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ARTICLES

Review of Developments in Instructions

Lieutenant Colonel Deidra J. Fleming and Lieutenant Colonel Tyesha L. Smith

A Whole Other Matter: The New Article 60(d) and Handling Victim Submissions During Clemency

Major Angela D. Swilley

Sometimes, They Come Back! How to Navigate the World of Court-Martial Rehearings

Major Timothy Thomas

The Next Best Thing to Zihuatanejo:

A Primer for Defense Counsel to Help Clients Find the Best Place to Live after a Conviction

Major Craig Schapira

TJAGLCS FEATURES

Lore of the Corps

Epaulettes and Shoulder Knots for Judge Advocates: A History of Branch Insignia for Army Lawyers in the 19th Century

Criminal Law

New Developments in Criminal Law: Child Pornography and Appellate Review

Decades of Military Failures Against Sex Crimes Earned America's Distrust and Congressional Imposition:
The Judge Advocate General's Corps's Newest, Most Important Mission

A Reflection Paper by Major Dave C. Lai

CLE NEWS

CURRENT MATERIALS OF INTEREST

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Lore of the Corps

| | |
|---|----------|
| Epaulettes and Shoulder Knots for Judge Advocates: A History of Branch Insignia for Army Lawyers in the 19th Century | 1 |
|---|----------|

Articles

| | |
|---|-----------|
| Review of Developments in Instructions <i>Lieutenant Colonel Deidra J. Fleming and Lieutenant Colonel Tyesha L. Smith.....</i> | 3 |
| A Whole Other Matter: The New Article 60(d) and Handling Victim Submissions During Clemency <i>Major Angela D. Swilley</i> | 16 |
| Sometimes, They Come Back! How to Navigate the World of Court-Martial Rehearings <i>Major Timothy Thomas</i> | 34 |
| The Next Best Thing to Zihuatanejo: A Primer for Defense Counsel to Help Clients Find the Best Place to Live after a Conviction <i>Major Craig Schapira</i> | 43 |

TJAGLCS Features

Criminal Law

| | |
|--|-----------|
| New Developments in Criminal Law: Child Pornography and Appellate Review..... | 57 |
| Decades of Military Failures Against Sex Crimes Earned America’s Distrust and Congressional Imposition: The Judge Advocate General’s Corps’s Newest, Most Important Mission | 60 |
| CLE News..... | 66 |
| Current Materials of Interest | 72 |

Lore of the Corps

Epaulettes and Shoulder Knots for Judge Advocates: A History of Branch Insignia for Army Lawyers in the 19th Century

*Fred L. Borch
Regimental Historian & Archivist*

While Army officers today wear their branch insignia on the lapels of their service uniforms, in the 19th century they wore this insignia (along with their insignia of rank) on their “epaulettes” and “shoulder knots.” What follows is a brief history of epaulettes and shoulder knots for judge advocates in the 19th century.

On July 29, 1775, the Continental Congress selected William Tudor as “Judge Advocate of the Army;” slightly more than a year later, the Congress changed Tudor’s title to “Judge Advocate General.” But neither Tudor nor any military lawyer who followed him in the late 18th century or early years of the 19th century wore any insignia identifying him as a judge advocate, much less as the Judge Advocate General. In fact, Army Regulations published in 1825 provided that “chaplains, judge advocates, commissaries of purchases and storekeepers have no uniform.”¹ This meant, of course, they wore civilian clothes.



Brigadier General Joseph Holt, TJAG from 1862 to 1875, never wore a uniform despite his status as the top lawyer in the Army.

Not until 1851 did judge advocates have a device that set them apart from other staff officers: a white pompon that they wore on their caps. But the wear of an Army uniform, much less the white pompon, does not seem to have been particularly important: witness the civilian attire of Judge Advocate General Joseph Holt. Then Brigadier General

Holt, who served from 1862 to 1875, never wore a uniform while on active duty.

Sometime between 1861 and 1865, judge advocates who did wear Union uniforms were authorized epaulettes that distinguished them by the use of the old English letters “JA.”² The photograph below illustrates epaulettes for a judge advocate captain. These were a graduation gift to the Corps from the members of the 62d Graduate Course in 2014, and are now on display at The Judge Advocate General’s Legal Center and School.



Epaulettes worn by Bureau of Military Justice captain (Civil War period to 1872).

In 1872, the shoulder knot replaced the epaulette on the full dress uniform, and those prescribed for judge advocates had the letters “JA” in Old English characters embroidered on them.³

¹ JUDGE ADVOCATE GENERAL’S CORPS, THE ARMY LAWYER 140 (1975).

² Other branches also adopted this style of letters to designate their officers. For example, officers in the Inspector General’s Department wore shoulder insignia with the letters “ID” and those in the Adjutant General’s Department wore the letters “AD.” WILLIAM K. EMERSON, ENCYCLOPEDIA OF UNITED STATES ARMY INSIGNIA AND UNIFORMS 167 (1996).

³ War Department, Adjutant General’s Office, Gen. Orders No. 92 (26 October 1872).



Shoulder knot on left worn by Bureau of Military Justice colonel or JAGD colonel (1872-1890); shoulder knot on right worn by JAGD colonel from 1890 to 1903.

In 1890, the Judge Advocate General's Department (JAGD), which had been established six years earlier, adopted a new insignia for Army lawyers. General Orders No. 53 described it as "a sword and pen crossed and wreathed ... embroidered in silver on the cloth of the pad (except for a Colonel ... who will wear the device made of solid silver on the knot midway between the upper fastening and the pad)."⁴

Shoulder knots with the sword-and-quill insignia (worn 1890-1903) were no longer permitted after that date, because the Army revised its uniform regulations and changed the style of shoulder knots to the pattern worn on dress uniforms today. As a result, judge advocates now wore the crossed sword and pen insignia on the collars of their service coats—a practice that continues to this day.

More historical information can be found at
The Judge Advocate General's Corps
Regimental History Website
<https://www.jagcnet.army.mil/8525736A005BE1BE>

*Dedicated to the brave men and women who have served
our Corps with honor, dedication, and distinction.*

⁴ EMERSON, *supra* note 2, at 250; Headquarters, U.S. Dep't of Army, Gen. Order No. 53 (23 May 1890).

Annual Review of Developments in Instructions

Lieutenant Colonel Deidra J. Fleming* and Lieutenant Colonel Tyesha L. Smith**

I. Introduction

This article discusses recent developments in the law regarding a military judge's instructions to panel members.¹ Cases decided by the Court of Appeals for the Armed Forces (CAAF) during its 2013-2014 term,² as well as important decisions published by service courts during the same period, are discussed. The *Military Judges' Benchbook (Benchbook)*,³ which is regularly updated to incorporate the newest statutory and case law developments, is the primary resource for drafting instructions. This article discusses updates on offenses and defenses instructions, evidentiary and trial counsel argument instruction issues, and sentencing instructions. The article ends with an overview of the changes made by the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2014.⁴

II. Instructions on Offenses and Defenses

The Appellate Standard of Review for Failing to Instruct on an Element

In *United States v. Payne*,⁵ the CAAF addressed the level of specificity required by counsel when making an objection to proposed elemental instructions in order to adequately preserve an error for appellate review.⁶ In *Payne*, the accused was charged with, among other offenses, attempting to persuade a minor to create child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ).⁷ The specification, however, was not "a model of

clarity," and the military judge proposed and ultimately instructed the panel on the elements of the offense of soliciting a minor to create child pornography in violation of Article 134, UCMJ.⁸ The defense counsel generally objected to the military judge's proposed instructions alleging the instructions were incorrect but declining to outline any specific deficiencies or propose alternate instructions.⁹ During the objection, defense counsel stated:

[W]e object to your instructions because we do not believe that the government in its pleadings identified the offenses to which you are listing elements. . . . [W]e believe that these [proposed] elements are not necessarily a fair parsing of what was pled [W]e have a duty to candor towards a tribunal and to identify any errors and give you a forthright answer, but we also have a competing duty to [the accused] and not to assist the government or even the bench in perfecting elements in charges against him if we think that there's, perhaps, a right way to do this. And therefore, we simply say that we don't believe that the court has been able, due to the nature of the pleadings, to properly identify if these are offenses and if so, what those elements would be.¹⁰

To adequately preserve error for appellate review, the CAAF held the level of specificity required in a counsel's objection to a proposed instruction is the same level required when making an evidentiary objection.¹¹ A counsel must provide "argument sufficient to make the military judge aware of the specific ground for objection, 'if the specific ground was not apparent from the context.'"¹² The defense counsel, by failing to provide the military judge with alternate elements or specific objection, was trying to preserve error while at the same time "refusing to assist the military judge in correcting any alleged instructional error at the trial level."¹³ The CAAF determined under those facts

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¹ The Manual for Courts-Martial requires the military judge to instruct members (jurors) on questions of law and procedure, findings, and sentencing. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 801(a)(5), 920 and 1005 [hereinafter MCM].

² The 2013 term began on September 1, 2013 and ended on August 31, 2014.

³ U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (10 Sep. 2014) [hereinafter BENCHBOOK].

⁴ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66.

⁵ 73 M.J. 19 (C.A.A.F. 2014).

⁶ *Id.* at 23. See R.C.M. 920(f) ("Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error. The military judge may require the party objecting to specify of what respect the instructions given were improper.")

⁷ *Id.* at 21.

⁸ *Id.* at 22, 24.

⁹ *Id.* at 21.

¹⁰ *Id.* at 21-22.

¹¹ *Id.* at 23.

¹² *Id.* at 23. (citing *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005) (quoting Military Rule of Evidence 103(a)(1))).

¹³ *Id.* at 23.

that the defense waived any error in the absence of plain error.¹⁴

The court then reviewed the case under a three prong plain error analysis where “the accused ‘has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.’”¹⁵ In deciding to apply this plain error analysis, the court rejected the argument that a military judge’s failure to instruct on every element of an offense was per se prejudicial.¹⁶ In announcing this position, the CAAF affirmatively overruled its prior precedent that a failure to instruct on an element of an offense was per se prejudicial.¹⁷ If a military judge fails to instruct on an element of an offense, the appellate courts must review the entire record as a whole to determine whether the substantial rights of the accused were materially prejudiced and whether the error was harmless beyond a reasonable doubt.¹⁸ In affirming the case, the CAAF found that the defense did not contest the elements upon which the military judge failed to instruct and that the evidence on those elements was overwhelming.¹⁹

Payne is a landmark case. The court clarified the specificity required when making an objection to preserve an instruction error on appeal and expressly overruled its prior holding that a military judge’s failure to provide an element instruction constituted per se prejudice. In *Payne*, the CAAF was unwilling to find preserved error when the defense counsel generally objected to the elemental instructions but offered no specific objection or solution to assist the military judge. In essence, the defense counsel’s failure to assist the military judge perpetuated the error, making the CAAF unwilling to allow defense a more favorable standard of review on appeal.

Instructing Based on Panel Question—United State v. Long

After providing findings instructions in a rape case, the panel president asked the military judge to legally define

“competent” person.²⁰ The panel president told the military judge that the question about competence related to the victim’s alcohol consumption.²¹ Although the victim testified she was tired, drunk, stumbling, and her alcohol consumption made it more difficult to resist the accused, the victim never stated she was incapacitated and the government’s case centered on a rape by force theory.²² The accused argued that the victim consented.²³ In instructing on a consent defense, the military judge told the panel “‘consent’ means words or overt acts indicating a freely given agreement to the sexual conduct by a competent person.”²⁴ The specific offense Benchbook instruction, however, did not provide guidance on a person’s competence in relation to potential alcohol consumption.

The military judge called a hearing outside the presence of the members to discuss the president’s question and to determine whether to instruct the panel on a portion of the definition of consent related to alcohol consumption under the offense of aggravated sexual contact.²⁵ Defense counsel objected to the military judge’s proposal and then requested, in the alternative, an instruction on the entire definition of consent under the offense of aggravated sexual contact.²⁶ The military judge provided the entire instruction reasoning:

I think as [the president of the panel] has clearly indicated, his concern is whether or not somebody who is intoxicated or has been drinking is a competent person to give consent. So, I think that this instruction that I propose to give helps the members understand what someone’s level of intoxication would mean with respect to consent. I think if I don’t give the instruction the members are going to be left hanging in the wind to decide whether or not somebody who is drunk can consent. I mean this instruction makes clear that somebody who is drunk can consent, as long as they’re not substantially incapable of understanding the conduct at issue. So, I think it is a helpful instruction and that’s why I’m going to give it to the members.²⁷

¹⁴ *Id.* at 23. See RCM 902(f).

¹⁵ *Id.* at 24-25 (citing *United States v. Tunstall*, 72 MJ 191, 193-94 (C.A.A.F. 2013) (quoting *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011))).

¹⁶ *Id.* at 25.

¹⁷ *Id.* (citing *Neder v. United States*, 527 U.S.1, 8, 119 S. Ct. 1827, 144 L. Ed. 35 (1999)) (holding the Supreme Court *Neder* ruling that structural error does not occur from a failure to instruct on an element warrants applying a harmless beyond a reasonable doubt standard as opposed to finding prejudice per se when a military judge fails to instruct on an element).

¹⁸ *Id.* at 25.

¹⁹ *Id.* at 25-26.

²⁰ *United States v. Long*, 73 M.J. 541 (A.C.C.A. 2014). The accused was also charged with aggravated sexual assault and assault consummated by a battery based on the same factual situation. *Id.*

²¹ *Id.* at 544.

²² *Id.* at 543.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

The Army Court of Criminal Appeals (ACCA) found that the military judge did not err in providing an additional instruction on competence in response to a panel question.²⁸ In upholding the conviction, the court considered not only a military judge's duty to properly and fully instruct the members but also that the Benchbook provided instructions and definitions derived from the same statute and Article as the charged rape offense.²⁹

The *Long* court focused on the military judge's obligation to ensure the members are "fully equipped to resolve those questions of fact necessary for proper resolution of the charges before them for judgment."³⁰ When faced with a tough panel question on a definition to which the law provided no further guidance and which the Benchbook provided no further instruction, the military judge adopted the Benchbook instruction from a closely aligned offense under the same Article. When left with the alternative of leaving the members "hanging in the wind" or providing guidance, the ACCA appears to defer to the military judge's decision to instruct from a related Benchbook instruction.

False Official Statements

Three recent CAAF cases have necessitated changes to the Benchbook instruction for false official statement offenses in violation of Article 107, UCMJ.³¹ In *United States v. Spicer*, the CAAF delineated what constitutes an "official" statement for purposes of an Article 107, UCMJ violation.³² A statement is "official" under Article 107, UCMJ in three situations:

- (1) where the speaker "make[s] a false official statement in the line of duty or ... the statement bears a clear and direct relationship to the speaker's official duties";
- (2) where the listener "is a military member carrying out a military duty at the time the statement is made"; or
- (3) where the listener "is a civilian who is performing a military function at the time the speaker makes the statement."³³

In reaching this conclusion, the CAAF reasoned that the legislative history and the purpose of Article 107, UCMJ

²⁸ *Id.* at 545.

²⁹ *Id.*

³⁰ *Id.*

³¹ See *United States v. Passut*, 73 M.J. 27 (C.A.A.F. 2014); *United States v. Capel*, 71 M.J. 485 (C.A.A.F. 2013); *United States v. Spicer*, 71 M.J. 470 (C.A.A.F. 2013); BENCHBOOK, *supra* note 3, para. 3-31-1.

³² *Spicer*, 71 M.J. at 473.

³³ *Capel*, 71 M.J. at 487, fn.3. (citation omitted).

was to criminalize statements that only involve a military function.³⁴ Therefore, making a false statement to a civilian law enforcement officer, when the civilian officer is not assisting military authorities and the speaker is not discussing an official duty, does not create an "official" false statement in violation of Article 107, UCMJ.

In *Spicer*, the accused told a civilian detective that a babysitter kidnapped his son.³⁵ Upon further questioning, the accused told the civilian detective the babysitter story was a lie.³⁶ The accused said that he was told to lie by a drug dealer who had taken the accused's baby in order to ensure the accused's silence after he witnessed a drug deal.³⁷ A panel convicted the accused for lying about the babysitter and the drug dealer stories.³⁸ In dismissing the false official statement convictions, the court found the accused's statements did not relate to his military duties and were not made to a civilian detective conducting a joint investigation with military officials.³⁹ The speaker and the hearer lacked a nexus to a military function at the time of the statement.⁴⁰

Similarly in *United States v. Capel*, the accused lied to a civilian detective about whether the accused had used another service member's debit card.⁴¹ The CAAF found the accused's statement was not "official" because it did not relate to any of the accused's specific military duties and the civilian detective did not notify any military authorities regarding the statement.⁴² The CAAF noted "while theft among military personnel can certainly impact unit morale and good order and discipline, it is the relationship of the statement to a military function at the time it is made – not the offense of larceny itself—that determines whether the statement falls within the scope of Article 107, UCMJ. . . ."⁴³

Based on *Spicer* and *Capel*, the definition of "official" for false official statements contained in Benchbook instruction 3-31-1 now states:

A statement is official when the maker is either acting in the line of duty or the statement directly relates to the maker's

³⁴ *Spicer*, 71 M.J. at 473.

³⁵ *Id.* at 472.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 471.

³⁹ *Id.* at 475.

⁴⁰ *Id.*

⁴¹ *United States v. Capel*, 71 M.J. 485, 486 (C.A.A.F. 2014).

⁴² *Id.* at 487.

⁴³ *Id.*

official military duties, or where the receiver is either a military member carrying out a military duty when the statement is made or a civilian necessarily performing a military function when the statement is made.⁴⁴

In *United States v. Passut*, the CAAF then further considered the issue of whether statements to Army and Air Force Exchange Service (AAFES) employees were “official” under Article 107, UCMJ.⁴⁵ In that case, the accused cashed several checks at the AAFES shopette by providing various AAFES employees an incorrect social security number.⁴⁶ The CAAF looked at whether AAFES’s unique role to the military would support a finding that AAFES employees were conducting a military function by cashing the accused’s checks.⁴⁷ The court found “AAFES – which is governed by service regulations and whose profits are fed back into the military—[has] a relationship sufficient to establish a military function.”⁴⁸ The following factors were significant in the court’s holding: (1) AAFES is a Department of Defense nonappropriated fund instrumentality with its proceeds supporting Morale, Welfare, and Recreation programs; (2) members of the armed forces make key decisions regarding AAFES operations; (3) Army and Air Force regulations direct procedures regarding the cashing of checks at AAFES; and (4) prior case law supported the position that AAFES performs a military function.⁴⁹ In response to *Passut*, the Benchbook was updated to include an instruction that “AAFES employees who are in the performance of their duties are considered to be performing a military function.”⁵⁰

Special Defense Instructions

In *United States v. Davis*, the CAAF reviewed a military judge’s duty to sua sponte instruct on any special defense raised at trial.⁵¹ In *Davis*, panel members heard diverging testimony regarding the charged offenses which occurred at the accused’s residence.⁵² The accused testified, in part: (1) that another Soldier, who had previously received permission to stay at the accused’s residence, attempted to

reenter the home after leaving because of an argument with the Soldier’s girlfriend; (2) that during the reentry the accused told the Soldier to leave and pushed him away; (3) that the Soldier then approached the doorway again and swung at the accused; and (4) that the accused then pulled a weapon from his back pocket and pointed it at the Soldier.⁵³ Ultimately, the panel members convicted the accused of simple assault with an unloaded firearm.⁵⁴

The issue on appeal was whether the military judge erred by failing to provide a defense of property instruction when the trial defense counsel did not request such instruction.⁵⁵ Military judges are required to sua sponte instruct on any affirmative defense if “some evidence” of the issue is raised without regard to the source or credibility of that evidence.⁵⁶ The CAAF found that the accused raised “some evidence” of a possible property defense during his testimony by stating that he was worried about what would happen to his property if the other Soldier knocked the accused out and that the accused wanted the Soldier to leave the accused’s property.⁵⁷ Although the military judge provided a self-defense instruction, the CAAF found the military judge erred by failing to also sua sponte provide a defense of property instruction.⁵⁸ The CAAF stated, “Although R.C.M. 916 does not expressly list defense of property as a special defense, this Court and its predecessor have long recognized defense of property as an available defense in the military justice system.”⁵⁹

After finding error, the CAAF then applied a “harmless beyond a reasonable doubt standard—i.e. could a rational panel have found [the accused] not guilty if they had been instructed properly.”⁶⁰ The CAAF recognized that two possible theories for a defense of property instruction existed—imminent threat to property and preventing/ejecting a trespasser.⁶¹ In order to assert an imminent threat to property defense the accused must have an objective reasonable belief that his property was in imminent danger and a subjective actual belief the amount of force he used was reasonable.⁶² In order to assert a preventing/ejecting trespasser property defense the accused may only use as much force as is reasonable to get the

⁴⁴ BENCHBOOK, *supra* note 3, para. 3-31-1.

⁴⁵ *United States v. Passut*, 73 M.J. 27 (C.A.A.F. 2014).

⁴⁶ *Id.* at 28.

⁴⁷ *Id.*

⁴⁸ *Id.* at 31.

⁴⁹ *Id.* at 30-31.

⁵⁰ BENCHBOOK, *supra* note 3, para. 3-31-1, n. 2.1.

⁵¹ *United States v. Davis*, 73 M.J. 268 (C.A.A.F. 2014). See RCM 920(e)(3)(outlining that “instructions of findings shall include: . . . (3) [a] description of any special defense under R.C.M. 916 in issue.”)

⁵² *Davis*, 73 M.J. at 269-70.

⁵³ *Id.* at 270.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 272.

⁵⁷ *Id.* at 272-73.

⁵⁸ *Id.* at 273.

⁵⁹ *Id.* at 272, fn. 5 (citations omitted).

⁶⁰ *Id.* at 273.

⁶¹ *Id.* at 271.

⁶² *Id.*

person to leave after allowing a reasonable time period for the person to leave.⁶³ The CAAF, holding the military judge's error harmless beyond a reasonable doubt, determined a rational panel could not have found the accused's actions reasonable under either theory.⁶⁴ In making its ruling the CAAF not only relied on a review of the evidence but also noted that the military judge had given a closely aligned self-defense instruction which the panel rejected.⁶⁵

Military judges must remain mindful of the *sua sponte* obligation to instruct on special (affirmative) defenses in the absence of a trial defense counsel request or a specific listing of that defense in RCM 916. "Some evidence" presented on a special defense, without consideration of the source or credibility, will trigger the need for a possible *sua sponte* instruction by the military judge after a discussion with the defense counsel regarding the proposed instruction.

Insanity Defense versus Involuntary Intoxication

While the defense of lack of mental responsibility (more commonly known as the insanity defense) is an affirmative defense,⁶⁶ it is rarely successfully asserted. One need not think long or hard to recall individuals for whom the defense has not been successful—Jeffrey Dahmer,⁶⁷ Ted Bundy,⁶⁸ David Berkowitz (also known as the "Son of Sam")⁶⁹—just to name a few.

Like many others, the accused in *United States v. MacDonald*⁷⁰ was ultimately unsuccessful at asserting the insanity defense. However, the evidence presented in *MacDonald* also raised the defense of involuntary intoxication. The military judge declined to give an involuntary intoxication instruction, finding that the instruction for lack of mental responsibility was sufficient.⁷¹ On appeal, the CAAF addressed the interesting issue of

whether the test for the insanity defense and the test for the defense of involuntary intoxication are substantially the same or, at a minimum, sufficiently similar.⁷²

Private First Class George MacDonald began taking the smoking cessation drug, Chantix, one month prior to attacking and fatally stabbing another Soldier.⁷³ The attack was completely unprovoked. After he was apprehended, the accused waived his rights and admitted stabbing the Soldier. In his confession, he stated that he "was someone else, something was wrong," that he "wanted[ed] help," . . . [this] wasn't me."⁷⁴

The defense theory of the case was that Chantix was a key factor in the accused's "homicidal outburst."⁷⁵ At the time that the Food and Drug Administration (FDA) approved Chantix in May 2006, the most common side effects were nausea, changes in dreams, constipation, gas, and vomiting.⁷⁶ In November 2007, the FDA issued an update stating that "suicidal thoughts and aggressive and erratic behavior" had been reported in Chantix patients.⁷⁷ The warnings continued to escalate⁷⁸ and culminated in the FDA issuing a Black Box warning⁷⁹ in July 2009 stating that all patients taking Chantix should be watched for

⁷² The granted issues were as follows:

Whether the Army Court of Criminal Appeals erred in determining that the military judge's error in quashing a subpoena issued to Pfizer, Inc., to produce relevant and necessary documents regarding clinical trials, adverse event reports, and post-market surveillance of the drug varenicline was harmless beyond a reasonable doubt.

Whether the military judge abused his discretion in denying a defense requested instruction on involuntary intoxication, and erred in failing to instruct the members on the effect of intoxication on appellant's ability to form specific intent and premeditation.

Id. at 427.

The CAAF decided this case on Issue II and did not reach Issue I. *Id.*

⁷³ *Id.* at 429. At the time of the attack, the accused was just 19 years old. He had been selected for an appointment to the United States Military Academy Preparatory School and had no history for violent behavior. The accused did not even know the victim.

⁷⁴ *Id.* at 429.

⁷⁵ *Id.* at 431.

⁷⁶ *Id.* at 430.

⁷⁷ *Id.*

⁷⁸ In May 2008, the FDA issued another warning urging patients to "stop taking Chantix and to call their doctor right away" if they noticed "agitation, depressed mood, or changes in behavior" that were not typical. It was also noted that Chantix may worsen current psychiatric illness and cause old psychiatric illnesses to reoccur." *Id.*

⁷⁹ The Black Box warning is the strongest FDA warning level before a drug is pulled from the market. *Id.* at 431.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 273.

⁶⁶ An affirmative defense does not deny "that the accused committed the objective acts constituting the offense charged" but denies "wholly or partially, criminal responsibility for those acts." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(a) (2012).

⁶⁷ *Other Notorious Insanity Cases*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/other.html>.

⁶⁸ *Ted Bundy Biography*, BIO., <http://www.thebiographychannel.co.uk/biographies/ted-bundy.html>.

⁶⁹ *Other Notorious Insanity Cases*, *supra* note 66.

⁷⁰ 73 M.J. 426 (C.A.A.F. 2014).

⁷¹ *Id.* at 433-34.

neuropsychiatric symptoms and that patients had reported “changes in mood (including depression and mania), psychosis, hallucinations, paranoia, delusions, homicidal ideation, hostility, agitation, [and] anxiety”⁸⁰

At trial, it was uncontroverted that the accused had Chantix in his system at the time of the stabbing.⁸¹ The defense called several expert witnesses to establish the defense.⁸² The most compelling expert testimony was testimony that the accused was suffering from “substance intoxication” caused by Chantix which caused him to have the equivalent of a psychotic break at the time that he committed the offense.⁸³

Based on the evidence presented, the defense requested an instruction on involuntary intoxication.⁸⁴ Both the defense and the government proposed an involuntary intoxication instruction, but the military judge declined to give such an instruction, finding that his instruction on mental responsibility was sufficient.⁸⁵

A panel convicted the accused of all charges and sentenced him to a reprimand, reduction to E-1, total forfeitures, confinement for life without eligibility for parole, and a dishonorable discharge.⁸⁶ The Army Court of Criminal Appeals (ACCA) found the military judge erred in failing to give the instruction but that the error was harmless because the military judge’s instruction on mental responsibility and partial mental responsibility were sufficiently equivalent to the instruction on involuntary intoxication.⁸⁷

The CAAF agreed with the ACCA and found that the military judge had a *sua sponte* duty to instruct on the affirmative defense of involuntary intoxication but disagreed

with the ACCA’s determination that the error was harmless.⁸⁸

In arguing to the CAAF, the government relied on *United States v. Hensler*⁸⁹ wherein the CAAF stated “[i]nvoluntary intoxication is treated like legal insanity” and “is defined in terms of lack of mental responsibility”⁹⁰ and argue that the tests for mental responsibility and involuntary intoxication are the same. However, the CAAF found that the facts of *Hensler*⁹¹ were dissimilar to the facts in *MacDonald*.⁹²

The CAAF’s analysis really turned on the authority behind *Hensler*, *United States v. F.D.L.*,⁹³ which established a two-part test for involuntary intoxication: “First, that there was an involuntary ingestion of an intoxicant. And second, due to this ingestion, [the] defendant was unable to appreciate the nature and quality or wrongfulness of his acts.”⁹⁴

In applying this two-part test, the CAAF easily found that the accused’s ingestion had been involuntary. Chantix was a medically prescribed drug and there was no evidence to show that he should have been aware of its side effects in taking the drug.⁹⁵ Just as easily, the CAAF found that there was some evidence that the accused did not appreciate the nature and quality of his acts. Several experts testified that the accused was “under the influence of a drug” and several witnesses testified regarding his disposition during the stabbing.⁹⁶

The CAAF reasoned that the defense of lack of mental responsibility is “substantially different” from the defense of involuntary intoxication.⁹⁷ The former requires that the

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* One forensic psychiatrist testified that Chantix raises the level of dopamine in the brain and “probably has one of the most profound effects on human emotion and behavior.” *Id.* He further elaborated that increases in dopamine can cause agitation, irritability, anxiety, depression and that if you “keep turning it up and up you can get manic; keep turning it up and up you can get psychotic,” and that the effects are worse if the patient has underlying mental health issues. *Id.* Another expert testified that the accused had a schizoid personality that predated the stabbing. There was further testimony that the Department of Defense and other federal agencies had banned the use of Chantix by aircraft personnel. *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* The military judge reasoned that Chantix was just an explanation for his mental condition and that it did not make a difference whether the accused’s mental condition was caused by Chantix or not.

⁸⁶ *Id.* at 434.

⁸⁷ See *id.* at 428 and 435.

⁸⁸ *Id.* at 435.

⁸⁹ 44 M.J. 184 (C.A.A.F. 1996).

⁹⁰ *Id.* at 437 (quoting *Hensler*, 44 M.J. at 188).

⁹¹ The accused in *Hensler* was charged with conduct unbecoming an officer and fraternization. The accused argued that the combination of drugs, the introduction of alcohol, her personality traits, and her depression caused her to lack mental responsibility. The military judge did not instruct on the defense of involuntary intoxication but gave the standard insanity instruction. However, he tailored the instruction to reference involuntary intoxication and he also instructed that “alcoholism and chemical dependency” is a medically recognized disease. The CAAF affirmed the findings and sentence in *Hensler*’s case. *Id.* at 436-37.

⁹² In *MacDonald*, the military judge referenced neither “involuntary intoxication” nor the effects of Chantix in his instructions. 73 M.J. 426.

⁹³ 836 F.2d 1113 (8th Cir. 1988).

⁹⁴ *MacDonald*, 73 M.J. at 437 (referencing *F.D.L.*, 838 F.2d at 1117).

⁹⁵ *Id.* at 437-38.

⁹⁶ *Id.* at 438.

⁹⁷ *Id.*

accused suffered from some mental disease or defect while the latter requires that the accused involuntarily ingested an intoxicant.⁹⁸ There was no way to determine if the panel even considered the second prong (i.e., that the accused was unable to appreciate the nature and quality or wrongfulness of his acts) since the panel, as instructed, may not have determined that the accused suffered from a serious mental disease or defect at the time of the stabbing.⁹⁹

The CAAF also found that the evidence of the accused's ability to form premeditated intent was not so overwhelming that the accused was not prejudiced by the error.¹⁰⁰ The CAAF concluded that the military judge erred and that the error was not harmless beyond a reasonable doubt. The findings and sentence were set aside.¹⁰¹

MacDonald is helpful on several fronts. One, it clarifies the CAAF's holding in *Hensler*, and leaves no doubt that the tests for mental responsibility and involuntary intoxication are substantially different. Second, it reminds counsel that each side has a vested interest in ensuring that the military judge properly instructs the panel members and that counsel can help the military judge by proposing tailored instructions. Third, military judges are reminded that they must take great care in tailoring their instructions to the specific case.

III. Evidence

"Human Lie Detector" Testimony

The CAAF again held that a military judge's failure to provide a curative instruction on human lie detector testimony required reversal.¹⁰² In *United States v. Knapp*, an agent from the Air Force Office of Special Investigation (AFOSI) testified regarding his investigative interview of the accused.¹⁰³ The accused initially told the AFOSI agent that the victim consented to sexual activity but, in the middle of the sexual encounter, she lost consciousness and he

immediately stopped touching her.¹⁰⁴ Multiple hours into the investigative interview, the accused told the AFOSI agent that the victim was unconscious at the beginning of the sexual activity and did not consent.¹⁰⁵ The defense asserted at trial that the victim consented and the accused only "confessed" to the AFOSI agent because of a prolonged investigative interview.¹⁰⁶

The AFOSI agent testified on direct and cross-examination that he was "trained to pick up on nonverbal discrepancies" and the accused's nonverbal cues during the interview indicated deception.¹⁰⁷ Defense counsel did not object to this testimony.¹⁰⁸ On redirect examination, the AFOSI agent said "large red sun blotches" appeared on the accused's face when he spoke about the "actual incident."¹⁰⁹ At this time, defense counsel made a human lie detector objection.¹¹⁰ The military judge overruled the objection after obtaining the trial counsel's agreement to not "draw an inference from the response."¹¹¹ Although the military judge provided the panel with the instruction regarding the general credibility of witnesses, the military judge at no stage of the trial addressed or provided an instruction regarding the AFOSI agent's "human lie detector" testimony.¹¹²

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 35.

¹⁰⁷ *Id.* The AFOSI agent stated the accused would not make eye contact with the agent so it indicated to the agent that some form of deception was going on. *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* The military judge gave the standard Benchbook Instruction 7-7-1, Credibility of Witnesses, to the panel. The military judge stated:

You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness's intelligence, ability to observe and accurately remember, sincerity, and conduct in court, friendships and prejudices. Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side; and how each witness might be affected by the verdict. In weighing discrepancies between witnesses, you should consider whether they resulted from an innocent mistake or a deliberate lie. Taking all these matters into account, you should then consider the probability of each witness's testimony and the inclination of the witness to tell the truth. The believability of each witness's testimony should be your guide in evaluating testimony, not the number of

⁹⁸ *Id.*

⁹⁹ *Id.* at 438-39.

¹⁰⁰ *Id.* at 439. The same evidence that the Government argued was indicative of mental responsibility (i.e., that the accused carried a double-edged knife, fleeing the scene, showering after the attack, etc.) could also be construed as evidence of an "uncontrolled 'homicidal ideation'" induced by Chantix.

¹⁰¹ *Id.*

¹⁰² *United States v. Knapp*, 73 M.J. 33 (C.A.A.F. 2014). See *United States v. Kasper*, 58 M.J. 314 (C.A.A.F. 2003) (holding the government's introduction of "human lie detector" testimony regarding the accused through a law enforcement agent was plain error because the accused's credibility was a central issue).

¹⁰³ *Id.* at 34.

Although the defense objected during redirect examination, the CAAF held the defense's failure to timely object during the direct and cross-examination of the AFOSI agent warranted a plain error review.¹¹³ The CAAF, in holding that plain error existed, asserted its precedent that "[i]f a witness offers human lie detector testimony, the military judge must issue prompt cautionary instructions to ensure that the members do not make improper use of such testimony."¹¹⁴ The court further found material prejudice to the accused's substantial rights because the ultimate issue of the victim's consent centered on the accused's truthfulness and his testimony had been improperly discredited by the AFOSI agent's assertion that his expertise allowed him to discern that the accused was lying from his demeanor.¹¹⁵ In reversing the case, the CAAF focused on the AFOSI agent's improper usurpation of the panel's mandate to determine a witness's credibility and truthfulness.¹¹⁶

From *Knapp* we glean that, if a law enforcement agent's testimony refers to the accused's truthfulness and the military judge fails to instruct the panel to disregard "human lie detector" testimony, it appears the CAAF will find plain error and prejudice. Prior CAAF precedent combined with the *Knapp* ruling creates a perception that this type of error is plain and per se prejudicial.¹¹⁷ Judge Baker, in his dissent in *Knapp*, raises the issue of the CAAF's apparent trend to find this testimony per se prejudicial stating "unless we are going to treat the introduction of human lie detector evidence as per se prejudicial or structural in nature, which we have not before done, I do not see how the introduction of this evidence materially prejudiced a substantial right of [this] accused."¹¹⁸ Judge Baker asserted that the following case facts did not warrant a finding of material prejudice: (1) the accused confessed; (2) the evidence corroborating the confession was overwhelming; (3) the defense introduced the entire investigative interview video where the AFOSI agents suggested on multiple occasions that they did not believe the accused; (4) the accused testified allowing the members to judge his credibility and demeanor; and (5) the government did not reference the AFOSI's testimony in closing argument.¹¹⁹ With the arguable weight of those facts

against a finding of material prejudice, *Knapp* further exemplifies the CAAF's lack of tolerance for "human lie detector" testimony.

