

Do Not Pay \$200—Go Directly to Jail: Clarifying the Fine Enforcement Provision

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I. Introduction

When the gavel drops, what are the chances the sentence adjudged by a court-martial will be an effective form of punishment for the accused? The answer to this question necessarily depends on the individual accused in every case, and the interests of society in punishing that particular Soldier. The question becomes more difficult to answer when dealing with financial crimes—crimes frequently committed against the U.S. government. Consider the following hypothetical, representative of an increasing number of fraud cases being investigated throughout the Army.¹

After a weeklong trial, the trial counsel is successful in convicting an Army staff sergeant with nine years of service at a general court-martial, comprised of members, of charges including larceny of government property and frauds against the United States.² The accused is found guilty of signing false documents in order to claim Basic Allowance for Housing (BAH) at the New York City rate for family members who neither lived in New York nor were actual dependents of the accused.³ Over the course of thirty-three months, the accused collected nearly \$98,000 to which he was not lawfully entitled. Upon announcement of sentence, the accused is sentenced to: reduction to Private First Class (E-3); forfeiture of \$1,500 pay per month for six months; confinement for six months; a fine of \$25,000 (and to serve an additional twelve months confinement if the fine is not paid) and to be discharged with a bad-conduct discharge.⁴

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¹ The U.S. Army Criminal Investigation Division Command has “founded” 491 cases of Basic Allowance for Housing (BAH) fraud since 2007. E-mail from Ms. Teena Hartsoe, Deputy, Intelligence Div., Headquarters, U.S. Army Crim. Investigation Div., to author (Feb. 23, 2012, 11:10 EST) (on file with author). After focusing a task force on the investigation of BAH fraud, founded cases jumped nearly 30% in 2008 from 2007 levels and have remained consistent each year. *Id.*

² UCMJ arts. 121, 132 (2012).

³ New York City has the highest .BAH rates in the continental United States. The allowance for an E-6 with dependents for 2013 is \$3,372. Def. Travel Mgmt. Office, U.S. Dep’t of Def., 2013 BAH Table WITH DEPENDENTS (Dec. 11, 2012), available at <http://www.defensetravel.dod.mil/Docs/perdiem/browse/Allowances/BAH/PDF/2012/2012-With-Dependents-BAH-Rates.pdf>. Soldiers committing BAH fraud often select the highest paying zip codes when committing this sort of fraud. E-mail from Ms. Gisella Schmitt, Chief of Fin., U.S. Army Europe, Heidelberg, Germany, to author (Feb. 28, 2012, 04:27 EST) (on file with author).

⁴ This hypothetical sentence, though an example of a typical sentence adjudged in these cases, is meant only for demonstrative purposes and is not offered to suggest what an appropriate sentence may be in similar cases. This example is a fictitious hypothetical; any similarities between this example and any actual cases are purely coincidence.

Given the limited information in this hypothetical, the adjudged sentence appears to be an appropriate punishment. Now consider how effective this hypothetical sentence would be if the convening authority *disapproved* the fine at the time of action. Without the fine, the adjudged sentence may seem light compared to the financial windfall received by the accused over two-and-a-half years. In this hypothetical, it is the *fine*, along with the threat of an additional year in confinement, that gives the punishment its severity.

As severe as an adjudged fine may be in a case such as the hypothetical, courts-martial rarely adjudge punitive fines at all.⁵ When a fine is adjudged, all too often the convening authority substantially mitigates it or disapproves it entirely. This can, perhaps, be explained by a degree of unfamiliarity among judge advocates regarding the practical aspects of enforcing fines and executing fine enforcement provisions. On its face, executing contingent confinement may seem administratively cumbersome. The rules on executing contingent confinement are confusing and lack procedural guidance. Too often, this results in chiefs of military justice and staff judge advocates recommending the convening authority mitigate or disapprove adjudged fines and contingent confinement. Such recommendation is unnecessary, as the due process procedures for enforcing fines are not as onerous as they appear. There is, however, a need for clarity in the law and clear procedural rules for enforcing an adjudged punitive fine to improve its effectiveness.

This article aims to highlight the need for clarifying punitive fine enforcement rules to ensure fines are effective and viable means to punish Soldiers convicted of financial crimes. The background section in Part II provides an overview of the military justice sentencing procedures and principles of punishment, concluding that financial sanctions are often the most appropriate punishment to deter and punish for financial crimes. Part III then examines the differences between the two forms of financial sanctions authorized by the *Manual for Courts-Martial (MCM)*: forfeitures of pay and a punitive fine.⁶ It compares the two sanctions, highlighting the effect other punishments may

⁵ The Army Court of Criminal Appeals (ACCA) reports that in calendar year 2011, 996 courts-martial were forwarded to the Clerk of Court pursuant to Uniform Code of Military Justice (UCMJ) Article 66 and Article 69. E-mail from Mr. Jeffrey Todd, Paralegal Specialist, U.S. Army Ct. of Crim. App., to author (Jan. 11, 2012, 15:54 EST) [hereinafter Todd e-mail] (on file with author). The accused was adjudged a fine in only twelve of these cases, or 1.2% of all reported cases. *Id.*

