

Navigating the Restoration of Capacity and Civil Commitment of a Mentally Incompetent Accused

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I. Introduction

When an accused is found mentally incompetent to stand trial, convening authorities and their judge advocates are thrust into the management of a unique capacity restoration process.¹ Born largely out of necessity, mentally incompetent service members are managed using a hybrid military-civilian process that “plugs the military justice system into the title 18 framework,” which was designed for the handling of incompetent civilian defendants in federal district court.² As the federal insanity statutes were not originally crafted for the military, there are specific wrinkles regarding their application in military cases that would be wholly unfamiliar to a seasoned federal practitioner.³ Because Article 76b, Uniform Code of Military Justice (UCMJ), explicitly integrates the federal insanity statutes, military justice practitioners must be familiar not only with court-martial procedures, but also with the same statutes, regulations, and case law that federal courts routinely wrestle with.⁴ The process of restoring capacity can be complex enough in a purely federal setting, but this task is more vexing in this hybrid setting because the federal civilian and military sides must cooperate with each other using a process that is likely unfamiliar to each.⁵

This article attempts to bridge the gap between the two systems while providing a linear framework for navigating the hybrid process of capacity restoration. The first part of this article examines the issue of capacity in military courts while describing the procedure by which an accused would

be subject to the federal insanity statutes related to restoring capacity. The second part examines the restoration process, with a particular emphasis on the use of psychotropic medications in that process. The third part examines the steps which must be taken if restoration is unsuccessful and a service member is civilly committed. It is ultimately the goal of this article to provide some clarity to a process that can only succeed if there are coordinated efforts of medical and legal professionals, and the cooperation of two very distinct federal court systems.⁶

II. Arriving at Capacity Restoration

Mental capacity or mental competency to stand trial refers to an accused's ability to “consult with counsel and to comprehend the proceeding.”⁷ Capacity involves an ongoing evaluation of the accused's ability to “participate meaningfully” in the trial process from the preferral of charges through approval of the sentence by the convening authority.⁸ Capacity, which is the focal point of this article, is not the same as the lack of mental responsibility defense.⁹ Where capacity focuses on the accused's mental condition throughout the trial process, the defense of mental responsibility focuses solely on the accused's mental condition at the time of the criminal offense.¹⁰

The Supreme Court established the constitutional standard for competency in *Dusky v. United States* when it stated that a defendant standing trial must have a “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.”¹¹ The Supreme Court has unambiguously

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¹ See Joint Service Committee on Military Justice Report, *Analysis of the National Defense Authorization Act Fiscal Year 1996 Amendments to the Uniform Code of Military Justice*, ARMY LAW., Mar. 1996, at 144–46 [hereinafter JSC Report].

² See *id.* at 145 (The present military incompetency procedure “grew out of Senator Strom Thurmond's desire to have a mechanism for dealing with a soldier who was incompetent to stand trial”).

³ See *id.* at 145 n.16 (stating the federal insanity statutes “were enacted when the federal civilian criminal justice system discovered it lacked an established procedure to handle the incompetent defendant. This deficiency first surfaced prominently when John Hinckley attempted to assassinate President Reagan.”); see also Steven V. Roberts, *High U.S. Officials Express Outrage, Asking for New Laws on Insanity Plea*, N. Y. TIMES, June 23, 1982, at B.

⁴ See 10 U.S.C. § 876b (2006).

⁵ See Richard D. Willstatter, *The Federal Criminal Mental Competency System*, CHAMPION, June 2006, at 16 (describing the federal insanity laws as a “daunting statutory and case law framework”).

⁶ See NAT'L JUD. COLL., MENTAL COMPETENCY BEST PRACTICES MODEL (2011), available at <http://mentalcompetency.org/model/BP-Model.pdf> (providing a discussion of the scope and challenges of competency related problems within the United States, and a model framework for developing competency processes).

⁷ *Pate v. Robinson*, 383 U.S. 375, 388 (1966) (Harlan, J., dissenting). In this article the terms capacity and competency will be used interchangeably.

⁸ RONALD ROESCH, PATRICIA A. ZAPF & STEPHEN D. HART, *FORENSIC PSYCHOLOGY AND LAW* 31 (2009) (“[I]t is unfair to try a defendant if he or she is unable to participate meaningfully in the proceeding.”); see *Pate*, 383 U.S. 388; see also *MANUAL FOR COURTS MARTIAL, UNITED STATES*, R.C.M. 909 and 1107(b)(5) (2012) [hereinafter MCM].

⁹ *United States v. McGuire*, 63 M.J. 678, 680 n.1 (A. Ct. Crim. App. 2006) (citing Lieutenant Colonel Donna M. Wright, “*Though This Be Madness, Yet There Is Method in It*”: A Practitioner's Guide to Mental Responsibility and Competency to Stand Trial, ARMY LAW., Sept. 1997, at 18).

¹⁰ *Id.*

¹¹ 362 U.S. 402 (1960).

stated that a “prohibition” on trying a mentally incompetent individual is “fundamental to an adversary system of justice,” and that any trial involving an incompetent individual would necessarily violate his “due process right to a fair trial.”¹² *Dusky’s* constitutional floor for competency has been incorporated into the military justice system’s competency standard by case law and statute.¹³

Article 76b, which mirrors the federal statutory definition of competency, refines the *Dusky* standard even further for court-martial purposes.¹⁴ It states that an accused cannot stand trial if he is “presently suffering from a mental disease or defect rendering the person mentally incompetent to the extent that the person is unable to understand the nature of the proceedings against that person or to conduct or cooperate intelligently in the defense of the case.”¹⁵

Concerns regarding an accused’s capacity to stand trial can emerge at any stage of the criminal proceeding, including during trial.¹⁶ In the military, the trigger for further inquiry regarding mental capacity is quite low.¹⁷ If it merely appears to “any commander who considers the disposition of charges, or to any investigating officer, trial counsel, defense counsel, military judge, or member” that “there is reason to believe” the accused lacks capacity to stand trial, that information must be passed along to the convening authority or military judge.¹⁸ If the issue of capacity is raised prior to referral, the convening authority “before whom the charges are pending” has the authority to order that a sanity board be conducted to inquire into the capacity concerns.¹⁹ If the issue of capacity arises after referral, the military judge can order the board.²⁰

The motion for a sanity board should be granted by the military judge or convening authority “if it is not frivolous and is made in good faith.”²¹ Should the convening authority deny a request for a sanity board prior to referral, the military judge retains the authority to order the board after referral of the charges.²² The decision to grant or deny the motion for a sanity board will be reviewed under a deferential “abuse of discretion standard.”²³

The order to conduct a sanity board regarding capacity must state the “reasons for doubting” the accused’s mental capacity.²⁴ In response to the order, the sanity board must make an explicit finding on the *Dusky* test for capacity by determining whether the accused is “presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense.”²⁵

Like the federal incompetency statute, Rule for Court-Martial (RCM) 909 presumes capacity to stand trial.²⁶ Prior to referral, if the sanity board reports that the accused lacks capacity to stand trial, the convening authority has two options—either agree or disagree with the findings of the sanity board.²⁷ If the convening authority disagrees with the finding that the accused lacks capacity, she may dismiss, forward, or refer the charges.²⁸ If the convening authority agrees with the board’s finding of lack of capacity, the convening authority must forward the charges to the general court-martial convening authority (GCMCA).²⁹ If the GCMCA disagrees with the board’s finding of lack of capacity, she may dismiss, forward, or refer the charges to trial.³⁰ If the GCMCA agrees that the accused lacks capacity, she must “commit the accused to the Attorney General.”³¹

¹² *Drope v. Missouri*, 420 U.S. 162, 172 (1975).