Military practitioners must closely monitor a law enforcement agent's testimony for any potential "human lie detector" testimony. The CAAF has recognized that "[w]e are skeptical about whether any witness could be qualified to opine as to the credibility of another."¹²⁰ Military practitioners should also remember that "human lie detector" testimony is not only potentially problematic when offered by a lay witness law enforcement agent but also if it is offered by an expert witness.¹²¹

IV. Argument

Prosecutorial Misconduct

*The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.*¹²²

In *United States v. Frey*,¹²³ the trial counsel, attempting to prosecute his case with earnestness and vigor as described by the Supreme Court above, unintentionally struck a foul blow by implying that the accused was a serial child molester. Unfortunately, the military judge's instruction to the panel only compounded the error.

A panel found Staff Sergeant Frey guilty of sexual contact and of engaging in a sexual act with RK, a child who

witnesses called. These rules apply equally to the testimony given by the accused.

Id.

¹¹³ *Id.*

¹¹⁴ *Id.* (citation omitted).

¹¹⁵ *Id.* at 37.

¹¹⁶ *Id.*

¹¹⁷ See *United States v. Knapp*, 73 M.J. 33 (C.A.A.F. 2014); *United States v. Kasper*, 58 M.J. 314 (C.A.A.F. 2003).

¹¹⁸ *Knapp*, 73 M.J. at 38.

¹¹⁹ *Id.*

¹²⁰ *United States v. Petersen*, 24 M.J. 283, 284 (C.M.A. 1987).

¹²¹ See *United States v. Brooks*, 64 M.J. 325 (C.A.A.F. 2007) (finding the government expert's testimony suggesting there was better than a ninety-eight percent probability that the child sexual assault victim was telling the truth was the functional equivalent of vouching for the victim's truthfulness, implicating the very concerns underlying the prohibition against human lie detector testimony). See also *United States v. Birdsall*, 47 M.J. 404 (C.A.A.F. 1998); *United States v. Palmer*, 33 M.J. 7 (C.M.A. 1991); *United States v. Petersen*, 24 M.J. 283 (C.M.A. 1987).

¹²² *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

¹²³ 73 M.J. 245 (C.A.A.F. 2014).

had not attained twelve years.¹²⁴ During the defense sentencing argument, the counsel argued that there was no evidence that the accused had ever committed a similar crime to the charged offense.¹²⁵ In rebuttal argument, the trial counsel stated that “the Defense Counsel said, ‘there’s no evidence before you that he’s ever done anything like this before.’ And there is no evidence before you. But think what we know, common sense, ways of the world, about child molesters.”¹²⁶

Defense counsel objected and the trial counsel stated that “I’m just arguing ways of the world.”¹²⁷ The military judge overruled the objection. Prior to panel deliberations, the military judge reminded the members that arguments by counsel are not evidence and that the accused should only be sentenced for the crimes that he had been convicted of. But the military judge also instructed the members “it was appropriate for them to apply their ‘commonsense [sic] and knowledge of the ways of the world whether or not in your particular case that involves any implication suggested by counsel.”¹²⁸

The panel sentenced the accused to a dishonorable discharge, eight years of confinement, forfeiture of all pay and allowances, and reduction to E-1.¹²⁹ On appeal, the Air Force Court of Criminal Appeals (AFCCA) found that while the trial counsel’s argument was improper, the accused was not materially prejudiced by the improper argument.¹³⁰ The CAAF then considered whether AFCCA erred in finding the trial counsel’s argument to be harmless error.¹³¹

In examining whether the accused was prejudiced by the trial counsel’s misconduct, the CAAF considered the factors set forth in *United States v. Fletcher*¹³²: “(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction.”¹³³

The CAAF found that the misconduct was severe. The trial counsel asked that the members consider information

not in evidence to conclude that the accused was a serial child molester who would reoffend.¹³⁴ The CAAF concluded that “one is hard pressed to imagine many statements more damaging”¹³⁵ The first *Fletcher* factor favored the accused.

Turning to the second *Fletcher* factor, the CAAF found that the military judge’s curative instructions actually made matters worse.¹³⁶ In overruling the defense objection and in reiterating to them that it was “appropriate for them to ‘apply their commonsense [sic] and knowledge of the ways of the world,’”¹³⁷ the military judge invited the members to substitute their own knowledge for evidence.¹³⁸ Furthermore, the CAAF noted that evidence of recidivism requires expert testimony, empirical research, etc., and cannot be resolved by common sense or knowledge of the ways of the world.¹³⁹ The second *Fletcher* factor also favored the accused.

In examining the last *Fletcher* factor, the CAAF concluded that the weight of the evidence supporting the sentence weighed heavily in the government’s favor.¹⁴⁰ The maximum period of confinement for the accused’s offenses was life without parole. The panel sentenced the appellant to eight years confinement.¹⁴¹ Notwithstanding the improper comment, the trial counsel’s overall argument was “powerful and proper.”¹⁴² Finally, in the CAAF’s estimation, none of the accused’s sentencing evidence could mitigate RK’s testimony or the actual note she wrote to her father concerning the offenses that was admitted into evidence. The CAAF was confident that the accused was sentenced based on the evidence presented and not on the trial counsel’s improper comments.¹⁴³

Although the central issue in *Frey* dealt with prosecutorial misconduct, *Frey* is also instructive on exactly what the term “ways of the world” actually encompasses. After all, everyone has a different life experience; a different lens through which the world is viewed; a different take on things. From *Frey*, one gleans that the term “ways of the

¹²⁴ *Id.*

¹²⁵ *See id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ The CAAF agreed with the AFCCA that the trial counsel’s argument was improper. *Id.* at 249.

¹³² 62 M.J. 175, 184 (C.A.A.F. 2005).

¹³³ *Frey*, 73 M.J. at 249 (quoting, *Fletcher*, 62 M.J. at 184.)

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 249-50.

¹³⁸ *Id.* at 250.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 251.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

world’ refers to court members’ evaluation of lay testimony, defenses, and witness credibility.”¹⁴⁴

*United States v. Hornback*¹⁴⁵ is another case this term that dealt with prosecutorial misconduct. In *Hornback*, the military judge’s “early and often” actions and instruction to the panel ameliorated prosecutorial misconduct.

Private Hornback pled not guilty to using spice, using Xanax, false official statement, larceny, solicitation, using provoking speech, and communicating threats.¹⁴⁶ To prove its case, the government called eleven witnesses. Out of these eleven witnesses, the government elicited or attempted to elicit improper character evidence testimony from nine of them.¹⁴⁷ Over the course of the trial, the military judge held multiple Article 39a sessions addressing the impermissible questioning. He even allowed the trial counsel to practice her questioning outside of the presence of panel members. At some point, he specifically told the trial counsel what questions she could ask. But despite the military judge’s admonitions and instructions, the trial counsel continued to ask impermissible questions. Each time, the military judge instructed the panel to disregard the witnesses’ answer.¹⁴⁸

During closing argument, the trial counsel argued that the “[t]he accused is like a criminal infection that is a plague to the Marine Corps. . . . [T]he command has taken . . . action in the form of these charges before you . . . The government is confident that you will find him guilty beyond a reasonable doubt.”¹⁴⁹ The military judge *sua sponte* stopped the trial counsel and had the panel agree and respond affirmatively that they understood and that the convening authority was not expecting a certain outcome in the accused’s case and that they would disregard the impermissible character evidence heard over the course of the trial.¹⁵⁰

The panel sitting as a special court-martial convicted the accused of one specification each of using spice, signing a false official statement, and larceny of military property. On appeal, the CAAF considered whether prosecutorial misconduct occurred, and if so, was the accused prejudiced?

The CAAF found that the trial counsel’s “repeated and persistent” elicitation of improper testimony despite repeated

and persistent defense objections and admonitions by the military judge amounted to prosecutorial misconduct even though she had no malicious intent.¹⁵¹

Similar to *Frey*, the CAAF examined the *Fletcher* factors¹⁵² in determining whether the trial counsel’s arguments prejudiced the accused’s substantial rights.

The CAAF found the trial counsel’s misconduct to be “sustained and severe,” but that the military judge’s curative measures of calling multiple Article 39(a), UCMJ sessions, repeatedly issuing curative instructions, and having the members agree that they would follow his instructions, ameliorated the trial counsel’s misconduct.¹⁵³

In examining the weight of the evidence supporting the conviction, the CAAF looked at what the accused was ultimately convicted of—signing a false official statement, larceny, and using spice.¹⁵⁴ The evidence regarding the false official statement and larceny, which were unrelated to the drug charges, was strong while the evidence regarding the spice use was not as strong but was still substantial.¹⁵⁵ The CAAF felt quite confident that the accused was not prejudiced, particularly since the panel appeared to follow the military judge’s instruction in finding the accused not guilty of other weaker drug charges.¹⁵⁶

United States v. Hornback has a lesson for everyone—“act early and often.” Judges act early and often to ameliorate misconduct by counsel.¹⁵⁷ Defense counsel object early and as often as needed. Do not wait for the military judge to cure a defect; if you do, the issue may be forfeited on appeal.¹⁵⁸ Trial counsel, seek help early and often before trial, particularly if inexperienced. Supervisors, mentor your counsel early and often. Do not leave your counsel, particularly the inexperienced, alone to flounder

¹⁵¹ *Id.* at 160.

¹⁵² *Fletcher*, 62 M.J. 175. The *Fletcher* factors are: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction. *Id.* at 184.

¹⁵³ *Hornback*, 73 M.J. at 161.

¹⁵⁴ *See id.*

¹⁵⁵ *Id.* The Government’s first two witnesses testified that they saw the accused smoking what the accused identified as spice.

¹⁵⁶ *Id.* The accused was acquitted of wrongfully using Xanax, larceny (different specification), solicitation, using provoking speech, and communicating threats. *Id.* at 156.

¹⁵⁷ *See id.* at 161 (where the CAAF commends the military judge for leaving “no stone unturned in ensuring that the members considered only admissible evidence” and for acting “early and often to ameliorate trial counsel’s misconduct.” *Id.*)

¹⁵⁸ *See id.* at 159 (On appeal, the accused argued that the trial counsel committed additional instances of misconduct during her opening statement and closing argument although the defense did not object at trial. The CAAF found that the defense had not shown that those statements constituted plain error.)

¹⁴⁴ *Id.* at 250. So for instance, based on the ways of the world, one can infer that a punch to the head can cause serious bodily injury while one cannot infer that prior drug use indicates another drug use.

¹⁴⁵ 73 M.J. 155 (C.A.A.F. 2014).

¹⁴⁶ *Id.* at 156.

¹⁴⁷ *Id.*

¹⁴⁸ *See id.* at 158-59.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

during a trial.¹⁵⁹

V. Sentencing

Rule for Courts-Martial 1001(c)(1) allows the defense to present matters in rebuttal and in extenuation and mitigation.¹⁶⁰ One common vehicle for eliciting such evidence is through the accused's unsworn statement. Often in cases involving sexual assault, an accused will mention in his unsworn statement the fact that he will have to register as a sex offender pursuant to Department of Defense Instruction 1325.07.¹⁶¹ While the right of allocution is virtually unfettered, a military judge may place collateral consequences¹⁶² mentioned during an accused's unsworn statement into the proper context for members.¹⁶³ In *United States v. Talkington*,¹⁶⁴ the CAAF addresses whether the military judge erred in instructing the panel that sex offender registration is a collateral matter that it should essentially disregard in its sentencing deliberations.

An enlisted panel found Airman First Class Talkington guilty of attempted aggravated sexual assault and attempted abusive sexual contact.¹⁶⁵ During his unsworn statement, the accused stated, "I will have to register as a sex offender for life. . . . I am not very sure what sort of work I can find."¹⁶⁶

The military judge instructed the panel, *inter alia*: (1) evidence of possible sex offender registration is inadmissible except in an unsworn statement, (2) sex offender registration is a collateral consequence that should not be a part of their deliberations, and (3) use of this information is problematic.¹⁶⁷ The defense counsel objected to the instruction on the grounds that the instruction went too far in that it implied that the panel members should give evidence

of possible sex offender registration "very little weight"¹⁶⁸ and that *United States v. Grill*¹⁶⁹ said nothing about giving the panel a limiting instruction regarding collateral matters addressed in the accused's unsworn statement. The military judge overruled the objection.¹⁷⁰ The panel sentenced the accused to eight months confinement, a bad-conduct discharge, total forfeitures, and reduction to E-1. The AFCCA affirmed the findings and the sentence.¹⁷¹

On appeal to the CAAF, the defense argued that the military judge abused his discretion in instructing the panel members that sex offender registration was irrelevant in fashioning its sentence. First, defense argued that sex offender registration is no longer a collateral matter under the recent CAAF case, *United States v. Riley*,¹⁷² and that consideration of sex offender registration was now required.¹⁷³ In *Riley*, the CAAF held that "in the context of a guilty plea inquiry, sex offender registration consequences can no longer be deemed a collateral consequence of the plea."¹⁷⁴

The defense urged the CAAF to extend their holding in *Riley* to apply to sentencing, but the CAAF reasoned that *Riley* was different: it was a guilty plea and the dispositive issue was whether her plea was a knowing plea. The CAAF declined extending its holding in *Riley*, finding no reason to do so, since nothing about the sentence impacted the requirement to register as a sex offender once convicted.¹⁷⁵

Second, the defense argued that the effect of sex offender registration, much like the impact of a punitive discharge on retirement benefits, is "a direct and proximate consequence of the sentence"¹⁷⁶ and that the military judge abused his discretion by instructing the members to disregard it as a collateral matter. But again, the CAAF disagreed, finding a major difference between the two. The loss of retirement benefits is a possible result of the sentence

¹⁵⁹ See *id.* at 160. The CAAF intimates that the trial counsel's superiors should have been present in court to assist her (stating "[a]lthough one may wonder what her supervisors were doing during the course of Appellant's trial")

¹⁶⁰ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001 (2012).

¹⁶¹ U.S. DEP'T OF DEF., INSTR. 1325.07 ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY enclosure 2, appendix 4 (March 2013).

¹⁶² A collateral consequence is "[a] penalty for committing a crime, in addition to the penalties included in the criminal sentence. *United States v. Miller*, 63 M.J. 452, 457 (C.A.A.F. 2006).

¹⁶³ See *United States v. Grill*, 48 M.J. 131-32 (C.A.A.F. 1998).

¹⁶⁴ 73 M.J. 212 (C.A.A.F. 2014).

¹⁶⁵ *Id.* The accused touched the victim's breast and penetrated her vagina while he believed she was sleeping.

¹⁶⁶ *Id.* at 213.

¹⁶⁷ *Id.* at 214.

¹⁶⁸ *Id.*

¹⁶⁹ *Grill*, *supra* note 113. In *United States v. Grill*, the CAAF held that it was error for the military judge to refuse to allow the appellant to mention in his unsworn statement that his co-conspirators received leniency.

¹⁷⁰ *Talkington*, 73 M.J. at 214.

¹⁷¹ *Id.*

¹⁷² 72 M.J. 115, 116-17 (C.A.A.F. 2013). In *Riley*, the accused pled guilty to kidnapping, not knowing and not being advised that she would have to register as a sex offender. The CAAF found that her plea was not a "knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences" and found her plea to be improvident.

¹⁷³ *Talkington*, 73 M.J. at 216.

¹⁷⁴ *Id.* (quoting *Riley*, 72 M.J. at 121.).

¹⁷⁵ *Id.* at 216-17.

¹⁷⁶ *Id.* at 215.

whereas sex offender registration is a result of the conviction itself. No matter the sentence, the accused would still have to register as a sex offender once he stood convicted.¹⁷⁷

Talkington is important because it confirms for practitioners that sex offender registration remains a collateral matter outside the context of a guilty plea inquiry. While an accused may mention the requirement to register as sex offender during his unsworn statement, the military judge, in his discretion, may give an instruction to place the unsworn statement in its proper context.¹⁷⁸ Practitioners should further note that the *Benchbook* instruction regarding an accused's unsworn statement has been updated to conform to the CAAF's holding in *Talkington*.¹⁷⁹

VI. National Defense Authorization Act for Fiscal Year 2014

In addition to the CAAF and courts of criminal appeals' jurisprudence, the NDAA for FY 2014¹⁸⁰ also impacted the ever-varying landscape of instructions. Prior to the NDAA for FY 2014, the convening authority had the power under Article 60, UCMJ, to lessen the findings or sentence in any case.¹⁸¹ Now, in light of the increased scrutiny of the military's processing of sexual assault cases, the NDAA for FY 2014 greatly limits these powers. For offenses occurring on or after June 24, 2014, the convening authority cannot dismiss an offense nor reduce the offense to a lesser-included offense (a) if the offense carries an authorized maximum punishment greater than two years confinement, (b) if the adjudged sentence includes a punitive discharge or confinement greater than six months, or (c) if the offense involved is rape, forcible sodomy, or bestiality.¹⁸²

The NDAA for FY 2014 also imposes a mandatory minimum sentence of a dismissal or dishonorable discharge for penetrative sexual offenses: rape or sexual assault of a child, forcible sodomy, and any attempts of the aforementioned.¹⁸³ If the offense carries a mandatory minimum sentence, the convening authority cannot disapprove, commute, or suspend the sentence unless the trial counsel recommends such because of the accused's substantial assistance in another case. In these cases, the

convening authority may only reduce a dishonorable discharge to a bad-conduct discharge.¹⁸⁴

All parties should be vigilant in ensuring that the convening authority has not overstepped these new limits particularly when negotiating pretrial agreements. Ultimately, military judges bear the responsibility of ensuring that all parties have a shared understanding of the operation of the quantum on the sentence. The *Benchbook* has been updated with a note that reminds military judges of the new limits on a convening authority's power and also prompts them to thoroughly review the terms of the quantum with the accused during the providence inquiry.¹⁸⁵

Other updates to the *Benchbook* based on the NDAA for FY 2014 include the addition of mandatory minimum sentences and associated references where applicable (see above discussion regarding mandatory discharges),¹⁸⁶ as well as the repeal of the offense of consensual sodomy, while including an instruction on the newly created offense of bestiality.¹⁸⁷

VII. Conclusion

The 2014 term of court covered a variety of instructions—from common instructions on attempt, the scope of unsworn statements, and prosecutorial misconduct—to the uncommon instructions on involuntary intoxication and defense of property. The 2014 term of court also clarified important, recurring issues like the fact that sex offender registration remains a collateral matter and that the “ways of the world” does not mean that panel members can substitute their own life experiences for the evidence presented or not presented. Additionally, the 2014 NDAA impacted instructions by limiting the convening authority's previously unfettered authority under Article 60, UCMJ, by establishing mandatory minimum sentences in some cases, and by repealing an old offense while creating a new one.

Nevertheless, this annual installment of developments in instructions would be remiss if it did not remind practitioners and judges alike of the one principle that

¹⁷⁷ *Id.* at 217.

¹⁷⁸ *Id.* at 218.

¹⁷⁹ BENCHBOOK, *supra* note 3, para. 2-6-11.

¹⁸⁰ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66.

¹⁸¹ See UCMJ art. 60 (2012).

¹⁸² See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702.

¹⁸³ See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1705.

¹⁸⁴ See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702.

¹⁸⁵ See BENCHBOOK, *supra* note 3, para. 2-4-2 and 2-6-24..

¹⁸⁶ See BENCHBOOK, *supra* note 3, para. 2-2-4, 2-5-1, 2-5-19, 2-5-22, and 8-2-4.

¹⁸⁷ See BENCHBOOK, *supra* note 3, para. 3-51-1, 3-51-2, and 3-51-3. The *Benchbook* also includes a change regarding forcible sodomy offenses occurring after December 26, 2013 based on the NDAA for FY 2014. The NDAA for FY 2014 states forcible sodomy can occur either “by force or without consent.” See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1707. This change allows a forcible sodomy offense occurring after December 26, 2013 to be charged as occurring either “by force and without consent,” or “by force,” or “without consent.” See BENCHBOOK, *supra* note 3, para. 3-51-2.

remains constant: the importance of the *Benchbook*. In typical fashion, many of the developments discussed in this article have already been addressed by appropriate changes in the *Benchbook*. Adherence to the *Benchbook* increases the likelihood that those who follow it can successfully navigate the ever-varying landscape of instructions to members.¹⁸⁸

¹⁸⁸ See *Annual Review of Developments in Instructions*, Colonel R. Peter Masterton, Colonel David Robertson, and Colonel Wendy P. Daknis, ARMY LAW, Dec 2013 at 14.

A Whole Other Matter: The New Article 60(d) and Handling Victim Submissions During Clemency

Major Angela D. Swilley*

“In any case in which findings and sentence have been adjudged for an offense that involved a victim, the victim shall be provided an opportunity to submit matters for consideration by the convening authority or by another person authorized to act under this section before the convening authority or such other person takes action under this section.”¹

I. Introduction

Welcome to Post-Trial! If you are reading this, you have probably just begun your new job as a Chief of Military Justice.² Speaking for the many who have walked in those shoes, congratulations and deepest sympathies. Gone now are the days when, as a trial counsel, you closed your file at the end of a successful trial, walked triumphantly back to your office, and began working on your next legal conquest, blissfully unaware that courts-martial do not end at the last tap of the gavel. Instead, you are now responsible for the next phase of the court-martial process,³ a phase that is extremely important,⁴ little understood, closely scrutinized,⁵

and quickly changing.⁶ So, roll up your sleeves and get to work!

Called an accused's best opportunity for sentence relief,⁷ post-trial practice gives the convening authority the ability to take action on the outcome of a court-martial.⁸ So important is post-trial processing that the Court of Appeals for the Armed Forces (CAAF) has treated it with equal importance to that of pre-trial processing and created a presumption of unreasonable delay when initial action occurs more than 120 days after trial.⁹

Prior to the enactment of the National Defense Authorization Act for Fiscal Year 2014 (2014 NDAA)¹⁰ and its changes to Article 60, Uniform Code of Military Justice (UCMJ),¹¹ convening authorities took action on court-martial sentences after considering input from the Staff Judge Advocate,¹² and any written matters submitted by an accused.¹³ Now, convening authorities must provide the victims of offenses the opportunity to submit matters for their consideration,¹⁴ and they must consider matters

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¹ UCMJ art. 60(d)(1) (2013).

² Although this article is designed to assist Chiefs of Military Justice in implementing the addition of Article 60(d), UCMJ and RCM 1105A into post-trial processing, the information contained in this article may also assist trial and defense counsel, special victim counsel, staff judge advocates, or any other military justice practitioner understand this new procedure.

³ See Stephen J. Carpenter Jr., *Federal Criminal Practice: A Military Justice Primer*, WASH. ST. BAR NEWS (Sept. 2005). As the Military Justice Manager, the Chief of Military Justice is also responsible for the responsibilities of the Trial Counsel. See generally, MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 502(d)(5), 502(f) discussion, 1103(b)(1) (2012) [hereinafter MCM].

⁴ U.S. ARMY COURT OF CRIMINAL APPEALS, THE POST-TRIAL HANDBOOK, Forword (2012).

⁵ See *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006); see also *United States v. Johnson*, 51 M.J. 227 (C.A.A.F. 1999).

⁶ See Major Brent A. Goodwin, *Congress Offends Eisenhower and Cicero by Annihilating Article 60, UCMJ*, ARMY LAW., July 2014, at 23, 24.

⁷ *Johnson*, 51 M.J. at 229.

⁸ 10 U.S.C. §860(c)(2) (2012). Although convening authorities must only specifically act on the sentence adjudged, they may also disapprove or mitigate some findings made during trial. 10 U.S.C. §860(c)(3) (2012).

⁹ *Moreno*, 63 M.J. at 140. The court held that under the 120-day standard, it will presume that any delay from completion of trial until time of initial action over 120 days is unreasonable, which triggers the four-part analysis of *Barker v. Wingo*, 404 U.S. 514, 530 (1972). *Id.* The presumption is rebuttable so long as the government presents evidence that proves the delay in processing is reasonable. *Id.* Also indicative of the importance of post-trial processing, the court established, in addition to the 120-day trial to action standard, a more stringent, 30-day standard for delay from initial action until mailing to the Court of Criminal Appeals. *Id.*

¹⁰ National Defense Authorization Act for Fiscal Year 2014, Pub. L. 113-66, 127 Stat. 672 (2013) [hereinafter 2014 NDAA].

¹¹ *Id.* at §1702.

¹² MCM, *supra* note 3, R.C.M. 1107(b)(3)(A)(ii).

¹³ MCM, *supra* note 3, R.C.M. 1107(b)(3)(A)(iii). The convening authority was permitted to consider any matter, even those outside the Record of Trial, in determining the appropriateness of the sentence adjudged. MCM, *supra* note 3, R.C.M. 1107(3)(B)(iii).

¹⁴ 2014 NDAA, *supra* note 10, §1706. Pursuant to the newly drafted RCM 1005A, which implements the changes in Article 60(d), the trial counsel is

submitted by a victim¹⁵ prior to taking action on those offenses. This new requirement adds at least one more player to the post-trial arena, creates another timeline to calculate, and forces government counsel to consider a variety of additional factors, all without easing or adjusting the 120-day standard created by *United States v. Moreno*.¹⁶

This paper will provide background on the new Article 60(d), UCMJ, explain the requirements of this new victim right, and discuss potential standard operating procedures (SOPs) to follow in successfully implementing these changes without greatly increasing the amount of time to take action on a court-martial. Although this new change has the ability to extend the amount of time required to get a case from authentication to action, establishing procedures to handle these new types of submissions efficiently will help mitigate this potential setback and ensure timely post-trial processing.

II. The New Article 60(d)

A. What?

The new Article 60(d) was enacted as part of the 2014 NDAA.¹⁷ The change represented a compromise between separate House of Representatives and Senate proposals to amend Article 60 to guarantee victims the right to participate in the court-martial post-trial process.¹⁸ Because of time constraints the compromise came without an opportunity for any substantive amendments or substantial floor debate.¹⁹

responsible for making all reasonable efforts to inform crime victims of this new right. Exec. Order No. 13669, 79 Fed. Reg. 34999 (June 18, 2014) [hereinafter Exec. Order].

¹⁵ *Id.*

¹⁶ 63 M.J. at 140. The court noted in its *Moreno* opinion that its establishment of the timeliness standard did not circumvent the President's ability to establish rules for courts-martial pursuant to Article 36, UCMJ. *Id.* at 141. Since *Moreno*, neither the court nor the President has modified the appellate standard created by *Moreno*. For more information on this topic see Major Jennifer L Venghaus, *Seven Years Later: The Struggle with Moreno Continues*, 217 Mil. L. Rev. 1 (Fall 2013).

¹⁷ 2014 NDAA, *supra* note 10.

¹⁸ See 159 Cong. Rec. §8548 (daily ed. Dec. 9, 2013). The Senate proposal was more broad, requiring the "complaining witness an opportunity to respond to any clemency matters submitted by an accused to the convening authority that referred to the complaining witness" as well as "an opportunity to submit matters to the convening authority in any case in which findings and sentence have been adjudged for an offense involving the complaining witness." S. Rep. No. 113-44 at 80 (2013). The House proposal was more narrow, requiring only "the complaining witness shall be provided an opportunity to submit matters for consideration by the convening authority or by another person authorized to act under this section before the convening authority or such other person takes action . . ." 113 H.R. 1960 at 110 (2013).

¹⁹ See 159 Cong. Rec. §8548 (daily ed. Dec. 9, 2013).

Consequently, practitioners can glean little guidance from the statute on how to implement this new provision.²⁰

Because crime victims have always had the ability to submit matters for consideration during the post-trial process,²¹ some commentators have called the change inconsequential, referring to parts of the new Article 60(d) as "merely a partial codification of a convening authority's existing ability to consider matters beyond the record of trial."²² However, this change did create an affirmative duty for the government to seek victim input where one did not previously exist.²³

B. Why?

The push for amendments to Article 60 began with concerns raised by recent Air Force sexual assault cases wherein convening authorities disapproved the findings and sentence in two separate courts-martial.²⁴ In the case of *United States v. Wilkerson*, the convening authority, Lieutenant General Craig Franklin set aside the conviction of an Air Force Wing Inspector General, months after a panel's findings.²⁵ Lieutenant Colonel James Wilkerson was

²⁰ Zachary D. Spilman, *2013 Changes to the UCMJ – Part 5: Post Trial Matters*, NIMJBLOG-CAAFLOG (Jan. 9, 2014), <http://www.caaflog.com/2014/01/09/2013-changes-to-the-ucmj-part-5-post-trial-matters/>. It was actually necessary to make changes in the National Defense Authorization Act for 2015 to correct technical errors contained in the 2014 version of the statute. Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 §531, 128 Stat. 3292, (2014) [hereinafter 2015 NDAA].

²¹ MCM, *supra* note 3, R.C.M. 1107(b)(3)(B)(iii); see also Zachary D. Spilman, *Not Helping: How Congressional Tinkering Harms Victims During the Post-Trial Phase of a Court-Martial*, 114 COLUM. LAW REV. 70, 70 (2014).

²² Spilman, *supra* note 21, at 78.

²³ 2014 NDAA, *supra* note 10, §1706(a). Previously, the rule, as stated in the Rules for Court-Martial (RCM), allowed convening authorities to consider any matter they considered relevant. MCM, *supra* note 3, R.C.M. 1107(b)(3)(B)(iii). However, there was nothing in either the rule or the prior version of the Uniform Code of Military Justice (UCMJ) specifically requiring that the victim of a crime be permitted to submit matters to the convening authority for consideration. See 10 U.S.C. §860 (2012); MCM, *supra* note 3, R.C.M. 1107.

²⁴ See Michael Doyle and Marisa Taylor, *Military Sexual Assault Case Triggers Political Furor*, MCCLATCHY NEWSPAPERS, Mar. 8, 2013, <http://mcclatchydc.com/2013/03/08/185271/military-sexual-assault-case-triggers.html>.

²⁵ Nancy Montgomery, *Case Dismissed Against Aviano IG Convicted of Sexual Assault*, STARS AND STRIPES, Feb. 27, 2013, <http://www.stripes.com/news/air-force/case-dismissed-against-aviano-ig-convicted-of-sexual-assault-1.209797> (last visited Mar. 13, 2015). Originally, the convening authority refused to provide an explanation for his decision. *Id.* However, later, the convening authority provided a six-page memorandum detailing his decision. Memorandum from Lt. Gen. Craig A. Franklin to Sec. Air Force Michael B. Donley (Mar. 12, 2013), available at <http://www.foia.af.mil/reading/thewilkersonfoiacase.asp> (follow "Gen Franklin's Memo" link) (last visited Mar. 13, 2015).

found guilty of abusive sexual contact, aggravated sexual assault, and conduct unbecoming an officer and a gentlemen following a sexual encounter with a female house guest while she was substantially incapacitated from alcohol.²⁶ A military panel sentenced him to confinement for one year, total forfeiture of pay and allowances, and dismissal from the service.²⁷ In a separate case, Lieutenant General Susan Helms set aside a sexual assault conviction in the case of *United States v. Herrera* months after the completion of that court-martial.²⁸ Captain Matthew Herrera was convicted of sexual assault of a female lieutenant and sentenced to 60 days of confinement, a reprimand, forfeiture of \$2,500 a month for two months, and a dismissal from the service.²⁹ He was acquitted, at the same court-martial, of a similar charge against a female staff sergeant.³⁰

One concern of lawmakers following these decisions was ensuring that victims' voices were heard when commanders were taking action on the results of a court-martial.³¹ Although the debate largely focused on victims of sexual assault, ultimately, the law applies to victims of all crimes in cases where a finding of guilt and a sentence has been adjudged.³²

C. Who?

Under Article 60(d), a victim is:

[A] person who has suffered a direct physical, emotional, or pecuniary harm as a result of a

commission of an offense under this chapter (the Uniform Code of Military Justice) and on which the convening authority or other person authorized to take action under this section is taking action under this section.³³

At first glance, this definition appears relatively clear. However, while the statute defines a victim as a "person" who suffers a "harm," it does not define the terms "person" or "harm."³⁴ Additionally, there is little guidance in case law, legislative history, or the new Rule for Courts-Martial (RCM) 1105A on the definition of these terms; therefore, in order to formulate a basic understanding of their meaning, one place to begin is *Black's Law Dictionary*.³⁵

Black's defines a "person" as "a human being"³⁶ or "natural person,"³⁷ or as a legal person—"an entity such as a corporation, created by law and given certain legal rights and duties of a human being."³⁸ Therefore, under the statute, input could be submitted by a single individual, a small business, or a large corporation, and government counsel now have an obligation to provide that opportunity.³⁹

²⁶ Kristin Davis, *Former Aviano IG Received 1 Year Sentence*, AIR FORCE TIMES, Nov 5, 2012, <http://www.airforcetimes.com/article/20121105/NEWS/211050301/Former-Aviano-IG-Receives-1-year-Sentence>.

²⁷ Montgomery, *supra* note 25.

²⁸ Memorandum for Record from Lt. Gen. Susan J. Helms (Feb. 24, 2013), available at <http://www.foia.af.mil/reading/> (follow "Herrera MFR / U.S. v. Herrera Part 1 hyperlink") (last visited Mar. 13, 2015).

²⁹ Kristin Davis, *Court-Martial, Then Clemency: Is This Justice?*, ARMY TIMES, Mar. 11, 2013, <http://www.armytimes.com/apps/pbcs.dll/article?AID=20133303110001>.

³⁰ *Id.*

³¹ See, *Department of Defense Authorization for Appropriations for Fiscal Year 2014 and The Future Years Defense Program: Hearing on S. 1197 Before the Comm. on Armed Forces*, 113 S. Hrg. 108 at 910 (2013) [hereinafter *Comm. On Armed Forces Hearings*]. During these hearings, Senator Claire McCaskill (D-Mo.) questioned General Mark A. Welch, III, Chief of Staff, U.S. Air Force, about the convening authority actions in *Wilkerson* and *Herrera*, pointing out that Lieutenant General Helms did not consider the input of the victim in making her decision on the case, although she was permitted to consider any matter prior to taking action on the court-martial, opining that victims of offenses would likely want to have input into the decision making process in cases such as this. *Id.*

³² 2014 NDAA, *supra* note 10, §1706.

³³ 2015 NDAA, *supra* note 20. The original definition of "victim" in the 2014 NDAA included the term "loss" instead of "harm" in the description of the injury required to be a victim under the statute. 2014 NDAA, *supra* note 3, §1706. This language created an ambiguity because, of the five definitions of "victim" contained in the 2014 NDAA, including the one contained in the new Special Victim Statute, it was the only one that used the word "loss" instead of "harm." Zachary D. Spilman, *2013 Changes to the UCMJ – Part 6: Practice Notes*, NIMJBLOG-CAAFLOG (Jan. 10, 2014), <http://www.caaflg.com/2014/01/10/2013-changes-to-the-ucmj-part-6-practice-notes/>.

³⁴ 2014 NDAA, *supra* note 10, §1706; 2015 NDAA, *supra* note 20, §531(a)(3)(B). The newly drafted RCM 1105A explains the definition of "victim" in a slightly clearer way, stating, "For the purposes of this rule, a crime victim is a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty, and on which the convening authority is taking action under RCM 1107." Exec. Order, *supra* note 14. The rule goes on to specify that for victims "under 18 years of age, incompetent, incapacitated, or deceased, the term includes one of the following (in order of precedence): a spouse, legal guardian, parent, child, sibling, or similarly situated family member." *Id.* Additionally, the Rule states, "For a victim that is an institutional entity, the term includes an authorized representative of the entity." *Id.*

³⁵ BLACK'S LAW DICTIONARY (9th ed. 2009).

³⁶ *Id.* at 1257 (9th ed. 2009).

³⁷ *Id.*

³⁸ *Id.* at 1258. In the 2015 NDAA, Congress limited the definition of "victim" under the Crime Victims' Rights Article, Article 6(b), UCMJ, to "individual" to exclude corporations and other such entities, but it did not modify the definition in any of the other provisions which defined "victim," including Article 60(d). 2015 NDAA, *supra* note 20, §531(f)(1).