⁶ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1003 (b)(2), (3) (2012) [hereinafter MCM].

have on the effectiveness of forfeitures and suggesting that a punitive fine may be more effective in certain cases. Part IV then examines how ambiguous language in Rule for Courts-Martial (RCM) 1003(b)(3) fails to address whether serving of contingent confinement releases the accused from liability to pay the adjudged fine. It examines how a lack of procedural rules for executing contingent confinement and how seemingly cumbersome indigence hearings may result in convening authorities mitigating or disapproving adjudged fines altogether: This result needlessly changes the sentence to one that fails to adequately punish the convicted Soldier. Then in Part V, this article proposes amended language to the RCM that would eliminate the ambiguity in the rule and also proposes clear procedural rules for executing contingent confinement. Finally, the article concludes by explaining that the amendments proposed in this article would improve the RCM, better allowing for the fair, consistent, and effective administration of justice.

II. Background

Sentencing procedures at a court-martial differ significantly from civilian federal courts, in which trial judges use federal sentencing guidelines to arrive at a calculated, and predictable, sentence.⁷ Conversely, in courts-martial, the trier of fact, either a panel or a military judge, considers evidence in both aggravation and mitigation through an adversarial proceeding before determining an appropriate sentence unconstrained by federal guidelines.⁸ Channeled only by sentence limitations and instructions issued by the military judge, panel members, rarely equipped with any significant training or experience in behavioral science or criminal psychology, are left to their collective devices on formulating what they believe is an appropriate sentence.⁹

To determine a sentence, the trier of fact must consider the five societal principles for punishing

those who violate the law. . . . (1) [r]ehabilitation of the wrongdoer; (2) [p]unishment of the wrongdoer [(retribution)]; (3) [p]rotection of society from the wrongdoer; (4) [p]reservation of good order and discipline in the military; and, (5) [d]eterrence of the wrongdoer and those who know of his . . . crime(s) and his . . . sentence from committing the same or similar offenses.¹⁰

Pursuant to authority vested in him by Congress,¹¹ the President prescribed procedural rules and maximum authorized punishments through executive orders, outlined in the *MCM*.¹² These punishments fall under one of the following general categories: (1) discharge from the Armed Forces; (2) deprivation of liberty; (3) financial sanctions; (4) reduction in grade; and, (5) a reprimand.¹³

Given the range of permissible punishments, it is not surprising when a court-martial sentences an accused convicted of a *violent* crime to a substantial length of confinement. Confinement in this case is a reflection of the court's interest in protecting society from the violent criminal. The need to protect society from a Soldier convicted of a purely *financial* crime, however, is arguably not as grave. It is in these cases where courts frequently turn to other forms of punishment, often imposing financial sanctions on the accused to promote society's interests in deterrence and retribution.¹⁴ But in reality, the effectiveness of these financial sanctions depends on what other punishments the court imposes as well as the ability of the government to enforce the sanctions. Understanding the nuances of each type of financial sanction reveals stark differences in the relative effectiveness of forfeitures compared with a punitive fine.

⁷ 2 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE 373 (2d ed. 1999). For a compelling comparative analysis of the U.S. sentencing guidelines to the military sentencing process, see Major Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 MIL. L. REV. 159 (2000) (arguing that creating military sentence guidelines that parallel federal guidelines would promote discipline by reducing sentencing disparity).

⁸ Immel, *supra* note 7, at 168 (noting that neither the Sentencing Reform Act of 1984 nor the U.S. Sentencing Commission applies to military justice sentencing); see also MCM, *supra* note 6, R.C.M. 1001. (providing procedural rules for the pre-sentencing hearing).

⁹ U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK paras. 8-3-20 to 8-3-28 (1 Jan. 2010) [hereinafter BENCHBOOK]. See also MCM, *supra* note 6, R.C.M. 1002 (stating, "[s]ubject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment.").

¹⁰ BENCHBOOK, *supra* note 9, para. 8-3-21.

¹¹ UCMJ art. 56 (2012); see also *United States v. Palmer*, 59 M.J. 362, 364 (C.A.A.F. 2004) (stating, "[p]ursuant to the authority Congress has given him to establish punishments, Article 56, UCMJ, 10 U.S.C. § 856 (2000), the President has provided that a court-martial 'may adjudge a fine in lieu of or in addition to forfeitures.' R.C.M. 1003(b)(3).").

¹² 1 GILLIGAN & LEDERER, *supra* note 7, at xxvii.

¹³ MCM, *supra* note 6, R.C.M. 1003; see also 2 GILLIGAN & LEDERER, *supra* note 7, at 381-95.

¹⁴ See 2 GILLIGAN & LEDERER, *supra* note 7, at 374 (noting "[t]he traditional goals for sentencing are rehabilitation; specific (or special) deterrence; general deterrence; incapacitation (or warehousing); retribution; respect for law and order; (and) restitution.") (alteration in original) (emphasis added). It is noted that restitution is not one of the five principles of punishment recognized in the *Benchbook* or in Rule for Court-Martial (RCM) 1001(g). See generally BENCHBOOK, *supra* note 9; MCM, *supra* note 6, R.C.M. 1001(g).