¹³ *United States v. Barreto*, 57 MJ 127, 130 (C.A.A.F. 2002); *United States v. Proctor*, 37 M.J. 330, 336 (C.M.A. 1993); 10 U.S.C. § 876b (2006).

¹⁴ *Compare* 18 U.S.C. § 4241 (d) (2006) (“presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense”), *with* 10 U.S.C. § 876b (2006) (“be presently suffering from a mental disease or defect rendering the person mentally incompetent to the extent that the person is unable to understand the nature of the proceedings against that person or to conduct or cooperate intelligently in the defense of the case”)

¹⁵ 10 U.S.C. § 876b (2006).

¹⁶ *See* *United States v. Usry*, 68 M.J. 501, 502–03 (C.G. Ct. Crim. App. 2009) (the accused’s competency to stand trial arose at trial during a colloquy regarding medications).

¹⁷ MCM, *supra* note 8, R.C.M. 706(a).

¹⁸ *Id.*

¹⁹ *Id.* R.C.M. 706(b)(1).

²⁰ *Id.* R.C.M. 706(b)(2).

²¹ *United States v. Nix*, 36 C.M.R. 76, 80 (1965).

²² MCM, *supra* note 8, R.C.M. 706(b)(2); *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008) (“[a] military judge has the authority to order a sanity board after referral under R.C.M. 706 if it appears there is reason to believe the accused lacked mental responsibility at the time of a charged offense or lacks the capacity to stand trial”).

²³ *Mackie*, 66 M.J. at 199.

²⁴ MCM, *supra* note 8, R.C.M. 706(c)(2).

²⁵ *Id.*; *see* *Dusky v. United States*, 362 U.S. 402 (1960).

²⁶ *Compare* MCM, *supra* note 8, R.C.M. 909(b) (“a person is presumed to have the capacity to stand trial”), *with* 18 U.S.C. § 4241(d) (2006) (the court must find by preponderance that the accused lacks capacity).

²⁷ MCM, *supra* note 8, R.C.M. 909(c).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* R.C.M. 909(c)-(f).

After referral, the military judge will determine if the accused has the capacity to stand trial.³² If any previous sanity board found that the accused lacks capacity to stand trial, the court is required to conduct a hearing into the accused's capacity.³³ The presumption of capacity will be overcome if it is established by a "preponderance of the evidence that the accused is presently suffering from a mental disease or defect."³⁴ During the hearing, the court is not limited by the rules of evidence, except privileges.³⁵ A military judge's ruling on capacity will be treated as a question of fact that will only be overruled "if it is clearly erroneous."³⁶ If the military judge finds that the accused lacks capacity to stand trial, the judge must report this matter to the GCMCA.³⁷

If the accused is found incompetent to stand trial, the GCMCA is required to commit the accused to the attorney general pursuant to 18 U.S.C. § 4241.³⁸ The view that this is a nondiscretionary act is consistent with federal courts examining this issue.³⁹ Even if the GCMCA is of the opinion that the accused will not regain capacity with treatment, the GCMCA "does not have the discretion, prior to a reasonable period of hospitalization in the custody of the Attorney General," to make that determination.⁴⁰

The process of remanding the accused to the attorney general is accomplished by contacting the Bureau of Prisons (BOP) via the United States Attorney's Office.⁴¹ Once the BOP takes custody of an accused, he will be transferred to a Federal Medical Center (FMC).⁴² Federal Medical Centers are federal prisons with "inpatient psychiatric unit[s]."⁴³ The

BOP presently has five FMCs: Butner, North Carolina; Lexington, Kentucky; Rochester, Minnesota; Devens, Massachusetts; and Carswell, Texas.⁴⁴

III. Restoring Capacity

The Supreme Court held in *Jackson v. Illinois* that a person who is committed based on a lack of capacity for trial can only be held for a "reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future."⁴⁵ Because of this, once an accused arrives at the designated FMC, the government must diligently monitor the accused's potential for restoration or it risks violating the accused's due process rights.⁴⁶ If the government cannot restore the accused, it must "either institute the customary civil commitment proceeding," or discharge him.⁴⁷ If the government reasonably believes that it can quickly restore the accused "his continued commitment must be justified by progress toward that goal."⁴⁸

A. Section 4241(d)

The restoration of an incompetent service member is based entirely on the process established in 18 U.S.C. § 4241(d).⁴⁹ This code provision was specifically tailored to meet the court's concerns regarding unlimited civil detention in *Jackson*.⁵⁰ The process begins with a four-month evaluation period.⁵¹ During that four-month time period, the staff of the FMC must determine whether "there is a substantial probability that in the foreseeable future" the accused will regain the capacity to proceed to trial.⁵² The purpose of the commitment at this phase is to allow "medical professionals to accurately determine" whether the accused can be restored to capacity.⁵³ This process will

³² *Id.* R.C.M. 909(d).

³³ *Id.*

³⁴ *Id.* R.C.M. 909(e)(2).

³⁵ *Id.*

³⁶ *United States v. Proctor*, 37 M.J. 330, 336 (C.M.A. 1993).

³⁷ MCM, *supra* note 8, R.C.M. 909(e)(3).

³⁸ 10 U.S.C. § 876b (a)(1)–(2) (2006); *United States v. Salahuddin*, 54 M.J. 918, 920 (A.F. Ct. Crim. App. 2001) (finding that "the purpose of any hearing, under Article 76b, or the federal statute, 18 U.S.C. § 4241(d), is to determine capacity, not to determine the propriety of commitment to the Attorney General").

³⁹ *Salahuddin*, 54 M.J. at 920 (citing *United States v. Filippi*, 211 F.3d 649, 651 (1st Cir. 2000); *United States v. Donofrio*, 896 F.2d 1301 (11th Cir. 1990); *United States v. Shawar*, 865 F.2d 856, 863 (7th Cir. 1989)); *see also* *United States v. Ferro*, 321 F.3d 756, 761 (8th Cir. 2003).

⁴⁰ *Ferro*, 321 F.3d at 761.

⁴¹ Bryon L. Hermel & Hans Stelmach, *Involuntary Medication Treatment for Competency Restoration of 22 Defendants with Delusional Disorder*, 35 J. AM. ACAD. PSYCHIATRY LAW. 47, 49–50 (2007).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ FEDERAL BUREAU OF PRISONS, FACILITY LOCATOR, <http://www.bop.gov/DataSource/execute/dsFacilityLoc> (last visited Jan. 1, 2013).

