the first four columns and the Convening Authority's intent in the fifth column.

Type Amount Length ETS CA Intent

Automatic

Adjudged

b. If there are adjudged and automatic forfeitures create two columns listing the forfeitures, the length of the columns should represent the relief the convening authority wishes to give. Also note the ETS date of the accused. Listed below are examples of how to chart forfeitures.

Example 1: the CA wants to give the maximum relief available for forfeitures where an accused is sentenced to total forfeiture of all pay and allowances and confinement for 6 years.

	<u>Adjudged</u>	<u>Automatic</u>
14 days after sentence is announced	defer	defer
Action	disapproved	waived for 6 months

ETS—3 years after sentence was announced.

Example 2: there are only automatic forfeitures and the CA only wishes to give 3 months of relief.

	<u>Adjudged</u>	<u>Automatic</u>
14 days after sentence is announced	none	waived for three months

ETS—1 year after sentence was announced.

Example 3: the Convening Authority wishes to give the maximum relief but the accused is to ETS 2 months after the sentence is announced.

	<u>Adjudged</u>	<u>Automatic</u>
14 days after sentence is announced	defer	defer

ETS—2 months after sentence was announced. ETS ends the affect of all deferments or other steps taken to affect forfeitures.

MEMORANDUM FOR Commander, 82d Airborne Division, Fort Bragg, NC 28310-4320

SUBJECT: Addendum to Staff Judge Advocate's Post-Trial Recommendation in the General Court-Martial Case of *United States v. Specialist Paul Smith*

1. This addendum is written to address the post-trial submissions of the accused and his defense counsel in the general court-martial case of Specialist Paul Smith, U.S. Army, 000-00-0000, HHC, Fort Bragg, NC 28310-4325.
2. Specialist Smith and his counsel have submitted a request for clemency asking you to reduce Specialist Smith's confinement so that he can return to his family and begin rehabilitation as soon as possible. You must consider the matters submitted by defense counsel and accused prior to taking action.
3. Specialist Smith's defense counsel has alleged that the military judge admitted evidence in Specialist Smith's Court-Martial in violation of the Military Rules of Evidence. I have considered the defense allegation of legal error regarding the military judge's admission of evidence in violation of the Military Rules of Evidence. I disagree that there was a legal error. In my opinion, no corrective action is necessary.
4. I have considered the enclosed clemency submission and allegation of legal error, and I adhere to my original recommendation.

3 Encls

1. Memorandum from Defense Counsel
2. Memorandum from the Accused
3. Letter from the Accused's Mother

Mark Jones
LTC, JA
Staff Judge Advocate