III. Comparison of Financial Sanctions Authorized by the RCM

Rule for Court-Martial 1003 outlines those punishments a court-martial may adjudge.¹⁵ Subject to statutory and jurisdictional limitations,¹⁶ the RCM authorizes the imposition of two distinct means of financial sanctions at a court-martial: a forfeiture of pay and allowances and a punitive fine.¹⁷ While both punishments amount to forms of financial deprivation, adjudged forfeitures and an adjudged fine have very different legal effects on the accused.¹⁸

A. Forfeitures of Pay and Allowances

Courts-martial frequently adjudge forfeitures of pay and allowances, irrespective of the type of crime committed.¹⁹ This is, perhaps, a reflection of the belief that an effective way to punish someone is to take away the resources they use for personal pleasure. Forfeitures deprive the accused of a specific amount of money per month for a specified period of time, becoming due as the accused's pay accrues.²⁰ A general court-martial may sentence an accused to either total or partial forfeiture of pay.²¹ A court-martial may only sentence an accused to forfeit allowances if the sentence also includes total forfeiture of pay.²² A special court-martial may sentence an accused to partial forfeiture of pay not to exceed two-thirds pay.²³ Unless total forfeitures are adjudged by a general court-martial, the amount of forfeitures imposed upon an accused is limited to the accused's monthly basic pay at the pay grade to which the accused is reduced or, if not reduced in rank, the pay grade

¹⁵ MCM, *supra* note 6, R.C.M. 1003.

¹⁶ *See generally id.* R.C.M. 1003(c) (limiting punishments generally by the jurisdiction of the forum in accordance with UCMJ Articles 18 through 20 and RCM 201, by the rank of the accused, or by limitations established in Part IV of the MCM pertaining to offenses).

¹⁷ *Id.* R.C.M. 1003(b)(2),(3).

¹⁸ These differences are magnified when the accused is also sentenced to either confinement in excess of six months, or any amount of confinement and a punitive discharge. UCMJ Article 58b requires total forfeiture of all pay and allowances (two-thirds of all pay in the case of a special court-martial), by operation of law, when the accused is sentenced to either confinement in excess of six months, or any amount of confinement along with a punitive discharge. UCMJ art. 58b (2012).

¹⁹ *See* Todd e-mail, *supra* note 5. Of the 996 cases forwarded to the Clerk of Court, the accused received an adjudged forfeiture in 344 cases. As such, some variation of forfeiture of pay and allowances was adjudged in 35% of reported cases. *Id.*

²⁰ MCM, *supra* note 6, R.C.M. 1003(b)(2) discussion.

²¹ UCMJ art. 19 (2012). Unless adjudging total forfeitures, the amount of partial forfeitures must be stated by the court-martial in whole dollars to be forfeited each month and for how many months. MCM, *supra* note 6, R.C.M. 1003(b)(2).

²² *Id.* (stating “[a]llowances shall be subject to forfeiture only when the sentence includes forfeiture of all pay and allowances.”).

²³ UCMJ art. 19 (2012).

at the time of sentencing.²⁴ Forfeitures of pay and allowances adjudged by a court-martial become effective fourteen days after the sentence is adjudged or when the convening authority approves the sentence, whichever is earlier.²⁵ In addition to the relatively quick effective date of forfeitures, enforcing forfeitures is entirely within the control of the government.²⁶

Forfeitures can be an effective financial sanction, particularly for an accused remaining on active duty after his conviction. But, because forfeitures may not be applied retroactively, they amount to a prospective financial sanction effective only so long as the accused remains on active duty.²⁷ As such, forfeitures adjudged against a Soldier nearing his expiration term of service (ETS) date have only limited effectiveness. Furthermore, any change in the Soldier's pay status (e.g., transfer to voluntary or involuntary excess leave pending discharge, etc.) will affect the government's ability to withhold pay and allowances.

In addition to these administrative distinctions that reduce the overall effectiveness of forfeitures, prospective forfeitures also fail to address the unjust enrichment already received by the accused in cases involving financial crimes of substantial proportion. As with the introductory hypothetical case, an accused convicted of financial fraud offenses often has received the benefit of his crime. Whether this money remains in the accused's bank account or was squandered elsewhere, the accused profited from money to which he was never entitled. In these cases, forfeitures alone barely scratch the surface in punishing the accused for his unjust enrichment. It is in these cases that a punitive fine, accompanied by a fine enforcement provision, most appropriately penalizes the accused.

B. Fine

Rule for Court-Martial 1003(b)(3) also authorizes a court-martial to adjudge a fine, either instead of or in addition to any adjudged forfeitures.²⁸ A punitive fine, or a combination of forfeitures *and* a punitive fine, serves an

²⁴ MCM, *supra* note 6, R.C.M. 1003(b)(2).

²⁵ UCMJ art. 57 (2012); *see also* MCM, *supra* note 6, R.C.M. 1003(b)(2) discussion. In practice, rarely does a convening authority act on a court-martial sentence within fourteen days. This assertion is based on the author's recent professional experiences as the V Corps Chief of Military Justice, from 15 July 2009 to 1 July 2011.