⁴⁵ 406 U.S. 715, 738–39 (1972).

⁴⁶ *See id.*

⁴⁷ *See id.*

⁴⁸ *Id.* at 739.

⁴⁹ *See* 10 U.S.C. § 876b (2006) (applying 18 U.S.C. § 4241(d) to UCMJ cases).

⁵⁰ *United States v. Strong*, 489 F.3d 1055, 1061 (9th Cir. 2007) ("it is significant to note that § 4241(d) was enacted in response to the *Jackson* decision and echoed its language").

⁵¹ 18 U.S.C. § 4241 (d)(1) (2006).

⁵² *Id.*

⁵³ *Strong*, 489 F.3d at 1062.

require a more thorough examination than that seen in the RCM 706 inquiry.⁵⁴ The diagnosis and treatment will be based on a comprehensive clinical assessment that will involve:

[A]n admission physical examination and laboratory studies to rule out underlying medical illness; individual forensic interviews; review of documents describing the defendant's arrest; past criminal history; and review of any available past medical and mental health records. Psychological testing is offered, although sometimes defendants refuse to participate. Incompetent defendants are usually encouraged to attend the weekly one-hour competency restoration group, which provides basic education on competency issues in a small group setting.⁵⁵

While every effort should be made to complete the evaluation within four months, an accused may be held for "an additional reasonable period" if a court finds "there is a substantial probability" that the accused will regain capacity within the additional time period.⁵⁶ Federal courts have consistently agreed that 18 U.S.C. § 4241(d)(2) allows a defendant to be held for a period beyond the original four-month time period if the "substantial probability" standard is satisfied.⁵⁷ For military cases, the GCMCA serves as the court for the purposes of determining if the extension of temporary commitment should be granted.⁵⁸ To avoid

potentially contentious issues, the GCMCA should ensure that any order to extend the accused's commitment pursuant to 18 U.S.C. § 4241(d)(2) is made prior to the expiration of the four-month time period.⁵⁹

Defendants can challenge further commitment extensions under 18 U.S.C. § 4241(d)(2)(A).⁶⁰ If the accused opposes the extension, the Government should consider the use of an investigation under Army Regulation (AR) 15-6 in order to afford the accused an opportunity to be heard on the matter.⁶¹ If the accused does not oppose the extension, trial counsel should consider the written reports provided by the FMC while also discussing the case with the accused's treating medical personnel prior to making a recommendation to the GCMCA regarding the extension.⁶² The treating personnel should be able to render expert opinions regarding the likelihood and length of time that it generally takes to restore an individual with the accused's condition.⁶³ Trial counsel should also inquire about any observations which lead to the conclusion that the accused is presently improving while asking what future benchmarks would indicate progress towards restoration.⁶⁴

Any order by the GCMCA for an extension of the accused's commitment under 18 U.S.C. § 4241(d)(2) should be in writing and state the specific facts which provided the basis for the belief that there is a substantial probability that the accused will regain competency within the time period which the GCMCA is providing for.⁶⁵ Trial counsel should

accused's military status has ended, does the GCMCA stop acting as the court, and a federal district court would need to be involved for further action, like a civil commitment pursuant to 18 U.S.C. § 4246. 10 U.S.C. § 876b (a)(5).

⁵⁹ *Magassouba*, 544 F.3d at 408 (attorney general lacks authority to hold the defendant in further custodial hospitalization once the four-month time period expires and no § 4241(d)(2) order is entered).

⁶⁰ *Id.* at 406.

⁶¹ *See* U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARD OF OFFICERS (2 Oct. 2006) [hereinafter AR 15-6]. While no federal case law deals explicitly with a military accused challenging a GCMCA's 18 U.S.C. § 4241(d)(2) extension, federal case law is clear that service members who are deprived of a "liberty interest" by the military without the procedural protections of regulations, such as those used in AR 15-6, may resort to the federal courts for relief. *Holley v. United States*, 124 F.3d 1462, 1469 (Fed. Cir. 1997).

⁶² *See* *United States v. Weston*, 326 F. Supp. 2d 64, 67 (D.D.C. 2004) (providing an example of a trial court order which sets forth the facts and applicable law considered by a federal district court in granting an 18 U.S.C. § 4241 (d)(2) extension).

⁶³ *See* Douglas Mossman, *Predicting Restorability of Incompetent Criminal Defendants*, 35 J. AM. ACAD. PSYCHIATRY LAW. 34, 41 (2007); *see also* *United States v. Loughner*, 672 F.3d 731, 741 (9th Cir. 2012) (discussing expert's testimony regarding treatment benchmarks and restoration rates).

⁶⁴ *See* *United States v. Loughner*, 672 F.3d 731, 741 (9th Cir. 2012) (discussing expert's testimony regarding treatment benchmarks and restoration rates that supported the court's factual basis to grant a 18 U.S.C. § 4241(d)(2) extension).

⁵⁴ *See id.* (comparing the initial federal competency evaluation, which is the functional equivalent to a sanity board, to the 18 U.S.C. § 4241(d)(1) evaluation process).

⁵⁵ *Hermel & Stelmach, supra* note 41, at 50.

⁵⁶ 18 U.S.C. § 4241 (d)(2) (2006).

⁵⁷ *See* *United States v. Magassouba*, 544 F.3d 387, 409 (2d Cir. 2008) (citing *United States v. Donofrio*, 896 F.2d 1303 (11th Cir. 1990)).

⁵⁸ *See* 10 U.S.C. § 876b (2006). A general court-martial convening authority's (GCMCA) prerogative to function as the court for the purpose of these determinations comes from Article 76b, Uniform Code of Military Justice (UCMJ). *Id.* The federal insanity statutes explicitly state that certain provisions will not apply to UCMJ prosecutions. 18 U.S.C. § 4247 (j)(2006) ("[s]ections 4241, 4242, 4243, and 4244 do not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice"). But, Article 76b expressly reintegrates certain provisions. 10 U.S.C. § 876b (a)(1)-(5) (integrating 18 U.S.C. §§ 4241(d), 4246 (2006)). Via Article 76b, selective provisions are made applicable to the UCMJ, but the GCMCA is empowered to serve as the court for the purposes of these determinations, as opposed to a federal district court. *See* 10 U.S.C. § 876b (a)(1). For example, Article 76b grants the GCMCA the authority to order the commitment of an accused by placing him in "the custody of the Attorney General." *Id.* The statute is clear that the GCMCA will serve as the court during this stage of the process, stating that "references to the court that ordered the commitment of a person, and to the clerk of such court, shall be deemed to refer to the general court-martial convening authority for that person." 10 U.S.C. § 876b (a)(5). Only once attempts to restore competency have failed, or an

avoid tacking on additional time to the order if the medical evidence suggests that competency may be restored within a shorter time period.⁶⁶ A GCMCA can grant further extensions if the requisite standard is met, but a time extension which is not tied specifically to the medical needs of the accused is unreasonable.⁶⁷ While it is unclear if an accused can challenge his continuing detention at an FMC in military courts, federal case law likely allows such a challenge via the writ of habeas corpus; accordingly, the government's records with regards to any extension must be legally sufficient.⁶⁸

B. Medicating to Restore Capacity

An accused committed due to a lack of capacity likely can be restored to capacity with treatment at the FMC.⁶⁹ Treatment to restore an accused to capacity generally will

⁶⁵ See *United States v. Green*, 532 F.3d 538, 556 (6th Cir. 2008) (finding that a trial court properly considered pertinent factors regarding competency when its order failed to enumerate the factors because the trial courts record as a whole demonstrated proper consideration).