³⁹ 2014 NDAA, *supra* note 10, §1706.

Likewise, *Black's* defines a "harm" as, "injury, loss, damage; material or tangible detriment."⁴⁰ Under the statute, however, only victims who suffer a "direct physical, emotional, or pecuniary harm" are entitled to submit matters.⁴¹ A "physical harm" is "any physical injury or impairment of land, chattels, or the human body."⁴² An "emotional harm," is a type of mental reaction "that results from another person's conduct."⁴³ A "pecuniary harm" is one "of or relating to money; monetary."⁴⁴ Finally, a harm is "direct" when it is "free from extraneous influence; immediate."⁴⁵

There is no requirement that "victims" actually participate in the prosecution of an alleged offense or that they be named in the specification of the offense to be entitled to submit matters.⁴⁶ Additionally, there is no qualifier that the loss be "directly relating to or resulting from the offense for which the accused has been found guilty" as is required to present evidence during presentencing.⁴⁷ Consequently, the door seems to have been opened to the multitudes who could call themselves "victims."⁴⁸ For instance, have the parents, spouse, or siblings of an individual against whom a criminal act is committed suffered a harm? What about someone who witnesses a crime occurring? Have they suffered an emotional harm? The spouse sharing the bank account of a Soldier who is named in a specification of larceny—has she suffered a pecuniary harm? Unfortunately, because there is little guidance in the statute on how to properly define the terms used in the definition of "victim" under the new Article 60(d) and RCM 1105A, appellate courts may have to provide the answers.⁴⁹ What is important to note, however, is that there are, theoretically, multiple persons who could fit

the definition of "victim" within any charged offense. Therefore, it is imperative you have a procedure to manage what could potentially be a daunting undertaking. D. How?

Paragraphs (d)(2)(A) and (B) of Article 60, provide time requirements for victim submissions during the post-trial process.⁵⁰ Essentially, a victim who desires to present matters for consideration by a convening authority must do so within ten days of receiving the later of "the authenticated record of trial in accordance with Article 54 (e), UCMJ"⁵¹ or "the recommendation of the staff judge advocate or legal officer."⁵² This time limit may be extended, by the convening authority or other person taking action, for not more than an additional twenty days upon a victim making a showing of good cause that additional time is required to submit matters.⁵³

III. Handling Victim Input During the Post-Trial Process

A. Post-Trial Begins Pre-Trial

Establishing a good SOP for handling victim submissions will make managing government timelines in light of this new requirement much easier. A good SOP will require identifying and communicating with these new players long before findings and sentence are announced. However you decide to accomplish the mission, locating and notifying victims early, even prior to trial, will help in managing the collection of matters later when the clock is ticking.

1. Locating "Victims"

Once you have grasped the definition of "victim," determining who is entitled to submit matters during the post-trial process should be relatively easy. Because the statute does not limit "victims" to those specifically listed in the charged specification,⁵⁴ the more difficult task becomes identifying and locating each "victim."⁵⁵

Locating these persons and notifying them of their new right to submit matters for consideration during clemency

⁴⁰ BLACK'S LAW DICTIONARY, *supra* note 35, at 784.

⁴¹ 2014 NDAA, *supra* note 10, §1706.

⁴² BLACK'S LAW DICTIONARY, *supra* note 35, at 784.

⁴³ BLACK'S LAW DICTIONARY, *supra* note 35, at 601.

⁴⁴ BLACK'S LAW DICTIONARY, *supra* note 35, at 1245.

⁴⁵ BLACK'S LAW DICTIONARY, *supra* note 35, at 525.

⁴⁶ 2014 NDAA, *supra* note 10, §1706.

⁴⁷ MCM, *supra* note 3, R.C.M. 1001(b)(4). Unlike the victim impact evidence permitted under RCM 1001, the definition of "victim" under Article 60(d) only requires that the loss be direct to the person rather than related to the offense. 2014 NDAA, *supra* note 10, §1706. Conversely, "crime victim" under the proposed RCM 1001A, which will provide the opportunity for victims to provide an unsworn statement during presentencing proceedings, only requires that the harm be directly to the victim rather than the offense. <https://www.federalregister.gov/articles/2015/02/04/2015-02149/manual-for-courts-martial-proposed-amendments#p-36>.

⁴⁸ Spilman, *supra* note 33.

⁴⁹ *Id.*

⁵⁰ 2014 NDAA, *supra* note 10, §1706.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Compare 2014 NDAA, *supra* note 10, §1706, with 2014 NDAA, *supra* note 10, §1701, and 10 U.S.C. §854(e) (2012).

⁵⁵ See Spilman, *supra* note 20.

can start before trial is complete.⁵⁶ During the pretrial process, military justice shops should begin investigating, identifying, and locating victims while they prepare their case for trial, even if those victims are unlikely to testify during the trial.⁵⁷

Identifying and locating victims is a task that a paralegal can easily undertake⁵⁸—reviewing the case file and the charge sheet to determine whether or not there are unnamed persons who may fit into the class of persons entitled to submit matters. They should work to locate them using available methods such as public records searches via Westlaw or LexisNexis,⁵⁹ criminal investigations records, or reports such as the Child Victim Identification Report provided in child pornography cases by the National Center for Missing and Exploited Children.⁶⁰

Immediately following trial, when it is clear who is entitled to make submissions, the trial counsel can begin contacting those persons previously identified and explaining to them the timeline to submit matters.⁶¹ This can be done while waiting for the record of trial to be transcribed.⁶² At the same time they are notified of their right to submit matters, victims may be asked if they are interested in exercising that right or if they would like to waive it. Should a victim choose to waive, that waiver must be in writing, signed by the victim, and attached to the final

record of trial.⁶³ Appendices A and B contain sample pre- and post-trial notification letters for your use. Having these conversations early will help you get a grasp of how many submissions you will be managing later.

2. Categories of “Victims”

Beyond the definition contained in Article 60(d), there are generally three categories of “victims” with whom you will be communicating. This categorization is important because of those representation rights, service considerations, and professional responsibility requirements.

a. Sexual Assault Victims Entitled to Special Victim Counsel

The 2014 NDAA required the service secretaries to “designate legal counsel (to be known as ‘Special Victims’ Counsel’) for the purpose of providing legal assistance” to qualifying victims of specified sexual offenses.⁶⁴ Under this statute, victims of alleged offenses under Articles 120, 120a, 120b, 120c, 125, UCMJ or attempts thereof under Article 88, UCMJ who are entitled to Legal Assistance pursuant to 10 U.S.C. §1044 are entitled to representation by Special Victims’ Counsel (SVC).⁶⁵ Special Victims’ Counsel provide victims with legal assistance representation in criminal contexts.⁶⁶ Additionally, SVCs advocate on behalf of their clients throughout the military justice process, including post-trial.⁶⁷ For this reason, victims remain represented by their SVCs from appointment until initial

⁵⁶ 2014 NDAA, *supra* note 10, §1706. A case must reach findings and a sentence for the right to actually exist. *Id.* The statute does not prohibit notifying persons of a right to which they may become entitled. *Id.* Because a “victim” is only permitted to submit matters in cases where a conviction and sentence has been entered to the specification which applies to them, the notification should include notice of that requirement.

⁵⁷ Compare MCM, *supra* note 3, R.C.M. 1001 (requiring evidence presented during presentencing to directly relate to or result from an offense), with Exec. Order, *supra* note 15 (requiring the harm to the victim be direct).

⁵⁸ See U.S. DEP’T OF ARMY, PAM. 600-25, U.S. ARMY NONCOMMISSIONED OFFICER PROFESSIONAL DEVELOPMENT GUIDE para. 12-1c(8) (28 July 2008) (approved revision 11 Aug 2011). The Office of the Staff Judge Advocate, Headquarters, Fort Bragg, assigns this responsibility to their Victim Witness Liaison. OSJA CL-FORM, OFFICE OF THE STAFF JUDGE ADVOCATE, HEADQUARTERS, FORT BRAGG, N.C. (on file with the author). Other installations assign this duty to their post-trial paralegal. OFFICE OF THE STAFF JUDGE ADVOCATE, FIRST CAVALRY DIVISION, STANDARD OPERATING PROCEDURES FOR MILITARY JUSTICE 19 (June 2014) [hereinafter 1CD MJ SOP] (on file with author).

⁵⁹ See LEXIS ADVANCE, <https://advance.lexis.com/publicrecordshome/?pdmfid=1000200&crd=9796f1c7-a561-449e-bac0-c51b3ad5b842&ecomp=c45g&prid=25c6a096-5e40-4f72-bd58-623d343e6a80> (last visited Mar. 13, 2015).

⁶⁰ See NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, <http://www.missingkids.com/CVIP> (last visited Mar. 13, 2015).

⁶¹ Exec. Order, *supra* note 14.

⁶² MCM, *supra* note 3, R.C.M. 1103(a), 1103(b)(2)(B), 1103(c)(1).

⁶³ Exec. Order, *supra* note 14; MCM, *supra* note 4, R.C.M. 1103(b)(3)(I).

⁶⁴ 2014 NDAA, *supra* note 10, §1716. Prior to the enactment of this statute, the Secretary of Defense General Counsel issued a memo entitled “Legal Assistance to Victims of Sexual Assault” opining that 10 U.S.C. §§ 1044 and 1565b “authorized, and certainly does not prohibit” judge advocates from providing legal advice and representation, including legal assistance in criminal contexts to victims of sexual assault. THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, SVP HANDBOOK Background (Nov. 1, 2013) [hereinafter JA SVC HANDBOOK]. The Army formally implemented the Special Victim Counsel Program on 1 November 2013. TJAG Policy Memorandum #14-01, The Office of the Judge Advocate Gen., U.S. ARMY, Subject: Office of the Judge Advocate General Policy Memorandum# 14-01, Special Victim Counsel (Nov. 1, 2013), available at http://jpp.whs.mil/Public/docs/RFI/Set_1/Encl13-25/RFI_Enclosure_Q16_USA.pdf.

⁶⁵ 10 U.S.C. §1044 (2012); 2014 NDAA, *supra* note 10. Although the definition of “victim” under this statute was originally different from the definition of “victim” contained in the provisions relating to Article 60(d), as discussed above, the 2015 NDAA corrected the discrepancy and now, with the exception of the entitlement to legal assistance requirement contained in 10 U.S.C. §1044e, the definitions of “victim” is the same. 2015 NDAA, *supra* note 21, §531.

⁶⁶ JA SVC HANDBOOK, *supra* note 64, para 4-1a.

⁶⁷ *Id.*

action by the convening authority, unless the victim releases the SVC sooner.⁶⁸

Because the rules applicable to SVC representation are relatively clear, matters involving victims who fall within this category are easier to manage. Once a victim of a qualifying offense has accepted SVC representation, post-trial documents should be served on the victim as well as the SVC, and all communication with the victim regarding submission of matters should be done through that SVC.⁶⁹

b. Non-Sexual-Assault Crime Victims Entitled to Legal Assistance

A second category of victims is those who are entitled to the services of a legal assistance attorney but who are not entitled to representation by an SVC.⁷⁰ These individuals are not likely to be represented by counsel during trial or when it comes time to serve post-trial documents. Therefore, serving these individuals will usually only require providing them with the required post-trial documents and informing them of their opportunity to submit matters and the timeline for such submissions.⁷¹

Because they are not automatically provided an attorney to represent them, these victims will have likely primarily worked with the trial counsel throughout the court-martial process. The familiarity gained through this often close coordination will likely lead victims to trust the trial counsel. Consequently, these victims may look to the trial counsel for assistance in submitting matters. Because trial counsel represent the government, they should not be assisting victims with preparation of their post-trial submissions.⁷² As the Chief of Justice, it is your responsibility to ensure that your counsel know and stay within their ethical bounds.⁷³

A good procedure to establish in these cases is to refer these victims to their servicing legal assistance office for help in preparing and submitting their matters.⁷⁴ Once

⁶⁸ *Id.*

⁶⁹ U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Rule 4.2 (1 May 1992) [hereinafter AR 27-26].

⁷⁰ 10 U.S.C. §1044 (2012). While §1044 establishes entitlement for legal assistance services, §1044e narrows that category regarding SVCs. 2014 NDAA, *supra* note 10, §1716.

⁷¹ AR 27-26, *supra* note 69, Rule 4.2; *but see id.*, Rule 4.3.

⁷² *See* MCM, *supra* note 3, R.C.M. 502(d)(5). Because the trial counsel prosecutes cases on behalf of the United States and not the crime victim, it is possible that a conflict could arise between the interests of those two parties. AR 27-26, *supra* note 69, Rule 1.13.

⁷³ AR 27-26, *supra* note 70, Rule 5.1.

⁷⁴ *See* 10 U.S.C. §1044 (2012). The assistance required in these situations would be the types that are provided for within the Army legal assistance

victims have been referred to legal assistance, however, it will become important to ascertain whether or not they are represented by counsel when communicating with them about their post-trial submissions.⁷⁵

c. Victims Not Entitled to Special Victims' Counsel or Legal Assistance

The final category of victims likely encountered during the post-trial process is those who are entitled to neither SVC representation nor legal assistance services. Generally, these persons are not represented either at trial or later, so when it comes time to serve them with post-trial documents, they alone will need to be served. Additionally, unless these individuals seek civilian counsel, they will not be represented while preparing submissions, so you will be able to communicate with them directly.⁷⁶ Like those victims not entitled to SVC representation, these victims may potentially look to the trial counsel for guidance and assistance. Again, trial counsel should not blur the lines of their representation of the government by assisting the victim in submitting matters.⁷⁷ Instead, after providing them with notice, these victims should be advised to seek private counsel for legal advice or should be referred to their Victim-Witness Liaison for further assistance.⁷⁸

B. The Authenticated Record of Trial and Staff Judge Advocate's Post-Trial Recommendation

Under Article 60(d), the victim's 10 days to submit matters to the convening authority begin upon the later service of the authenticated record of trial or the staff judge advocate's post-trial recommendation (SJAR).⁷⁹

Article 54(e), UCMJ states:

In the case of a general or special court-martial involving a sexual assault or other offense covered by section 920 of this title (Article 120), a copy of all prepared records of the proceedings of the court-martial shall be given to the victim of the offense if the victim testified during the proceedings. The records

program. *See* U.S. DEP'T ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM paras. 2-1, 3-7 (Feb. 21, 1996) (RAR Sept. 13, 2011).

⁷⁵ AR 27-26, *supra* note 69, Rule 4.2.

⁷⁶ *Id.* at Rule 4.3.

⁷⁷ *Id.* at Rule 3.8.

⁷⁸ *See* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE Chapter 17 (3 Oct. 2011).

⁷⁹ 2014 NDAA, *supra* note 10, §1706.

of the proceedings shall be provided without charge and as soon as the records are authenticated. The victim shall be notified of the opportunity to receive the records of the proceedings.⁸⁰

Based on the plain language of the statute, not all crime victims are entitled to a free copy of the authenticated record of trial.⁸¹ Additionally, the National Defense Authorization Act for Fiscal Year 2015 (2015 NDAA) clarified that not all “victims” covered under Article 60(d) are entitled to a free record of proceedings.⁸² Specifically, to be entitled to a free, authenticated copy of the record, the following criteria must be met: “(1) a general or special court-martial; (2) involving a sexual assault or other Article 120 offense; and (3) when the victim testified during the proceedings.”⁸³ Conversely, all “victims” under Article 60(d) are entitled to a copy of the SJAR when a convening authority is taking action on their related offenses.⁸⁴

The distinction regarding entitlement to a free copy of the authenticated record of trial can create an opportunity in

servicing victims and managing their submissions. Because trial counsel are required in all special and general courts-martial to examine the record of trial prior to authentication,⁸⁵ in many jurisdictions, counsel are provided an unauthenticated version of the record of proceedings for this review.⁸⁶ So long as there are no substantial errors in this unauthenticated version, all of the information required to be contained in the SJAR is available, and there appears to be no prohibition to using it to draft the initial post-trial recommendation for serving victims.⁸⁷ Therefore, for cases where the victim is only entitled to the SJAR, consider drafting this document early using an unauthenticated version of the record and giving it to the victim while you are awaiting the record of trial to be authenticated. This will allow victim submissions to be received and ready to serve on the accused immediately upon authentication, resulting in saved government time.

C. Calculating Submission Time

1. Counting Victim Days

Pursuant to the statute, victim submissions are due within ten days of their later receipt of the record of trial or the SJAR.⁸⁸ The statute is silent on what is considered a “day.” The Rules for Courts-Martial state, however, “when a period of time is expressed in a number of days, the period shall be in calendar days, unless otherwise specified.”⁸⁹ Similar to practice in providing these documents to the accused and counsel, a good SOP will require a method for documenting exactly when this service occurs, such as registered mail or other signed receipt, so days can be accurately calculated.⁹⁰

2. Providing Victims Additional Time

⁸⁰ UCMJ art. 54(e) (2012).

⁸¹ *Id.* Because of the rule, it is possible that a person could be entitled to a free copy of the authenticated record of trial and not be entitled to submit matters to the convening authority for consideration. Specifically, unlike Article 60(d), Article 54(e) does not require that the accused be found guilty of the offense in which they are the “victim.” *Id.* Therefore, if an accused is acquitted of the Article 120 offense, the “victim” will be entitled to a no-cost copy of the authenticated record of trial; however, the “victim” will not be entitled to submit matters during post-trial. Compare 2014 NDAA, *supra* note 11, §1706 (requiring a finding of guilt and sentence on relevant offenses to be entitled to submit matters to the convening authority), with UCMJ art. 54(e) (only requiring cooperating in the prosecution of sexual offense related charges).

⁸² 2015 NDAA, *supra* note 20, §531. The 2014 NDAA generated confusion regarding whether or not it was intended that all “victims” receive an authenticated record of trial. 2014 NDAA, *supra* note 10, §1706. That ambiguity was clarified in the 2015 NDAA by the inclusion of the words “if applicable” in the provisions pertaining to the record of proceedings. 2015 NDAA, *supra* note 20, §531.

⁸³ Information paper from The Joint Service Committee on Military Justice, DOD, subject: Implementation Guidance for Article 54(e), UCMJ (28 June 2012). Because of the way the statute was written, it is possible that a victim in a sexual assault case can become entitled to a free copy of the record of trial even if they are not entitled to submit matters during clemency. Compare 2014 NDAA, *supra* note 10, §1706 (requiring a finding of guilt and sentence on relevant offenses to be entitled to submit matters to the convening authority), with UCMJ art. 54(e) (only requiring cooperating in the prosecution of sexual offense related charges). For example, a person named in a sexual assault allegation in a case where there is an acquittal on that specification is entitled to a free record of trial in accordance with Article 54(e), but would not likely be entitled under Article 60(d) to submit matters during post-trial. *Id.*

⁸⁴ 2014 NDAA, *supra* note 10, §1706. This right was also clarified by the 2015 NDAA by removing the words “if applicable” from the paragraph which discussed the service of the Staff Judge Advocate’s recommendation, which had been included in the 2014 version of the NDAA. 2015 NDAA, *supra* note 20, §531.

⁸⁵ MCM, *supra* note 3, R.C.M. 1103(i)(1)(A). Defense counsel should be permitted to examine the record prior to authentication, unless such will cause unreasonable delay; however, defense counsel are not required to examine the record prior to authentication. *Id.* R.C.M. 1103(i)(1)(B).

⁸⁶ This assertion is based on the author’s professional experience as trial counsel for 3d Infantry Division from March 2007 to June 2009, as defense counsel for U.S. Army Trial Defense Service from July 2009 to May 2011, as senior trial counsel for both Combined Joint Task Force-1 and 1st Cavalry Division from July 2011 to June 2013 and as chief, military justice for 1st Cavalry Division from June 2013 to July 2014 [hereinafter Professional Experience].

⁸⁷ MCM, *supra* note 3, R.C.M. 1106(d)(2).

⁸⁸ 2014 NDAA, *supra* note 10, §1706. This time limit is reduced to seven days for cases arising out of summary courts-martial. *Id.*

⁸⁹ MCM, *supra* note 3, R.C.M. 103(9).

⁹⁰ See generally *id.*, RCM 1106(f)(1). These documents should also be attached to the Record of Trial. *Id.* R.C.M. 1103(b)(3)(I).

Like the rule applying to accused post-trial submissions, convening authorities, for good cause, may grant victims not more than an additional 20 days to submit their matters upon a showing by a victim that additional time is required.⁹¹ Also like the provisions that apply to an accused's post-trial submissions, there is no specific definition of "good cause" in the statute.⁹² "Good cause" is defined as a "legally sufficient reason."⁹³ When discussing whether or not a convening authority should grant an accused's request for extension of time to file post-trial matters, appellate courts have urged staff judge advocates to routinely grant reasonable extension requests "in absence of compelling reasons to the contrary."⁹⁴ This same standard can arguably be used in determining whether to grant additional time for victim submissions, although, because SVCs have fewer procedural obligations than defense counsel (no errata, deferral requests, etc.), this standard could also be made more stringent. Interestingly, although RCM 1105 states "[f]or the purpose of this rule, good cause for an extension ordinarily does not include the need for securing matters which could reasonable have been presented at the court-martial,"⁹⁵ that same explanation is not provided in RCM 1105A, which applies to victim post trial submissions.⁹⁶ However, because a victim's right to submit matters during post-trial is a procedural one, rather than a constitutional one (like the accused's right to speedy post-trial processing), a victim's request for additional time should be considered in light of favoring speedy post-trial.⁹⁷

D. Providing Victim Submissions to the Accused

1. Is It a "New Matter"?

The RCM allow SJAs to amend an original post-trial recommendation following receipt and review of an accused's submissions.⁹⁸ Importantly, if information

⁹¹ 2014 NDAA, *supra* note 10, §1703.

⁹² UCMJ art. 60 (2013).

⁹³ BLACK'S, *supra* note 35, at 251.

⁹⁴ *United States v. Pearson*, 15 M.J. 888, 889 (A.C.M.R. 1983).

⁹⁵ MCM, *supra* note 3, R.C.M. 1105(c)(4).

⁹⁶ Exec. Order, *supra* note 14.

⁹⁷ *See United States v. Skaar*, 20 M.J. 836, 838 (N-M.C.M.R. 1985) (noting that submitting matters for consideration during post-trial was a procedural and not a constitutional right and requiring a showing of specific prejudice where a convening authority takes action prior to the expiration of the time provided by RCM 1105). The Court of Military Appeals later agreed with the Navy-Marine Court of Military Review (NMCMR) that the accused should make a showing prior to being provided relief for failure to follow the guidelines established in RCM 1105 and Article 60, UCMJ. *See United States v. DeGrocco*, 23 M.J. 146, 148 (C.M.A. 1987).

⁹⁸ MCM, *supra* note 3, R.C.M. 1106(f)(7).

provided to a convening authority through this addendum or other source contains matters not included in the SJA's original recommendation served upon the accused, that information must be provided to the accused and defense counsel, allowing them the opportunity to respond to the new information.⁹⁹ Such "new matters" include "discussion of the effect of new decisions on issues in the case, matters from outside the record of trial, and issues not previously discussed."¹⁰⁰ "[New matter] does not ordinarily include any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the case."¹⁰¹

Whether or not an addendum to the post-trial recommendation contains a "new matter" is an issue reviewed on appeal *de novo*.¹⁰² Appellate courts have considered several cases on this issue, thereby providing some guidance on what is considered a "new matter."¹⁰³ For example, in *United States v. Jones*, the CAAF held that "new matter" includes any "information which is not contained in the record of trial."¹⁰⁴ In *United States v. Leal*, the court clarified that not everything that is "between the blue covers"¹⁰⁵ is considered "contained in the record of trial,"¹⁰⁶ noting the difference between documents that are marked as exhibits and entered during trial and those that are marked as exhibits but not admitted, later to be included in the Record of Trial to assist in appellate review.¹⁰⁷ Finally, in *United States v. Buler*, the CAAF determined that even "neutral" or "trivial" information should be considered "new" for purposes of submission to the convening authority and

⁹⁹ *Id.*, R.C.M. 1106 (f)(7).

¹⁰⁰ *Id.*, RCM 1106(f)(7) discussion.

¹⁰¹ *Id.*

¹⁰² *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997).

¹⁰³ *See United States v. Del Carmen Scott*, 66 M.J. 1 (C.A.A.F. 2008) (SJA's addendum that contains no new information and that is not "erroneous, inadequate, or misleading" does not contain new matter); *United States v. Chatman*, 46 M.J. 321 (C.A.A.F. 1997) (where information contained in the addendum injects facts not previously discussed, the addendum contains new matter); *United States v. Leal*, 44 M.J. 242 (C.A.A.F. 1996) (addendum that mentioned reprimand which had been offered into evidence but not admitted contained new matter and required defense notice); *United States v. Spears*, 48 M.J. 768 (A.F.C.C.A. 1998) (rule regarding new matter prevents SJA from having the last say to the convening authority without the defense knowing about it); *United States v. Haynes*, 28 M.J. 881 (A.F.C.M.A. 1989) (SJAs should err on the side of caution and provide matters to the defense where there is any doubt regarding new matter in the addendum).

¹⁰⁴ *United States v. Jones*, 44 M.J. 242 (C.A.A.F. 1996) (quoting RCM 1106 (f) (7)).

¹⁰⁵ *Leal*, 44 M.J. at 236.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

provided, first, to the accused for response.¹⁰⁸ The court favored this practice because even neutral information could be used to an accused's detriment.¹⁰⁹

The content of victim submissions are likely to vary greatly, as the only standard for the submissions is that they be in writing, signed by the victim, and not include video, audio, or other media beyond photographs.¹¹⁰ Some submissions may address the continuing impact of the crime on the victim since the time of trial and would clearly contain "new matters." Others may appear to be a reiteration of any testimony the victim provided during the court-martial. Because "[t]he dividing line between what is and is not 'matter from outside the record of trial' can be wafer thin,"¹¹¹ the term "new matter" should be construed liberally.¹¹² Therefore, a good SOP should require all matters submitted by a victim, regardless of their content, be provided to the accused and defense counsel for consideration and possible response prior to going to the convening authority for action.¹¹³

2. When Will You Serve the Accused?

Once you are prepared to serve the accused and defense counsel with their copy of the record of trial and SJAR, you will need to establish a procedure to determine how you will best manage the government time. There are three possible scenarios to accomplish serving an accused, depending on the entitlements of the victim: (1) obtain victim submissions before the record is authenticated and serve them on the accused when serving the authenticated record and SJAR; (2) serve the victim and the accused with an authenticated record and SJAR at the same time and later serve the accused with the victim's submissions when they are received; or (3) serve the victim with the authenticated record of trial and SJAR, wait for submissions, and then serve the accused the authenticated record of trial, SJAR, and victim submissions all at once. Appendix C contains visual depictions of each process.

¹⁰⁸ United States v. Buler, 46 M.J. 468 (C.A.A.F. 1997).

¹⁰⁹ *Id.* at 469.

¹¹⁰ See 2014 NDAA, *supra* note 10, §1706, Exec. Order, *supra* note 14.

¹¹¹ Haynes, 28 M.J. at 882 (A.F.C.M.A. 1989).

¹¹² *Id.*

¹¹³ See Leal, 44 M.J. at 237. "The essence of post-trial practice is fair play—notice and an opportunity to respond." *Id.* The Office of the Staff Judge Advocate, Headquarters U.S. Army Joint Readiness Training Center and Fort Polk, suggests annotating whether or not the victim has submitted matters in the SJA's addendum to the post-trial recommendation, thereby creating a "new matter" in the addendum and requiring service and opportunity to respond to the accused and counsel. Victim Participation in Post-Trial Process at Slide 7 (Mar. 12, 2014) (unpublished PowerPoint presentation) (on file with author).

a. Victim Not Entitled to Authenticated Record of Trial

If no victim is entitled to the authenticated record of trial and you have drafted the SJAR from the unauthenticated version of the record, you should have the victim's submission prior to receiving the authenticated record. If so, you can serve the accused and counsel and move through post-trial submission management as before the change in Article 60(d).

b. Victim Entitled to Authenticated Record of Trial

If a victim is entitled to the authenticated record of trial, you must decide when to serve the accused based on when you serve the victim. There are two options here: (1) serve the victim and the accused at the same time and then later serve the accused with the victim's submissions; or (2) serve the victim first and then serve the accused after receiving the victim's submissions.

If you decide to serve the victim and the accused at the same time, you will need to calculate the submission deadlines for each victim and for the accused. Once you receive a victim's submission, you should immediately serve it on the accused and defense counsel, giving them the required amount of time to respond to the "new matter," meaning you will either have to calculate a separate submission deadline or extend the current submission deadline by ten days.¹¹⁴

This method seems easier because you are managing victim submission timelines as if the victim were another accused. Importantly, however, this method has the potential to lengthen the time it takes to get the case to the convening authority for action, should the victim and accused each use their entire allotted time, particularly when each are granted a 20-day extension. Additionally, because it is possible that more than one "victim" can exist for every charged specification, you may be faced with calculating a new submission deadline each time an accused is served with another victim submission.

The process can be streamlined by providing the victim with the authenticated record and the SJAR, waiting for the victim's submission and then providing all documents, at one time, to the accused for consideration.¹¹⁵ This method will allow you to collect all victim submissions and serve them on the accused at one time. This is the preferred

¹¹⁴ MCM, *supra* note 3, R.C.M. 1106(f)(7).

¹¹⁵ Professional Experience, *supra* note 86. A good enforcer of your timeline is to include in your SOP a maximum amount of time (generally 48 hours) that the military justice office will have victim submissions prior to ensuring that they are served on the accused. See ICD MJ SOP, *supra* note 58, at 19.

method, as it is more manageable in handling new matters and is likely to result in less time required for accuseds to submit post-trial submissions because they are able to prepare those submissions while responding to any pertinent victim submissions. As the chief of justice, you gain more control over the timeliness of receiving victim and accused submissions. The accused and defense counsel gain clarity on how to best respond to all information going to the convening authority.¹¹⁶

IV. Conclusion

The area of post-trial is rapidly changing as Congress tries to balance the interests of crime victims and those of criminal accused.¹¹⁷ As a chief of justice, you are the military justice manager and, therefore, on the frontlines of this battle. The addition of the new Article 60(d) is a substantial step in ensuring that crime victims are given a voice throughout the entire court-martial process. At all stages of the process, and especially after the government has proven its burden beyond a reasonable doubt, victims must be consulted and given the opportunity to provide input. It must always be remembered, however, that the clemency process was established primarily for the accused,¹¹⁸ and that the accused has the right to speedy trial processing, rooted in the Constitution.¹¹⁹ Because of this, where the rights of victims to an opportunity to provide their perspective conflicts with the accused's rights, the scale should balance in favor of the accused's right to speedy trial and appeal.

The addition of victims and possibly their attorneys into the post-trial process creates hurdles for you and your team. The changes to post-trial processing have the potential for extending the amount of government time in an already stringent timeline.¹²⁰ Having a strong SOP will help you manage the new requirements without wasting precious government processing time and will ensure that the rights of both victims and the accused are protected. Now go get 'em! Good Luck!

¹¹⁶ One of the generally accepted sentencing philosophies is rehabilitation of the accused. *See* MCM, *supra* note 3, R.C.M. 1001(g). As a defense counsel, when drafting post-trial submissions, my clients would want to share with the convening authority the things they had done to rehabilitate themselves, including the training they had completed and their acknowledgement of the impact of their action on their victims. Articulating that the accused had considered that impact by reviewing the victim's submissions would be beneficial to an accused. Professional Experience, *supra* note 87.

¹¹⁷ *See* 2014 NDAA, *supra* note 11, §1702, §1706. *See also* *Comm. on Armed Services Hearings*, *supra* note 31.

¹¹⁸ *See* Goodwin, *supra* note 6, at 24.

¹¹⁹ *Toohey v. United States*, 60 M.J. 100, 101 (C.A.A.F. 2004).

¹²⁰ *Moreno*, 63 M.J. at 140.

Appendix A

SAMPLE LETTER FOR NOTIFICATION OF IDENTIFICATION AS "VICTIM"

March 16, 2015

Dear _____:

You have been identified, pursuant to Article 60(d), Uniform Code of Military Justice, as having suffered a physical, emotional, or pecuniary loss because of a charged offense in the case of United States v. Private John Snuffy.

Private Snuffy's case is currently scheduled to go to trial on January 1, 2016. Should the court adjudge findings or a sentence in the above case, you will be entitled to submit matters for the convening authority to consider when deciding whether to grant clemency in the case.

Upon completion of the trial, this office will notify you of whether or not you are entitled to submit matters to the convening authority. Should you be entitled, this office will notify you of the process for doing so.

Should you wish, you may waive your right to submit matters to the convening authority. You may choose to waive that right now, or later when you are notified of the outcome of the trial. If you choose to waive your prospective right at this time, you will not be notified of the outcome of the trial.

Please complete, sign, and return the attached certificate of receipt in the enclosed stamped envelope. If you have any questions prior to making your election, please feel free to contact this office at (555) 555-5555, or ima.d.chief.mil@mail.mil. We are unable to provide legal advice to you; however, we may be able to assist you in determining whether or not you may be entitled to legal advice relating to this case.

Sincerely,

Ima D. Chief
Major, U.S. Army
Chief, Military Justice

I have received the letter dated March 16, 2015, identifying me as having suffered a physical, emotional, or pecuniary loss because of a charged offense(s) in the case of United States v. Private John Snuffy.

_____ I would like to waive my right to submit matters to the convening authority should the court adjudge findings and sentence.

_____ I DO NOT wish to be notified of the outcome of the trial.

OR

_____ I DO wish to be notified of the outcome of trial.

Date

Signature

Printed Name

Appendix B

POST-TRIAL NOTIFICATION AND WAIVER

In the matter of: US v. _____, U.S. Army, _____, _____ CM

**Convened by Commander, Headquarters, Fort Hooah
Fort Hooah, NC**

Name: _____

Address: _____

City, State, Zip: _____

Phone Number: _____

In the court-martial listed above, I testified as a victim who suffered a direct physical, emotional, or pecuniary harm as a result of an offense committed under Article 120, Article 120b, Article 120c, Article 125, or any attempt to commit such offense in violation of Article 80, Uniform Code of Military Justice (UCMJ).

I acknowledge that under 10 U.S.C. §854 (Article 54, UCMJ) I am entitled to receive a copy of the authenticated record of proceedings of the court-martial as soon as practicable.

I request a copy of the authenticated record of proceedings when the record is authenticated. I understand that no expense will be incurred on my part to receive a copy of the record of the proceedings of the court-martial. I further understand that I am responsible for providing my updated contact information to OSJA, Criminal Law Division, ATTN: Victim Witness Liaison, 2175 Reilly Road, Stop A, 3rd Floor, Fort Hooah, NC 28310.

I do not wish to receive a copy of the authenticated record of the proceedings of the above entitled court-martial.

I acknowledge that under 10 USC §860 (Article 60, UCMJ) I have an opportunity to submit matters for consideration by the convening authority. (Fill out bottom portion only, if applicable).

I wish to submit matters in writing to the convening authority within ten days of receipt of the Authenticated Record of Proceeding and the Staff Judge Advocate Recommendation (SJAR).

I wish to waive my right to submit matters in writing to the convening authority.

Date

Signature

This document prepared in accordance with 10 U.S.C. §854 & 10 U.S.C. §860 (Articles 54 & 60, UCMJ)

POST-TRIAL NOTIFICATION AND WAIVER (VERSION 2)

In the matter of: US v. _____, US Army, _____, _____CM

Convened by Commander, Fort Swampy
Fort Swampy, Louisiana 71459

Name: _____

Address: _____

City, State, Zip: _____

CITY

STATE

ZIP

Phone Number: _____

I was a victim in the above entitled court-martial. I acknowledged under Article 60(d), UCMJ, I am entitled to receive a copy of the authenticated record of proceedings of the court-martial. I am also entitled to submit matters to the convening authority taking action on this case before such action is taken.

_____ I understand that a copy of the authenticated record of trial and Staff Judge Advocate's post trial recommendation will be served on me or, if I so request, will be forwarded to my Special Victim Counsel, _____ (name of counsel).

_____ I (authorize) (do not authorize) my Special Victim Counsel to accept service of the authenticated record of trial and Staff Judge Advocate's post trial recommendation on my behalf.