²⁶ Forfeitures are initiated when the government files a signed DA Form 4430, Report of Result of Trial, through the accused's immediate commander to the installation finance office. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-30b. (3 Oct. 2011).

²⁷ *See* 2 GILLIGAN & LEDERER, *supra* note 7, at 389.

²⁸ A special or summary court-martial may not adjudge any fine or combination of fine and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case. MCM, *supra* note 6, R.C.M. 1003(b)(3).

extraordinarily effective punishment where forfeitures alone fall short of their intended penological interest. Unlike forfeitures, a fine is a sum certain that “makes the accused immediately liable to the United States for the entire amount” when it is ordered executed.²⁹ Different from forfeitures, a fine does not deprive the accused of prospective pay and allowances.³⁰ While forfeitures are limited at a general court-martial by the basic pay and allowances due to an accused, no such limitation exists for fines.³¹ Only the Eighth Amendment protection against cruel and unusual punishment limits the amount of a fine that a court-martial may adjudge.³² As such, a fine is the most effective means of targeting the unjust enrichment gained by the accused in financial crimes.

While courts-martial may adjudge forfeitures for any crime committed, they ordinarily should adjudge a punitive fine only in cases where the accused was unjustly enriched by his offense.³³ It is important to note that a punitive fine is paid to the U.S. Treasury; consequently, a court-martial may not direct payment of a fine to a particular victim or to the U.S. Army.³⁴ In light of this requirement, a fine is most appropriate in cases where the accused stole money from the United States, such as for larceny of government property or BAH fraud cases.³⁵

²⁹ *Id.* discussion (“A fine is in the nature of a judgment and, when ordered executed, makes the accused immediately liable to the United States for the entire amount of the money specified in the sentence.”).

³⁰ See 2 GILLIGAN & LEDERER, *supra* note 7, at 389 (“The only form of deprivation of pay that may be imposed as a court-martial punishment is forfeiture of pay and allowances.”) (emphasis added).

³¹ MCM, *supra* note 6, R.C.M. 1003(b)(2).

³² U.S. CONST. amend. VIII; see also *United States v. Williams*, 18 M.J. 186, 187 (C.M.A. 1984) (finding there to be no financial limits on the amount of fine able to be adjudged by a general court-martial other than the constitutional and statutory proscriptions against cruel and unusual punishment); *United States v. Parini*, 12 M.J. 679, 685 (A.C.M.R. 1981) (finding that a fine is unconstitutionally excessive only if it is “so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances”).

³³ MCM, *supra* note 6, R.C.M. 1003(b)(3) discussion (stating, “[a] fine normally should not be adjudged against a member of the armed forces unless the accused was unjustly enriched as a result of the offense of which convicted.”). But, this is not a legal requirement and fines may be imposed in other cases. See *United States v. Czeck*, 28 M.J. 563 (N.M.C.M.R. 1989) (whether accused has been unjustly enriched is only one factor to be considered in determining whether a fine is an appropriate sentence); see also *United States v. Stebbins*, 61 M.J. 650 (C.A.A.F. 2007) (holding that, based on the plain language of the rule as well as the history of a fine as punishment, it is not unlawful to impose a fine where there is no unjust enrichment).

³⁴ Lieutenant Colonel David M. Jones, *Making the Accused Pay for His Crime: A Proposal to Add Restitution as an Authorized Punishment Under Rule for Courts-Martial 1003(b)*, 52 NAVAL L. REV. 1, 2 (2005) (“Under the military’s present punishment system, there is no judicial mechanism for victim restitution.”). Therefore, a fine should not be considered a form of restitution in cases where the victim of the financial crime is not the government.

³⁵ See *Stebbins*, 61 M.J. at 370 (noting that historically, fines were considered “especially appropriate to those offenses which consist in a

A fine also differs from forfeitures in the date it becomes effective. Unlike forfeitures, that become effective fourteen days after sentencing,³⁶ a fine is not effective—and therefore not due—until the convening authority approves and orders its execution.³⁷ Nevertheless, geared towards the accused’s unjust enrichment, it is a fine’s definite and certain liability, which makes an adjudged fine such a powerful punishment.

As powerful a punishment as it may be, a fine is only as effective as the government’s ability to enforce it. While forfeitures are enforceable through the government’s withholding of pay, satisfaction of a punitive fine requires the accused to affirmatively pay money to the government. Absent some enforcement measure, the accused’s obligation to pay a fine is subject only to the accused’s own “moral persuasion.”³⁸ RCM 1003(b)(3) provides this enforcement measure, stating:

To enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired.³⁹

On its face, the authority to execute contingent confinement provides the government with a powerful tool for enforcing payment of a fine. This authority, however, is not without limitation. RCM 1113(e)(3) protects an accused whose inability to pay a fine is due solely to indigence.⁴⁰

misappropriation or misapplication of public funds or property, being in general adjudged with a view mainly to the reimbursement of the United States for some amount illegally diverted to private purposes.”).

³⁶ See *supra* note 25.