⁶⁶ See *Loughner*, 672 F.3d at 772 (finding that the trial court properly granted a narrowly tailored extension which was based on medical expert testimony, all case files, and the rebuttal evidence presented by the defendant).

⁶⁷ See *id.*

⁶⁸ 18 U.S.C. § 4247(g) (2006) (“[n]othing contained in section 4243, 4246, or 4248 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention”); see also *United States v. Salahuddin*, 54 M.J. 918, 920–921 (A.F. Ct. Crim. App. 2001) (military court avoided ruling on whether it had justification to issue a writ of mandamus under the All Writs Act in response to GCMCA’s commitment of the accused to the Attorney General by determining the commitment was a non-discretionary act); *United States v. Magassouba*, 544 F.3d 387, 411 (2d Cir. 2008) (“[a] defendant may also petition for a writ of habeas corpus to secure release from unlawful custody. Because habeas corpus originates in equity, it affords courts considerable flexibility to intervene to ensure that cases of confined incompetent defendants are not allowed to languish, whether the confinement is alleged to be unlawful under § 4241(d)”).

⁶⁹ See Douglas R. Morris & George F. Parker, *Jackson’s Indiana: State Hospital Competence Restoration in Indiana*, 36 J. AM. ACAD. PSYCHIATRY LAW. 522, 528 (2008) (a study of Indiana state hospitals that examined cases from 1988 to 2004 found that nearly eighty-four percent of individuals who lacked capacity were successfully restored within one year of treatment); see also U.S. Resp. Brief at 28–29, *Sell v. United States*, 539 U.S. 166 (2003), 2003 WL 193605 (a Bureau of Prison’s study found that eighty-seven percent of defendants who voluntarily submitted to treatment were restored to capacity, while seventy-six percent who were forcibly treated were restored to capacity); see also Patricia A. Zapf & Ronald Roesch, *Future Directions in the Restoration of Competency to Stand Trial*, 20 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCI. 43, 43–45 (2011); but see Mossman, *supra* note 63, at 41 (showing that attempts at competency restoration are generally successful unless the accused suffers from a “long standing psychotic disorder that has resulted in lengthy periods of psychiatric hospitalization,” or has an “irremediable cognitive disorder (e.g., mental retardation)”).

involve the “administration of psychotropic medications.”⁷⁰ In most situations, accused will voluntarily take medication in order to restore competency.⁷¹ In these voluntary treatment situations, the process will largely remain a matter between the treating medical personnel at the FMC and the accused.⁷² However, situations inevitably arise where accused will refuse medication to restore competency.⁷³

1. Forcibly Medicating for Dangerousness Under Harper

A GCMCA can order the forcible medicating of an accused in order to restore competency.⁷⁴ Before resorting to a GCMCA order to medicate, trial counsel should ensure that the FMC has determined that the accused cannot be medicated pursuant to what is commonly called a *Harper* hearing.⁷⁵ In *Washington v. Harper*, the Supreme Court held that the Due Process Clause allows a prison facility to forcibly medicate an inmate if the inmate “is dangerous to himself or others and the treatment is in the inmate’s medical interest.”⁷⁶ Relying on the fact that the decision to medicate is primarily a “medical judgment,” the Court stated that an administrative hearing, conducted at the facility before an impartial medical professional that provides for “notice, the right to be present at an adversary hearing, and the right to present and cross-examine witnesses” sufficiently protects the defendant’s due process rights.⁷⁷

Harper’s holding has been incorporated into Code of Federal Regulations.⁷⁸ In order to forcibly medicate an accused under the applicable regulations, the accused must be given twenty-four hours’ written notice, and “an explanation of the reasons for the psychiatric medication

⁷⁰ See Zapf & Roesch, *supra* note 69, at 45 (concluding that “[t]he most common form of treatment for the restoration of competency involves the administration of psychotropic medication”).

⁷¹ See *id.* (concluding that “[t]he majority of incompetent defendants consent to the use of medication”).

⁷² See U.S. DEP’T OF JUST., BUREAU OF PRISONS, LEGAL RESOURCE GUIDE TO FEDERAL BUREAU OF PRISONS 26–27 (2008) [hereinafter BOP LEGAL GUIDE]; see also Psychiatric Evaluation and Treatment, 76 Fed. Reg. 40229-02 (“[a]n inmate may also provide informed and voluntary consent to the administration of psychiatric medication that complies with the requirements of § 549.42 of this subpart”).

⁷³ See U.S. Resp. Brief, *supra* note 69, at 27–28 (finding 59 of 285 patients had to be forcibly medicated to restore competency at the FMC); see also Zapf & Roesch, *supra* note 69, at 45.

⁷⁴ See *supra* note 58.

⁷⁵ *Washington v. Harper*, 494 U.S. 210 (1990).

⁷⁶ *Id.* at 227.

⁷⁷ *Id.* at 231–33, 235–36.

⁷⁸ See 28 C.F.R. § 549.46 (2012).

proposal.”⁷⁹ During the hearing, the accused has the right to be present, have a representative from the facility’s staff, present evidence, request reasonably available witnesses, and have the staff representative or the hearing officer question witnesses.⁸⁰ The hearing officer, who will be a psychiatrist who is not presently involved in the accused’s treatment, must determine “whether involuntary administration of psychiatric medication is necessary because, as a result of the mental illness or disorder, the inmate is dangerous to self or others, poses a serious threat of damage to property affecting the security or orderly running of the institution, or is gravely disabled.”⁸¹ Once the hearing officer reaches a decision, the accused has the right to a written copy of the hearing officer’s report, and the accused may appeal the decision to the hospital’s mental health administrator within twenty-four hours of receiving the report.⁸² Medication usually will not be dispensed while the appeal is pending, but ordinarily the appeal authority will act within twenty-four hours of receiving the appeal.⁸³ Once the appeal has been acted upon, medication may be forcibly given to the accused.⁸⁴

Medicating an accused in order to restore capacity requires different justifications than medicating for dangerousness, even though medicating for dangerousness may restore capacity.⁸⁵ Nonetheless, when forcible medication is contemplated, it remains a good idea to inquire about a *Harper* justification because it not only avoids GCMCA action, but also because some federal circuits have required the government to consider or conduct a *Harper* hearing before attempting forcible medication for the purpose of restoring capacity.⁸⁶

⁷⁹ *Id.* § 549.46(a).