_____ I understand that if I have matters that I wish the convening authority to consider, or matters in response to the Staff Judge Advocate's recommendation, such matters must be submitted within 10 days after I receive a copy of the record of trial or the recommendation of the Staff Judge Advocate, whichever occurs earlier. If I authorized service to my Special Victim Counsel, the 10-day period begins to run after my counsel receives the record of trial or the recommendation of the Staff Judge Advocate, whichever occurs later.

_____ I understand that I may request an extension of up to 20 additional days, if necessary, for good cause.

_____ I understand that my matters and any request for extension should be submitted to the Military Justice Office, ATTN: Victim Witness Liaison, 1234 Any Street, Building 1454, Fort Swampy, Louisiana 71459.

_____ I understand that if I fail to submit matters within the time allotted, the convening authority will proceed to take action on the case.

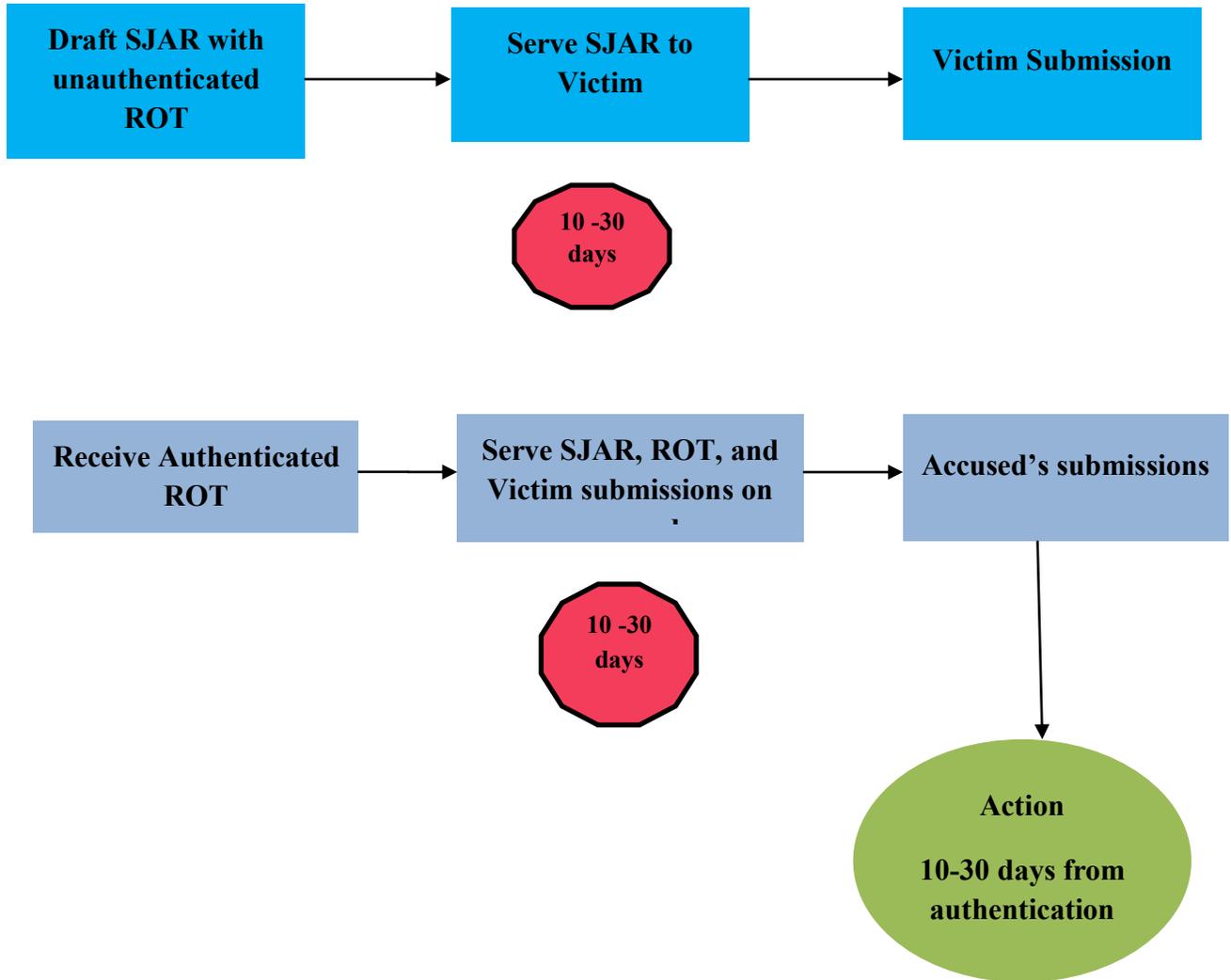
_____ I understand that it is my responsibility to inform the Office of the Staff Judge Advocate and/or my Special Victim Counsel of any changes to the contact information I have listed above.

I do not wish to submit matters. I understand that my waiver of the right to submit matters to the convening authority cannot be revoked.

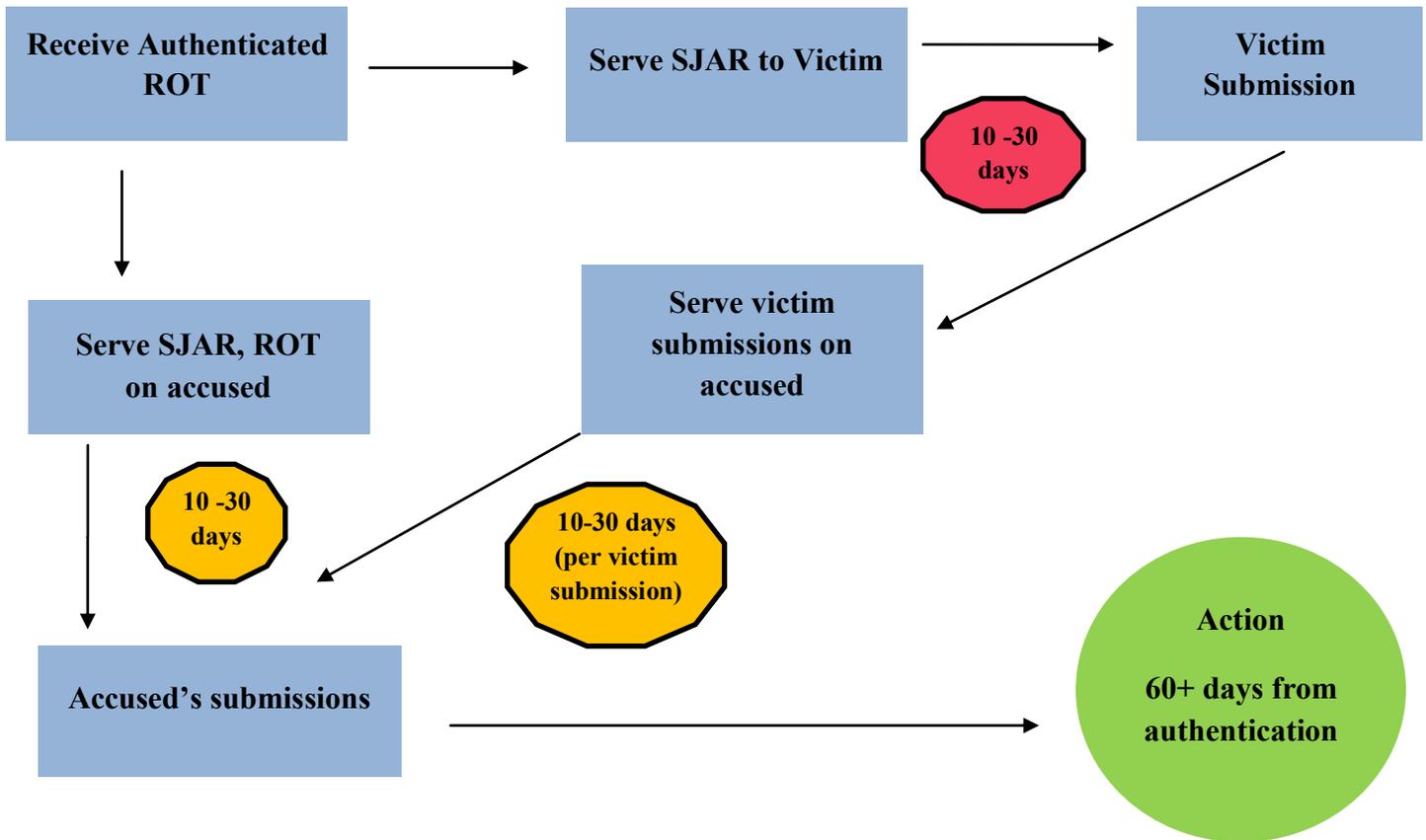
Date Signature

** Sign/date and return to the Office of the Staff Judge Advocate, Post-Trial Section **
Phone: (337)-531-7004, Fax: (337)-531-9420, Email: Victim.W.Liasion.civ@mail.mil

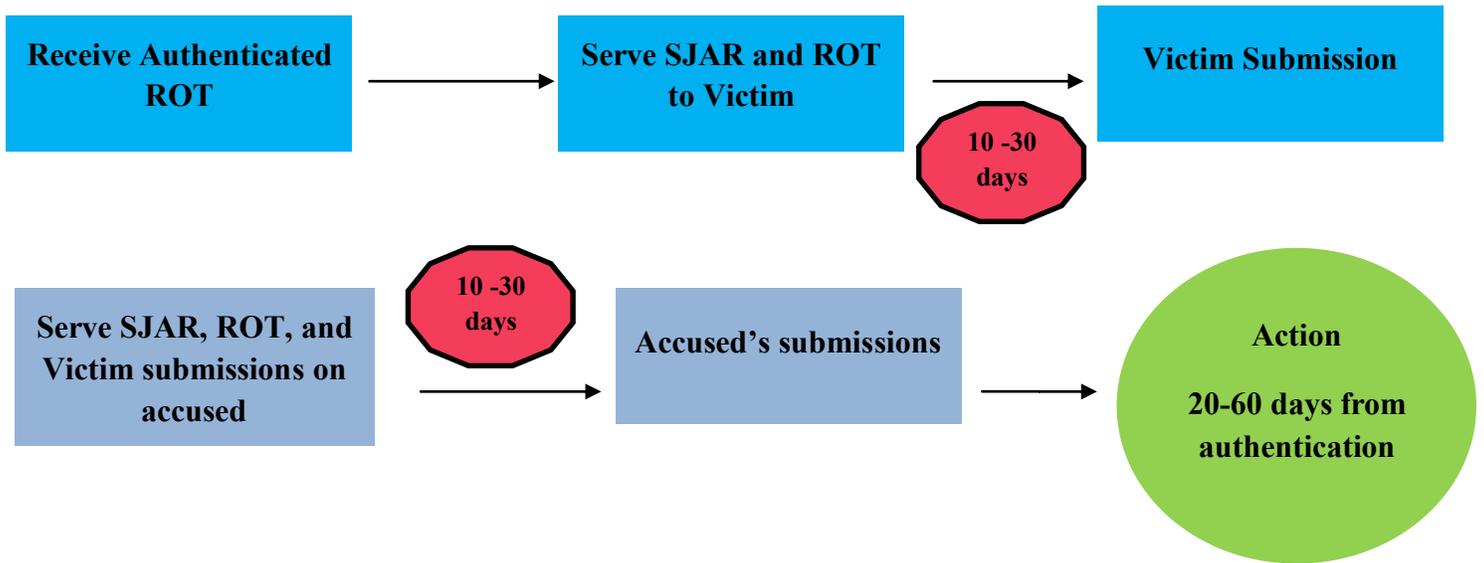
Victim Not Entitled To Authenticated Record of Trial



Victim Entitled to Free Copy of Authenticated Record of Trial IAW Article 54(e)



OR



Appendix D

Sample Standard Operating Procedure¹²¹

8. Pre-Trial Processing.

- a. Case Management.
- b. Pretrial Investigations.

When considering charges, trial counsel (TCs) will determine whether any “victim,” as defined by Rule for Court-Martial (RCM) 1105A, exists who will not be named in the specification. Trial Counsel will note any such victims to ensure that all entitled persons are provided the opportunity to provide input during post-trial processing.

- c. Pretrial Confinement (PTC).
- d. Preferral of Charges.
- e. Article 32 Investigations.
- f. Referral.
- g. Trial Preparation.

While the TC is preparing the case for prosecution, the Brigade Paralegal will consider each referred specification to identify all “victims,” as defined by Rule for Courts-Martial 1105A. The paralegal will then begin locating such “victims” so they may be notified of their potential right to submit matters pursuant to Rule for Courts-Martial 1105A. A sample notification letter is located at Appendix #.

- h. Trial Documents.
- i. Trial Procedures.
- j. Alternative Dispositions.
- k. After Trial.

i. At the end of trial, TCs will ensure that all necessary post-trial documents (Result of Trial, Victim-Witness Notification Form, Confinement Order) are properly prepared and signed, and that the signed Result of Trial is provided to the Staff Judge Advocate (SJA).

ii. No later than one week following the end of trial, the Post-Trial Paralegal will confirm the “victims,” as defined by RCM 1105A, for all specifications where a finding of guilty and sentence have been adjudged. The Post-Trial Paralegal will send notification letters to all identified “victims.” A sample post-trial notification letter is located at Appendix #.

9. Post-Trial Processing.

- a. All efforts will be made to ensure that court-martial post-trial matters are processed expeditiously.
- b. Immediately following trial, the Chief of Justice will determine whether any findings or sentence was adjudged for an offense that involved a victim as defined in Rule for Courts-Martial 1105A. If such offense is involved, the Chief of Justice (CoJ) will ensure that the victim is identified and notified of his/her opportunity to submit matters for consideration by the convening authority before initial action. A sample notification letter is provided at Appendix #.
- c. Deferral Requests.

¹²¹ This sample Standard Operating Procedure (SOP) is an excerpt of relevant portions from the SOP the author used while assigned as Chief, Military Justice, 1st Cavalry Division, Fort Hood, Texas, from 2013 to 2014.

d. Errata.

e. Clemency.

i. Upon receipt of the authenticated Record of Trial (RoT), the post-trial paralegal will immediately draft the Staff Judge Advocate's Post Trial Recommendation (SJAR) using Military Justice Online (MJO). The post-trial paralegal will provide the drafted SJAR to the CoJ for review and forwarding to the SJA for signature. The CoJ will ensure that the SJA signs the SJAR within 48 hours of receipt of the authenticated RoT.

iii. Once the SJA signs the SJAR, the post-trial paralegal will ensure that the SJAR and authenticated RoT are sent to the Accused and Defense Counsel within 48 hours. If a victim has a right to submit matters, the post-trial paralegal will ensure that the SJAR and, if entitled, RoT (see Article 54(e), UCMJ) are served upon the victim. The post-trial paralegal will annotate in MJO the date on which each individual is served for the purpose of tracking the due date for submission of matters.

iv. Upon the expiration of the period for submissions, if matters have not been received, the post-trial paralegal will reach out to the Defense Counsel and Victim, if applicable, and request submission of matters pursuant to Rule for Court-Martial 1105 and 1105A or, if not yet requested, a request for additional time to provide matters.

v. If a request for additional time to file matters is received, the post-trial paralegal will properly annotate the date of request in MJO and will prepare a memorandum for the SJA's decision regarding the extension. The post-trial paralegal will annotate in MJO the new date matters will be due.

vi. When matters are received from a victim, those matters will be sent to the Accused and Defense Counsel within 48 hours of receipt so that the Accused and Defense Counsel may have the opportunity to respond to the victim's matters. The victim does not have the right to review and respond to the Accused's matters or response, if any, to the victim's matters.

vii. Upon receipt of matters from the Accused, Defense Counsel, and Victim, if applicable, the post-trial paralegal will annotate the date of receipt of matters in MJO and will prepare the Addendum to the SJAR and the Convening Authority's (CA) Action, also using MJO. The CoJ will review these documents prior to providing them to the SJA for signature and decision by the CA. The CoJ will ensure that the Addendum and Action are prepared for the first CG appointment following receipt of matters from relevant parties.

viii. Once the CA has taken Action in a court-martial case, the post-trial paralegal will immediately upload the signed Addendum and Action into MJO and will begin preparing the Promulgating Order. The post-trial paralegal will have the Promulgating order ready for the CoJ's signature within 48 hours of signed Action. Original Promulgating Orders are maintained, in reverse numerical order, in a green, two-sided folder, labeled by calendar year and type of Court-Martial. A list will be maintained on the left side of the folder.

ix. Once the Promulgating Order is signed, the post-trial paralegal will begin packaging the "Original" copy of the RoT for forwarding to the Army Court of Criminal Appeals (ACCA), if required. The post-trial paralegal will ensure that the record is properly assembled and forwarded, by Certified Mail, to ACCA and a copy of the Action and Promulgating Order is sent to the Accused and Defense Counsel within 48 hours of completion of the Promulgating Order.

x. All "SJA" copies of the RoT will be properly assembled and filed alphabetically in the Military Justice Section by year and type of Court-Martial.

Sometimes, They Come Back!¹ How to Navigate the World of Court-Martial Rehearings

Major Timothy Thomas*

I. Introduction

When an appellate court returns court-martial charges to the convening authority for a rehearing on findings, sentence, or both, both government and defense counsel are faced with rules and issues that are not part of their ordinary practice. How does the government go forward? Why was this sent back? What charges are still in play after the appellate decision? What limitations exist based on the rules? When does the speedy trial clock start? Is this a sentencing-only rehearing or a full rehearing? Is justice served by a retrial, or is an administrative separation a better option? What about simply not going forward at all? These decisions are often made in an environment where no one in the command has any ties to any of the parties or misconduct involved. Further compounding those issues, some witnesses may be dead, missing, hard to find, or they may have a memory of key events that is at best faulty and at worst non-existent. The victim may have no interest in being involved in the process or may be incensed at having to go through this all over again.

Defense counsel must decide how to best serve a client who lost beyond a reasonable doubt the first time around. They have an accused and his family who also have to go through the trial process all over again. Their client may be put in pretrial confinement and not get paid because his term of service from active duty ended and finance refuses to pay him. Does the defense counsel do everything the prior counsel did, only better? Or, does counsel try another route since the first approach did not work at the initial trial? Everyone is trying to figure out what to do. How do rehearings work?

This article will summarize the rules, procedures, pitfalls, and quirks that surround rehearings. Section I reviews the authority for and types of rehearings. Section II focuses on sentence-only rehearings, while Section III addresses full rehearings. Finally, Section IV summarizes key lessons for counsel in dealing with rehearings.

¹ Stephen King, *Sometimes They Come Back*, Cavalier, Mar. 1974.

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II. Authority for Rehearings

Rehearings come in three types: rehearings in full, sentence-only, or a combination of both. Rehearings can be authorized by the appellate courts; or, in some cases, by the convening authority. Also, appellate courts may send cases back for limited evidentiary hearings. The authority for rehearings comes from several places. Article 66(d), Uniform Code of Military Justice (UCMJ) gives service courts the authority to order a rehearing on the findings and/or the sentence in all cases where the findings and/or sentence are set aside, except cases involving a "lack of sufficient evidence" to support a finding of guilty.² Article 67(d), UCMJ gives the Court of Appeals for the Armed Forces (CAAF) the same authority and the same limitation.³ Appellate courts can also order limited evidentiary hearings called *DuBay* hearings, named after *United States v. DuBay*.⁴ These limited evidentiary hearings are a court-created means to resolve disputed factual issues raised on appeal through an adversarial, trial setting that develops the facts sufficiently to allow the court to rule on an issue.⁵

A rehearing can occur at initial action, or when the convening authority is authorized to do so by a superior competent authority, usually an appellate court.⁶ It can also occur when the case does not qualify for appellate review, or appellate review is waived, and the case is reviewed by a judge advocate under Rule for Courts-Martial (RCM) 1112,⁷ or when an accused petitions for a new trial under RCM 1210.⁸ An important limitation of this authority is that a convening authority cannot order a rehearing in cases where there is "a lack of sufficient evidence in the record to support

² UCMJ art. 66(d).

³ UCMJ art. 67(d).

⁴ *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

⁵ *Id.* See also *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997) (holding that a *DuBay* hearing may only be required if the following circumstances are not met: 1) appellant alleges an error that would not result in relief; 2) an affidavit alleges not facts but speculative or conclusory observations; 3) a facially adequate affidavit is uncontested by the Government; 4) the record as a whole compellingly demonstrates the improbability of appellant's facts; 5) an appellate claim of ineffective representation contradicts a matter within the record of a guilty plea, unless the appellant rationally explains why he made those statements at trial but not on appeal). In practice, a *DuBay* hearing is similar to a motions hearing during an Article 39(a) session. Counsel for each side will be allowed to call relevant witnesses, to cross-examine opposing witnesses, and to make argument concerning the specified issues. Like rehearings, *DuBay* hearings usually occur some significant period of time after the trial, and thus the same issues with witness availability, memory, and evidence are present in *DuBay* hearings as in other types of rehearings.

⁶ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1107(e)(1)(B) (2012) [hereinafter MCM].

⁷ *Id.*, R.C.M. 1112(f)(1)(C).

⁸ *Id.*, R.C.M. 1210(a).

the findings of guilty of the offense charged or of any lesser included offense.”⁹ Like the appellate courts, the convening authority can order a rehearing on findings and/or sentence, but subject to the limitations noted above. Also, a convening authority cannot take any action inconsistent with directives of a superior competent authority.¹⁰

In addition to the appellate courts, a convening authority has the authority to order a rehearing on a limited selection of findings at initial action.¹¹ Recent amendments to Article 60(c) prohibit the convening authority from setting aside a finding of guilty for an offense that is not a “qualifying offense.”¹² A “qualifying offense” is an offense under the UCMJ, other than offenses under Articles 120(a) or (b), 120b, or 125, for which “the maximum sentence of confinement that may be adjudged does not exceed two years; and the adjudged sentence does not include a dismissal, a dishonorable or bad-conduct discharge, or confinement for more than six months.”¹³ Article 60(f)(3) remains unchanged and technically allows on its face the convening authority to order a rehearing without any limitations.¹⁴ Notwithstanding Article 60(f)(3), the changes to Article 60(c) barring dismissal of non-qualifying offenses remove the convening authority’s ability in Article 60(f)(3) to dismiss the charge for non-qualifying offenses, although the ability of the convening authority to disapprove and order a rehearing for qualifying offenses remains.¹⁵

⁹ *Id.*, R.C.M. 1107(e)(1)(C)(ii).

¹⁰ *Id.*, R.C.M. 1107(e)(1)(B), discussion.

¹¹ UCMJ art. 60(f)(1) (“The convening authority . . . in his sole discretion, may order . . . a rehearing.”).

¹² UCMJ art. 60(c)(3)(B)(i) (The convening authority “may not dismiss any charge or specification, other than a charge or specification for a qualifying offense, by setting aside a finding of guilty thereto.”).

¹³ UCMJ art. 60(c)(3)(D).

¹⁴ UCMJ art. 60(f)(3) (providing that if findings are disapproved, the convening authority may order a rehearing or dismiss the charges). *See also* MCM, *supra* note 6, R.C.M. 1107(e)(1)(A) (authorizing the convening authority to order a rehearing as to some or all offenses where there is a finding of guilty, or to the sentence alone, subject to the limitations of Rule for Courts-Martial (RCM) 1107(e)(1)(B-E)).

¹⁵ This raises an interesting problem. What happens when the defense raises a legal error through clemency, and the convening authority wants to address it? Before the changes to Article 60(c), the answer was simply for the convening authority either to set aside and order a rehearing or to dismiss. Now, for non-qualifying offenses, the convening authority can only order a post-trial Article 39(a) session. *See* MCM, *supra* note 6, R.C.M. 1102(d) (convening authority may direct a post-trial session any time before initial action). A post-trial RCM 39(a) session can be called to resolve “any matter that arises after trial and substantially affects the legal sufficiency of any findings of guilty or the sentence.” *Id.*, R.C.M. 1102(b)(2). If there is legal error, the military judge is free to enter a finding of not guilty. *Id.* Or, she can order a mistrial. *Id.*, R.C.M. 915. If a mistrial is ordered by the military judge, then the affected charges and specifications are withdrawn from the court-martial. *Id.*, R.C.M. 915(c). They are then returned to the convening authority who “may refer them anew or dispose of them.” *Id.*, R.C.M. 915, discussion.

III. What Alternatives to Trial Does the Government Have?

When an appellate court sends charges back and authorizes a rehearing, the convening authority does not have to order a rehearing. For rehearsings in full, the convening authority can dismiss the charges with or without prejudice.¹⁶ For sentence rehearsings, the convening authority can approve a sentence of no punishment without conducting a rehearing.¹⁷ The reasons why a convening authority might make a certain decision depends on why the case was sent back, what charges remain, or the availability of witnesses or evidence. In cases where an appellate court dismisses the more significant charges on the charge sheet, and the remaining charges are relatively minor, the reasons not to go forward to court-martial could include time, cost, availability of witnesses, impact on the unit, or fairness to the accused. Where an appellate court identifies a discovery violation, the government will have to determine if they can resolve the violation in a way which allows them to go forward to trial, or whether the information now available to the defense significantly improves the viability of a defense, or lessens the credibility of a witness. Availability of witnesses, or evidence, and the impact on the complaining witness are additional reasons why a court-martial may not be the best option in some cases. These examples may appear to be stating the obvious. However, it is important for government counsel to remember that administrative separation, reprimand, non-judicial punishment, resignations, or simply taking no action other than dismissal of the charges are other viable courses of action that should be considered fully in lieu of a rehearing.

Alternatively, the government may have held back on additional charges, or may be aware of new charges based on older misconduct, or misconduct that occurred while the accused was in pretrial confinement and these charges can be added to the rehearing. Either of these reasons could justify going forward to trial when combined with the remaining charges not dismissed by an appellate court. Furthermore, after analyzing the difficulties involved, the government may still decide to go forward even with a reduced chance of conviction. Whichever path the government chooses, the government should discuss the decision with any complaining witnesses, who should be kept informed throughout the process.

A. Sentence Rehearings

A sentence rehearing involves a new presentencing proceeding to determine an appropriate sentence for the affirmed findings of guilty, where there were errors in the original sentencing hearing. The new sentencing hearing must be referred to the same level of court-martial (general or special) as the original trial.¹⁸ Generally, the sentence

¹⁶ MCM, *supra* note 6, R.C.M. 1107(e)(1)(B)(iii).

¹⁷ *Id.*, R.C.M. 1107(e)(1)(C)(iii).

¹⁸ MCM, *supra* note 6, R.C.M. 1107(e)(1)(C)(iii).

approved after the new sentencing hearing cannot be in excess of the sentence approved at the original trial.¹⁹ However, the process is not without some complexity.

1. Permissible Punishments at Sentence Rehearings

As the Court of Military Appeals (CMA) noted in *United States v. Hodges*, it is not always clear in comparing two punishments which punishment is more or less severe.²⁰ A convening authority cannot convert a sentence to confinement into a punitive discharge or convert a bad-conduct discharge (BCD) to a dishonorable discharge (DD).²¹ However, a convening authority can commute a punitive discharge into a period of confinement.²² Consider the hypothetical where the original approved sentence was for six months of confinement and a BCD. At the sentencing rehearing, the panel sentences the accused to nine months of confinement and no BCD, and the convening authority approves the sentence. This sentence with longer confinement can be approved by the convening authority, because the BCD was effectively converted to three months of confinement. If the sentence adjudged at the second sentence rehearing was instead nine months of confinement and a DD, it would not be permissible to approve this sentence because of the more serious type of discharge and the three extra months of confinement. However, the convening authority can reduce the DD to a BCD and the confinement to six months. There is not an exact answer on how to convert a BCD or DD into a set number of days of confinement. One year of confinement has been found not more severe than a BCD.²³ Staff judge advocates should be leery of recommending that the convening authority approve a punishment that converts a punitive discharge to a period of confinement much longer than a year, and if they do, defense counsel should be ready to challenge.

¹⁹ UCMJ Art. 63. See also MCM, *supra* note 6, R.C.M. 810 (but note that it can be increased if there is a mandatory minimum sentence).

²⁰ *United States v. Hodges*, 22 M.J. 260, 262 (C.M.A. 1986).

²¹ MCM, *supra* note 6, R.C.M. 1107(d)(1), discussion (a bad-conduct discharge can be changed to confinement, but not vice versa). See also *United States v. Altier*, 2012 WL 1514767 (N. M. Ct. Crim. App. 2012).

²² *Hodges*, 22 M.J. at 262 (holding a punitive discharge may be commuted to some period of confinement); *United States v. Prow*, 32 C.M.R. 63, 64 (C.M.A.1962) (changing a bad-conduct discharge to confinement for three months and forfeiture of \$30.00 per month for three months lessens the severity of the punishment); *United States v. Brown*, 32 C.M.R. 333, 336 (C.M.A.1962) (permissible to substitute six months' confinement and partial forfeitures for a bad-conduct discharge); *United States v. Owens*, 36 C.M.R. 909, 912 (A.F.B.R.1966) (commuting a bad-conduct discharge to confinement at hard labor for eight months, forfeiture of \$83.00 per month for eight months, and reduction to airman basic was permissible).

²³ MCM, *supra* note 6, R.C.M. 1107(d)(1), discussion (a bad-conduct discharge adjudged by a special court-martial can be changed to confinement for up to one year). See also *United States v. Carrier*, 50 C.M.R. 135, 138 (holding that a bad-conduct discharge is more severe than one year in confinement).

2. Guilty Pleas and Sentence Rehearings

Guilty pleas add an additional layer of complexity to sentence rehearings. In sentence rehearings, the accused may not withdraw from a prior guilty plea,²⁴ and the maximum punishment is limited to the approved sentence.²⁵ Sometimes, the convening authority will combine a sentencing rehearing with a trial on new charges, which is called a combined rehearing.²⁶ In this situation, the maximum punishment allowed is calculated as the maximum punishment allowed for the new charges plus the approved sentence for the charges of which the accused has been found guilty at the first trial.²⁷ Another hypothetical example will illustrate this point. Assume that an accused has been found guilty of an offense at court-martial and received an adjudged sentence of ten years. The statutory maximum punishment for that offense is twenty years. The convening authority gives significant clemency and only approves five years of the adjudged sentence. On appeal, an appellate court overturns the conviction and authorizes a full rehearing. The accused is retried on the original charge, but has committed an additional offense which is referred together with the original charge at the rehearing. The statutory maximum punishment for the additional offense is seven years. Thus, the combined statutory maximum punishment for both offenses is twenty-seven years. The accused is convicted of both offenses, and receives an adjudged sentence of twenty years. The most that the convening authority can approve in this hypothetical is twelve years. That is the maximum punishment of the additional offense (seven years) added to the approved sentence for the original offense at the first trial (five years).

Another sentencing consideration in retrials is the Disciplinary and Adjustment Board (D&A Board). When inmates in confinement facilities get into trouble, they receive D&A Boards.²⁸ These are the functional equivalent of a non-judicial punishment hearing for Soldiers under Article 15, UCMJ. They are admissible as personnel records of the accused just like Article 15s.²⁹ Trial counsel should be aware of the possibility of these records and exercise due diligence in identifying whether they exist and their utility on sentencing.

The rights and safeguards for D&A Boards are even more limited than for Article 15s, as the right to counsel is

²⁴ MCM, *supra* note 6, R.C.M. 810(a)(2)(B).

²⁵ *Id.*, R.C.M. 810(d)(1). But see R.C.M. 810(d)(2) ("If . . . the sentence was approved in accordance with a pretrial agreement and at the rehearing the accused fails to comply with the pretrial agreement . . . the approved sentence resulting at a rehearing of the affected charges and specifications may include any . . . lawful punishment not in excess of or more serious than lawfully adjudged punishment at the earlier court-martial).

²⁶ *Id.*, R.C.M. 810(a)(3).

²⁷ *Id.*, R.C.M. 810(d)(1).

²⁸ U.S. Disciplinary Barracks, Reg. 600-1, Manual for the Guidance of Inmates para. 6-3 (14 Nov. 2013) [hereinafter USDB Reg. 600-1].

²⁹ MCM, *supra* note 6, R.C.M. 1001(b)(2).

extremely limited, and the investigation process is comparatively minimal.³⁰ Also, the language used to describe offenses is often inflammatory. An example is that an inmate can be charged with “trafficking” for giving a note or piece of fruit to another inmate.³¹ Defense counsel should expect that their client may have some of these in his records, and consider fighting their admission and how it affects the sentencing case. There may also be situations where getting into the underlying offense for a D&A Board is actually helpful to an accused in properly portraying it to the fact-finder as minor misconduct.

3. Evidentiary Issues in Sentence Rehearings

One of the issues with sentence rehearings is how to present evidence from the original trial on the merits to the panel. One option is to have someone read it aloud to the panel. This is a tactic often used when presenting prior Article 32 or deposition testimony to the panel at a trial. While this is an acceptable method, the downside is a panel may have difficulty following and retaining a long, dry recitation of prior testimony. Another option is to produce copies of the verbatim testimony you want admitted and have the panel read it. The problem with this option is that not everyone reads at the same speed, and you risk slower readers “skipping” portions to catch up with the faster readers. Also, if it is voluminous, it can be difficult for panel members to retain all of the testimony. A third option is to have attorneys act out the roles as questioner and witness, reading in turn from the verbatim transcript. While there is a giggle factor with this method initially, the benefit is it most closely replicates the manner in which panels are used to receiving evidence: a question and answer colloquy. Finally, counsel could choose to reduce prior merit testimony into a mutually-agreed stipulation of fact. The final determination on how the relevant evidence from the original trial on the merits will be presented to the court members is up to the military judge.

Another issue with sentence-only rehearings is not simply how to present prior merits evidence, but determining what prior merits evidence is admissible or necessary. “Matters excluded from the record of the original trial or improperly admitted on the merits must not be brought to the attention of the members”³² On appeal, whole charges could have been dismissed or select pieces of evidence or testimony could have been ruled inadmissible.³³ Addressing these issues can involve both counsel and the military judge

³⁰ USDB Reg. 600-1, *supra* note 28.

³¹ Policy Letter 16, United States Army Corrections Command, subject: Army Corrections Command (ACC) Policy Letter #16 – Institutional Offense Policy (31 Mar. 2010) [hereinafter ACC Policy Letter 16], at 7.

³² MCM, *supra* note 6, R.C.M. 810(a), discussion.

³³ See e.g. *United States v. Gilbreath*, 2014 CAAF LEXIS 1206 (C.A.A.F. Dec. 18, 2014) (holding appellant’s confession inadmissible for failure to administer rights-warnings); *United States v. Conklin*, 63 M.J. 333 (C.A.A.F. 2005) (finding search of appellant’s computer for child pornography was unlawful, and subsequent images found were tainted by the unlawful search).

going through the prior merits testimony and evidence line-by-line or even word-by-word to determine what should come in before the panel at the rehearing. Counsel for both sides should be prepared for this time-intensive, but necessary, process.

B. Rehearings in Full

A rehearing in full starts almost from scratch with a few, notable exceptions. First, it is not required to re-prefer the charges³⁴ or conduct a new Article 32 hearing, assuming no new preferred charges are combined with the charges to be reheard.³⁵ However, a referral to a new court-martial is required.³⁶ Second, the speedy trial clock starts anew “on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing.”³⁷ The inclusion of the word “authorizing” in addition to the word “directing” supports that the speedy trial clock starts not just in cases where the appellate court directs a rehearing, but also in cases where the convening authority is “authorized” to either order a new trial or conduct some other action, such as dismissal, *DuBay* hearing, or sentence re-assessment. Thus, government counsel should be wary in thinking the convening authority has additional time to make a decision when a superior competent authority leaves the decision in the convening authority’s hands. Finally, all alternative resolution options are still applicable during rehearings, particularly rehearings in full. Thus, dismissal of some or all of the charges by the convening authority³⁸ or military judge,³⁹ discharge in lieu of court-martial,⁴⁰ or offer to plead guilty⁴¹ are still viable options for both sides to pursue.

1. Appendix D, Military Judges’ Benchbook

Most counsel who conduct a rehearing are doing so for the first time. Appendix D of the Military Judges’ Benchbook⁴² can give counsel a quick understanding of the procedures and script for a rehearing. The military judge will address right to counsel, forum rights, maximum punishment, how to inform the panel that this is a rehearing,

³⁴ *United States v. McFarlin*, 24 M.J. 631, 634 (A.C.M.R. 1987).

³⁵ UCMJ Art. 32. See also MCM, *supra* note 6, R.C.M. 405(b).

³⁶ *Id.*, R.C.M. 801(a).

³⁷ *Id.*, R.C.M. 707(b)(3)(D).