³⁷ MCM, *supra* note 6, R.C.M. 1003(b)(3) discussion. See also UCMJ art. 57(c) (2012) (stating all punishments except forfeitures and confinement become effective on the date ordered executed); *United States v. Phillips*, 64 M.J. 410, 412 (C.A.A.F. 2007) (noting that “[u]nless a different date or payment schedule is set forth in the convening authority’s action or otherwise agreed to by the convening authority, payment of the fine is due on the date that the convening authority takes action” approving the sentence).

³⁸ *United States v. Rascoe*, 31 M.J. 544, 552 (1990).

³⁹ MCM, *supra* note 6, R.C.M. 1003(b)(3). This fine enforcement provision is really the brawn of the punishment. Confinement ordered pursuant to this fine enforcement provision is often referred to as “contingent confinement.” *Rascoe*, 31 M.J. at 548 n.1.

⁴⁰ Major Larry Cuculic, *Contingent Confinement and the Accused’s Counter-Offer*, ARMY LAW., May 1992, at 28, 29; see also *Rascoe*, 31 M.J. at 550 (noting that while RCM 1003(b)(3) appears to authorize an enforcement provision resulting in an automatic reversion to confinement in the event a fine is not paid, RCM 1113(d)(3), now RCM 1113(e)(3), “appears to limit that automatic transformation until [the accused] is afforded the due process of law that might prevent his imprisonment if he invokes it”). In 2008, Executive Order 13,468 re-designated subparagraph

RCM 1113(e)(3) extends a right of procedural due process to an accused before the accused may be ordered into confinement for his failure to pay a fine.⁴¹ The rule states that:

Confinement may not be executed for failure to pay a fine if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigence, unless the authority considering imposition of confinement determines, after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the Government's interest in appropriate punishment.⁴²

Notwithstanding these limitations, this fine and enforcement provision may potentially form a powerful punishment appropriate for financial crimes committed against the government. Despite this potential, as infrequently as fines are adjudged across the Army, convening authorities often mitigate or disapprove the fine or any contingent confinement announced with the sentence.⁴³ The potential effectiveness of fines and contingent confinement is stifled by the rules' lack of procedural clarity, lack of implementing guidance, and ambiguous language. As a result, staff judge advocates and convening authorities are left to decipher the rule and navigate through conflicting case law to execute contingent confinement and enforce punitive fines. Faced with unanswered questions and seemingly cumbersome procedures, convening authorities often mitigate fines or disapprove them entirely. The rules' textual ambiguity and lack of procedural guidance render a potentially powerful punishment and enforcement provision otherwise weak and ineffective.

IV. Deciphering the Fine Enforcement Provision

Unclear procedural requirements and ambiguities in the RCM create uncertainty amongst judge advocates in

(d) of RCM 1113 to subparagraph (e) by inserting a new subparagraph. Exec. Order No. 13,468, 73 Fed. Reg. 43,831 (July 28, 2008).

⁴¹ *Rascoe*, 31 M.J. at 550. This due process is frequently referred to as an "indigence hearing." *United States v. Palmer*, 59 M.J. 362, 364 (C.A.A.F. 2004).

⁴² MCM, *supra* note 6, R.C.M. 1113(e)(3). This rule modifies RCM 1003(b)(3) to ensure constitutional protection under the Equal Protection clause of the U.S. Constitution. *Id.* R.C.M. 1113 analysis, at A21-93.

⁴³ See Todd e-mail, *supra* note 5. At the time this article was written, the respective convening authorities had taken action on only seven of the twelve courts-martial in which a fine was adjudged in 2011. *Id.* Of these seven cases, the convening authorities mitigated the fine in two cases reducing each fine to roughly one third of the adjudged amount, disapproved the contingent confinement in one case, and disapproved the fine and contingent confinement in another. *Id.*

determining exactly what is required to execute contingent confinement. Trial courts, and even appellate courts, struggle with interpreting the rules as well.⁴⁴ The rules themselves are the source of the greatest confusion. Poorly written, RCM 1003(b)(3) and RCM 1113(e)(3) contain textual ambiguities leaving open for interpretation the legal effect of contingent confinement while providing no implementing guidance or procedural requirements.

A. Ambiguous Language in RCM 1003(b)(3)

Naturally, judge advocates first look to the rule to determine the applicability of a fine enforcement provision. Given the language of RCM 1003(b)(3) and RCM 1113(e)(3), this is not always helpful. These rules contain ambiguous language⁴⁵ that creates confusion as to the legal effect of a fine enforcement provision.

Assume that an accused fails to pay an adjudged fine and is ordered to confinement pursuant to the fine enforcement provision announced with his sentence. As written, RCM 1003(b)(3) is unclear whether serving this contingent confinement discharges the accused's liability to pay the adjudged fine. A logical reading of RCM 1003(b)(3) suggests it does, stating, "the person fined shall . . . be further confined until a fixed period *considered an equivalent punishment to the fine* has expired."⁴⁶ The emphasized language of the rule implies that by serving an "equivalent" amount of confinement, the punishment is

⁴⁴ See *Rascoe* 31 M.J. at 550 (addressing the trial judge's mischaracterization of the fine enforcement provision).