⁸⁰ *Id.*

⁸¹ *Id.* § 549.46(a)(4), (a)(7).

⁸² *Id.* § 549.46(a)(4), (a)(8).

⁸³ *Id.* § 549.46(a)(9).

⁸⁴ *Id.*

⁸⁵ See *Sell v. United States*, 539 U.S. 166, 179 (2003); see also 28 C.F.R. § 549.46(b)(2) (2012) (“[a]bsent a psychiatric emergency as defined above, § 549.46(a) of this subpart does not apply to the involuntary administration of psychiatric medication for the sole purpose of restoring a person’s competency to stand trial”).

⁸⁶ *United States v. White*, 431 F.3d 431, 434 (5th Cir. 2005) (government failed to “exhaust” remedies by not conducting a *Harper* hearing prior to seeking a court order to medicate); *United States v. Morrison*, 415 F.3d 1180, 1182 (10th Cir. 2005) (government should have conducted a *Harper* hearing or explained why it did not prior to seeking a court order to medicate); *United States v. Gutierrez*, 443 F. App’x 898, 903 (5th Cir. 2011) (government failed to “exhaust” remedies by not conducting a *Harper* hearing prior to seeking a court order to medicate). In response to these and similar holdings, the Bureau of Prisons approved in August of 2011 a regulation which clarified that the Code of Federal Regulations (CFR) hearing provisions do “not apply to the involuntary administration of psychiatric medication for the sole purpose of restoring a person’s competency to stand trial.” See *Psychiatric Evaluation and Treatment*, 76

2. Forcibly Medicating for Capacity Under Sell

A defendant can be forcibly medicated solely to restore capacity under the Supreme Court’s holding in *Sell v. United States*.⁸⁷ In *Sell*, the Court stated that forcibly medicating to restore capacity requires a court to consider whether the government has shown a “need for that treatment sufficiently important to overcome the individual’s protected interest in refusing it.”⁸⁸ The Court cautioned that forcibly medicating a defendant is an aberrant situation that requires a court to deeply consider “the side effects, the possible alternatives, and the medical appropriateness” of the proposed treatment.⁸⁹ To guide this analysis, the Court set forth four factors which must be established in order to forcibly medicate a defendant.⁹⁰

First, the court must establish that “important governmental interests are at stake.”⁹¹ When an accused is charged with a serious offense which carries a protracted term of confinement, the government generally will have an important interest in protecting society.⁹² Federal courts have generally agreed that “it is appropriate to focus on the maximum penalty authorized by statute in determining if a crime is ‘serious’ for involuntary medication purposes.”⁹³ The alleged crime or crimes do not have to involve violence in order to be considered serious.⁹⁴ However, the Court cautioned that “special circumstances” such as the availability of a “civil commitment” process may mitigate the government’s interest by providing an alternative means of protecting the public.⁹⁵

Fed. Reg. 40,229–02, 31–33 (Aug. 12, 2011) (to be codified at 28 C.F.R. § 549.46(b)(2) (2012)). Because there still remains some question how the courts will respond to this rule, and because a *Harper* hearing provides a vetted mechanism for forcibly medicating, trial counsel should still discuss with Federal Medical Center (FMC) personnel whether the accused would qualify for forced medication under *Harper*. See Donna L. Elm & Douglas Passon, *Forced Medication After United States v. Sell: Fighting Your Client’s War on Drugs*, CHAMPION, June 2008, at 28.

⁸⁷ 539 U.S. 166, 186 (2003).

⁸⁸ *Id.* at 183.

⁸⁹ *Id.*

⁹⁰ *Id.* at 180–81.

⁹¹ *Id.* at 180.

⁹² *Id.* The government’s interest in a “timely prosecution” is also considered important due to concerns regarding the degradation of evidence and witnesses as a result of the passing of time. Finally, the Court noted that the Government has an important interest in ensuring the accused receives a “fair trial.” *Id.*

⁹³ *United States v. Green*, 532 F.3d 538, 548 (6th Cir. 2008) (quoting *United States v. Evans*, 404 F.3d 227, 237 (4th Cir. 2005)).

⁹⁴ *United States v. White*, 620 F.3d 401, 410 (4th Cir. 2010) (fraud and theft were “serious crimes” because the statutory maximum for the alleged offenses was ten years of confinement).

⁹⁵ *Sell*, 539 U.S. at 180.

Second, the court must establish that forced medication will “significantly further” the government’s interest.⁹⁶ This means that the court must establish that the proposed medication regimen is “substantially likely” to restore the accused to capacity; and the proposed medication is “substantially unlikely” to cause “side effects that will interfere significantly with the defendant’s ability to assist counsel in conducting a trial defense.”⁹⁷ In order to satisfy this factor, the accused’s doctors must apprise counsel of “the particular medication, including the dose range, it proposes to administer” to the accused.⁹⁸ While no precise definition of “substantially likely” has been agreed upon, a seventy percent chance of restoration has been deemed “substantially likely.”⁹⁹ The second prong of this factor focuses exclusively on any side effects from the medication which may impact the accused’s ability to cooperate in his defense.¹⁰⁰ While a competent expert from the FMC should again be able to spell out any obvious side effects which may cause other capacity concerns, counsel should be cautious to inquire whether the proposed medication will modify the accused’s “attitude, appearance, and demeanor at trial” because courts have found that a visible modification of these traits may be unfairly prejudicial.¹⁰¹

Third, the court must find that forcible medication is “necessary to further” the government’s important interests, namely that other “non-drug therapies” are “unlikely to achieve substantially the same result.”¹⁰² In order to satisfy this factor, counsel should inquire about what alternative treatments are generally available to individuals with the accused’s medical condition, and why specifically those alternatives will not be as productive as medication in the accused’s case.¹⁰³

⁹⁶ *Id.* at 181.

⁹⁷ *Id.*

⁹⁸ *United States v. Evans*, 404 F.3d 227, 241 (4th Cir. 2005).

⁹⁹ *United States v. Nicklas*, 623 F.3d 1175, 1180 (8th Cir. 2010); *but see United States v. Ghane*, 392 F.3d 317, 320 (8th Cir. 2004) (five percent to ten percent chance of restoration was not substantially likely); *United States v. Moruzin*, 583 F. Supp. 2d 535, 547 (D.N.J. 2008) (eighty-five percent success rate was not substantially likely when considered in conjunction with the individual defendant’s mental health history); *United States v. Rivera-Morales*, 365 F. Supp. 2d 1139, 1140 (S.D. Cal. 2005) (fifty percent chance of restoration was not substantially likely).

¹⁰⁰ *See Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (warning that “drugs can prejudice the accused in two principal way: (1) by altering his demeanor in a manner that will prejudice his reactions and presentation in the courtroom, and (2) by rendering him unable or unwilling to assist counsel”).