³⁸ *Id.*, R.C.M. 306(c)(1). See also *id.*, R.C.M. 401(c)(1).

³⁹ *Id.*, R.C.M. 907.

⁴⁰ U.S. DEPT OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS Ch. 10 (6 June 2005) (RAR, 6 Sept. 2011) [hereinafter AR 635-200].

⁴¹ MCM, *supra* note 6, R.C.M. 910.

⁴² U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK app. D (10 Sept. 2014) [hereinafter DA PAM 27-9].

and disregarding the prior trial.⁴³ The military judge will also address the manner in presenting evidence from the first trial to the rehearing panel, pretrial confinement credit, and how to deal with convictions for offenses that remain from the original trial.⁴⁴ Reviewing Appendix D at the start of the rehearing process will help guide counsel on some of the issues that both sides should consider.

2. Evidentiary Issues in Rehearings in Full

The biggest issues in rehearings in full typically involve evidentiary considerations and witness location. Counsel for either side should never assume that the rehearing will go just like the first trial. Witnesses may forget or change testimony, or they may be dead, missing, or difficult to locate. Key evidence can be lost or damaged.⁴⁵ As such, counsel for both sides may have to take a different tactical or strategic approach to the case than the counsel at the original trial.

The initial inclination of government counsel is to replicate what the government counsel did before that led to the prior conviction, while accounting for whatever appellate ruling sent the case back. After all, that approach led to a conviction beyond a reasonable doubt. However, the error(s) that led to a rehearing and the time that has passed likely have changed the playing field, usually in favor of the accused.⁴⁶ The previously mentioned issues with witness memory and availability, as well as evidence, will also have introduced new challenges to consider. As early as possible, government counsel need to aggressively identify any potential issues with witness availability and memory, and prepare for evidentiary issues. Government counsel should also anticipate defense expert requests. The case may have been sent back due to expert witness issues,⁴⁷ or new defense counsel may have identified an expert to patch up a hole in the defense.

While government counsel seek to replicate, defense counsel will be tempted to follow the opposite approach of what was done by defense at trial. After all, it “did not work.” There is merit to this, in that defense counsel should be prepared to bring a fresh perspective to the case. However, just because the case resulted in a conviction does not mean that the path taken at the original trial by defense counsel was wrong, or cannot work at a rehearing. It may

simply require slight tweaks, an additional lay or expert witness, or evidence that was not presented or was not allowed to be presented at the first trial. On the other hand, it could mean wholesale changes in strategies and tactics, or in themes and theories. Defense counsel should also consider a request for a defense investigator in more complex cases, or in cases where there is a large lag between the original trial and rehearing.

Another twist common in rehearings is that Military Rule of Evidence (MRE) 804(b)(1) allows the admission of prior testimony given “as a witness at another hearing of the same or different proceeding . . . if the party against whom the testimony is now offered, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” However, the witness must be unavailable, and the prior testimony must be a verbatim record at a prior court-martial, Article 32 hearing, or other equivalent hearing.⁴⁸ Unavailability for this purpose is not limited to death, serious illness or literal physical absence, but also includes when the witness testifies to a lack of memory of the relevant subject matter.⁴⁹ Article 50, UCMJ allows, in non-capital cases and in cases not involving the dismissal of an officer, authenticated prior verbatim testimony to be read into the record where the witness is unavailable to testify.⁵⁰ The admission of prior testimony is something not often seen by counsel on either side. The fact that nearly every witness has verbatim prior testimony to consider brings whole new challenges to counsel.

There are many challenges when dealing with prior verbatim testimony. Prior verbatim testimony can be a significant issue when witnesses are dead, too sick to attend, or missing.⁵¹ Prior verbatim testimony can also be an issue when a witness does not remember.⁵² Prior verbatim testimony cannot be cross-examined. The parties are “stuck” with the cross-examination that was done at that time, for good or bad. However, when a witness is not physically present, or testifies they cannot remember, and prior verbatim testimony is entered into the record, counsel have a couple of paths to addressing the testimony, since cross-examination is not an available tool. First, counsel can highlight the cross-examination that was done at the prior trial or hearing. The prior cross-examination may have been effective and complete on its own. However, if there were holes in the prior cross-examination, counsel should look to fill those holes with other witnesses or evidence, while remembering to look for missed evidence of bias or motive to fabricate.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See e.g., *United States v. Muwakkil*, 73 M.J. 859 (A. Ct. Crim. App. 2014) (striking testimony of alleged victim after loss of tapes from Article 32 hearing by government).

⁴⁶ See e.g., *United States v. Ellerbrock*, 70 M.J. 314 (C.A.A.F. 2011) (overturning trial judge’s ruling preventing appellant from introducing evidence of the alleged victim’s first marital affair to show a motive to fabricate, and ordering a new trial).

⁴⁷ See, e.g., *United States v. McAllister*, 64 M.J. 248 (C.A.A.F. 2007) (setting aside findings of guilty to a murder specification where there was an improper denial of a requested defense expert witness).

⁴⁸ MCM, *supra* note 6, Mil. R. Evid. 804(b)(1).

⁴⁹ *Id.*, Mil. R. Evid. 804(a)(1-6).

⁵⁰ UCMJ art. 50 (however, in capital cases and cases involving the dismissal of an officer, only the defense is allowed to read in prior testimony).

⁵¹ MCM, *supra* note 6, Mil. R. Evid. 804(b)(1).

⁵² *Id.*

Prior verbatim testimony also provides a host of challenges for the witnesses who return to testify at the rehearing. First, rarely do witnesses testify exactly the same way, every time they testify. Second, rehearings usually occur years after the original trial. Witnesses usually have not spent that time thinking about the events that led to the charged offenses. There is going to be memory loss or changes to memory. These factors collectively result in some witnesses testifying differently at the rehearing. The challenge for counsel is not only dealing with these contradictions in their own witnesses, but also recognizing the limitations of attacking them on cross-examination. The panel or military judge is going to be aware of the difficulties in memory, the passage of time, and the fact that witnesses will have some variability in testimony, particularly in this situation. In other words, impeachment tactics will have a reduced effectiveness, when some or all of the discrepancies can reasonably be explained away by time and the vagaries of memory. What should still remain very effective impeachment are the differences between statements made prior to the original trial and testimony at the original trial or the rehearing. These are much less affected by the passage of time, are much closer in time to the events surrounding the charged offenses, and they should not get the same benefit of the doubt from the finder of fact. The limitation here is that if the witness was already cross-examined about these discrepancies at the first trial, they are going to be better prepared to deal with those issues at the rehearing.

3. Common Issues with the Complaining Witness in Rehearings in Full

A rehearing can be an emotional, confusing, and difficult situation for a complaining witness. Defense counsel, and the military judge, will sometimes use the term “alleged victim.”⁵³ While this may be appropriate once a conviction has been overturned, it returns to the complaining witness the qualifier “alleged” that the complaining witness likely thought was permanently excised by the prior conviction. Additionally, the complaining witness has likely spent the intervening period moving on from the alleged offenses, possibly reaching closure. Now, usually through no fault of the complaining witness, the process reverts to square one, and the complaining witness will be forced not only to testify again including facing cross-examination, but will now face anew the possibility that the accused could be found not guilty. The presence of the victim advocate (VA),⁵⁴ special victims’ counsel (SVC),⁵⁵ and special

⁵³ DA Pam. 27-9, *supra* note 42 (compare the use of the words “alleged victim” repeatedly throughout Department of the Army (DA) Pamphlet (Pam) 27-9 prior to findings, e.g., in Instruction 7-14, with the use of the word “victim” alone throughout DA Pam 27-9 after findings, e.g., in paragraph 2-5-23).

⁵⁴ U.S. DEP’T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM para. 3-2(h) (30 Nov. 2007) (RAR, 13 Sept. 2011).

⁵⁵ See TJAG Sends Vol. 39-02, The Judge Advocate General, Army, subject: Special Victim Advocate Program 13 Oct. 2013 (establishing the special victim advocate (later changed to special victim counsel) program).

victims’ prosecutor (SVP)⁵⁶ will help the complaining witness deal with this tough situation, but trial counsel should recognize that preparing the complaining witness for direct and cross-examination may have an emotional element. Trial counsel must also consider how to assist the complaining witness if the panel finds the accused not guilty at the rehearing of some or all the offenses. While acquittals happen and are a natural part of the justice system, they have an added impact to a complaining witness at a rehearing.

Much like other witnesses, the complaining witness may testify inconsistently with prior testimony, because of memory loss, confusion, or the passage of time. While some latitude will likely be given by the finder of fact because of these reasons, it is important that the complaining witness, like all witnesses, review prior testimony. This is not so that the complaining witness closely parrots prior testimony on the stand, but so that the complaining witness understands what has been testified to previously and can be prepared to address the changes in testimony. Government counsel can use the complaining witness’s prior testimony, if there is a fact or issue testified to at the first trial that the complaining witness now no longer remembers.⁵⁷ Trial counsel can first attempt to refresh the complaining witness’s memory using prior testimony.⁵⁸ If that does not work, and the complaining witness or any witness still has no recollection of the subject matter of that prior testimony, then that witness may be unavailable,⁵⁹ and relevant prior testimony can be introduced to the panel.⁶⁰

4. Common Issues with the Accused in Rehearings in Full

Similar to complaining witnesses, an accused rides an emotional roller coaster at a rehearing. While there may be some hope or optimism tied to getting a second chance, the accused may have achieved closure after the original trial. Now, the accused’s life once again hangs in the balance between the defense counsel and the finder of fact. Some accused will have understandably unreasonable optimism at their chances of an acquittal the second time around, while others may be more fatalistic about what is to come. However the accused reacts, defense counsel should be prepared for the added impact that a rehearing will have on their client.

The accused may consider hiring a civilian defense counsel, if he did not do so at the first trial. After all, the detailed military counsel lost. Even if an accused does not ultimately hire civilian defense counsel, he may be reluctant

⁵⁶ See TJAG Sends Vol. 37-18, The Judge Advocate General, Army, subject: Special Victim Prosecutors and Highly Qualified Experts in Military Justice Jan. 2009 (establishing special victim prosecutors).

⁵⁷ MCM, *supra* note 6, Mil. R. Evid. 804(b)(1).

⁵⁸ *Id.*, Mil. R. Evid. 612.

⁵⁹ *Id.*, Mil. R. Evid. 804(a)(3).

⁶⁰ *Id.*, Mil. R. Evid. 804(b)(1).

to trust a newly detailed military defense counsel. Even if the accused makes an individual military counsel⁶¹ (IMC) request for the original trial defense counsel, trust issues could still arise. Detailed defense counsel at rehearings in full should be aware that they may have to do more to earn the trust and confidence of their clients. They should endeavor to keep their clients involved and fully informed about the process.⁶² While this is good advice at any time, it is even more so for rehearings.

If the accused is currently in post-trial confinement, he should be released once a rehearing has been ordered. If the government desires to place him into pretrial confinement, they must follow the normal rules governing pretrial confinement, including proper notice and a pretrial confinement hearing. This is because “all rights and privileges affected by an executed part of a court-martial sentence which has been set aside or disapproved, except an executed dismissal or discharge, shall be restored”⁶³

Defense counsel should inquire into improper pretrial punishment as well. Rehearings in full can occur years after a court-martial. A unit may view an accused that has been returned to them for a new trial as an added nuisance who is only there for the purpose of a new trial, and of no use to the unit. Due to the lack of any ties between the unit and the accused, an accused in this situation could be isolated, mistreated, put on special work details, or penalized in other ways that could violate Article 13, UCMJ.⁶⁴ There is also the added burden that the accused may spend some time away from his civilian job, and, in cases where he is past his ETS date, will do so while no longer receiving pay from the military.⁶⁵ One solution to this situation is for government counsel to work with the accused to minimize time away from his civilian job. Additionally, some civilian employers will be more agreeable to allowing the accused time away, if

the trial counsel issues a subpoena for the accused and provides it to the employer. In shorter cases, the court-martial could be held over a weekend or during the accused’s off-time.

However, the lack of ties between the accused, the charged offenses, and the unit can also be a plus for the accused. In cases where a guilty plea is feasible, the lack of any real personal stake by the command or the government in the case can be a boon for defense counsel looking for the best result for their client. For the same reasons, alternate resolutions such as an administrative discharge may be easier in rehearings, depending upon the severity of the charges.⁶⁶ Defense counsel must quickly assess command interest and be prepared to move forward with a favorable alternate disposition.

If alternate disposition is not an option, and the case is going to trial, defense counsel must look at pretrial investigation as being even more extensive in a rehearing than at an original trial. The defense should complete a new discovery request, look at physical evidence, review the scene of the alleged offense, and interview all necessary and material witnesses. Often, relying on the previous counsel’s work will fall short of what is required to zealously represent a client.⁶⁷ In some cases, the client no longer has access to his awards, family photos, or other items that defense might need for presentencing because of immediate confinement after the last trial. In these cases, defense counsel should communicate with the previous counsel to get the entire defense file, as some of these things may have been collected but not used at the previous trial (and thus not in the record).

The accused’s decision whether or not to testify can be tough under normal conditions. At a rehearing, the degree of difficulty can increase. If the accused did not testify at the original trial, then the calculus does not fundamentally change from the decision to testify at any trial. However, if the accused did testify at the original trial, then things become more complicated. Ostensibly, the accused testified at the earlier trial, gave his version of events, and the finder of fact, in whole or in part, did not believe him. While this may or may not actually be true, the fear that his testimony was found not credible in some respect is a reasonable one. Furthermore, if the accused testifies at the rehearing, that testimony will be compared for inconsistencies with his earlier testimony, along with any other statements.⁶⁸

⁶¹ UCMJ, art. 38(3)(B).

⁶² U.S. DEP’T OF ARMY, REG. 27-26, RULES FOR PROFESSIONAL CONDUCT FOR LAWYERS Rule 1.4 (1 May 1992) [hereinafter AR 27-26].

⁶³ UCMJ, art. 75(a).

⁶⁴ See, e.g., *United States v. Combs*, 47 M.J. 330 (C.A.A.F. 1997) (airman forbidden to wear E-6 rank while awaiting rehearing violates Article 13); *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987) (public denunciations violate Article 13); *United States v. Hoover*, 24 M.J. 874 (A.C.M.R. 1987) (being required to sleep in pup tent violates Article 13); *United States v. Cruz*, 25 M.J. 326 (CMA 1987) (separating out suspected drug users into a “peyote platoon” violates Article 13).

⁶⁵ *Dock v. United States*, 46 F.3d 1083, 1092-93 (Fed. Cir. 1995) (citing UCMJ art 75(a) and the Department of Defense Military Pay & Allowances Entitlements Manual, the court held that the appellant was not entitled to pay and allowances post-expiration of term of service while in pretrial confinement awaiting a rehearing unless and until “acquitted, charges are dropped, or the member is restored to full duty status”); see also *United States v. Dodge*, 60 M.J. 873, 878 (A.F. Ct. Crim. App. 2005) (“[T]here are myriad reasons why finance officials could conclude the appellant is not entitled to pay, including the not unreasonable belief that Article 75(a), UCMJ bars his restoration to a pay status until after this Court’s decision [A]ppellant . . . should pursue [his claim] . . . in . . . the United States Court of Federal Claims.”); *United States v. Fischer*, 61 M.J. 415 (C.A.A.F. 2005) (failure to pay an accused in pretrial confinement after ETS is not an Article 13 violation).

⁶⁶ See AR 635-200, *supra* note 40; see also U.S. DEP’T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006) (C1, 13 Sept. 2011) (administrative separation process for officers).

⁶⁷ See AR 27-26, *supra* note 62, Rule 1.1.

⁶⁸ MCM, *supra* note 6, Mil. R. Evid. 801(c) (“[A]n accused who chooses to testify as a witness waives the privilege against self-incrimination only with respect to the matters about which he or she testifies.”). *But cf.* *United States v. Murray*, 52 M.J. 671, 674 (N-M. Ct. Crim. App. 2000), *citing* *Harrison v. United States*, 392 U.S. 219 (1968) (holding that ordinarily an accused testimony can be used at a retrial except either where that testimony was based on ineffective assistance of counsel or where the appellant testified in order to overcome the impact of an illegally obtained confession).

However, if the accused does not testify at the rehearing, there may be issues left unclarified from his prior testimony that the government has offered into evidence.⁶⁹ Also, the trial counsel may not offer the accused's testimony into evidence at all because of its exculpatory nature. All of these competing concerns should inform the advice of defense counsel on whether or not the accused should testify at the rehearing.

5. Sentencing in Rehearings in Full

As with sentence rehearings, the sentence at a rehearing in full normally cannot exceed the prior approved sentence.⁷⁰ Unlike a sentence rehearing, the accused may withdraw from a guilty plea in a rehearing in full. However, by withdrawing from a guilty plea, the accused loses the protection of any pretrial agreement that was conditioned on that guilty plea.⁷¹

In situations where the original adjudged sentence was less than the limitation in the pretrial agreement, the accused is protected from receiving a higher sentence, regardless of whether he pleads guilty or not guilty, because the second approved sentence cannot be higher than the earlier approved sentence.⁷² In this situation, there is no tactical advantage for the accused to keep the pretrial agreement, unless it contained other benefits besides a sentence cap, such as a promise not to prosecute certain offenses. However, if the original adjudged sentence was greater than the approved sentence, then the accused risks a sentence up to that greater adjudged sentence, if he pleads not guilty.⁷³ For example, if the original deal was for six years, and the adjudged sentence was three years, then the accused cannot receive an approved sentence greater than three years at a rehearing, regardless of the plea. If the original deal was for three years, and the adjudged sentence was six years, then the accused risks an approved sentence of up to six years, unless the accused pleads guilty to keep the benefit of the three year cap in the pretrial agreement.

IV. Lessons for Counsel

Every rehearing has something unique to it, but there are some lessons common to all rehearings. If trial and defense

⁶⁹ *Harrison*, 392 U.S. at 222 (“[I]n this case we need not and do not question the general evidentiary rule that a defendant’s testimony at a former trial is admissible in evidence against him in later proceedings.”).

⁷⁰ UCMJ art. 6. See also MCM, *supra* note 6, R.C.M. 810 (but note that it can be increased if there was a mandatory minimum sentence).

⁷¹ MCM, *supra* note 6, R.C.M. 810(d)(2) (“If . . . the sentence was approved in accordance with a pretrial agreement and at the rehearing the accused fails to comply with the pretrial agreement . . . the approved sentence resulting at a rehearing of the affected charges and specifications may include any . . . lawful punishment not in excess of or more serious than lawfully adjudged punishment at the earlier court-martial.”).

⁷² *Id.*, R.C.M. 810(d)(1).

⁷³ *Id.*, R.C.M. 810(d)(2).

counsel follow the ten lessons below, they will be a step ahead in successfully tackling the challenge of rehearings.

1. The speedy trial clock starts when the responsible convening authority receives the record of trial and mandate directing or authorizing the rehearing.

2. The authority for rehearings comes primarily from Article 63, RCM 810, and RCM 1107. It is important to understand the type of rehearing and the authority for it and to remember that a convening authority cannot take any action inconsistent with directives of a superior competent authority. Also, counsel should remember that Article 60(c) creates an obstacle to the ability of the convening authority to order rehearings for non-qualifying offenses. However, at a post-trial Article 39(a) session, a military judge may impose a remedy that enables a convening authority to order a rehearing.

3. A new preferral or Article 32 hearing is generally not required, unless new charges are combined with the charges to be reheard, but a new referral is required.

4. Defense counsel especially (but also trial counsel) should watch for issues with confinement, pay, and improper pretrial punishment.

5. A pretrial confinement hearing will be necessary to confine the accused pending a rehearing.

6. Trial counsel should understand that witness location and production is likely going to be harder and take longer than for an original trial, and trial counsel should begin identifying and locating witnesses early in the process.

7. Defense counsel should check for D&A Boards their client received during post-trial confinement. They should research and know what, if any, rights their client had to dispute the allegations. Further, they must be prepared to argue against their admission or mitigate their impact by getting details about the underlying conduct that led to the D&A Board.

8. Rehearings take a tremendous emotional toll on the accused, the complaining witness, and their families. This may make it harder to establish a relationship between the defense counsel and the accused, or trial counsel/SVP and the alleged victim. It will also likely require more understanding and willingness to listen on the part of counsel.

9. Rehearings do not necessarily unfold like the prior trial. While counsel should read and know the original trial transcript, they should approach the rehearing with fresh eyes and be ready to reinvestigate the case from scratch. Both sides should be prepared for faulty memories, missing witnesses, and missing or degraded evidence.

10. Unless there are new offenses, the approved sentence cannot be greater than the sentence previously approved.

However, a punishment can be commuted to another punishment that is not more severe.

These lessons recognize the procedural issues as well as the personal issues for the participants. Dealing with the latter will require counsel to show patience and understanding as accused and complaining witnesses alike go through the difficult process of a court-martial for the second time. Trust will also be at issue, particularly between the accused and the defense counsel.

VI. Conclusion

Rehearings may seem daunting to counsel facing them for the first time. There are new, difficult tactical and strategic decisions to make, as well as a significant increase in potential issues with evidence and witnesses. There are also emotional concerns with both the accused and the alleged victim. However, so long as counsel slow down, plan in advance, and consider the tactical and strategic ramifications of having a prior trial's worth of evidence and testimony, rehearings can be not only manageable, but a rewarding professional experience.

The Next Best Thing to Zihuatanejo¹: A Primer for Defense Counsel to Help Clients Find the Best Place to Live After a Conviction

Major Craig Schapira*

“You know what the Mexicans say about the Pacific? . . . They say it has no memory. That’s where I want to live the rest of my life. A warm place with no memory.”²

I. Introduction

You are serving as a Trial Defense Service (TDS) attorney and a month before the court-martial, your client asks you the following question: “Ma’am, if I get convicted, where should I live that will give me the best chance to put my life back together?” Just as Andy Dufresne yearned for Zihuatanejo in *The Shawshank Redemption*,³ your client seeks a place where he can get a fresh start at life. But you have no idea how to answer him, even though his question is applicable to everyone facing general⁴ court-martial for an

offense that is not “military unique.”⁵ Questions fill your head. What factors matter for offenders reentering society? What laws impact those factors the most? And does the analysis change if your client is convicted of an offense requiring sex offender registration?

Not wanting to give incorrect advice, you end up saying something nonresponsive about how the laws of each state differ and how his personal circumstances will ultimately dictate the best location. While these caveats are important when providing any advice to a client about laws that may rapidly change,⁶ your advice should consist of more than a mere caveat. As one judge advocate noted, “[M]ilitary clients deserve the best advice from their trial defense counsel, not just the bare minimum standard required by the [Court of Appeals for the Armed Forces].”⁷

¹ THE SHAWSHANK REDEMPTION, *infra* note 2 and accompanying text.

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² THE SHAWSHANK REDEMPTION (Castle Rock Entertainment 1994) (discussing Zihuatanejo, a city in Mexico on the Pacific Ocean where protagonist Andy Dufresne wants to live, if he ever gets out of prison, that symbolizes a fresh start where no one knows of the horrible crime he was convicted of).

³ *Id.*

⁴ The Federal Government does not consider a special court-martial conviction a felony. See 18 U.S.C.S. § 3559(a)(6)–(9) (LexisNexis 2015) (defining a misdemeanor as an offense for which “the maximum term of imprisonment authorized is . . . one year or less . . . but more than five days”); see also 18 U.S.C.S. § 922(g) (LexisNexis 2015) (“It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”); 27 C.F.R. § 478.11 (2014) (clarifying that 18 U.S.C.S. § 922(g) only applies to general court-martial convictions). Additionally, while more study is needed, it is likely that states do not consider special court-martial convictions as felonies. See Christopher R. Pieper, *Military Discipline and Criminal Justice: Prior Military Convictions as Predicate Felonies Under Missouri’s Recidivism Statute*, 70 MO. L. REV. 219, 241

(2005) (discussing how the Missouri Supreme Court’s decision in *State v. Grubb*, 120 S.W.3d 737 (Mo. 2003), implied that special court-martial convictions are not considered felonies under Missouri’s “recidivism statute”); Matthew S. Freedus & Eugene R. Fidell, *Conviction by Special Courts-Martial: A Felony Conviction?*, 15 FED. SENT’G. REP. 220 (2003) (concluding that special court-martial convictions “should be treated as the equivalent of a misdemeanor, not a felony, for purposes of federal and state sentencing”). Moreover, one state—New Mexico—does not consider any type of court-martial conviction as a felony for purposes of its “habitual offenders” statute. N.M. STAT. ANN. § 31-18-17 (LexisNexis 2015). Thus, while the information in this article is still useful for servicemembers convicted at special court-martial due to employers’ use of computerized background checks, they will likely not be considered felons regardless of where they live. As a final note, sex offender residency restrictions will still be applicable to clients convicted of qualifying offenses at special court-martial because all states require registration for individuals convicted of qualifying offenses at any courts-martial. Major Andrew D. Flor, *Sex Offender Registration Laws and the Uniform Code of Military Justice: A Primer*, ARMY LAW., Aug. 2009, at 1, 4.

⁵ See Major Michael J. Hargis, *Three Strikes and You Are Out – The Realities of Military and State Criminal Record Reporting*, ARMY LAW., Sept. 1995, at 3, 7–11 (providing a detailed discussion of the court-martial conviction reporting process and noting that “military unique” offenses are not reported to the Federal Bureau of Investigation for entry into the national database) (citing U.S. DEP’T OF ARMY REG. 190-47, ARMY CORRECTIONS SYSTEM para. 10-2(b) (17 June 1994)). While the current version of U.S. DEP’T OF ARMY REG. 190-47, ARMY CORRECTIONS SYSTEM (15 June 2006) still contains this rule, more study is needed to determine if modern, electronic background checks will reveal “military unique” offenses nonetheless. This is relevant for the reasons discussed *infra* Section IV.

⁶ See U.S. DEP’T OF ARMY PAM. 27-9, MILITARY JUDGES’ BENCHBOOK para. 2-5-23 (10 Sept. 2014) (noting that “[sex offender registration] requirements may differ between jurisdictions” and that “specific requirements are not necessarily predictable”).

⁷ Flor, *supra* note 4, at 14.

This article seeks to educate defense counsel on what they need to discuss with their clients in order to determine where it would be most advantageous for them to live after a conviction. It begins by informing defense counsel of the challenges their clients face following a conviction and argues why it is important to discuss a reentry plan with them at the earliest stages of representation. Section III explains why a client's family relationships drive the initial discussion about where he should live following confinement. Section IV covers the crucial role employment plays in the reentry process and explains why "ban-the-box" ⁸ laws boost your client's chances of securing meaningful employment following a conviction. It concludes by comparing and contrasting the laws of the thirteen states that currently have ban-the-box legislation, as well as the laws of three other states that offer employment protections for offenders. Part V discusses the importance of housing for offenders during the reentry process and how sex offender residency restrictions make it difficult for offenders to find adequate housing. The section will then examine the sex offender residency restrictions in states with ban-the-box or other employment protections for offenders and highlight several states your client should be aware of when deciding where to live. The article concludes by enumerating which states have the most reasonable sets of laws to enable successful reentry. Finally, it reminds TDS attorneys about their important role in the reentry process.

II. Why It's Worthwhile to Counsel Clients About Where to Live

Although a client convicted at a general court-martial will likely reenter society long after his attorney-client relationship with his TDS counsel has terminated, ⁹ the pretrial conversation regarding where he will live after confinement can impact his life as much as anything the attorney does in the courtroom. Research indicates that during the reentry process, offenders "face serious obstacles, especially in the realms of education, work, housing, and substance abuse."¹⁰ Many of these difficulties arise from the

⁸ *Ban the Box: A Fair Chance for a Stronger Economy*, NAT'L EMP'T LAW PROJECT, <http://www.nelp.org/page/content/banthebox/> (last visited November 15, 2014) (noting that the term "[ban-the-box] refers to the policy of removing the check-box that asks about criminal history from job applications").

⁹ Policy Memorandum 2014-02, United States Army Trial Defense Service, subject: Detailing of Defense Counsel and Formation of Attorney-Client Relationships Within the Trial Defense Service (TDS) (10 Dec. 2014) (listing "events [that] terminate an attorney-client relationship with a court-martial client," all of which are likely to take place within six months of the conclusion of trial).

¹⁰ Matthew Makarios, Benjamin Steiner, & Lawrence F. Travis III, *Examining the Predictors of Recidivism Among Men and Women Released from Prison in Ohio*, 37 CRIMINAL JUSTICE AND BEHAVIOR 1377, 1378 (2010) (discussing Joan Petersilia's research, among others, that supports this proposition); Cynthia L. Conley & Susan Sawning, *Designing Programming and Interventions for Women in the Criminal Justice System*, 38 AM. J. CRIM. JUST. 27, 35 (2013) (finding that those on probation or parole identified "barriers to employment[,] the need for safe, affordable

"collateral consequence[s]" associated with a felony conviction, which "amplify punishment beyond the sanctions imposed by the criminal justice system."¹¹ And unlike the "place with no memory" of which Andy Dufresne spoke,¹² society never forgets a felony conviction. Instead, it places a "scarlet letter"¹³ on offenders that hinders virtually every important aspect of their lives, to include employment, housing, and even contact with family members.¹⁴ Overcoming the label of "felon" has become even more difficult with the "increased use" of computerized background checks by employers¹⁵ and landlords.¹⁶ Helping clients select a location that can mitigate this label will improve the chances that they will return "to [the] useful and constructive place in society" envisioned by the military justice system.¹⁷

A successful reentry plan not only benefits offenders, but also benefits society. Currently, approximately two-thirds of offenders in the United States¹⁸ are "arrested within 3 years of release, and 76.6% [are] arrested within 5 years of release."¹⁹ These subsequent crimes impact society from

housing[,] and the pervasive influence of substance abuse" as key areas that impacted their ability to participate in reentry programs).

¹¹ Megan C. Kurlycheck, Robert Brame, & Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending*, 5 CRIMINOLOGY AND PUBLIC POLICY 483, 484 (2006). See also *U.S. v. Talkington*, 73 M.J. 212, 218 (C.A.A.F. 2014) (Baker C.J., concurring) (noting that sex offender registration "may be the most significantly stigmatizing and longest lasting effect arising from [a] conviction").

¹² THE SHAWSHANK REDEMPTION, *supra* note 2 and accompanying text.

¹³ Daniel S. Murphy, Brian Fuleihan, Stephen C. Richards & Richard S. Jones, *The Electronic "Scarlet Letter": Criminal Backgrounding and a Perpetual Spoiled Identity*, 50 JOURNAL OF OFFENDER REHABILITATION 101, 102 (2013).

¹⁴ See *National Inventory of the Collateral Consequences of Conviction, Choose a Jurisdiction*, AMERICAN BAR ASSOCIATION, <http://www.aba.collateralconsequences.org/map/> (click on any state for a list of collateral consequences) (last visited May 13, 2015).

¹⁵ Harry J. Holzer, Steven Raphael, & Michael A. Stoll, *The Effect of an Applicant's Criminal History on Employment Hiring Decisions and Screening Practices: Evidence from Los Angeles*, in BARRIERS TO REENTRY? THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA 117, 131 (Shawn Bushway, Michael A. Stoll & David F. Weiman eds., 2007).

¹⁶ See Heidi Lee Cain, *Housing Our Criminals: Finding Housing for the Ex-Offender in the Twenty-First Century*, 33 GOLDEN GATE U. L. REV. 131, 153-56 (2003) (noting that "[m]ore and more frequently," landlords use background checks when determining whether to rent to a particular applicant and often "find local or state legislative support for denying an individual housing based entirely on a past offense").

¹⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(5) (2012).

¹⁸ While no data exists on recidivism rates for military offenders specifically, there are reasons to believe their rates are lower than the civilian population. See *infra* Section IV.

¹⁹ MATTHEW R. DUROSE, ALEXIA D. COOPER, PH.D., & HOWARD N. SNYDER, PH.D., U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS

both a “public safety” and financial standpoint.²⁰ One study showed that “[in] 2001, prisoners released in the three preceding years accounted for approximately 30 percent of the arrests for violent crime, 18 percent of the arrests for property crime, and 20 percent of the arrests for drug offenses.”²¹ Moreover, in 2013 the average nationwide cost of keeping one person in prison for a year was over \$31,000, while the cost in the most expensive state averaged \$60,000 a year.²² Thus, when an attorney spends time with her client developing a plan for reentry, the potential return on investment adds up into the tens of thousands of dollars in both taxpayer costs and psychological costs to the victims of those new crimes.²³

In developing a plan for her client’s successful reentry, there are three basic factors an attorney should discuss—“family ties,”²⁴ “ban-the-box”²⁵ employment laws, and sex offender residency restrictions.²⁶ Other factors a client may want to consider when deciding where he should live after his release include: the availability of mental health treatment,²⁷ the availability of drug and alcohol treatment,²⁸

RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, N.C.J. 244205 1 (2014), available at <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

²⁰ JEREMY TRAVIS, AMY L. SOLOMON, & MICHELLE WAUL, WASHINGTON DC: URBAN INSTITUTE JUSTICE POLICY CENTER, FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY, N.C.J. 190429 1 (2001), available at http://www.urban.org/UploadedPDF/01prison_to_home.pdf.

²¹ JEREMY TRAVIS, BUT THEY ALL COME BACK 98 (2005).

²² Marc Santora, *City’s Annual Cost Per Inmate is \$168,000, Study Finds*, N.Y. TIMES, Aug. 24, 2013, at A16.

²³ See Angela Browne & David Finkelhor, *Initial and Long-Term Effects: A Review of the Research*, in A SOURCEBOOK ON CHILD SEXUAL ABUSE 143, 145–46, 152, 162 (David Finkelhor ed. 1986) (synthesizing the results from twenty-eight studies and noting that a significant percentage of sexual abuse victims had “reactions of fear, anxiety, depression, anger and hostility, and inappropriate sexual behavior” in the short-term, and “depression, self-destructive behavior, anxiety, feelings of isolation and stigma, poor self-esteem, a tendency toward revictimization, and substance abuse” in the long-term); see also Brian J. Love, *Regulating for Safety or Punishing Depravity? A Pathfinder for Sex Offender Residency Restriction Statutes*, 43 CRIM. L. BULL. 834, 871 (2007) (discussing Browne and Finkelhor’s article).

²⁴ Mark T. Berg & Beth M. Huebner, *Reentry and the Ties That Bind: An Examination of Social Ties, Employment, and Recidivism* 28 JUSTICE QUARTERLY 382, 384 (2011).

²⁵ NAT’L EMP’T LAW PROJECT, *supra* note 8.

²⁶ The term “residency restrictions” refers to laws that prevent registered sex offenders from living within a certain distance of a school, park, or other area where children are likely to be present. See *infra* Section V.

²⁷ See Henry J. Steadman, Fred C. Osher, Pamela Clark Robbins, Brian Case, & Steven Samuels, *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 PSYCHIATRIC SERVICES 761, 764 (2009) (finding that an average of 14.5% of male inmates and 31% of female inmates had a “serious mental illness”).

²⁸ See CHRISTOPHER MUMOLA & JENNIFER C. KARBERG, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF

the presence of community support groups,²⁹ state procedures impacting ex-offenders’ parental rights,³⁰ whether a state has “opt[ed] out” of the ban on the Supplemental Nutrition Assistance Program (SNAP) and Temporary Assistance for Needy Families (TANF) for drug-offenders,³¹ and whether a state provides ex-offenders with voting rights.³² Information on whether many of these factors exist or their quality at a given location is problematic to obtain³³ and generally falls outside the expertise of a trial defense attorney. Conversely, the three factors addressed in this primer are easily applied, as the laws are statutory in nature and a client is likely to have a good idea of his family situation. Additionally, these factors cover a client’s most basic, human needs of shelter and a means of financial support upon his release from confinement.

III. Family Relationships

As a starting point for the conversation with a client on where he will live following a conviction, a trial defense attorney should ask where the client has positive family relationships. Family relationships have been shown to

JUSTICE STATISTICS, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS 2004, NCJ 213530 6 (2006), available at <http://www.bjs.gov/content/pub/pdf/dudsfp04.pdf> (finding in 2004, “53% of State and 45% of Federal prisoners met criteria for drug dependence or abuse”).

²⁹ See Kathryn J. Fox, *Second Chances: A Comparison of Civic Engagement in Offender Reentry Programs*, 35 CRIM. JUST. REV. 335, 340–48 (2010) (discussing several models of community-based reentry programs in Vermont, each with varying degrees of effectiveness depending upon factors such as how formalized the program was or the type of support offenders received).