⁴⁵ Prior to 20 March 2013, there was one more ambiguity in RCM 1003(b)(3): whether a convening authority may execute contingent confinement when the adjudged sentence does not also include ordinary confinement. 2 GILLIGAN & LEDERER, *supra* note 7, at 392. The confusion stems from a poorly drafted rule, which states:

To enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, *in addition to any period of confinement adjudged*, be further confined until a fixed period considered an equivalent punishment to the fine has expired.

MCM, *supra* note 6, R.C.M. 1003(b)(3) (emphasis added). The emphasized words caused confusion as to whether ordinary confinement must also be adjudged before contingent confinement may be imposed. The Air Force interpreted these words to require adjudged confinement, *United States v. Carmichael*, 27 M.J. 757, 757 (A.F.C.M.R. 1988) (holding a fine enforcement provision is invalid when a sentence does not also include a term of ordinary confinement), whereas the Army did not. *United States v. Bevins*, 30 M.J. 1149, 1149 (A.C.M.R. 1990) (holding a fine enforcement provision is valid even when the sentence does not also include a term of ordinary confinement). Recently, however, the Air Force Court of Criminal Appeals overruled its *Carmichael* decision holding that fine enforcement provision is valid without an ordinary confinement. *United States v. Ferris*, ACM 37885 (A.F. Ct. Crim. App. Mar. 20, 2013), available at http://afcca.law.af.mil/content/afcca_opinions/cp/ferris-37885.pub.pdf. Hence, this issue appears to have been clarified, though the rule remains ambiguous.

⁴⁶ MCM, *supra* note 6, R.C.M. 1003(b)(3) (emphasis added).

satisfied. Furthermore, whether intended by the drafters of the RCM or not, the short title of RCM 1113(e)(3), “*Confinement in lieu of fine*,” supports this understanding.⁴⁷ But, it is critical to remember that a fine enforcement provision itself is not punishment for the crime.⁴⁸ As such, it would follow that an accused’s confinement served under a fine enforcement provision would not discharge his liability to pay an adjudged fine, but only serve to enforce payment of the punitive fine.

A review of the historical origins of the RCM 1003(b)(3) fine enforcement provision supports that contingent confinement does *not* discharge the accused of his liability to pay a punitive fine. The Navy-Marine Corps Court of Military Review provided a thorough historical review of the origins of the current RCM 1003(b)(3) fine enforcement provision in *United States v. Rascoe*.⁴⁹ In *Rascoe*, the court explained that the RCM 1003(b)(3) fine enforcement provision was analogous to the “committed fine” used by the federal courts before 1987.⁵⁰ The court explained that under this “committed fine,” the civilian remedy for a defendant’s refusal to pay a fine was for the court to authorize, prospectively, additional confinement *until* the fine was paid.⁵¹ This confinement was intended to address “willful refusal to pay and was an action taken for contumacious conduct rather than as the imposition of punishment for the offense of which the defendant had been convicted.”⁵² In the civilian courts, the defendant remained liable for the fine notwithstanding any confinement served for nonpayment of the fine.⁵³ However, RCM 1003(b)(3) and RCM 1113(e)(3) seem to suggest contingent confinement is an alternative to an adjudged fine triggered by an accused’s failure to pay a fine.

In *Rascoe*, the court acknowledges this ambiguity but leaves unanswered the question of whether a Soldier’s adjudged fine is discharged once he has served contingent

confinement.⁵⁴ The court distinguishes an accused with the ability to pay but willfully refuses from an accused who cannot pay due to indigence.⁵⁵ The court explains under certain conditions, contingent confinement *may* be “transformed into punishment under RCM 1113(d)(3) [now RCM 1113(e)(3)],” becoming a substitute for the adjudged fine.⁵⁶ In these cases, the court explains, “the fine is thereby discharged at the time an accused has served the substituted punishment.”⁵⁷ Nevertheless, the court also notes, “we believe the fine of an accused confined for contumacious conduct is *not* discharged regardless of how much confinement he serves; *nor* is an indigent accused’s fine discharged if the fine enforcement provision is not transformed into punishment.”⁵⁸ In the same footnote, the court acknowledges that the language of RCM 1003(b)(3) could mean that the accused’s fine is discharged upon his serving contingent confinement.⁵⁹ The court chose not to clarify the question.⁶⁰ The court’s analysis, however, suggests that the authority ordering confinement must make a determination as to whether an executed fine enforcement provision is intended to *transform* into punishment, thereby discharging the punitive fine, or is intended to serve only as a fine enforcement tool.⁶¹ The Court of Appeals for the Armed Forces (CAAF) also chose not to clarify the issue in *United States v. Palmer*. In *Palmer*, the CAAF highlighted this same ambiguity in a footnote, but chose not to address whether serving a period of contingent confinement discharges the adjudged punitive fine.⁶² Thus, the answer remains unclear, once again leaving staff judge advocates and convening authorities on their own in interpreting the rule.

This ambiguity weakens the effect of a punitive fine when the rules fail to provide the accused, counsel, convening authority, and the court with a clear understanding of what is intended by the fine enforcement provision. It is not, however, just the ambiguity in the rule that weaken the effectiveness of a fine and enforcement

⁴⁷ *Id.* R.C.M. 1113(d)(3) (emphasis added).