¹⁰¹ *Id.* at 131; *see United States v. Moruzin*, 583 F. Supp. 2d 535, 549–50 (D.N.J. 2008); *United States v. Gomes*, 387 F.3d 157, 162 (2d Cir. 2004).

¹⁰² *Sell*, 539 U.S. at 181.

¹⁰³ *See United States v. Ruiz-Gaxiola*, 623 F.3d 684, 702–03 (9th Cir. 2010) (trial court properly considered “less intrusive” forms of treatment when it concluded that the defendant’s “resistance to treatment and his conspiratorial delusions” made them less likely to restore the defendant than medication).

Fourth, the court must find that forcibly medicating the defendant is “medically appropriate,” considering the overall “medical condition” of the defendant and the proposed slate of medications.¹⁰⁴ The focus here is whether the defendant, as a “patient,” will suffer other side effects, not related to capacity, which make it improper to medicate.¹⁰⁵ This means that there may be a defendant who can be restored to capacity, but should not be restored to capacity because other specific medical concerns make the proposed treatment medically unsuitable for the defendant.¹⁰⁶ Counsel should not confuse this inquiry with the second factor’s inquiry regarding capacity-related side effects.¹⁰⁷ Instead, counsel, under this factor, must ask the questions regarding short-and long term dangers that any reasonable patient would ask prior to accepting a proposed treatment.¹⁰⁸

While the forcible medication of a defendant facing federal charges requires a hearing and court order, the forcible medication of a military accused can be ordered by the GCMCA or military judge.¹⁰⁹ However, the GCMCA or military judge must apply the *Sell* factors in arriving at the decision to forcibly medicate an accused.¹¹⁰ Because of the complexities involved in applying the *Sell* factors, and the benefits of developing a written record, a GCMCA should consider appointing a formal AR 15-6 investigation if forcible medication to restore capacity is being considered and the matter is not before a military judge.¹¹¹ A formal AR 15-6 investigation provides the best opportunity to fully develop a record of the underlying reasons behind a GCMCA’s decision to forcibly medicate or not, while providing the accused notice and an opportunity to be heard on the issue.¹¹² Case law is clear that each *Sell* factor must be established by “clear and convincing evidence.”¹¹³ Upon arriving at a decision to forcibly medicate, the GCMCA’s order should make explicit findings on each of the *Sell*

¹⁰⁴ *Sell*, 539 U.S. at 181.

¹⁰⁵ *Ruiz-Gaxiola*, 623 F.3d 703 (quoting *Sell*, 539 U.S. at 180–81) (noting that use of the term ‘patient’ in *Sell* “serves to emphasize that, in analyzing this factor, courts must consider the long-term medical interests of the individual rather than the short-term institutional interests of the justice system”).

¹⁰⁶ *See id.*

¹⁰⁷ *See id.* at 703–04 (federal magistrate erred by conflating the fourth factor’s analysis into the second factor’s analysis).

¹⁰⁸ *See id.*

¹⁰⁹ *See supra* note 58.

¹¹⁰ *See Sell v. United States*, 539 U.S. 166, 180–83 (2003).

¹¹¹ *See United States v. Diaz*, 630 F.3d 1314, 1331 (11th Cir. 2011) (*Sell* factor analysis necessarily implicates both factual and legal findings).

¹¹² *See AR 15-6, supra* note 61.

¹¹³ *Diaz*, 630 F.3d at 1332 (citing *United States v. Bush*, 585 F.3d 806, 814 (4th Cir. 2009); *United States v. Grape*, 549 F.3d 591, 598 (3d Cir. 2008); *United States v. Gomes*, 387 F.3d 157, 160 (2d Cir. 2004)).

factors while directly citing the evidence that supports the finding.¹¹⁴

IV. Post–Restoration Issues

Because the government has only a limited amount of time to restore an accused to capacity, there are limitations on what treatments can be undertaken.¹¹⁵ Ultimately these limitations exist because the government is using its coercive power to hold an individual, albeit in a clinical setting, who has yet to be convicted of any criminal offense.¹¹⁶ Invariably, there will be cases where the government cannot restore the accused to capacity; in such cases a trial counsel’s responsibilities will include assisting in the civil commitment process, while advising the command on issues related to the accused’s military status.¹¹⁷

A. Managing the Restored Accused

If an accused is restored to capacity, the FMC will notify the GCMCA and the accused’s attorney via a certificate of competency.¹¹⁸ The certificate should state that the accused “has recovered to such an extent that the [accused] is able to understand the nature of the proceedings against the person and to conduct or cooperate intelligently in the defense of the case.”¹¹⁹ The FMC is permitted to hold the accused for 30 days from when the notification is made.¹²⁰ Once notified, the GCMCA must “promptly take custody” of the accused.¹²¹

Military courts have determined that it is not necessary to conduct another RCM 706 inquiry before trial unless new

¹¹⁴ See *United States v. Decoteau*, 857 F. Supp. 2d 295, 307 (E.D.N.Y. 2012) (providing an excellent trial court opinion regarding forcible medicating which coherently sets forth the applicable law and facts needed for this type of order).

¹¹⁵ See *Jackson v. Indiana*, 406 U.S. 715, 738–39 (1972) (while not imposing “arbitrary time limits” the Court cautioned that “indefinite commitment” without progress toward restoration violates due process).

¹¹⁶ See *Cook v. Ciccone*, 312 F. Supp. 822, 824 (W.D. Mo. 1970) (“such consideration is dictated by the inherent unfairness and substantial injustice in keeping an unconvicted person in federal custody to await trial where it is plainly evident his mental condition will not permit trial within a reasonable period of time”).

¹¹⁷ See Major Jeff A. Bovarnick, *Trying to Remain Sane Trying an Insanity Case* *United States v. Captain Thomas S. Payne*, ARMY LAW., June 2002, at 23.

¹¹⁸ 10 U.S.C. § 876b (a)(4)(A) (2006).

¹¹⁹ *Id.*

¹²⁰ *Id.* § 876b (a)(4)(C).

¹²¹ *Id.* § 876b (a)(4)(B).

grounds arise to question the accused’s capacity once the accused is back under military control because “the warden’s certificate can be viewed as a proper substitute” for a sanity inquiry.¹²² However, counsel should consider that an appellate court will look very closely at the capacity of a recently restored defendant; therefore, the best way to protect the record from appellate issues is to conduct a final sanity inquiry prior to trial.¹²³ Counsel should also anticipate that a recently restored accused may raise the lack of mental responsibility defense at trial.¹²⁴

B. Managing the Unrestored Accused

If after a reasonable amount of time an accused cannot be restored to capacity, the government must either “release” the accused or initiate a “civil commitment.”¹²⁵ Functionally, once the FMC determines that the accused cannot be restored, the government must move quickly because the underlying “statutory authority” to hold the accused for treatment no longer exists.¹²⁶ Upon receipt of the FMC report stating that the accused cannot be restored, trial counsel should promptly review the report and advise the GCMCA on whether to agree or disagree with the opinion.