³⁰ See, e.g., 42 U.S.C.S. § 675(5) (LexisNexis 2015) (requiring states to have “a procedure for assuring that . . . in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months . . . the State shall file a petition to terminate the parental rights of the child’s parents. . . unless” another family member is caring for the child, the state determines termination “would not be in the best interests of the child,” or the state has failed to provide “services” to the family on time).

³¹ 21 U.S.C.S. § 862a (LexisNexis 2015) states that anyone convicted of felony “possession, use, or distribution of a controlled substance” is ineligible for the “supplemental nutrition assistance program” (SNAP) and “temporary assistance for needy families” (TANF) but allows states to “opt out” and “exempt any or all individuals domiciled in the State” from the law.

³² JEAN CHUNG, THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 1 (2014), available at http://www.sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf.

³³ See TRAVIS, *supra* note 21, at 72 (“Tracking the consequences of statutes that disqualify criminals from education loans, public housing, welfare benefits, or parental rights would be extraordinarily difficult. Agencies administering these sanctions are far flung, have little or no connection with the criminal justice system, may or may not keep records of their decisions, and have no incentive to report on these low-priority exercises of discretion.”).

provide offenders with “psychological, material, and financial support.”³⁴ This support also includes providing offenders with a place to live and helping them find meaningful employment.³⁵ Family members are able to do this because they are better able to look past the offender’s conviction and connect the offender with potential employers³⁶ by acting as an “intermediar[y] [who] can help to reduce employers’ concerns about hiring [offenders] by vouching for the individual in question.”³⁷ Family relationships are also a fruitful area of discussion because clients should make contact with their relatives prior to trial, which will potentially provide TDS attorneys with material for sentencing and clemency matters.³⁸

It is important that an attorney conducts discussions about where a client has family relationships in the shadow of the other information in this article. Although family members can increase an offender’s odds of obtaining employment, the employment protection laws of some states discussed below will almost certainly make the job application process easier.³⁹ Additionally, for clients required to register as sex offenders, residency restrictions may make it impossible for an offender to live with or near his family, negating some of the benefits family members can provide.⁴⁰ The following sections give an attorney the tools needed to incorporate these factors when speaking with a client.

IV. Employment and Ban-the-Box Laws

A. The Employment Challenges Offenders Face

“Employment is widely considered a centerpiece of the reentry process . . .”⁴¹ “It is close to a criminological truism that the lack of a legitimate job fosters criminality and, conversely, that holding a legitimate job diminishes criminal conduct.”⁴² Numerous studies support this truism and show

that a lack of “future employment opportunities and earnings potential . . . are among the strongest predictors of recidivism.”⁴³

However, while society generally supports the idea of rehabilitating offenders,⁴⁴ employers are considerably less willing to hire them than applicants with no convictions.⁴⁵ Employers often do not hire offenders out of a desire to avoid negligent hiring lawsuits.⁴⁶ Additionally, there are laws forbidding offenders from working in certain jobs.⁴⁷ In many instances employer reluctance to hire offenders is compounded by racial biases, particularly against African Americans.⁴⁸ Moreover, the majority of offender applicants will undergo computer background checks that will reveal their criminal history.⁴⁹ Consequently, an offender is often ruled out as a viable job candidate at the “initial stage” of the application process.⁵⁰

B. Ban-the-Box Laws and Other Employment Protections for Offenders

Several states have enacted “ban-the-box” legislation to keep offenders from being ruled out at the initial stages of the job application process.⁵¹ Ban-the-box laws protect

³⁴ Berg & Huebner, *supra* note 24, at 384.

³⁵ *Id.* at 384, 402.

³⁶ Berg & Huebner, *supra* note 24, at 384, 386.

³⁷ See Devah Pager, *Evidence-Based Policy for Successful Prisoner Reentry*, 5 CRIMINOLOGY & PUBLIC POLICY 505, 510 (2006) (discussing how “intermediaries” work, in general).

³⁸ U.S. DEP’T OF ARMY PAM. 27-9, MILITARY JUDGES’ BENCHBOOK para. 2-5-23 (10 Sept. 2014), recognizes “rehabilitative potential” as a relevant sentencing factor. The presence of involved family members with a plan for the servicemember upon his release is certainly relevant to whether the servicemember will be able to rehabilitate and the finder of fact may give a lower period of confinement in lieu of this.

³⁹ See *infra* Section IV.

⁴⁰ See *infra* Section V.

⁴¹ Pager, *supra* note 37, at 505.

⁴² Jessica S. Henry & James B. Jacobs, *Ban the Box to Promote Ex-Offender Employment*, 6 CRIMINOLOGY & PUBLIC POLICY 755, 755 (2007).

⁴³ Devah Pager, *The Mark of a Criminal Record*, 108 AMERICAN JOURNAL OF SOCIOLOGY 937, 939 (2003).

⁴⁴ Brett Garland, Eric Wodahl & Robert Schuhmann, *Value Conflict and Public Opinion Toward Prisoner Reentry Initiatives*, 24 CRIM. JUST. POLICY REV. 27, 41 (2013).

⁴⁵ Henry & Jacobs, *supra* note 42, at 756.

⁴⁶ Timothy Creed, *Negligent Hiring and Criminal Rehabilitation: Employing Ex-Convicts, Yet Avoiding Liability*, 20 ST. THOMAS L. REV. 183, 184 (2007). “Under [the] tort [of negligent hiring], courts can hold employers liable for the harm their employees inflict on third parties if the employer knew or should have known of an employee’s potential risk, or if ‘the risk would have been discovered by a reasonable investigation.’” *Id.*

⁴⁷ See Michael A. Stoll & Shawn D. Bushway, *The Effect of Criminal Background Checks on Hiring Ex-Offenders*, 7 CRIMINOLOGY & PUBLIC POLICY 371, 372–73 (2008) (noting that offenders are “legally” prohibited from doing some jobs, “includ[ing] jobs that require contact with children, certain health-services occupations, and employment with firms that provide security services”).

⁴⁸ Pager, *supra* note 43, at 958 (finding that employers were more willing to call back white job applicants with a criminal record than African American applicants *without* a criminal record; African American applicants with a criminal record fared even worse).

⁴⁹ See Stoll & Bushway, *supra* note 47, at 378 (finding that “[a]bout half of the employers in [the study] routinely check for criminal backgrounds, and another 20% check sometimes”).

⁵⁰ Pager, *supra* note 43, at 954–56 (2003) (studying the way 350 employers handled job applicants with a criminal record and finding that “[a] criminal record . . . reduces the likelihood of a callback by 50%” and “employers’ levels of responsiveness change[d] dramatically once they had glanced down at the criminal record question”).

⁵¹ *Ban the Box*, ALL OF US OR NONE, <http://www.allofusornone.org/newsite/campaigns/ban-the-box> (last visited Jan. 7, 2015). Scholars credit the

offenders by preventing employers from asking whether an applicant has been convicted of a crime or performing a criminal background check at the initial stage of the application process.⁵² Under many of these laws, an employer can only perform a background check after an applicant comes in for an interview or receives a conditional offer of employment.⁵³ The New Mexico Legislature succinctly summarizes the rationale of these laws: “[T]he public is best protected when criminal offenders or ex-convicts are given the opportunity to secure employment or to engage in a lawful trade, occupation or profession and that barriers to such employment should be removed to make rehabilitation feasible.”⁵⁴ In keeping with motivations to protect the public, ban-the-box laws do not apply to jobs that require background checks for public safety reasons, such as prison guards,⁵⁵ or those involving “vulnerable” members of society, such as teachers.⁵⁶

These laws have gained increasing political traction in recent years⁵⁷ and evidence suggests they are effective at helping offenders gain employment.⁵⁸ To date, fifteen states

group, All of Us or None, with coining the term “ban-the-box.” Henry & Jacobs, *supra* note 42, at 757.

⁵² See, e.g., DEL. CODE TIT. 19, § 711(g)(1) (2015) (“It shall be an unlawful employment practice for any public employer to inquire into or consider the criminal record, criminal history, credit history, or credit score of an applicant for employment during the initial application process, up to and including the first interview.”)

⁵³ See, e.g., 820 ILL. COMP. STAT. ANN. 75/15(a) (LexisNexis 2015) (“An employer or employment agency may not inquire about or into, consider, or require disclosure of the criminal record or criminal history of an applicant until the applicant has been determined qualified for the position and notified that the applicant has been selected for an interview by the employer or employment agency or, if there is not an interview, until after a conditional offer of employment is made to the applicant by the employer or employment agency.”)

⁵⁴ N.M. STAT. ANN. § 28-2-2 (LexisNexis 2015).

⁵⁵ See, e.g., MINN. STAT. § 364.021 (2015) (stating that the ban-the-box provision “does not apply to the Department of Corrections or to employers who have a statutory duty to conduct a criminal history background check or otherwise take into consideration a potential employee’s criminal history during the hiring process”).

⁵⁶ See, e.g., COLO. REV. STAT. § 24-5-101(1)(b) (2015) (stating that the ban-the-box provision “shall not apply to . . . [t]he employment of personnel in positions involving direct contact with vulnerable persons . . .”).

⁵⁷ See Yvonne Wenger, ‘Ban the Box’ Bill Advances Over Opposition From Businesses, BALTIMORE SUN (April 7, 2014) http://articles.baltimoresun.com/2014-04-07/news/bs-md-ci-ban-the-box-update-20140407_1_bill-advances-mosby-city-leaders (discussing the ability of the Baltimore City Council to bring a ban-the-box bill forward despite concerns from some leaders).

⁵⁸ See NAT’L LEAGUE OF CITIES INST. FOR YOUTH, EDUC. AND FAMILIES & NAT’L EMP’T LAW PROJECT, CITIES PAVE THE WAY: PROMISING REENTRY POLICIES THAT PROMOTE LOCAL HIRING OF PEOPLE WITH CRIMINAL RECORDS 5 (2009), available at <http://www.nelp.org/page/-/SCLP/2010/CitiesPaveTheWay.pdf?nocdn=1> (hereinafter NAT’L LEAGUE OF CITIES) (discussing how Minneapolis’s ban-the-box policy has led to the hiring of “nearly 60 percent of the applicants for whom the background check raised a potential concern,” whereas before the ban-the-box policy only 5.7 percent of such applicants were eventually hired).

have some form of statewide ban-the-box legislation—California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, Rhode Island, and Virginia.⁵⁹ Additionally, three states—New York, Pennsylvania, and Wisconsin—have other laws protecting offenders from employment discrimination.⁶⁰

The key difference between true ban-the-box laws and the other laws is that while the other laws forbid an employer from using a criminal conviction to rule out an applicant for a job unless there is a nexus between the type of conviction and the job,⁶¹ employers still get to immediately see that the applicant has a criminal conviction.⁶² This difference matters because employers who see a conviction on the job application frequently rule out a candidate before contacting references or otherwise inquiring further.⁶³ Nonetheless, like ban-the-box laws, there is evidence these laws help offenders obtain employment.⁶⁴

Evidence suggests that ban-the-box laws and other employment protections may be more effective at helping military offenders obtain employment than their civilian counterparts. One reason for this is that military offenders are likely to have job skills from their military training.⁶⁵

⁵⁹ See *infra* Appendix.

⁶⁰ See *infra* Appendix.

⁶¹ See, e.g., N.Y. CORRECT. LAW § 752 (Consol. 2015) (“No application for any license or employment . . . shall be denied or acted upon adversely . . . unless . . . there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual . . .”).

⁶² See, e.g., 18 PA. CONS. STAT. § 9124 (2015) (“Except as provided by this chapter, a board, commission or department of the Commonwealth, when determining eligibility for licensing, certification, registration or permission to engage in a trade, profession or occupation, may consider convictions of the applicant of crimes but the convictions shall not preclude the issuance of a license, certificate, registration or permit.”) (emphasis added).

⁶³ Pager, *supra* note 43, at 954–55 (studying the way 350 employers handled job applicants with a criminal record and finding that almost all employers eliminated from “consideration” individuals who self-reported convictions on their job application before the employers contacted references or made efforts “to solicit nuanced information about applicants”).

⁶⁴ See *Matter of Acosta v. N.Y.C. Dep’t of Educ.*, 16 N.Y.3d 309, 320 (N.Y. 2011) (holding that the Department of Education violated New York’s employment protection statute when it conducted a “pro forma denial” of an application for employment based on a thirteen year old conviction for first degree robbery without properly considering the factors outlined in the law as well as matters submitted by the applicant).

⁶⁵ See, e.g., *Ordnance Mechanical Maintenance School: Helping the Army Stay at the Ready*, U.S. ARMY, <http://www.goarmy.com/soldier-life/becoming-a-soldier/advanced-individual-training/ordnance-mechanical.html> (last visited Feb. 27, 2015) (“Ordnance Soldiers have the opportunity to obtain certification with national technical accrediting agencies, such as the American Welding Society (AWS), the National Institute of Metalworking Skills (NIMS), and the Automotive Society of Excellence (ASE).”).

Also, the minimum educational requirements for military service make military offenders generally more educated than civilian offenders.⁶⁶ These skills and education may make it more likely that a military offender will be regarded as qualified for a position, which in many ban-the-box states is the threshold determination an employer must make prior to conducting a background check.⁶⁷ This implies it is more likely military offenders will get an opportunity to explain themselves before the employer has a chance to rule them out. Further, studies have shown that job skills and education make it more likely employers will look past a conviction.⁶⁸ Additionally, employers will logically be more likely to look past a conviction if it is someone's first offense; due to the background checks required for admission into the armed forces, military offenders are likely first time offenders.⁶⁹ Individual characteristics aside, some employers may be more willing to hire a military offender simply because he served in the armed forces.⁷⁰ Thus, while nothing is guaranteed, military offenders may benefit considerably from ban-the-box laws.

While each state's ban-the-box law limits an employer's knowledge of a criminal conviction at the early stages of the job application process, not all ban-the-box laws are created equal. In some states the law applies to only government employers. Some laws prevent employers from performing background checks until a certain point in the application process, while others merely prohibit employers from asking about conviction records.⁷¹ Additionally, not all ban-the-box

laws require a nexus between the criminal offense and the job in order to deny someone employment.⁷² Other differences a client should consider when determining which state may be most beneficial to him are whether the law gives protections for state licensing, contains a "sunset" provision preventing the use of convictions past a certain timeframe, or requires the employer to provide notice to the applicant if it uses a conviction to deny him employment.⁷³

Based on these criteria, one state stands out among the rest as being particularly favorable for offenders—Hawaii. Hawaii is one of only six states whose law applies to both government and private employers.⁷⁴ Hawaii also prevents background checks until "after . . . a conditional offer of employment" and requires a nexus between the criminal offense and the job in order to deny someone employment.⁷⁵ Additionally, Hawaii has a "sunset" provision, forbidding the use of convictions more than ten years old, "excluding periods of incarceration."⁷⁶ The other states with ban-the-box laws that apply to private employers are Illinois, Massachusetts, Minnesota, New Jersey, and Rhode Island.⁷⁷ Ban-the-box laws that apply to private employers may provide offenders with more options than laws that only apply to government employers because roughly eighty-five percent of all jobs in the United States are in the private sector.⁷⁸

Among the states whose laws only apply to government jobs, two merit special mention—New Mexico and Colorado. New Mexico's law stands out because it offers numerous additional protections for offenders.⁷⁹ Like Hawaii, New Mexico's law prevents background checks at the initial stages of the application process.⁸⁰ But on top of that, New Mexico requires either a nexus between the conviction and the job or that the employer makes a determination "that the person so convicted has not been sufficiently rehabilitated to warrant the public trust" before

⁶⁶ See U.S. DEP'T OF ARMY REG. 601-210, ACTIVE AND RESERVE COMPONENTS ENLISTMENT PROGRAM para. 2-7 (12 Mar. 2013) (requiring applicants to "meet trainability and education requirements"); CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, EDUCATION AND CORRECTIONAL POPULATIONS, NCJ 195670 1 (Jan. 2003), available at <http://www.bjs.gov/content/pub/pdf/ecp.pdf> (finding that approximately forty-one percent of state prison inmates do not have a high school diploma or GED).

⁶⁷ See, e.g., 820 ILL. COMP. STAT. ANN. 75/15(a) (LexisNexis 2015).

⁶⁸ See Cheryl G. Swanson, Courtney W. Schnippert, and Amanda L. Tryling, *Reentry and Employment: Employers' Willingness to Hire Formerly Convicted Felons in Northwest Florida*, in OFFENDER REENTRY: RETHINKING CRIMINOLOGY AND CRIMINAL JUSTICE 203, 213 (Matthew S. Crow & John Ortiz Smykla eds., 2014) (finding that almost four in ten employers would be "more willing to hire a formerly convicted felon who has adequate formal education or training").

⁶⁹ See U.S. DEP'T OF ARMY REG. 601-210, ACTIVE AND RESERVE COMPONENTS ENLISTMENT PROGRAM para. 2-11 (12 Mar. 2013) (requiring police and court records checks for all Army applicants).

⁷⁰ See Swanson et al., *supra* note 68 (finding that 15.9% of employers would be "more willing to hire a [felon] who is a veteran").

⁷¹ When analyzing this, the author looked at whether the statute specifically mentioned the job application and limited its applicability to the job application. This is in contrast to broad words such as "consider" or "inquire," which imply an employer cannot run a criminal background check because, logically, an employer would be incapable of ignoring the information once he or she obtained it. In support of this logic, see Sheri-Ann S.L. Lau, *Recent Development: Employment Discrimination Because of One's Arrest and Court Record in Hawai'i*, 22 HAWAII L. REV. 709, 721 (2000) (analyzing Hawaii's ban-the-box law, which uses the language

"inquiry into and consideration of conviction records," and concluding that an employer would "violate[] the law by performing a criminal background check before making a job offer").

⁷² See *infra* Appendix.

⁷³ See *infra* Appendix.

⁷⁴ See *infra* Appendix.

⁷⁵ HAW. REV. STAT. ANN. § 378-2.5 (LexisNexis 2015).

⁷⁶ *Id.*

⁷⁷ See *infra* Appendix.

⁷⁸ EMP'T PROJECTIONS PROGRAM, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *Employment by Major Industry Sector* (last modified Dec. 19, 2013), http://www.bls.gov/emp/ep_table_201.htm.

⁷⁹ See *infra* Appendix.

⁸⁰ N.M. STAT. ANN. §§ 28-2-3, 28-2-4 (LexisNexis 2015) (stating that the "[employer] shall only take into consideration a conviction after the applicant has been selected as a finalist for the position").

denying them employment.⁸¹ Further, New Mexico mandates a “presumption of sufficient rehabilitation” once an offender has gone three years without a conviction after being released from confinement.⁸² It also requires a government agency to make written documentation of their reason for not hiring someone if that decision is based in any way on the existence of a conviction.⁸³ Additionally, New Mexico is one of only three states whose ban-the-box law also covers state licensure.⁸⁴

Similar to New Mexico, Colorado’s ban-the-box law contains additional protections not found in most states. Colorado prohibits background checks until “an applicant is a finalist or [the employer] makes a conditional offer of employment.”⁸⁵ It also covers applications for state licensure.⁸⁶ Additionally, Colorado requires an employer to analyze the totality of the circumstances surrounding the conviction, to include “[a]ny information produced by the applicant . . . regarding his or her rehabilitation and good conduct,” in determining whether the conviction disqualifies them from employment.⁸⁷

The laws of the other seven ban-the-box states offer progressively fewer protections than those mentioned above, with California’s and Nebraska’s laws offering the least protection. These laws only apply to government employers and only prevent them from asking about convictions on the application or directly to the applicant “until [the employer determines] the applicant meets the minimum employment qualifications.”⁸⁸ The Appendix outlines all state-level ban-the-box laws.

In addition to state-level laws, some individual cities may offer favorable employment protections for offenders. For example, although Pennsylvania is not a ban-the-box state, the city of Philadelphia has a ban-the-box law that prohibits city or private employers from “mak[ing] any inquiry regarding or . . . requir[ing] any person to disclose or reveal any criminal convictions during the application process” until after the first interview.⁸⁹ Cities may also have laws or policies to help offenders that are not ban-the-box laws, but rather provide incentives for employers to hire

individuals with convictions.⁹⁰ Although a review of employment protections in every major city is beyond the scope of this article, the National Employment Law Project keeps updated information online about these laws.⁹¹

Beyond state and city employment laws, federal law contains additional legislation to help offenders.⁹² Two examples of this legislation are the Second Chance Act and Work Opportunity Tax Credit.⁹³ The Second Chance Act provides federal funds to states that develop measures to help offenders reintegrate into society.⁹⁴ The Work Opportunity Tax Credit also provides a financial incentive, in the form of a tax break, to businesses who hire offenders.⁹⁵ Additionally, the federal government has “bonding programs” that serve as a kind of insurance for employers, covering them financially for the actions of offenders they hire in the event of a negligent hiring lawsuit.⁹⁶ Further, the Equal Opportunity Employment Commission (EEOC) issued guidance stating that because the employer practice of excluding offenders from consideration for positions has a “disparate impact” on racial minorities, using a criminal conviction against someone violates Title VII of the 1964 Civil Rights Act unless the conviction is “job related and consistent with business necessity.”⁹⁷ Because these are all federal measures, a client can take advantage of them in any state.

C. Discussing Employment Protections with a Client

A TDS attorney can use the information from this section to counsel clients about how to take advantage of

⁸¹ *Id.* §28-2-4 (clarifying that protections do not apply to jobs involving children).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *See infra* Appendix.

⁸⁵ COLO. REV. STAT. § 24-5-101 (2015).

⁸⁶ *See infra* Appendix.

⁸⁷ COLO. REV. STAT. § 24-5-101 (2015).

⁸⁸ CAL. LAB. CODE § 432.9(a) (Deering 2015); *accord* NEB. REV. STAT. ANN. § 48-202(1) (LexisNexis 2015).

⁸⁹ PHILA. CODE. § 9-3504 (2015).

⁹⁰ For example, the city of Indianapolis has “a bid incentive program” that “directs the city’s purchasing division to give preference to vendors who train or employ people with criminal records.” NAT’L LEAGUE OF CITIES, *supra* note 58, at 8.

⁹¹ NAT’L EMP’T LAW PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR HIRING POLICIES TO REDUCE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS (2014), *available at* <http://www.nelp.org/page/-/SCLP/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf?nocdn=1>.

⁹² *See also* Swanson et al., *supra* note 68, at 207.

⁹³ *See also Id.*

⁹⁴ *Second Chance Act (SCA)*, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, https://www.bja.gov/ProgramDetails.aspx?Program_ID=90 (last visited May 13, 2015) (click on “read more”).

⁹⁵ *Work Opportunity Tax Credit*, U.S. DEP’T OF LABOR (last updated Apr. 30, 2015), <http://www.doleta.gov/business/incentives/opptax/>.

⁹⁶ U.S. DEP’T OF LABOR, FEDERAL BONDING PROGRAM: UNIQUE JOB PLACEMENT TOOL 3 (n.d.), *available at* <http://www.doleta.gov/usworkforce/onestop/FBP.pdf>.

⁹⁷ EQUAL EMP’T OPPORTUNITY COMM’N, EEOC GUIDANCE NO. 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*, 1 (2012).

state, local, and federal employment laws to find the best place for them to live. First, a TDS attorney should educate clients on employment protection laws. Next, an attorney should determine if he has any family or friends in one of the eighteen states with employment protections for offenders.⁹⁸ If he has multiple options among those states, “ban-the-box states” are preferred, with Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Rhode Island, New Mexico, and Colorado offering the most robust protections.⁹⁹ Also, an attorney should check the National Employment Law website and see if the client has family in one of the cities offering some form of employment protection to offenders.¹⁰⁰ And even if the state or city where the client has family does not have employment protection laws for offenders, staying with family may still be the client’s best means to secure employment.

Additionally, the attorney should ask him about his job skills and determine if he is more likely to apply for government or private employment. For example, if he has driver training, he may be able to secure employment as part of a public transportation fleet and would benefit from a state with a ban-the-box law that only applies to government employers. Conversely, if he has training as a mechanic and will likely apply to auto body shops, it may be best to seek out one of the six states with laws that apply to private employers. As a final note, TDS attorneys should ask a client if his occupation will require licensing.¹⁰¹ If it does, he should consider the benefits of living in one of the three states that protects licensure.¹⁰²

V. Sex Offender Residency Restrictions

A. The Unique Housing Challenges Sex Offenders Face

Commentators note that finding housing is “one of the most daunting issues [offenders] face during the reentry process.”¹⁰³ “Parole officials say finding housing for parolees is by far their biggest challenge, even more difficult

and important than finding a job.”¹⁰⁴ And as with the lack of a job, offenders who lack housing are more likely to return to confinement.¹⁰⁵ Compounding this issue are federal laws that prohibit many offenders from living in public housing,¹⁰⁶ to include sex offenders.¹⁰⁷ Roughly ten percent of offenders end up homeless¹⁰⁸ and a far greater percentage of sex offenders suffer this indignity.¹⁰⁹

In addition to the regular challenges in finding housing, sex offenders face unique obstacles stemming from legislation that has become increasingly harsh since the mid-1990s.¹¹⁰ Although sex offender registration laws began as merely a requirement that law enforcement monitor where sex offenders live,¹¹¹ they have now “spiraled out of control” into what one commentator has dubbed “super-registration schemes.”¹¹² While federal law contemplates “tiers” of offenders who face different levels of restriction,¹¹³ state laws often equally restrict all sex offenders, regardless of the

¹⁰⁴ Joan Petersilia, *Hard Time, Ex-Offenders Returning Home After Prison*, 64 CORRECTIONS TODAY 66, 69 (2005).

¹⁰⁵ See Stephen Metraux & Dennis P. Culhane, *Homeless Shelter Use and Reincarceration Following Prison Release*, 3 CRIMINOLOGY & PUBLIC POLICY 139, 140 (2004) (discussing the various ways homeless individuals have “an increased risk for imprisonment”).

¹⁰⁶ See 42 U.S.C.S. § 13661(b)-(c) (LexisNexis 2015) (requiring landlords to deny public housing to drug users and allowing landlords to deny public housing to individuals who “engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment . . . by other residents”).

¹⁰⁷ 42 U.S.C.S. § 13663(a) (LexisNexis 2015) (“Notwithstanding any other provision of law, an owner of federally assisted housing shall prohibit admission to such housing for any household that includes any individual who is subject to a lifetime registration requirement under a State sex offender registration program.”).

¹⁰⁸ See Metraux & Culhane, *supra* note 105, at 150 (finding that of those released from New York State prisons who went to live in New York City, 11.4% stayed at a homeless shelter “within two years”); Curtin, *supra* note 103, at 112 (noting that “experts estimate that approximately 10% of returning offenders are ‘homeless’ . . .”).

¹⁰⁹ See John Simerman, *Sex Offender Agency Faults Megan’s Law Drawbacks*, CONTRA COSTA TIMES (February 16, 2010, 4:57 PM), http://www.contracostatimes.com/top-stories/ci_14412670 (noting that because of the 2,000 foot residency restriction in California, an estimated “84% of paroled sex offenders [in San Francisco] are homeless”).

¹¹⁰ Elizabeth Ehrhardt Mustaine, *Sex Offender Residency Restrictions, Successful Integration or Exclusion?*, 13 CRIMINOLOGY & PUBLIC POLICY 169, 169-70 (2014) (discussing the “explosion of federal legislation” dealing with sex offenders enacted between 1994 and 2006).

¹¹¹ Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101(a)(1), 108 Stat. 1796, 2038 (1994); see also Mustaine, *supra* note 110, at 169-70.

¹¹² Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1073 (2012).

¹¹³ 42 U.S.C.S. §§ 16911, 16915-16 (LexisNexis 2015) (defining “Tier I,” “Tier II,” and “Tier III” sex offenders based on the severity of their crimes and basing the length of registration and frequency of in-person verifications with law enforcement on the tier level).

⁹⁸ See *infra* Appendix.

⁹⁹ See *infra* Appendix.

¹⁰⁰ NAT’L EMP’T LAW PROJECT, *supra* note 91.

¹⁰¹ See DICK M. CARPENTER II, LISA KNEPPER, ANGELA C. ERICKSON, & JOHN K. ROSS, INSTITUTE FOR JUSTICE, LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING, Table 1 (May 2012), available at <http://licensetowork.ij.org/report/1> (listing “102 Lower-income [sic] Occupations” that require licensure, to include various labor contractors, cosmetologists, barbers, and equipment installers).

¹⁰² See *infra* Appendix (noting that Colorado, Connecticut, and New Mexico protect licensure).

¹⁰³ Elizabeth Curtin, *Home Sweet Home for Ex-Offenders*, in CIVIL PENALTIES, SOCIAL CONSEQUENCES 111, 111 (Christopher Mele & Teresa A. Miller eds., 2005).

actual risk a particular offender poses.¹¹⁴ Under a typical registration scheme, a sex offender must provide to law enforcement his name, address, name and address of any school he attends, name and address of his employer, license plate number, vehicle description, photograph, and criminal history, among other identifying information.¹¹⁵ Most of this litany of identifying information is available online for ordinary citizens, which can lead to “public shaming” and even violence against sex offenders.¹¹⁶

Despite the shame and risk of violence for sex offenders, the most devastating sanctions for sex offenders are the residency restrictions in many states, counties, and cities. Residency restrictions make it illegal for sex offenders to reside within a certain distance of “child congregation locations,” such as “schools, parks, [and] daycare centers.”¹¹⁷ In many cases, these laws apply to sex offenders even if their offenses did not involve a child.¹¹⁸ Enacted as a means to keep children safe,¹¹⁹ residency restrictions often have the practical effect of denying offenders the ability to live at the residence they had prior to their conviction, forcing offenders to move away from family members.¹²⁰ Quantifying the effect of these laws, one study of two New York counties using geospatial analysis showed that residency restrictions of 1000–2000 feet eliminated 73–89 percent of all available housing for sex offenders.¹²¹ Because of these laws, sex offenders are often only able to find housing in “socially downtrodden and disorganized neighborhoods.”¹²² Consequently, sex offender

¹¹⁴ See Carpenter & Beverlin, *supra* note 112, at 1078–80 (noting the “elimination of individualized assessment” for sex offenders).

¹¹⁵ See, e.g., CODE OF ALA. § 15-20A-7(a) (LexisNexis 2015), DEL. CODE ANN. tit. 11, § 4120 (2015), GA. CODE ANN. § 42-1-12 (2015) (LexisNexis), and HAW. REV. STAT. ANN. § 846E-2 (LexisNexis 2015) (requiring all of these items); 730 ILL. COMP. STAT. ANN. 150/3 (LexisNexis 2015) (requiring all of these items except for the vehicle description); MINN. STAT. § 243.166 (2015) (requiring all of these items except a criminal history); R.I. GEN. LAWS § 11-37.1-5 (2015) (requiring all of these items except for the license plate number and vehicle description).

¹¹⁶ Catherine Wagner, *The Good Left Undone: How to Stop Sex Offender Laws from Causing Unnecessary Harm at the Expense of Effectiveness*, 38 AM. J. CRIM. L. 263, 271–74 (2011); *but see* Colo. Rev. Stat. § 16-13-901 (2015) (declaring that because of the “high potential for vigilantism that often results from community notification[,] . . . notification should only occur in cases involving a high degree of risk to the community”).

¹¹⁷ Mustaine, *supra* note 110, at 170.

¹¹⁸ See, e.g., GA. CODE ANN. § 42-1-15(b) (2015) (LexisNexis) (“[No sex offender] shall reside within 1,000 feet of any child care facility, church, school, or area where minors congregate if the commission of the act for which such individual is required to register occurred on or after July 1, 2008.”); *see also* Wagner, *supra* note 116, at 268.

¹¹⁹ Carpenter & Beverlin, *supra* note 112, at 1073.

¹²⁰ Wagner, *supra* note 116, at 268.

¹²¹ Jacqueline A. Berenson & Paul S. Appelbaum, *A Geospatial Analysis of the Impact of Sex Offender Residency Restrictions in Two New York Counties*, 35 LAW & HUMAN BEHAVIOR 235, 238, 241 (2011).

¹²² Mustaine, *supra* note 110, at 172.

residency restrictions have the ability to eclipse the potential advantages of a particular location in terms of family relationships and pro-employment legislation for offenders.

The impact of sex offender residency restrictions on otherwise favorable locations is particularly relevant for military practitioners. A staggering 46.6% of completed Army courts-martial in 2014 involved at least one rape, sexual assault, or forcible sodomy charge.¹²³ Although comparable data is not available for state prosecutions, statistics on the percentage of state prisoners serving sentences for sex crimes (12.2%)¹²⁴ and the percentage of registered sex offenders out of the total felon population (approximately 6%)¹²⁵ strongly indicate that the crime for which military offenders are tried is more likely to be a sex offense than their civilian counterparts. This disparity is unlikely to taper off given Congress’s interest in curbing sexual assaults in the military.¹²⁶

The dialogue with military clients about sex offender residency restrictions is further necessitated by the fact that these laws are unlikely to go away soon. Since their inception, academics have criticized sex offender residency restrictions as unconstitutional,¹²⁷ “ineffective,”¹²⁸ politically

¹²³ E-mail from Malcom Squires, Clerk of Court, Army Court of Criminal Appeals, to author (Feb. 24, 2015, 15:07 EST) (on file with author). The percentage of completed courts-martial involving at least one rape, sexual assault, or forcible sodomy charge has risen over the last several years in the Army. *Id.* In 2012, 2013, and 2014, the ratios climbed from 28.5%, to 36.5%, and finally 46.6%, respectively. *Id.* During the same three year span, the ratio of rape, sexual assault, or sodomy convictions relative to the total number of convictions ballooned from 21.2%, to 26.2%, and eventually to 37.1% in 2014. *Id.* Further, this data actually understates the percentage of clients facing sex offender registration because it does not include other offenses requiring registration, such as indecent exposure or possession of child pornography. *Id.*

¹²⁴ E. ANN CARSON, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013, NCJ 247282 15 (Sep. 2014), available at <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

¹²⁵ See TRAVIS, *supra* note 21, at 71 (estimating there were thirteen million felons in the United States in 2005); NAT’L CTR. FOR MISSING AND EXPLOITED CHILDREN, REGISTERED SEX OFFENDERS IN THE UNITED STATES AND ITS TERRITORIES PER 100,000 POPULATION 1 (Dec. 15, 2014), available at http://www.missingkids.com/en_US/documents/Sex_Offenders_Map.pdf (tracking 819,218 registered sex offenders in the United States at the end of 2014).

¹²⁶ RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL, REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 55 (2014) (“Congress directed the Secretary of Defense to establish the Response Systems to Adult Sexual Assault Crimes Panel . . . ‘to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses . . . for the purpose of developing recommendations regarding how to improve the effectiveness of such systems.’”); *see also* Tom Vanden Brook, *Congress Aims to Fix Military Sexual Assault Crisis*, USA Today (Dec. 10, 2013, 2:23 PM), <http://www.usatoday.com/story/news/nation/2013/12/10/military-sexual-assault-congress/3953705/>.

¹²⁷ See Jacob Salsburg, *The Constitutionality of Iowa’s Sex Offender Residency Restriction*, 64 MIAMI L. REV. 1091, 1102–15 (2010) (discussing the many ways Iowa’s sex offender residency restrictions may violate an

driven,¹²⁹ “de facto banishment,”¹³⁰ having no scientific basis,¹³¹ potentially responsible for offenders committing more crimes,¹³² and unfairly aimed at a population with “universally lower [recidivism rates] than other criminal offenders.”¹³³ In spite of these criticisms, the public strongly approves of these measures¹³⁴ and they are unlikely to disappear without action from the judiciary.¹³⁵ Perhaps the only silver lining to these laws for offenders is that many states do not have statewide sex offender residency restrictions. While there are still hundreds, and likely over a thousand, counties and other local municipalities with these laws,¹³⁶ the absence of statewide residency restrictions

offender’s constitutional rights, to include procedural due process, substantive due process, the “right to travel,” “the right to live where you want,” the Ex Post Facto clause, and the right against self-incrimination).

¹²⁸ See Kelly M. Socia, *Residence Restrictions are Ineffective, Inefficient, and Inadequate: So Now What?*, 13 CRIMINOLOGY & PUBLIC POLICY 179, 179 (2014) (“[S]tudy after study has suggested that these policies are ineffective and may be resulting in collateral consequences for both registered sex offenders (RSOs) and community members.”).