⁴⁸ *Rascoe*, 31 M.J. at 550 (expressly stating, “a fine enforcement provision is not punishment.”) (citing *Sarae*, 9 C.M.R. at 633 (“There is a clear distinction between confinement imposed as punishment for an offense, and confinement until a fine is paid. That distinction rests upon the fact that the latter is imposed, not as punishment for the offense, but to compel obedience to the sentence of the court, i.e., the payment of the fine.”)).

⁴⁹ *Id.* at 544 (accused (E-1) was convicted of nine specifications of larceny when he altered and presented his government paychecks to receive \$5200 to which he was not entitled. He was sentenced to a dishonorable discharge, six months confinement, forfeiture of all pay and allowances, a fine of \$6000, and to serve an additional five years confinement if the fine is not paid).

⁵⁰ *Id.* at 550. As further support, the court noted that the 1949 edition of the *MCM* included language indicating that an accused may be imprisoned “until the fine is paid.” *Id.* at 551.

⁵¹ *Id.* at 551.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 552 n.6.

⁵⁵ *Id.* at 551.

⁵⁶ *Id.* at 552.

⁵⁷ *Id.*

⁵⁸ *Id.* at 552 n.6 (emphasis added).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 552–53.

⁶² *United States v. Palmer*, 59 M.J. 362, 364 n.4 (C.A.A.F. 2004) (“[T]he unpaid portion of Palmer’s fine was remitted pursuant to Department of the Air Force Instruction 51–201, Administration of Military Justice, §§ 9.9.2, 9.9.5.11 (Nov. 26, 2003) [AFI 51–201], both of which indicate that the additional confinement is a ‘substitute’ for the fine. This opinion does not address whether the convening authority may execute contingent confinement without remitting any unpaid portion of an approved fine or providing for remission of the unpaid portion of a fine upon service of a contingent period of confinement.”).

provision. The rules also lack procedural guidance for executing contingent confinement, which further stifles the effectiveness of a punitive fine and contingent confinement.

B. Lack of Procedural Rules for Executing Fine Enforcement Provision

As discussed, RCM 1113(e)(3) is the procedural safeguard against punishing the accused whose failure to pay an adjudged fine was due solely to indigence.⁶³ Before executing contingent confinement, RCM 1113(e)(3) requires the “authority considering the imposition of confinement” to first determine whether the accused has made a good faith effort to pay the fine and whether the accused’s inability to pay the fine is due to indigence.⁶⁴ Although RCM 1113(e)(3) provides limitations on executing contingent confinement, the rule is silent on specific procedures the government must follow before doing so and leaves open for interpretation what exactly the rule requires.⁶⁵

Military appellate courts have attempted to clarify where the RCM fall short in providing procedural guidance to practitioners.⁶⁶ In *United States v. Rascoe*, the Navy-Marine Corps Court of Military Review outlined criteria to be reviewed by the authority considering executing contingent confinement.⁶⁷ The U.S. Court of Military Appeals (CMA) again addressed the procedural requirements of RCM 1113(e)(3) in *United States v. Tuggle*. In reversing the lower court, the CMA discussed several factors that should and should not be considered in determining whether the accused is indigent.⁶⁸

Despite the appellate courts’ efforts at clarifying the requirements of RCM 1113(d)(3), the courts’ guidance amounts to piecemeal treatment, as the courts only address the particular procedural issues raised by the cases before them. While *Rascoe* and *Tuggle* may provide some guidance on factors to be considered in determining whether an accused is indigent, these cases fail to provide comprehensive treatment of other questions raised by the RCM. The CAAF highlighted this lack of guidance when it stated:

⁶³ Cuculic, *supra* note 40, at 29. See also *Rascoe*, 31 M.J. at 550 (noting that while RCM 1003(b)(3) appears to authorize an enforcement provision resulting in an automatic reversion to confinement in the event a fine is not paid, RCM 1113(d)(3) “appears to limit that automatic transformation until [the accused] is afforded the due process of law that might prevent his imprisonment if he invokes it.”).

⁶⁴ MCM, *supra* note 6, R.C.M. 1113(e)(3).

⁶⁵ *Id.*; see also Cuculic, *supra* note 40, at 29.

⁶⁶ Cuculic, *supra* note 40, at 29.

⁶⁷ *Rascoe*, 31 M.J. at 563. This guidance forms the basis of the proposed rules outlined in Appendix B, *infra*.

⁶⁸ *United States v. Tuggle*, 34 M.J. 89, 92 (C.M.A. 1992).

The *Manual for Courts–Martial, United States* (2002 ed.) lacks specific guidance regarding the procedures applicable to a delinquent, but not indigent accused. In light of the more substantial civilian experience in this area, the President might well consider further amplification in lieu of case-by-case appellate review of such matters.⁶⁹

The CAAF reiterated this same concern when addressing the question of who is authorized to execute contingent confinement in *United States v. Phillips*. In *Phillips*, the CAAF noted that the UCMJ fails to identify who is authorized to execute contingent confinement, and the question “is covered only obliquely in the *Manual for Courts–Martial*.”⁷⁰ The CAAF also addressed other procedural questions relating to RCM 1113(e)(3) that had not previously been addressed by the courts.⁷¹

This piecemeal treatment by the military courts in clarifying the procedural requirements of RCM 1113(e)(3) highlights the persistent questions raised by the rule’s lack of clear guidance. This same treatment also creates a patchwork of judicial interpretation that requires staff judge advocates and convening authorities to decipher before executing contingent confinement. What the services need is a decisive, comprehensive set of procedures that clearly outline the requirements of RCM 1113(e)(3). These rules would eliminate questions about how to execute contingent confinement, thereby improving the effectiveness the RCM 1003(b)(3) fine enforcement provision.