1. The Civil Commitment Process

If the GCMCA agrees with the accused’s treating personnel that he cannot be restored, the accused is subject to the civil commitment process of 18 U.S.C. § 4246.¹²⁷ To initiate the federal civil commitment process, the GCMCA should direct the FMC to conduct a risk assessment of the

¹²² See *United States v. Mancillas*, NMCCA 200401950, 2006 WL 4573010 (N-M. Ct. Crim. App. Dec. 18, 2006) (citing *United States v. Jancarek*, 22 M.J. 600, 603 (A.C.M.R. 1986)).

¹²³ See *United States v. Collins*, 41 M.J. 610, 613 (A. Ct. Crim. App. 1994) (an ambiguous mental status report at the trial court caused the appeals court to remand for a rehearing on the accused’s capacity at the time of trial); see also Captain Annamary Sullivan, *Insanity on Appeal*, ARMY LAW., Sept. 1987, at 41–45 (for an excellent discussion of how military appellate courts have reviewed capacity-related concerns).

¹²⁴ See UCMJ art. 50a (2012); 18 U.S.C. § 4241 (f) (2012) (“[a] finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged”). If the accused is found “not guilty by reason of lack of mental responsibility” the government will need to facilitate the civil commitment of the accused if he or she is a serious danger to the public. 10 U.S.C. § 876b (b)(4) (2006) (incorporating 18 U.S.C. § 4243 which provides for the civil commitment of an a dangerous accused post acquittal due to lack of mental responsibility).

¹²⁵ *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); see 10 U.S.C. § 876b (a)(3) (2006).

¹²⁶ See *United States v. Magassouba*, 544 F.3d 387, 392, 410 (2d Cir. 2008) (finding that the BOP exceeded its authority to hold a defendant when it failed to seek a court order extending the four month evaluation period).

¹²⁷ 10 U.S.C. § 876b (a)(3) (2006); 18 U.S.C. § 4246 (2006).

accused.¹²⁸ The purpose of the risk assessment is to determine if the accused “is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another.”¹²⁹ Within a matter of weeks, the FMC should return a risk assessment report to the GCMCA which will cover the accused’s history, course of treatment, and analysis of dangerousness.¹³⁰ If the accused is deemed to be dangerous by the evaluators, trial counsel should review the report and be prepared to advise the GCMCA on whether to agree with the report. If the GCMCA agrees, the FMC will first attempt to transfer the accused to a state mental health facility where the accused “is domiciled.”¹³¹

If the FMC cannot convince a state facility to accept the accused, the FMC’s warden will file a Certificate of Mental Disease or Defect and Dangerousness in the federal district court where the accused is being held, while also notifying the GCMCA of this action.¹³² The district court will then conduct a hearing where it must determine by “clear and convincing evidence” that the accused is a danger.¹³³ The determination of dangerousness is based on multiple factors, but they may include “a history of dangerousness, a history of drug or alcohol use, identified potential targets, previous use of weapons, any recent incidents manifesting dangerousness, and a history of problems taking prescribed medicines.”¹³⁴ If the court finds the accused to be a danger, the accused will be held at an FMC until either he is no longer a threat or a state facility will undertake his care.¹³⁵ It is at this point in the process that the appropriate convening authority can dismiss the charges against the accused

because the long term care and custody of the accused will become the responsibility of the FMC.¹³⁶

An accused subject to civil commitment due to an underlying criminal offense will likely remain in custody longer than an ordinary civil patient.¹³⁷ Military authorities will have very little ability to influence when the accused is released because the final decision will be made by the district court where the accused resides.¹³⁸ Ultimately, release will only be granted by the court if it finds by a “preponderance of evidence” that the accused has recovered from the condition that made him a danger, or that a proscribed treatment plan, which can be adjusted or revoked by the court, renders the accused no longer a danger.¹³⁹

2. Administrative Concerns

A mentally incompetent accused who is committed for dangerousness will fail to meet the “medical fitness standards” for continued service.¹⁴⁰ Accordingly, a Medical Evaluation Board (MEB) must be initiated in these cases, with the added requirement that the board be conducted at the FMC where the accused resides.¹⁴¹ Because the accused likely is located at an FMC which is some distance from the GCMCA who has been acting on the case, the GCMCA should transfer jurisdiction over the accused to the nearest military treatment facility that is capable of traveling to the accused in order to manage the MEB.¹⁴² Counsel should

¹²⁸ See BOP LEGAL GUIDE, *supra* note 72, at 6-7.

¹²⁹ 18 U.S.C. § 4246 (a) (2006).

¹³⁰ *Id.* § 4247 (c).

¹³¹ See *id.* § 4246 (a)–(d).

¹³² See *id.* § 4246 (a) (“[t]he clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment”); UCMJ art. 76b (a)(5) (2012) (“references to the court that ordered the commitment of a person, and to the clerk of such court, shall be deemed to refer to the general court-martial convening authority for that person”).

¹³³ 18 U.S.C. § 4246 (d) (2006); see *Addington v. Texas*, 441 U.S. 418, 419 (1979) (holding that a state law standard which was the equivalent of “clear and convincing” evidence protected the due process concerns implicated in the civil commitment of a defendant for dangerousness); see also *United States v. S.A.*, 129 F.3d 995, 998 (8th Cir. 1997); *United States v. Copley*, 935 F.2d 669, 672 (4th Cir. 1991); *United States v. Sahhar*, 917 F.2d 1197, 1200 (9th Cir. 1990).

¹³⁴ *United States v. Ecker*, 30 F.3d 966, 970 (8th Cir. 1994).

¹³⁵ 18 U.S.C. § 4246 (d) (2006).

¹³⁶ See 10 U.S.C. § 876b (d)(2) (2006) (which makes it clear that a service member whose military status is terminated but who is in the custody of the attorney general remains subject to the federal civil commitment statutes).

¹³⁷ See Gwen A. Levitt et al., *Civil Commitment Outcomes of Incompetent Defendants*, 38 J. AM. ACAD. PSYCHIATRY LAW. 349, 356 (2010) (study of Arizona defendants finding that mentally incompetent non-restorable defendants spent “twice as long” in hospitals compared to civil patients).

¹³⁸ 18 U.S.C. § 4246 (e) (2006).

¹³⁹ *Id.*

¹⁴⁰ U.S. DEP’T OF ARMY, REG. 40-400, PATIENT ADMINISTRATION, USE OF MEDICAL EVALUATION BOARD para. 7-5b(7) (15 Sept. 2011) [hereinafter AR 40-400] (stating that a Medical Evaluation Board (MEB) is required in situations involving mental competency); see U.S. DEP’T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS, ANXIETY, SOMATOFORM, OR DISSOCIATIVE DISORDERS para. 3-33 (23 Aug. 2010) [hereinafter AR 40-501] (dissociative disorders which cause “[p]ersistence or recurrence of symptoms sufficient to require extended or recurrent hospitalization” are medically disqualifying); see also Bovarnick, *supra* note 117, at 15 n.19 (“[s]ervice members diagnosed as suffering from a severe mental disease or defect are usually separated via a medical board. The military does not have any long-term in-patient psychiatric treatment facilities because contracting these services to civilian facilities is more cost effective”).