¹²⁹ Joseph L. Lester, *Off to Elba! The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 AKRON L. REV. 339 (2007) (noting that for politicians, “the political risk is too great not to allow their constituents’ passions to overrun their own common sense”).

¹³⁰ Ryan Hawkins, *Human Zoning: The Constitutionality of Sex-Offender Residency Restrictions as Applied to Post-Conviction Offenders*, 5 PIERCE L. REV. 331, 340 (2007).

¹³¹ See Love, *supra* note 23, at 868–70 (reviewing studies from four states which did not show any link between a sex offender living near a school and committing a new sex offense against children).

¹³² Michelle L. Meloy, Susan L. Miller, & Kristin M. Curtis, *Making Sense Out of Nonsense: The Deconstruction of State-Level Sex Offender Residence Restrictions*, 33 AM. J. CRIM. JUST. 209, 212–13 (2008).

¹³³ Mark Kielsingard, *Myth-Driven State Policy: An International Perspective of Recidivism and Incurability of Pedophile Offenders*, 47 CREIGHTON L. REV. 247, 256–57 (2014) citing PATRICK A. LANGAN, ERICA L. SCHMITT, & MATTHEW R. DUROSE, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, NCJ 198281 1 (Nov. 2003), available at <http://bjs.gov/content/pub/pdf/rsorp94.pdf> (finding that “[r]eleased sex offenders with 1 prior arrest . . . had the lowest rearrest rate for a sex crime [at] about 3%” and only 3.3% “of released child molesters were rearrested for another sex crime against a child” within 3 years).

¹³⁴ CTR. FOR SEX OFFENDER MGMT., U.S. DEP’T OF JUST., OFC. OF JUST. PROGRAMS, EXPLORING PUBLIC AWARENESS AND ATTITUDES ABOUT SEX OFFENDER MANAGEMENT: FINDINGS FROM A NATIONAL PUBLIC OPINION POLL 4 (2010), available at <http://www.csom.org/pubs/CSOMExploring%20Public%20Awareness.pdf>.

¹³⁵ See Socia, *supra* note 128, at 182 (noting that politicians are unlikely to eliminate these laws due to the risk of being “labeled as ‘soft on crime’” and discussing how courts have struck down some of these laws).

¹³⁶ See COUNCIL OF STATE GOV’TS, ZONED OUT: STATES CONSIDER RESIDENCY RESTRICTIONS FOR SEX OFFENDERS 2 (2008), available at <http://www.csg.org/knowledgecenter/docs/pubsafety/ZonedOut.pdf> (noting that “96 local jurisdictions in Florida established additional restriction zones by local ordinance”). Other sources estimate “hundreds” of residency restriction laws at the municipal level. Carrie F. Mulford, Ronald E. Wilson, & Angela Moore Parmley, *Geographic Aspects of Sex Offender Residency Restrictions*, 20 CRIM. JUST. POLICY REV. 3, 3 (2009). Thus,

provides the offender with at least some opportunity to find viable housing within a given state.

B. Sex Offender Residency Restrictions in States with Employment Protections

Of the eighteen states with employment protections discussed above, only six have statewide residency restrictions for sex offenders—Illinois, Virginia, Delaware, Rhode Island, California, and Georgia. Illinois has a tolerable restriction, forbidding only “child sex offender[s]” from living within 500 feet of a school or other child congregation area.¹³⁷ Virginia’s law is similarly tolerable, as it only restricts offenders who committed crimes against minors from living within 500 feet of a school or day care.¹³⁸ And while Rhode Island and Delaware also have residency restrictions prohibiting offenders from living within 300 and 500 feet of a school, respectively, their laws apply to all sex offenders,¹³⁹ making them slightly harsher than Illinois and Virginia.

Conversely, the restrictions in California and Georgia are among the harshest in the nation. California forbids all sex offenders from living “within 2000 feet of [schools] or park[s] where children regularly gather.”¹⁴⁰ And while Georgia only has a 1000 foot residency restriction, in practice it may be more onerous than California’s 2000 foot restriction. In Georgia, sex offenders cannot live within 1000 feet of a “child care facility, church, school, or [all public and private recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, school bus stops, and public and community swimming pools].”¹⁴¹ Sex offenders in Georgia also cannot work or volunteer within 1000 feet of “a child care facility, a school, or a church.”¹⁴² Moreover, sex offenders in Georgia caught knowingly living, working, or volunteering in a restricted area face a mandatory minimum of ten years in prison.¹⁴³

In addition to these two states, TDS attorneys must also be aware of four other states with severe residency restrictions—Alabama, Arkansas, Iowa, and Oklahoma.

although no comprehensive tally exists, it is likely that there are over a thousand such laws in the United States.

¹³⁷ 720 ILL. COMP. STAT. ANN. 5/11-9.3(b-10) (LexisNexis 2015).

¹³⁸ VA. CODE ANN. § 18.2-370.3 (2014).

¹³⁹ R.I. GEN. LAWS § 11-37.1-10(c) (2015) and DEL. CODE ANN. tit. 11, § 1112 (2015).

¹⁴⁰ CAL. PENAL CODE § 3003.5(b) (Deering 2015).

¹⁴¹ GA. CODE ANN. § 42-1-15 and § 42-1-16 (2015) (LexisNexis) (defining “[a]rea where minors congregate”).

¹⁴² GA. CODE ANN. § 42-1-15(c)(1) (2015) (LexisNexis).

¹⁴³ GA. CODE ANN § 42-1-15(g) (2015) (LexisNexis).

Each of these four states forbids sex offenders from living within 2000 feet of many child congregation areas,¹⁴⁴ leaving clients with grim prospects for housing. Thus, while there are other factors to consider, it may be best to advise clients facing sex offender registration to avoid Alabama, Arkansas, California, Georgia, Iowa, and Oklahoma altogether.

On the other end of the spectrum, Colorado, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, New York, Pennsylvania, and Wisconsin do not have any¹⁴⁵ statewide residency restrictions for sex offenders. One important caveat is that even though a state may not have enacted a statewide sex offender residency restriction, many towns or counties within that state have likely done so.¹⁴⁶ Consequently, Kansas, Nebraska, and New Mexico take on a unique importance, as they are the only states with laws preventing or restricting counties and local municipalities from enacting sex offender residency restrictions.¹⁴⁷ Kansas and New Mexico forbid counties and local municipalities from enacting sex offender residency restriction laws,¹⁴⁸ while Nebraska limits restrictions to only 500 feet and only for “sexual predators,” rather than all sex offenders.¹⁴⁹

C. Discussing Sex Offender Residency Restrictions with a Client

When counseling a client facing sex offender registration on where to live, a TDS attorney must carefully incorporate the information from this section into the larger

discussion.¹⁵⁰ Although the discussion still begins with where the client has family or friends, the attorney now needs to weigh the benefits of staying with family and having employment protections against the pitfalls of potential residency restrictions. This balancing act is imperative not merely because it helps the client determine the best place to live after a conviction, but also because it may inform his decision on how to plead at court-martial.¹⁵¹

Once the client outlines prospective housing options, his TDS attorney can walk him through the legal environment at those locations. While there are no statewide residency restrictions in most states with employment protections for offenders—Illinois, Virginia, Delaware, Rhode Island, California, and Georgia have them—many cities and counties have enacted residency restrictions.¹⁵² Thus, after the client makes contact with a family member or friend willing to help him out after confinement, the client should contact the local sheriff’s department where he is considering living and ensure there are no residency restrictions, or the restrictions are tolerable and will not inhibit his ability to find housing. Also, an attorney must ensure the client knows that Alabama, Arkansas, California, Georgia, Iowa, and Oklahoma have draconian, statewide residency restrictions and should recommend that he avoids living in those states absent a compelling reason to do so.

Additionally, regardless if a client has any ties to Kansas, New Mexico, or Nebraska, these states merit special consideration because they are the only three states that ban or limit sex offender residency restriction laws within the entire state, to include counties and local municipalities.¹⁵³ If a client has no family or friends willing to help him out, these states will likely give him the best chance to rehabilitate, particularly New Mexico and Nebraska, which also have ban-the-box laws. Lastly, residency restrictions are only one of many sanctions a sex offender will face. The client will want to look at all of the requirements where he intends to live and ensure there is not a different law he will

¹⁴⁴ ALA. CODE § 15-20A-11 (LexisNexis 2015); ARK. CODE ANN. § 5-14-128 (2015) (LexisNexis) (applies to “Level 3 or Level 4 offender[s]”); IOWA CODE § 692A.114 (2013) (applies to those “convicted of an aggravated offense against a minor”); and OKLA. STAT. tit. 57, § 590 (2015).

¹⁴⁵ Although parole boards in several states can limit where sex offenders can live and some states require schools to be notified of where sex offenders live, these provisions were not considered as “residency restrictions” for purposes of this tally. *But see* MARCUS NIETO & DAVID JUNG, CAL. RESEARCH BUREAU, THE IMPACT OF RESIDENCY RESTRICTIONS ON SEX OFFENDERS AND CORRECTIONAL MANAGEMENT PRACTICES: A LITERATURE REVIEW 17 (Aug. 2006) (counting these rules as residency restrictions).

¹⁴⁶ *See* COUNCIL OF STATE GOV’TS, *supra* note 136 and Mulford et al., *supra* note 136.

¹⁴⁷ KAN. STAT. ANN. § 22-4913 (LexisNexis 2014); NEB. REV. STAT. ANN. § 29-4017 (LexisNexis 2015); N.M. STAT. ANN. § 29-11A-9 (LexisNexis 2015).

¹⁴⁸ KAN. STAT. ANN. § 22-4913 (LexisNexis 2014); N.M. STAT. ANN. § 29-11A-9 (LexisNexis 2015) (asserting “supremacy” over the state for sex offender laws but permitting ordinances enacted before Jan. 19, 2005 to remain in effect).

¹⁴⁹ NEB. REV. STAT. ANN. § 29-4016 (LexisNexis 2015). Nebraska defines “sexual predator” as someone “who has committed an aggravated offense . . . [against] a person eighteen years of age or younger.” *Id.* § 4017.

¹⁵⁰ The larger discussion should always include U.S. ARMY DEFENSE COUNSEL ASSISTANCE PROGRAM FORM 1, SEX OFFENDER REGISTRATION ADVICE (1 Dec. 2009), which notifies clients that they are accused of an offense requiring sex offender registration, and that state registration requirements vary and are subject to change.

¹⁵¹ *See* United States v. Miller, 63 M.J. 452, 459 (C.A.A.F. 2006) (discussing how a requirement that defense counsel discuss sex offender registration with their clients “address[es] a legal issue about which an accused may be uninformed” and “foster[s] an accused’s proper consideration of this unique collateral circumstance that may affect the plea decision[.] . . .”).

¹⁵² *See* COUNCIL OF STATE GOV’TS, *supra* note 136 and Mulford et al., *supra* note 136.

¹⁵³ KAN. STAT. ANN. § 22-4913 (LexisNexis 2014); NEB. REV. STAT. ANN. § 29-4017 (LexisNexis 2015); N.M. STAT. ANN. § 29-11A-9 (LexisNexis 2015).

find equally unpalatable, such as a requirement to have “SEXUAL PREDATOR” printed on his driver’s license.¹⁵⁴

VI. Conclusion

Andy Dufresne was on to something when he yearned to live by the Pacific Ocean.¹⁵⁵ Hawaii, surrounded by the Pacific Ocean, is the state that forgets someone’s past transgressions most readily. It has the most robust employment protections for offenders and lacks statewide sex offender residency restrictions. It even forbids employers from considering convictions over ten years old¹⁵⁶ and gives some sex offenders the opportunity to apply for removal from registration lists after a reasonable period of time.¹⁵⁷ And while Hawaii may be difficult to relocate to, there are a number of other states where military offenders can go in order to maximize their chances of successful reentry.

Because TDS attorneys speak with military offenders before they are even convicted, these attorneys are at the tip of the spear for the reentry process. Attorneys can make a tremendous difference in the lives of their clients by simply being proactive and opening up a dialogue about a post-confinement plan. This dialogue starts with a client’s family support network and incorporates the laws discussed in this article. Trial Defense Service attorneys should see if their clients’ circumstances enable them to take advantage of favorable employment legislation, while avoiding hostile residency restrictions for those who face sex offender registration. Attorneys must also instruct their clients facing sex offender registration to make contact with local law enforcement and determine what restrictions the client will likely face upon release. Although the discussion about where to live after confinement may not be a comfortable one because it presumes a conviction, with a little effort, TDS attorneys can help each client find his own Zihuatanejo.¹⁵⁸

¹⁵⁴ FLA. STAT. ANN. § 322.141(3) (LexisNexis 2015). *See also* Wagner, *supra* note 116, at 272.

¹⁵⁵ THE SHAWSHANK REDEMPTION, *supra* note 2 and accompanying text.

¹⁵⁶ HAW. REV. STAT. ANN. § 378-2.5(c) (LexisNexis 2015).

¹⁵⁷ HAW. REV. STAT. ANN. § 846E-10 (LexisNexis 2015) (permits “Tier 1” offenders to petition for removal from registration requirements after 10 years and “Tier 2” offenders to petition for removal after 25 years).

¹⁵⁸ THE SHAWSHANK REDEMPTION, *supra* note 2 and accompanying text.

Appendix - Ban-the-Box Laws

| State | Employers | Protects Licensure? | Timing of Background Check | Requires Nexus to Deny Employment? | Sunset Provision? |
|--|--|---------------------|--|--|---|
| California CAL. LAB. CODE § 432.9 | Only Government | No | Anytime | No | No |
| Colorado COLO. REV. STAT. § 24-5-101 | Only Government | Yes | When applicant is a finalist or employer makes conditional offer of employment | Yes | Yes; must weigh age of conviction* |
| Connecticut CONN. GEN. STAT. § 46a-80 | Only Government | Yes | After determination that applicant has desired qualifications | Yes; employer must consider whether nexus exists | Yes; must weigh age of conviction* |
| Delaware DEL. CODE ANN. tit. 19, § 711(g) | Only Government | No | After first interview | Yes | Yes; must weigh age of conviction* |
| Georgia Governor's Executive Order (Feb. 23, 2015) | Only Government | No | Anytime | Yes; employer must permit applicant to provide evidence of rehabilitation and contest "relevance of a criminal record" | No |
| Hawaii HAW. REV. STAT. ANN. § 378-2.5 | Both Private and Government | No | After conditional offer of employment | Yes | Yes; ten years |
| Illinois 820 ILL. COMP. STAT. ANN. 75/15 & Gov's Admin. Order No. 1 (Oct. 3, 2013) | Both Private and Government (does not cover local governments) | No | When invited for an interview or given a conditional offer of employment | Yes (only for state agencies) | Yes; state agencies must weigh age of conviction* |
| Maryland MD. CODE ANN., STATE PERS. & PENS. § 2-203 | Only Government (does not cover local governments) | No | After the first interview | No | No |
| Massachusetts MASS. ANN. LAWS ch. 151B, §4(9.5) | Both Private and Government | No | Anytime | No | Yes; ten years (if sealed) |
| Minnesota MINN. STAT. § 364.021 (2015) | Both Private and Government | No | Invited for interview or given a conditional offer of employment | No | No |
| Nebraska NEB. REV. STAT. ANN. § 48-202 | Only Government | No | After determination that employee has desired qualifications | No | No |
| New Jersey N.J. STAT. ANN. § 34:6B-14 | Both Private and Government | No | After initial application process | No | No |

| State | Employers | Protects Licensure? | Timing of Background Check | Requires Nexus to Deny Employment? | Sunset Provision? |
|---|---|---------------------|---|--|---|
| New Mexico N.M. STAT. ANN. §§ 28-2-3, 28-2-4 | Only Government | Yes | "[A]fter the applicant has been selected as a finalist" | Yes; employer must show nexus or "[insufficient rehabilitation]" | Yes; three years (presumed rehabilit'n) |
| Rhode Island R.I. GEN. LAWS § 28-5-7 | Both Private and Government | No | Anytime | No | No |
| Virginia Governor's Executive Order No. 41 (Apr. 3, 2015) | Only Government | No | "[A]fter a candidate has . . . been found otherwise eligible . . . [and] is being considered for a specific position" | Yes | No |
| OTHER EMPLOYMENT PROTECTIONS | | | | | |
| New York N.Y. CORRECT. LAW § 752, 753 | Both Private and Government | Yes | Anytime | Yes; requires "direct relationship" or "unreasonable risk to property or [public safety]" | Yes; must weigh age of conviction* |
| Pennsylvania 18 PA. CONS. STAT. §§ 9124, 9125 | Only Private Employers and State Licensing Agencies | Yes | Anytime | Yes (licensure), but only for misdemeanors; Yes (employment); must "relate to the applicant's suitability" | No |
| Wisconsin WIS. STAT. §§ 111.321, 111.335 | Both Private and Government | Yes | Anytime | Yes; "circumstances of [offense must] substantially relate to the circumstances of the particular job or licensed activity." | No |

* The age of the conviction is one of several factors states require employers to consider. Others include "[t]he nature and gravity of the offense," "[t]he nature of the job held or sought,"¹⁵⁹ and "information pertaining to the degree of rehabilitation of the convicted person."¹⁶⁰

** This is intended as a tool for attorneys. This does not constitute legal advice nor is it a substitute for competent legal research. The laws cited here are current as of the date of final editing for publication; however, attorneys should always conduct their own research to ensure the law has not changed.

¹⁵⁹ See, e.g., DEL. CODE ANN. tit. 19, § 711(g)(3).

¹⁶⁰ See, e.g., CONN. GEN. STAT. § 46a-80(c).

New Developments in Criminal Law: Child Pornography and Appellate Review

MAJ Jeremy Stephens*

I. *United States v. Piolunek*

On March 26, 2015, the Court of Appeals for the Armed Forces (CAAF) issued its opinion in *United States v. Piolunek*,¹ setting aside its 2012 decision in *United States v. Barberi*,² and recasting the manner in which the military appellate courts will approach child pornography cases.

Understanding the true impact of *Piolunek* requires a refresher on the *Barberi* decision. In *Barberi*, the CAAF reversed a child pornography conviction after the Army Court of Criminal Appeals (ACCA) had previously held two of the six images presented at trial were not, in fact, child pornography, but affirmed the conviction.³ Because the images were found insufficient on appeal, and since it was impossible to know whether the panel considered this now-excluded material in reaching its verdict, the CAAF held that Staff Sergeant (SSG) Christopher Barberi's conviction must be set aside. "Where a general verdict of guilt is based in part on conduct that is constitutionally protected, the Due Process Clause requires that the conviction be set aside."⁴

Like SSG Barberi, Senior Airman Justin Piolunek was convicted of knowing and wrongful possession of more than one image of child pornography.⁵ At trial, the members evaluated 22 images of child pornography and returned a general verdict of guilty to the possession charge as drafted.⁶ The members did not use the exceptions and substitutions mechanism,⁷ nor did they otherwise indicate which images, if any, did not amount to child pornography. On appeal, the

Air Force Court of Criminal Appeals (AFCCA) determined only 19 of the 22 images were, in fact, "visual depictions of a minor engaging in sexually explicit conduct," and thus child pornography.⁸ Once this factual review was complete, AFCCA made a decision to not apply the *Barberi* precedent and affirmed the conviction using a harmless-beyond-a-reasonable-doubt analysis instead.⁹

The CAAF begins its reasoning in *Piolunek* by asserting the analysis required is not a constitutional review of the images, but instead a review of the military judge's instructions.¹⁰ In *Barberi*, the CAAF reversed a conviction when child pornography images were excluded on appeal using Supreme Court precedent on constitutional error. "[I]f a factfinder is presented with alternative theories of guilt and one or more of those theories is later found to be unconstitutional, any resulting conviction must be set aside when it is unclear which theory the factfinder relied on in reaching a decision."¹¹ The *Piolunek* court framed the issue differently less than three years later. After the *Piolunek* court found neither the statute nor the legal theory constitutionally infirm, it asserted the *Stromberg* doctrine,¹² which the *Barberi* court used to set aside SSG Barberi's conviction, no longer applied to these scenarios.

Rather than examining whether or not automatic reversal is warranted, the CAAF opined the only question truly necessary in these cases is simply whether the panel was properly instructed. "Absent an unconstitutional definition of criminal conduct, flawed instructions, or evidence that

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¹ *United States v. Piolunek*, 74 M.J. 107 (C.A.A.F. 2015).

² 71 M.J. 127 (C.A.A.F. 2012).

³ *Id.* at 128-29.

⁴ *Id.* at 128.

⁵ *Piolunek*, 74 M.J. at 108.. Senior Airman Piolunek was also convicted of receipt of child pornography, enticing a minor to send him child pornography, and communicating indecent language, and received a sentence of eighteen months confinement, reduction to E-1, and a dishonorable discharge. *Id.*

⁶ *Id.*

⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 921 (2012).

⁸ *United States v. Piolunek*, 72 M.J. 830 (A.F. Ct. Crim. App. 2013)

⁹ *Id.* at 838-39. Senior Airman Piolunek petitioned the Court of Appeals for the Armed Forces (CAAF) to review the Air Force Court of Criminal Appeals' (AFCCA) decision, and the Air Force Judge Advocate General (TJAG) sought review of AFCCA's ruling that certain images did not constitute child pornography. *Piolunek*, 74 M.J. at 108.. In its opinion, the CAAF swiftly dealt with the issue certified by the Air Force TJAG, noting it lacks authority to review factual determinations generally, unlike the AFCCA, and thus it could not review the lower court's factual determination that the images were not child pornography. 74 M.J. at 110. *See also*, 10 U.S.C. § 867(d), which outlines the plenary authority of each service's Judge Advocate General to personally certify any case acted on by the service courts of criminal appeals to CAAF for review.

¹⁰ *Piolunek*, 74 M.J. at 110-11..

¹¹ *Barberi*, 71 M.J. at 131 (internal citations omitted).

¹² In *Stromberg v. California*, the Supreme Court set aside a conviction in a general verdict case because it was impossible to know if the defendant had been convicted under a theory or statute that on appeal was held to be unconstitutional. 283 U.S. 359, 368-69 (1931).

members did not follow those instructions . . . there is simply no basis in law to upset the ordinary assumption that members are well suited to assess the evidence in light of the military judge's instructions."¹³ Without any evidence to the contrary, the panel, as has long been the standard, is presumed to follow the judge's instructions. Here the military judge properly instructed the panel, the panel returned a verdict of guilty, and the AFCCA found the evidence legally and factually sufficient to sustain the verdict. Thus, SrA Piolunek's conviction was affirmed and servicemembers in similar situations will see the same result.

From an appellate review standpoint, *Piolunek* settles the aftershocks of *Barberi*. While SSG Barberi saw his conviction set aside after the appellate courts held two of the six images in his case were not in fact child pornography, *Piolunek* announces a new doctrine. In cases, such as SrA Piolunek's, where some—but not *all*—of the images are set aside on appeal, the conviction stands. The analysis for the appellate courts centers on whether or not the panel was properly instructed. If the instructions were legally sound, the panel is presumed to have followed those instructions. *Piolunek* refocuses the approach to child pornography images not as constitutional-level error but rather as a factual sufficiency questions. This changed approach leads to a vastly different outcome that compels the CAAF to assert its decision in *Barberi* was error.¹⁴ Practitioners on all sides need to be mindful of instructions practice and must carefully review all instructions before the military judge reads them to the panel or the instructions are passed to the members.

Additionally, any party can request special findings in a military judge alone case and perhaps in certain cases this may be a proper tool.¹⁵ The decision is also a reminder of the role that findings by exceptions and substitutions can play at trial. If specific child pornography images are listed in a specification and the panel or military judge does not except out any images, then all images form the basis for the finding of guilt. As *Piolunek* makes clear, the remaining images, not excepted by the factfinder or set aside by the appellate courts, form the basis for the conviction and its affirmation.

¹³ *Piolunek*, 74 M.J. at 109.

¹⁴ *Id.* It is also worth noting that the CAAF itself contains different members than it did in *Barberi* and that then-Chief Judge Andrew Effron has been replaced on the court by Judge Kevin Ohlson. While then-Chief Judge Effron voted to set aside SSG Barberi's conviction and Judge Ohlson voted to uphold SrA Piolunek's (thus shifting one vote), the decision in *Piolunek* also saw Judge Ryan, who authored the *Piolunek* opinion, change her position and side with Chief Judge Baker and judges Stucky and Ohlson.

¹⁵ *See*, R.C.M. 918(b).

On its face the *Piolunek* decision is limited to appellate review in child pornography cases. As to trial practice, however, the legal analogy is easy to draw. If general verdicts are permissible, even after action by appellate courts to set aside certain images, then they should be permissible by trial courts as well. Therefore, gone are the days of having counsel list out every discrete image of alleged child pornography as part of the findings worksheet. The more conservative view of course is that the ruling in *Piolunek* by its terms is strictly limited to appellate review and the court was silent about any extension to the trial arena.

II. Justice Management in Child Pornography Cases and Beyond

While the CAAF's decision in *Piolunek* is a game changer in the way child pornography cases are decided at the appellate level, an earlier decision from the Army Court of Criminal Appeals (ACCA) illustrates the charging, managing, and proving of such cases is far from perfect. In *United States v. Doshier*, ACCA considered a child pornography general verdict issue where the appellant was convicted of possession of hundreds of images.¹⁶ Sergeant Marcus Doshier was charged with possessing more than four hundred images of child pornography, along with several child sexual assault offenses.¹⁷ Sergeant Doshier argued that since some of the images did not in fact show child pornography, his conviction for this offense should be set aside. While using the AFCCA's *Piolunek* reasoning to uphold the conviction, the *Doshier* opinion is a reminder that trial-level practitioners can and must do a better job of separating prohibited and protected material. "As appellant notes in his brief, some images include depictions of a door, a sign, the back of someone's head, fully-clothed children, children in bikinis, and images too small to determine their content."¹⁸

The *Doshier* opinion at least implicitly continued ACCA's recent wave of exhortation for all involved to "do better" in the nuts and bolts management of military justice practice, an exhortation that began in *United States v. Mack*.¹⁹ "Those who administer our system of justice must redouble their efforts to ensure that systems are in place to avert the creation of preventable appellate issues and litigation such as those in the instant case."²⁰ As of June 11,

¹⁶ *United States v. Doshier*, No. 20120691, 2015 CCA LEXIS 69, at *2 (A. Ct. Crim. App. February 24, 2015).

¹⁷ *Id.* at *1.

¹⁸ *Id.* at *9.

¹⁹ *United States v. Mack*, No. 20120247, 2013 LEXIS 1016 (A. Ct. Crim. App. December 9, 2013).

²⁰ *Id.* at *8 (Pede, J., concurring).

2015, there have been seventeen cases this calendar year granting some form of relief to an appellant for errors in the post-trial process.²¹

As practitioners across the JAG Corps work to improve, it is important to note that while *Piolunek* lightens the litigation burden, it does not change our overall charter. The system will only continue to work if charge sheets and available evidence together illustrate judge advocates are prepared to take difficult cases to trial as opposed to simply dumping innocuous material into case files and onto charge sheets.

²¹ *United States v. Jackson*, No. 20120159, 2015 CCA LEXIS217 *12(A. Ct. Crim. App. May 18, 2015) (nearly two years from sentence to action, on rehearing court limits the accused confinement to one-half of his original sentence based on the delay) *United States v. Clarke*, 74 M.J. 627 (A. Ct. Crim. App. 2015) (promulgating order issued 30 days after convening authority's action); *United States v. Carlson*, No. 20130129, 2015 LEXIS 227, at *8 (A. Ct. Crim. App. May 29, 2015) (225 days to transcribe a 163 page record); *United States v. Kittelmann*, No. 20120542, 2015 LEXIS 226, at *2-3 (A. Ct. Crim. App. May 29, 2015) (526 days from sentence to action and 57 more days from action until receipt by ACCA); *United States v. Solt*, No. 20130029, 2015 LEXIS 229, at *10-12 (A. Ct. Crim. App. May 28, 2015) (the court ordered an eight-month reduction in sentence which corresponds to the length of time the case was in post-trial processing beyond the 120-day limit); *United States v. Myers*, No. 20130094, 2015 LEXIS 216, at *2 (A. Ct. Crim. App. May 21, 2015) (203 days to transcribe a 144 page record); *United States v. Willhaus*, No. 20130146, at *2 (A. Ct. Crim. App. May 11, 2015) (261 days to transcribe a guilty plea); *United States v. Middleton*, No. 20121121, 2015 LEXIS 187, at *2 (A. Ct. Crim. App. Apr. 30, 2015) (SJAR signed 218 days after authentication); *United States v. Jordan*, No. 20130366, 2015 LEXIS 181, at *2 (A. Ct. Crim. App. Apr. 27, 2015) (116 day from action until receipt by ACCA); *United States v. Padilla*, No. 20130874, 2015 LEXIS 180, at *4 (A. Ct. Crim. App. Apr. 23, 2015) (returned for new action due to issues with forfeitures and dilatory processing); *United States v. Forney*, No. 20121018, 2015 LEXIS 175, *2 (A. Ct. Crim. App. Apr. 16, 2015) (266 days to transcribe a 191-page record); *United States v. Mason*, No. 20140028, 2015 LEXIS 178, at *2, (A. Ct. Crim. App. Apr. 16, 2015) (384 days from sentence to action for a 184-page record); *United States v. Krause*, No. 20140388, 2015 LEXIS 189, at *2 (A. Ct. Crim. App. Apr. 9, 2015) (49 day from action to receipt by ACCA); *United States v. Zemke*, No. 20121069, 2015 LEXIS 121, at *3(A. Ct. Crim. App. Mar. 27, 2015) (350 days from sentence to action for a 159-page record); *United States v. Corona*, No. 20130106, 2015 LEXIS 73, at *2 (A. Ct. Crim. App. Feb. 26, 2015) (two months to send record to military judge for authentication); *United States v. Kindle*, No. 20120954, 2015 LEXIS 43 at *6, (A. Ct. Crim. App. Feb. 10, 2015) (132 days from sentence until defense counsel received the record for errata); *United States v. Fuller*, No. 20120928, 2015 LEXIS 33, at *2(A. Ct. Crim. App. Jan. 28, 2015) (352 days from sentence to action for a 111-page record).

**Decades of Military Failures Against Sex Crimes
Earned America's Distrust and Congressional Imposition:
The Judge Advocate General's Corps's Newest, Most Important Mission**

*A Reflection Paper by Major David Lai**

Undoubtedly, judge advocates are tremendously frustrated over the recent heavy-handed congressional intrusion into military justice.¹ The media demonization of the military is incessant. America's faith in its military seems to be only slightly better than its confidence in Congress.² Servicemembers are beyond worn from all the briefings and politics.³ How did we get here? How did it get so bad?

"Until the mid-1990s, the Army was largely free of the highly publicized sexual misconduct cases that had dogged the other services."⁴ That all changed in the fall of 1996 with the Aberdeen sex scandal.⁵ It was "the

Army's most devastating leadership failure since the Vietnam War."⁶ The command interviewed every female Soldier who attended basic training from 1995 to early 1997, received thousands of complaints of abuse, and preferred charges against a dozen Soldiers and officers.⁷ Only a company commander and two drill sergeants were convicted of rape while the other eight defendants were discharged or disciplined administratively.⁸ The court found Sergeant Delmar G. Simpson guilty of raping six junior enlisted female Soldiers and sentenced him to 25 years.⁹

Responding to public and congressional outrage, the Secretary of the Army formed the Senior Review Panel on Sexual Harassment (Senior Review Panel).¹⁰ The Senior Review Panel found that "leadership is the fundamental issue . . . [p]assive leadership has allowed sexual harassment to persist; active leadership can bring about change to eradicate it."¹¹ However, the Army Equal Opportunity (EO) program took the core of the blame and became the scapegoat;¹² it was subsequently "reorganized" from the top down.¹³ "We [now] have a

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¹ See e.g., Jim Michaels, *Marine Officer: Sex Assault Problem's Scope Exaggerated*, USA TODAY (July 15, 2013), <http://usat.ly/16ArZ9C>.

² See *Sexual Assault in the Military Widely Seen as Important Issue, But No Agreement on Solution*, PEW RESEARCH CENTER (June 12, 2013), <http://www.people-press.org/2013/06/12/sexual-assault-in-the-military-widely-seen-as-important-issue-but-no-agreement-on-solution/> [hereinafter Pew Research].

³ See Andrew Tilghman, Hope Hodge Seck, Michelle Tan, Patricia Kime, David Larter, Steve Losey and Leo Shane III, *America's Military: A Conservative Institution's Uneasy Cultural Evolution*, MILITARY TIMES (Dec. 21, 2014), <http://www.militarytimes.com/story/military/2014/12/21/americas-military-a-conservative-militarys-cultural-evolution/18959975/>.

⁴ Dana Michael Hollywood, *Creating a True Army of One: Four Proposals to Combat Sexual Harassment in Today's Army*, 30 HARV. J.L. & GENDER 151, 159 (2007).

⁵ "[T]he Army announced that three male trainers at the northern Maryland training base had been charged with rape, abuse and

harassment of female soldiers under their supervision. Accusations against other soldiers followed, and the Army soon found itself in the middle of a scandal exposing rampant sex and abuse of authority among male drill sergeants and the female soldiers whose lives they virtually controlled." Jackie Spinner, *In Wake of Sex Scandal, Caution Is the Rule at Aberdeen*, WASH. POST (Nov. 7, 1997), <http://www.washingtonpost.com/wp-srv/local/longterm/library/aberdeen/caution.htm>. See MG (RET.) ROBERT D. SHADLEY, *THE GAME: UNRAVELING A MILITARY SEX SCANDAL* (2013).

⁶ Hollywood, *supra* note 4, (quoting Claudia J. Kennedy with Malcolm McConnell, *Generally Speaking* 169 (2001)).

⁷ Spinner, *supra* note 5.

⁸ *Id.*

⁹ *Id.* ("I don't think you're going to find full closure on Aberdeen until this issue [concerning the legal definition of rape] is resolved," said Eugene Fidell, president of the National Institute of Military Justice.").

¹⁰ U.S. DEP'T OF THE ARMY, *THE SEC. OF THE ARMY'S SENIOR REVIEW PANEL REPORT ON SEXUAL HARASSMENT* (1997), http://www.dtic.mil/dtfs/doc_research/p18_13.pdf.

¹¹ *Id.* at 2.

¹² *Id.* at 3. The panel found that "the Army lacks institutional commitment to the [Equal Opportunity (EO)] program and soldiers distrust the EO complaint system." *Id.* Additionally, it also recommended that the Army "[p]ublish Army Regulation (AR) 600-20, Army Command Policy, immediately and publish interim changes in a timely manner." *Id.*

¹³ *Id.* Among its many recommendations, the Senior Review Panel sought to "[r]e-engineer the EO program from top to bottom to make it

plan on the street,” promised Colonel Herman Keizer Jr., co-chairman of the Army's human relations task force. “[T]he critical thing we have to do next is be able to say this has made a difference.”¹⁴

However, in 2004, the military suffered another series of severe setbacks.¹⁵ Following the 2003 Air Force Academy sex scandal¹⁶ where, as Senator Wayne Allard (R-CO) described it, “the entire support and legal system at the academy appear[ed] to have failed,”¹⁷ the Department of Defense (DoD) launched another series of task forces, investigations, surveys, and further studies. The DoD Care for Victims of Sexual Assaults Task Force “found that ‘[e]xisting policies and programs aimed at preventing sexual assault were inconsistent and incomplete,’ and the lack of confidentiality available to victims in the military prevented a significant number of victims from even reporting sexual assaults.”¹⁸ This resulted in the creation of the restricted reporting option and the Sexual Assault Prevention and Response (SAPR) program.¹⁹

In 2005, the DoD Task Force on Sexual Harassment and Violence at the Military Service Academies (task

responsive to leaders and soldiers, to protect those who use it, and to ensure that those working in it are not stigmatized.” *Id.*

¹⁴ Spinner, *supra* note 5.

¹⁵ “In 2004, perhaps in response to public outrage, the [Department of Defense (DoD)] became serious about rethinking the current sexual assault policies, and the Secretary of Defense ordered a review of sexual assaults throughout the military.” Katherine A. Krul, *The Sexual Assault Prevention and Response (SAPR) Program—In Need of More Prevention*, 2008 ARMY LAW. 41, 42.

¹⁶ Diana Jean Schemo, *Air Force Ignored Academy Abuse*, N.Y. TIMES (Sept. 23, 2003), <http://www.nytimes.com/2003/09/23/politics/23CADE.html> (“The blistering report released . . . by the commission, led by Tillie Fowler, a former congresswoman from Florida, . . . [cited] repeated warnings from the Air Force surgeon general and its Office of Special Investigations, as well as the Senate Armed Services Committee, . . . [and] concluded that ‘since at least 1993, the highest levels of Air Force leadership have known of serious sexual misconduct problems at the academy,’ but failed to take effective action. Instead, it made fitful, limited efforts to investigate the issue, but quickly dropped them.”).

¹⁷ Eric Schmitt & Michael Moss, *Air Force Academy Investigated 54 Sexual Assaults in 10 Years*, N.Y. TIMES (Mar. 7, 2003), <http://www.nytimes.com/2003/03/07/us/air-force-academy-investigated-54-sexual-assaults-in-10-years.html> (“Senator Wayne Allard, Republican of Colorado, said he believed that the situation at the Air Force Academy was worse than the Tailhook scandal . . . Mr. Allard said, ‘We really do need to instill confidence in the system so victims know when they report rape they know the rape itself will not jeopardize their career.’”).

¹⁸ Krul, *supra* note 15 (quoting U.S. DEP’T OF DEFENSE, TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT (2004)).

¹⁹ See U.S. DEP’T OF DEFENSE, DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM (Oct. 6, 2005). See also SHARP POLICY: RESTRICTED REPORTING, http://www.sexualassault.army.mil/Template-Policy.cfm?page=policy_restricted_unrestricted_reporting.cfm.

force) published its report.²⁰ In it, the task force made a number of findings and proposals: (1) the academies need more women, both in the cadet corps and as staff and faculty, and more women in visible leadership roles; (2) “the leadership, staff, faculty, cadets and midshipmen must model behaviors that reflect and positively convey the value of women in the military;” (3) the Uniform Code of Military Justice (UCMJ) should be updated to include privileged protections between the victim and the medical and mental health care providers and victim advocates; (4) Congress should “revise the current sexual misconduct statutes to more clearly and comprehensively address the full range of sexual misconduct,” to include sexual harassment; (5) Article 32 proceedings need to be amended to better protect the privacy of victims and alleged offenders; (6) servicemembers require classes and training on sexual harassment and assault; and (7) the SAPR Program must be fully implemented to better ensure that victims are informed of and afforded their federally mandated rights.²¹ Of the twelve appointed members on the task force who issued these recommendations, two were judge advocates: one was Brigadier General Jarris J. Sanborn of the Air Force, and the other was Major General (retired) Michael J. Nardotti Jr., The Judge Advocate General (TJAG) of the Army from 1993–97.²² Following the DoD reports, the then Air Force Secretary, James G. Roche, declared that “[w]e cannot bear the thought of a criminal being commissioned We’re learning enough to realize that change must occur . . . [c]hange in the climate, change in how we manage.”²³

The sexual assault and harassment problem in the respective services, and at the military academies for that matter, have unfortunately persisted. Just last year at the United States Military Academy (West Point), its rugby team was investigated and disbanded for having a hostile team environment and a culture of disrespect toward women.²⁴ Shortly after, Colonel Matthew Moten, the head of West Point’s history department, and, coincidentally, the father of Second Lieutenant Marshall Moten, a former West Point rugby player who was

²⁰ U.S. DEP’T OF DEFENSE, REPORT OF THE DEFENSE TASK FORCE ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES (June 2005) [hereinafter Report on Military Academies].

²¹ *Id.* at ES1-ES3.

²² *Id.* at iv.

²³ Schmitt & Moss, *supra* note 17.

²⁴ Joe Gould, *West Point Rugby Team Disbanded Over 'Inappropriate' Emails: Punishment Includes 'Respect Rehabilitation.'* ARMY TIMES (June 2, 2013), <http://www.armytimes.com/article/20130602/NEWS/306020005/West-Point-rugby-team-disbanded-over-inappropriate-emails>. See also Thomas Ricks, *What West Point Says About Why the Rugby Team Was Temporarily Disbanded*, FOREIGN POLICY (May 29, 2013), http://ricks.foreignpolicy.com/posts/2013/05/29/what_west_point_says_about_why_the_rugby_team_was_temporarily_disbanded.

himself investigated and “one of the 15 cadets found guilty of ‘unsatisfactory behavior,’”²⁵ was formally reprimanded and resigned after an Army Regulation 15-6 inquiry over “accusations of trying to kiss and touch female subordinates and wives of subordinate officers.”²⁶

Around the same time at West Point, Sergeant First Class (SFC) Michael McClendon was “charged with crimes for taking nude photos of female cadets without their consent, extending the military’s sex-scandal crisis to the hallowed ground of its premier training academy.”²⁷ What made this case even worse, SFC McClendon was a hand-selected, tactical Non-Commissioned Officer (NCO) charged “to be a leader for a company of cadets, . . . responsible for the health, welfare, and discipline of 125 future officers . . . [and] to establish a proper command climate within their respective companies.”²⁸ He was supposed to be “in the top 10% of the NCO Corps” in the Army.²⁹

Sex scandals also continued to rock the other service academies. Last year, United States Naval Academy football players were investigated for the alleged sexual assault of another cadet.³⁰ One of the midshipmen was court-martialed and was later acquitted.³¹ Charges were dropped on one of the other midshipmen over evidentiary issues; his statements were taken without him being read his Article 31 rights.³² Last August, the United States Air Force Academy’s superintendent, Lieutenant General Michelle D. Johnson, initiated another investigation looking “into misconduct among student athletes and possible cover-ups by members of the athletic staff, after two Colorado newspapers reported allegations of rape,

drug use, and spiked drinks at illicit parties involving football players.”³³ Just this past November, one of the Air Force Academy athletics officials was caught soliciting sex from an undercover police officer and resigned.³⁴

Sadly, all of these accounts are just a diminutive survey of the headlines from the ever expansive sexual assault and harassment history of the military.³⁵

So, what is the point? For many of us, especially new and young judge advocates, we do not seem to understand the outrage over the military’s handling of sex crimes. Many within the military, throughout the ranks, believe

²⁵ Dave Philipps, *Informant Debate Renewed as Air Force Revisits Cadet Misconduct*, N.Y. TIMES (Aug. 9, 2014), <http://www.nytimes.com/2014/08/10/us/informant-debate-renewed-as-air-force-revisits-cadet-misconduct.html>.

²⁶ Tom Roeder, *Air Force Academy Athletic Official Arrested in Prostitution Sting*, CO. SPRINGS GAZETTE (Nov. 19, 2014), <http://www.military.com/daily-news/2014/11/19/air-force-academy-athletic-official-arrested-prostitution-sting.html?comp=700001075741&rank=2>.

²⁷ See, e.g., Tom Vanden Brook, *Fort Hood Assault Prevention Chief Under Investigation*, USA TODAY (May 14, 2013), <http://www.usatoday.com/story/news/nation/2013/05/14/fort-hood-sexual-assault-pentagon-investigation-prostitution/2159685/>; Richard Sisk, *Two-Star Relieved in Sexual Assault Investigation*, MILITARY.COM (June 08, 2013), <http://www.military.com/daily-news/2013/06/08/army-two-star-relieved-in-sex-assault-investigation.html>; Luis Martinez, *Army’s Top Sexual Assault Prosecutor Accused of Sexual Assault*, ABC NEWS (Mar 6, 2014), <http://abcnews.go.com/blogs/politics/2014/03/armys-top-sexual-assault-prosecutor-accused-of-sexual-assault/>; Molly O’Toole, *James Wilkerson, Air Force Pilot Convicted Of Sexual Assault, Reassigned*, HUFFINGTON POST (April 8, 2013), http://www.huffingtonpost.com/2013/04/02/james-wilkerson-air-force-sexual-assault_n_2994998.html; Jeff Black, *Marine Recruiter Charged with Sexual Assault of Teen-Aged Recruits*, NBC NEWS (Jan. 27, 2013), http://usnews.nbcnews.com/_news/2013/01/27/16726962-marine-recruiter-charged-with-sexual-assault-of-teen-aged-recruits?lite; *Marine Convicted of Rape Walks Without Prison Time*, MILITARY.COM (MAY 8, 2013), <http://www.military.com/daily-news/2013/05/08/marine-convicted-of-rape-walks-without-prison-time.html>; *Navy Commander Pleads Guilty To Rape, Sex Assault*, FOX NEWS (Oct. 29, 2011), <http://www.foxnews.com/us/2011/10/29/navy-commander-pleads-guilty-to-rape-sex-assault/>; Kristin Davis, *Tyndall JAG Convicted in Underage Sex Case*, ARMY TIMES (Feb. 26, 2013), <http://www.armytimes.com/article/20130226/NEWS/302260315/>; Michael Biesecker, *Ex-Army Prosecutor, Maj. Erik J. Burris, Found Guilty Of Rape At Court-Martial*, HUFFINGTON POST (Jan. 27, 2015), http://www.huffingtonpost.com/2015/01/27/maj-erik-j-burris-guilty_n_6554228.html; *Disbarred US Army Lawyer Pleads Guilty to Forcible Sodomy with Infant - Sentenced to 37 Years in Prison*, SALEM NEWS (Jan. 7, 2011), <http://www.salem-news.com/articles/january072011/army-rape.php>; *Navy JAG attorney Sentenced for Child Porn*, NAVY TIMES (Jul. 8, 2011), <http://archive.navytimes.com/article/20110708/NEWS/107080326/Navy-JAG-attorney-sentenced-child-porn>; *Ralston Adultery Case Shows Inequity of Air Force*, Flinn Says, L.A. TIMES (June 9, 1997), http://articles.latimes.com/1997-06-09/news/mn-1682_1_air-force; Jane Gross, *Court Martial of Army Sergeant Major Opens on Sexual Misconduct Charges*, N.Y. TIMES (Feb. 4, 1998), <http://partners.nytimes.com/library/national/020498mckinney-sex-trial.html>; David Culver, *Air Force Officer Not Guilty in Assault Case*, NBC (Nov. 13, 2013), <http://www.nbcwashington.com/news/local/Air-Force-Officers-Battery-Trial-Moves-Forward-231743911.Html>.

²⁸ Charles Clymer, *I Want to Apologize to West Point*, HUFFINGTON POST (Sept. 12, 2013), http://www.huffingtonpost.com/charles-clymer/i-want-to-apologize-to-we_b_3846095.html.

²⁹ *West Point Professor Quits after Investigation*, STAR & STRIPES (Sept. 10, 2013), <http://www.military.com/daily-news/2013/09/10/west-point-professor-quits-after-investigation.html>.

³⁰ Tom Vanden Brook, *Sergeant Busted for Taking Nude Photos of Cadets*, USA TODAY (May 24, 2013), <http://www.usatoday.com/story/news/nation/2013/05/22/sex-scandal-hits-west-point/2352163/>.

³¹ *Id.* UNITED STATES MILITARY ACADEMY, WEST POINT, UNITED STATES CORPS OF CADETS TACTICAL NON-COMMISSIONED OFFICER PROGRAM, <http://www.usma.edu/g1/SitePages/TAC%20NCO%20Program.aspx>. [hereinafter USMA TAC NCO Program].

³² USMA TAC NCO Program, *supra* note 28.

³³ Phil Stewart, *U.S. Naval Academy Football Players Investigated for Sexual Assault*, REUTERS (May 31, 2013), <http://www.reuters.com/article/2013/05/31/us-usa-military-sexualassault-idUSBRE94U17520130531>.

³⁴ Helene Cooper, *Former Naval Academy Football Player Is Acquitted of Sexual Assault*, N.Y. TIMES (Mar. 20, 2014), http://www.nytimes.com/2014/03/21/us/former-naval-academy-football-player-is-acquitted-of-sexual-assault-charges.html?_r=0.

³⁵ *Id.*

that this is all political.³⁶ There are others who believe that the documentary, *The Invisible War*, manufactured the indignation.³⁷ Many more argue that this is not just a military problem but a greater societal crisis.³⁸ In fact,

³⁶ “[S]urvey showed some dissatisfaction with the service’s focus on sexual assault. Only about half of respondents believe sexual assault to be a ‘serious or significant’ problem in the military. About 18 percent had no opinion and 31 percent said that they do not believe it’s a significant or serious problem.” Stephen Losey, *America’s Military: A Conservative Institution’s Uneasy Cultural Evolution*, MILITARY TIMES (Dec. 21, 2014), <http://www.militarytimes.com/story/military/2014/12/21/americas-military-a-conservative-militarys-cultural-evolution/18959975/>.

³⁷ See Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129 (2014); and Mark Kermod, *The Invisible War Review – Sexual Assault within the US Military*, THE GUARDIAN (Mar. 8, 2014), <http://www.theguardian.com/film/2014/mar/09/invisible-war-review-kermod-kirby-dick>.

³⁸ See Pew Research, *supra* note 2 (“A substantial majority of Americans (81%) view sexual assault in the military as an extremely or very important issue. But the public does not believe the problem of sexual assault is a bigger problem in the military than outside it: Just 11% say it is more of a problem inside the military, 23% say it is more of a problem outside the military, while 63% say it is about the same.”). Lieutenant General Flora Darpino, Army TJAG, once said that “sexual assault is not just an Army problem, but it is a problem where the Army has a unique ability to make a difference. ‘Sexual assault is a societal problem, it is the most under-reported crime there is out there,’ she said. ‘But I feel the Army is better equipped to address this issue than a lot of the rest of society.’” C. Todd Lopez, *Women Leaders Serve as Role Models, Whether They Realize It or Not*, ARMY NEWS (Jan. 21, 2014), http://www.army.mil/article/118716/Women_leaders_serve_as_role_models_whether_they_realize_it_or_not/. See, e.g., Daniel Burke, “*Sea Change*” in *Catholic Sex Abuse Scandal*, CNN (Jun. 10, 2015) <http://www.cnn.com/2015/06/10/us/pope-vatican-bishops-sex-abuse-tribunal/index.html>; Amy O’Leary, *In Virtual Play, Sex Harassment Is All Too Real*, N.Y. TIMES (Aug. 1, 2012), http://www.nytimes.com/2012/08/02/us/sexual-harassment-in-online-gaming-stirs-anger.html?_r=0; Kyung Lah, “*RapeLay*” Video Game Goes Viral Amid Outrage, CNN (Mar. 31, 2010), <http://www.cnn.com/2010/WORLD/asiapcf/03/30/japan.video.game.rape/index.html>; Jessica Luther, *How Football Culture Can Change Rape Culture*, THE NATION (Apr. 16, 2014), <http://www.thenation.com/article/179347/how-football-culture-can-change-rape-culture>; Jeff MacGregor, *Only the Truth will Save Us*, ESPN (Oct. 19, 2013), http://espn.go.com/espn/story/_/id/9845262/society-fails-victims-sexual-assault-stigmatized; Walter Moseley, *Ten Things to End Rape Culture*, THE NATION (Feb. 4, 2013), <http://www.thenation.com/article/172643/ten-things-end-rape-culture>; Tony Gonzalez, *University Confronts Culture of Sexual Violence*, USA TODAY (Sept. 8, 2013), <http://www.usatoday.com/story/news/nation/2013/09/08/university-confronts-culture-of-sexual-violence-2780705/>; Angela Carone, *Fraternity Culture Linked To College Sexual Assault Problem*, KPBS (Oct. 21, 2014), <http://www.kpbs.org/news/2014/oct/21/fraternities-and-campus-sexual-assault-problem/>; Julia Kacmarek and Elizabeth Geffre, *Rape Culture Is: Know It When You See It*, HUFFINGTON POST (June 1, 2013), http://www.huffingtonpost.com/julia-kacmarek/rape-culture-is_b_3368577.html; Rahiel Tesfamariam, *Bigger than Rick Ross: An Industry that Glorifies Rape and Drug Culture*, WASH. POST (Mar. 29, 2013), http://www.washingtonpost.com/blogs/therootdc/post/ric-rosss-uoeno-glorifying-rape-and-drug-culture/2013/03/28/2ce16392-97d0-11e2-97cd-3d8c1afe40f_blog.html; Todd Leopold and Ben Brumfield, *Rape Allegations Haunt Bill Cosby in the Digital Age*, CNN (Nov. 15, 2014), <http://www.cnn.com/2014/11/14/showbiz/tv/bill-cosby-rape-allegations/index.html>; and Ken Rudin, *Congressional Sex Scandals in History*, WASH. POST (1998), <http://www.washingtonpost.com/wp-srv/politics/special/clinton/congress.htm>.

many military prosecutors contend that we are better at prosecuting and try proportionally more sex crime cases than our civilian counterparts.³⁹ This military shaming is largely unwarranted,⁴⁰ and congressmen, who are not versed in and do not practice military justice, should not meddle in the military’s “specialized community governed by a separate discipline from that of the civilian.”⁴¹ But, while these counterarguments defending the military are probably true to an extent, have we not, considering our soiled history over the past two decades, earned America’s distrust and the congressional imposition to some degree? So many promises and commitments have been unkept, recommendations unheeded, initiatives half-baked and unresourced, victims unsupported and alienated, cases untried or lost.⁴² Would the military, or

³⁹ “The Judge Advocate General of the Army described seventy-nine cases where Army commanders chose to prosecute off-post offenses after civilians declined to prosecute or could not prosecute. She said the cases demonstrated that ‘Army commanders are willing to pursue difficult cases to serve the interests of both the victims and our community.’” REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL, 129 (June 2005), *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf. “[C]ivilian jurisdictions face under-reporting challenges similar to those of the military. Further, it is not clear that the criminal justice response in civilian jurisdictions—where prosecutorial decisions are supervised by elected or appointed lawyers—are any more effective at encouraging reporting of sexual assaults, or investigating and prosecuting these assaults when they are reported.” *Id.* at 167. “When the same criteria are used for calculation of prosecution and conviction rates, the military justice system’s rates are comparable to major civilian prosecution entities for the same types of offenses.” Lisa M. Schenck, *Article: Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense Its Own Worst Enemy?*, 11 OHIO ST. J. CRIM. L. 579, 582 (2014). See also, e.g., Ailsa Chang, *In the Bronx, Victims Get 24 Hours to Talk--Or the DA Lets the Accused Walk*, WNYC (Aug. 21, 2012), <http://www.wnyc.org/story/231114-bronx-da/>.

⁴⁰ Per Pew Research, “[j]ust 11% [surveyed] say sexual assault is more of a problem in the military than outside it; twice as many (23%) think it is more of a problem outside of the armed forces, while 63% say it is about the same in and out of the military.” Pew Research, *supra* note 2. See also, Michaels, *supra* note 1 (“Capt. Rodman, assigned to Pentagon as a lawyer, worries Draconian ‘solutions’ will only make things worse.”).

⁴¹ *Parker v. Levy*, 417 U.S. 733, 787 (1974) (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)). “About half of Americans (52%) have a great deal or fair amount of confidence that military leaders will make the right decisions when it comes to the problem of sexual assault in the military, but just 36% express at least a fair amount of confidence in Congress on this issue.” Pew Research, *supra* note 2.

⁴² “The Pentagon has spent decades trying to rid its ranks of sexual predators—and encouraging victims to come forward—but progress has been slow. . . . Sen. Kirsten Gillibrand, D-N.Y., said, ‘There is no other mission in the world for our military where this much failure would be allowed.’ . . . That’s slowly changing, with the emphasis on *slowly*.” Mark Thompson, *Military’s War on Sexual Assault Proves Slow Going*, TIME (Dec. 4, 2014), <http://time.com/3618348/pentagon-sexual-assault-military/>. “‘There have been indications of real progress,’ Defense Secretary Chuck Hagel said . . . , but ‘we still have a long way to go.’” *Id.* “General Ray Odierno, the Army chief of staff, fired a volley at his troops on the subject. ‘The Army is failing in its efforts to combat sexual assault and sexual harassment,’ Odierno said in a written message. ‘It is up to every one of us, civilian and Soldier, general officer to private, to solve this problem within our ranks.’” Mark Thompson, *The Roots of*

the Judge Advocate General Corps (JAG Corps), for that matter, have made any changes without public anger and congressional commandment?⁴³

To the American public, the military has not been at the forefront, leading the charge against sexual harassment and violence.⁴⁴ We have been reactionary. We respond under pressure, every decade or so, after another sex scandal and public outcry. Each time, we conduct another task force that makes nearly identical recommendations.⁴⁵ The 2005 report by the task force that investigated the military academies specifically identified problems and made recommendations regarding the Military Rules of Evidence (MRE) 513 privileges and Article 32 proceedings that are similar, if not identical, to the changes Congress is now demanding.⁴⁶ These were proposals endorsed by the Army's TJAG nearly a decade ago.⁴⁷

No one has made the claim, but we, as judge advocates in the field and at the frontlines of this invisible war, bear a significant share of the responsibility for the military's failures. We advise commanders. In many ways, we are equally responsible for the victims. We prosecute and defend cases. However, we have not taken the lead on the issue until recently. Why do so many victims of sexual assault in the military feel so revictimized by our military justice process?⁴⁸ Did trial counsels fail in their duty to

serve and protect their victims? Do judge advocates, as prosecutors for the armed forces, even see that as one of their duties? Why were the Victim Witness Liaisons (VWL) ineffective?⁴⁹ Did we take the VWL program seriously? Did we sufficiently train, resource, and stress its importance? Why did commanders fail to see that sex crimes are at intolerable levels in the military? Did we not recognize it ourselves, or, if we did, why had we kept silent and let commanders fail? Surely, it is commanders' duty and responsibility to govern, but do we not have an equal responsibility to lead the way and help perpetuate change? Whatever the answers are, we have, as judge advocates and military justice practitioners, taken on the burden of change. Congress has assigned the mission to us. Our leadership has declared their commitment and issued our marching orders.⁵⁰ Regardless of whether the forced changes are good or otherwise, the failure is now ours.

As history has shown, the military comes under scrutiny about every decade for the same issue, and each time someone takes the blame. The Army EO program was reorganized in the nineties. Then, SAPR was criticized in the 2000s. The JAG Corps is now squarely in the crosshairs. If we fail to lead the military out of this persistent cycle of the same problem, the JAG Corps may very well carry the blame at the next outbreak of sex scandals.

Sexual Abuse in the Military, TIME (May 17, 2013), <http://nation.time.com/2013/05/17/the-roots-of-sexual-abuse-in-the-military/> [hereinafter *The Roots of Sexual Abuse*].

⁴³ In a letter to Senator Gillibrand, "Lieutenant General Claudia Kennedy, the first woman to reach the rank of three-star general, . . . [declared that] '[h]aving served in leadership positions in the US army, I have concluded that if military leadership hasn't fixed the problem in my lifetime, it's not going to be fixed without a change to the status quo.'" Karen McVeigh, *Senator Kirsten Gillibrand Gains Support for Army Sexual Assault Reform*, THE GUARDIAN (Sept. 24, 2013), <http://www.theguardian.com/world/2013/sep/24/generals-kirsten-gillibrand-army-sexual-assault>.

⁴⁴ See generally Liz Halloran, *Stunned by Military Sex Scandals, Advocates Demand Changes*, NPR (May 25, 2013), <http://www.npr.org/2013/05/23/186335999/stunned-by-military-sex-scandals-advocates-demand-changes>.

⁴⁵ See, e.g., Ashley Rowland, *Report Underscores Army's Ineffectiveness to Prevent Sexual Assaults in Korea*, STARS & STRIPES (May 21, 2013) ("The Eighth Army's Prevention of Sexual Assault Task Force was formed in 2011 to assess the climate in South Korea regarding sexual assault among soldiers and the effectiveness of the Army's current programs However, nearly two years later, Eighth Army officials say that the report has yet to be finalized and approved by leadership."). Interestingly, among its draft findings and recommendations, this task force reportedly found that "[t]here was a lack of female unit victim advocates at small, predominantly male installations The report also noted that most commanders did not understand the role and responsibility of unit victim advocates." *Id.*

⁴⁶ See Report on Military Academies, *supra* note 20.

⁴⁷ *Id.*

⁴⁸ See generally Karisa King, *In Cases of Military Sexual Assault, Victims Are Victimized Twice*, BUSINESS INSIDER (May 25, 2013),

<http://www.businessinsider.com/in-cases-of-military-sexual-assault-victims-are-victimized-twice-2013-5#ixzz3QZRLMbUV>.

⁴⁹ See U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, para. 17-7 (2 Oct. 2011).

⁵⁰ "[President] Obama said curbing sexual assault in the ranks will require 'putting our best people on this challenge.'" *The Roots of Sexual Abuse*, *supra* note 42. "If I do not see the kind of progress I expect, then we will consider additional reforms that may be required to eliminate this crime from our military ranks and protect our brave service members who stand guard for us every day at home and around the world." White House Press Release, President Barack Obama, Statement by the President on Eliminating Sexual Assault in the Armed Forces (Dec. 20, 2013), <http://www.whitehouse.gov/the-press-office/2013/12/20/statement-president-eliminating-sexual-assault-armed-forces>. "[General] Odierno said 'it is time we take on the fight against sexual assault and sexual harassment as our primary mission.'" *The Roots of Sexual Abuse*, *supra* note 42. See also Memorandum from Lieutenant General Flora D. Darpino, The Judge Advocate General, to Judge Advocate Legal Services Personnel, subject: Special Victims Counsel (1 Nov. 2013), available at http://jpp.whs.mil/Public/docs/RFI/Set_1/Encl13-25/RFI_Enclosure_Q16_USA.pdf.

Now, it is, more than ever, conceivable that military justice may be stripped to its bones and civilianized.⁵¹ By that point, one of the JAG Corps's main mandate may be nevermore, and our core mission (and our own careers) may lose relevancy. If we, as trial and defense counsels, as Chiefs of Justice and Senior Defense Counsels, as Special Victims Counsel (SVC), and legal assistance attorneys, cannot continue to demonstrate successful and just prosecutions, or if victims remain unsatisfied despite our efforts, the next public and congressional explosion will surely be targeted directly at us.

⁵¹ See generally Murphy, *supra* note 37.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS) is restricted to students who have confirmed reservations. Reservations for TJAGLCS CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty servicemembers and civilian employees must obtain reservations through their directorates' training office. U.S. Army Reserve (USAR) and Army National Guard (ARNG) Soldiers must obtain reservations through their unit training offices.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department, at (800) 552-3978, extension 3172.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to ATRRS Self-Development Center and click on "Update" your ATRRS Profile (not the AARTS Transcript Services).

Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. Continuing Legal Education (CLE)

The armed services' legal schools provide courses that grant continuing legal education credit in most states. Please check the following web addresses for the most recent course offerings and dates:

a. The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS).

Go to: <https://www.jagcnet.army.mil>. Click on the "Legal Center and School" button in the menu across the top. In the ribbon menu that expands, click "course listing" under the "JAG School" column.

b. The Naval Justice School (NJS).

Go to: http://www.jag.navy.mil/njs_curriculum.htm. Click on the link under the "COURSE SCHEDULE" located in the main column.

c. The Air Force Judge Advocate General's School (AFJAGS).

Go to: <http://www.afjag.af.mil/library/index.asp>. Click on the AFJAGS Annual Bulletin link in the middle of the column. That booklet contains the course schedule.

3. Civilian-Sponsored CLE Institutions

For additional information on civilian courses in your area, please contact one of the institutions listed below:

- AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225
- ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552
- ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600
- ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990
- CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973
- CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747
- CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662
- ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900
- FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697

FB: (202) 638-0252
 Florida Bar
 650 Apalachee Parkway
 Tallahassee, FL 32399-2300
 (850) 561-5600

GICLE: The Institute of Continuing Legal Education
 P.O. Box 1885
 Athens, GA 30603
 (706) 369-5664

GII: Government Institutes, Inc.
 966 Hungerford Drive, Suite 24
 Rockville, MD 20850
 (301) 251-9250

GWU: Government Contracts Program
 The George Washington University Law School
 2020 K Street, NW, Room 2107
 Washington, DC 20052
 (202) 994-5272

IICLE: Illinois Institute for CLE
 2395 W. Jefferson Street
 Springfield, IL 62702
 (217) 787-2080

LRP: LRP Publications
 1555 King Street, Suite 200
 Alexandria, VA 22314
 (703) 684-0510
 (800) 727-1227

LSU: Louisiana State University
 Center on Continuing Professional Development
 Paul M. Herbert Law Center
 Baton Rouge, LA 70803-1000
 (504) 388-5837

MLI: Medi-Legal Institute
 15301 Ventura Boulevard, Suite 300
 Sherman Oaks, CA 91403
 (800) 443-0100

MC Law: Mississippi College School of Law
 151 East Griffith Street
 Jackson, MS 39201
 (601) 925-7107, fax (601) 925-7115

NAC: National Advocacy Center
 1620 Pendleton Street
 Columbia, SC 29201
 (803) 705-5000

NDAA: National District Attorneys Association
 44 Canal Center Plaza, Suite 110
 Alexandria, VA 22314
 (703) 549-9222

NDAED: National District Attorneys Education Division
1600 Hampton Street
Columbia, SC 29208
(803) 705-5095

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 (in MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

4. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for the career progression and promotion eligibility for all Reserve Component company grade judge advocates (JA). It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD) at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each December.

b. Phase I (nonresident online): Phase I is limited to USAR and ARNG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC). Prior to enrollment in Phase I, students must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, unless, at the time of their accession into the JAGC, they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrollment in Phase I, please go to JAG University at <https://jagu.army.mil>. At the home page, find JAOAC registration information at the "Enrollment" tab.

c. Phase II (resident): Phase II is offered each December at TJAGLCS. Students must have completed and passed all non-writing Phase I modules by 2359 (EST) 1 October in order to be eligible to attend Phase II in the same fiscal year as the 1 October deadline. Students must have submitted all Phase I writing exercises for grading by 2359 (EST) 1 October in order to be eligible to attend Phase II in the same fiscal year as the 1 October deadline.

d. Phase II includes a mandatory Army Physical Fitness Test (APFT) and height and weight screening. Failure to pass the APFT or height and weight may result in the student's disenrollment.

e. If you have additional questions regarding JAOAC, contact LTC Andrew McKee at (434) 971-3357 or andrew.m.mckee2.mil@mail.mil.

5. Mandatory Continuing Legal Education

a. Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state to remain certified to perform the duties of an Army JA. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

b. To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations, and requirements for Mandatory Continuing Legal Education.

c. The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

d. Regardless of how course attendance is documented, it is the personal responsibility of JAs to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist JAs in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

e. Please contact the TJAGLCS CLE Administrator at (434) 971-3307 if you have questions or require additional information.

Current Materials of Interest

1. The USALSA Information Technology Division and JAGCNet

a. The USALSA Information Technology Division operates a knowledge management, and information service, called JAGCNet. Its primary mission is dedicated to servicing the Army legal community, but alternately provides Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGLCS publications available through JAGCNet.

b. You may access the “Public” side of JAGCNet by using the following link: <http://www.jagcnet.army.mil>. Do not attempt to log in. The TJAGSA publications can be found using the following process once you have reached the site:

(1) Click on the “Legal Center and School” link across the top of the page. The page will drop down.

(2) If you want to view the “Army Lawyer” or “Military Law Review,” click on those links as desired.

(3) If you want to view other publications, click on the “Publications” link below the “School” title. This will bring you to a long list of publications.

(4) There is also a link to the “Law Library” that will provide access to additional resources.

c. If you have access to the “Private” side of JAGCNet, you can get to the TJAGLCS publications by using the following link: <http://www.jagcnet2.army.mil>. Be advised that to access the “Private” side of JAGCNet, you MUST have a JAGCNet Account.

(1) Once logged into JAGCNet, find the “TJAGLCS” link across the top of the page and click on it. The page will drop down.

(2) Find the “Publications” link under the “School” title and click on it.

(3) There are several other resource links there as well. You can find links the “Army Lawyer,” the “Military Law Review,” and the “Law Library.”

d. Access to the “Private” side of JAGCNet is restricted to registered users who have been approved by the Information Technology Division, and fall into one or more of the categories listed below.

(1) Active U.S. Army JAG Corps personnel;

(2) Reserve and National Guard U.S. Army JAG Corps personnel;

(3) Civilian employees (U.S. Army) JAG Corps personnel;

(4) FLEP students;

(5) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DoD personnel assigned to a branch of the JAG Corps; and, other personnel within the DoD legal community.

e. Requests for exceptions to the access policy should be e-mailed to: itdservicedesk@jagc-smtp.army.mil.

f. If you do not have a JAGCNet account, and meet the criteria in subparagraph d. (1) through (5) above, you can request one.

(1) Use the following link: <https://www.jagcnet.army.mil/Register>.

(2) Fill out the form as completely as possible. Omitting information or submitting an incomplete document will delay approval of your request.

(3) Once you have finished, click “Submit.” The JAGCNet Service Desk Team will process your request within 2 business days.

g. Contact information for JAGCNet is 703-693-0000 (DSN: 223) or at itdservicedesk@jagc-smtp.army.mil

2. The Judge Advocate General's Legal Center and School (TJAGLCS)

a. Contact information for TJAGLCS faculty and staff is available through the JAGCNet webpage at <https://www.jagcnet2.army.mil>. Under the “TJAGLCS” tab are areas dedicated to the School and the Center which include department and faculty contact information.

b. TJAGLCS resident short courses utilize JAG University in a “blended” learning model, where face-to-face resident instruction (‘on-ground’) is combined with JAGU courses and resources (‘on-line’), allowing TJAGLCS short course students to utilize and download materials and resources from personal wireless devices during class and after the course. Personnel attending TJAGLCS courses are encouraged to bring a personal wireless device (e.g. laptop or tablet) to connect to our free commercial network to access JAGU course information and materials in real-time. Students must have their AKO username and password to access JAGU unless the wireless device has a Common Access Card (CAC) reader. Additional details on short course operations and JAGU course access are provided in separate correspondence from a Course Manager.

c. Personnel desiring to call TJAGLCS can dial via DSN 521-3300 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the TJAGLCS Information Technology Division at (434) 971-3264 or DSN 521-3264.

3. Distributed Learning and JAG University (JAGU)

a. *JAGU*: The JAGC’s primary Distributed Learning vehicle is JAG University (JAGU), which hosts the Blackboard online learning management system used by a majority of higher education institutions. Find JAGU at <https://jagu.army.mil>.

b. *Professional Military Education*: JAGU hosts professional military education (PME) courses that serve as prerequisites for mandatory resident courses. Featured PME courses include the Judge Advocate Officer Advanced Course (JAOAC) Phase 1, the Pre-Advanced Leaders Course and Pre-Senior Leaders Course, the Judge Advocate Tactical Staff Officer’s Course (JATSOC) and the Legal Administrator Pre-Appointment Course.

c. *Blended Courses*: TJAGLCS is an industry innovator in the ‘blended’ learning model, where face-to-face resident instruction (‘on-ground’) is combined with JAGU courses and resources (‘on-line’), allowing TJAGLCS short course students to utilize and download materials and resources from personal wireless devices during class and after the course. Personnel attending TJAGLCS courses are encouraged to bring a personal wireless device (e.g. laptop, iPad, tablet) to connect to our free commercial network to access JAGU course information and materials in real-time. Students must have their AKO user name and password to access JAGU unless the wireless device has a Common Access Card (CAC) reader. Additional details on short-course operations and JAGU course access are provided in separate correspondence from a Course Manager.

d. *On-demand self-enrollment courses and training materials*: Self enrollment courses can be found under the ‘Enrollment’ tab at the top of the JAGU home page by selecting course catalog. Popular topics include the Comptrollers Fiscal Law Course, Criminal Law Skills Course, Estate Planning, Law of the Sea, and more. Other training materials include 19 Standard Training Packages for judge advocates training Soldiers, the Commander’s Legal Handbook, and specialty sites such as the SHARP (Sexual Harassment/Assault Response and Prevention) site and the Paralegal Proficiency Training and Resources site.

e. *Streaming media*: Recorded lectures from faculty and visiting guests can be found under the JAGU Resources tab at the top of the JAGU home page. Video topics include Investigations Nuts and Bolts, Advanced Contracting, Professional Responsibility, Chair Lectures and more.

f. *Contact information*: For more information about Distributed Learning/JAGU, contact the JAGU help desk at <https://jagu.army.mil> (go to the help desk tab on the home page), or call (434) 971-3157.

The Judge Advocate General's Legal Center & School
U.S. Army
ATTN: JAGS-ADA-P
Charlottesville, VA 22903-1781