¹⁴¹ AR 40-400, *supra* note 140, para. 5-13g (stating that prisoner patient MEBs “will be convened at the place of confinement to consider disposition”).

¹⁴² See *id.* para. 5-15 (for a discussion of various procedural hurdles related to the handling of military psychiatric patients); see also Meredith L. Mona, *Update on the Disposition of Military Insanity Acquittes*, 34 J. AM. ACAD. PSYCHIATRY LAW. 538, 541 (2006) (for a thoughtful discussion of the

engage their GCMCAs early in the process as this action will likely require senior leader intervention in order to facilitate the jurisdictional transfer.¹⁴³ As this entire process will take a substantial amount of time to complete, potentially crossing over many counsel, each assigned counsel should keep “a running Memorandum for Record (MFR) containing all the facts, points of contact, and legal analysis that has already gone into the process” in order to “avoid the simple well-meaning but already considered solutions.”¹⁴⁴

V. Conclusion

Bringing an accused to trial can be a difficult proposition which is only made more difficult when mental capacity concerns arise.¹⁴⁵ At times the process may feel like counsel are “forcing a square peg into a round hole.”¹⁴⁶ But the hybrid system offers some benefits, namely access to a federal system that routinely confronts these types of

issues, thereby “conserving judicial and other resources.”¹⁴⁷ With some forethought and understanding of the process, counsel will be better equipped to advise their commanders on the relative costs and benefits of various courses of action during the restoration process, while being able to honestly apprise commanders of the limitations that may exist. Restoring competency is not easy, and even the best results will often lead to dissatisfaction; however, by knowing how the system works, and focusing on due process concerns, judge advocates and their commanders can preserve the system’s integrity while minimizing the friction that naturally occurs in these types of cases.¹⁴⁸

limitations and challenges facing the military’s management of mental illness).

¹⁴³ E-mail from Major Ryan Beery, Brigade Judge Advocate, 1st Brigade Combat Team, 1st Armored Div., to author (Feb. 17, 2013, 18:10 EST) (on file with author).

¹⁴⁴ E-mail from Major Ryan Beery, Brigade Judge Advocate, 1st Brigade Combat Team, 1st Armored Div., to author (Feb. 18, 2013, 02:06 EST) (on file with author).

¹⁴⁵ Bovarnick, *supra* note 117, at 14.

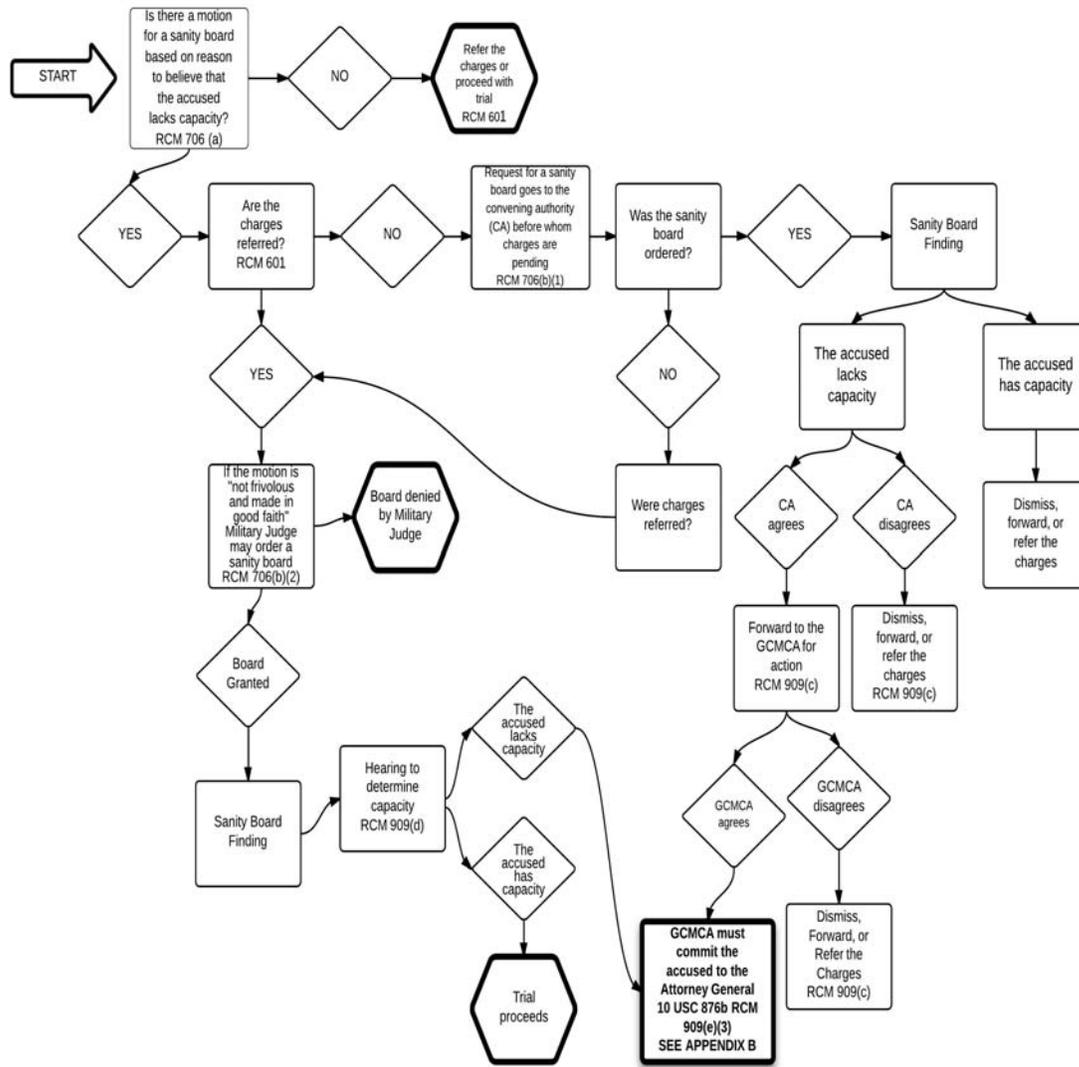
¹⁴⁶ EDWARD BULWER LYNTON, *KENELM CHILLINGLY, HIS ADVENTURES AND OPINIONS BY THE . . .* 352 (2d ed. 1873) (the origin of the phrase “square pegs into round holes”).

¹⁴⁷ JSC Report, *supra* note 1, at 146.

¹⁴⁸ See Mona, *supra* note 142, at 544 (discussing the “significant burden” on “time, money, and resources” which criminal cases involving mental health concerns require).

Appendix A

Arriving at Capacity Restoration



Appendix B

Restoring Capacity