V. Recommended Solutions

The confusion created by RCM 1003(b)(3) and RCM 1113(e)(3) can be eliminated. This article proposes amended language to the RCM that would eliminate ambiguous language. The article also proposes clear procedural rules for executing contingent confinement. Together, these proposed amendments would improve the RCM, better allowing for the fair, consistent, and effective administration of justice.

A. Clarify Ambiguous Language in RCM 1003(b)(3)

It is essential that the RCM provide clear, consistent, and unequivocal guidance to everyone involved in our justice system. Where interpretation of rules leads to disparate treatment by convening authorities, we run the risk of violating some accuseds’ rights by subjecting them to

⁶⁹ *United States v. Palmer*, 59 M.J. 362, 366 (C.A.A.F. 2004).

⁷⁰ *United States v. Phillips*, 64 M.J. 410, 412 (C.A.A.F. 2007).

⁷¹ *Id.* at 411.

impermissible punishments. Conversely, ambiguities weaken our justice system when convening authorities mitigate punishments based upon unclear rules to avoid appellate issues. Clarification of RCM 1003(b)(3) is in the best interest of all military justice practitioners.

There is no logical rationale supporting the conclusion that serving contingent confinement discharges the accused's liability to pay a punitive fine. Our precedent establishes that the RCM 1003(b)(3) fine enforcement provision is not a punishment for the crime committed, but an enforcement tool for collecting a fine.⁷² Because ordinary confinement and punitive fines serve distinct penological interests, it is illogical that an accused's willful failure to pay a fine resulting in contingent confinement should discharge him of the very same punishment that levied his pecuniary liability to the United States. Subject to limitations, a court-martial is always at liberty to adjudge some degree of confinement.⁷³ A sentence to a punitive fine, however, reflects the court-martial's determination that the accused should satisfy a debt to the United States, and not that the accused requires additional confinement. Therefore, the fine enforcement provision of RCM 1003(b)(3) should remain an enforcement tool and courts should not interpret the provision as creating an alternative form of punishment.

Although an important enforcement tool, the rule cannot be so inflexible as to unduly prejudice the indigent. Confining an indigent incapable of paying his debt, until such time as he *is* able to pay, presents its own problem. If confined and out of the workforce, an indigent prisoner is unable to earn the money to pay off his debt. Thus, RCM 1113(e)(3) must remain the procedural safeguard against punishing those whose failure to pay is due *solely* to indigence. Our rules must continue to protect those whose inability to pay a fine is due solely to indigence: Indigence must become the threshold determination under RCM 1113(e)(3). As proposed in the procedural rules for RCM 1113(e)(3),⁷⁴ a finding that an accused's failure to pay a fine was *not* due solely to indigence, but due to his own willful disregard, should subject the accused to confinement under an announced fine enforcement provision *until* such fine is paid. Of course, an accused's inability to pay a fine for whatever reason may still be considered by the convening authority at the time of action. Should a convening authority determine that an accused's indigence might prevent him from paying a fine, the convening authority may always disapprove, commute, or mitigate the fine to an alternative

form of punishment.⁷⁵ Appendix A proposes language that eliminates the ambiguity and improves the overall effectiveness of the fine enforcement provision.

B. Promulgate Rules for Executing Contingent Confinement

Rule for Courts-Martial 1113(e)(3) is only triggered when an authority is considering executing contingent confinement and is *not* invoked when a fine is either paid or disapproved. As intuitive as this is, it is important to note. Because RCM 1113(e)(3) is confusing and lacks procedural guidance, convening authorities often mitigate fines to an amount already paid by the accused, if any, or disapprove a fine or contingent confinement to avoid a seemingly onerous administrative hearing pursuant to RCM 1113(e)(3).⁷⁶ To the extent the court-martial believed an adjudged fine was an appropriate punishment for the particular accused, it may be an injustice for convening authorities to disapprove the punishment due solely to unanswered procedural questions. This is especially true when providing guidance could be as easy as promulgating procedural rules within the RCM.

An indigence hearing under RCM 1113(e)(3) need not be the nebulous procedure it is today. Promulgating clear rules on conducting a fine enforcement hearing would prevent further piecemeal interpretation by appellate courts and provide staff judge advocates and convening authorities a powerful tool to enforce a punitive fine. Just as RCM 405 provides procedural rules for conducting a pre-trial investigation under Article 32, UCMJ, similar rules should be promulgated under RCM 1113(e)(3) outlining the exact requirements of the rule.⁷⁷ Appendix B proposes procedural rules for executing contingent confinement. These rules, proposed for inclusion within the RCM, provide clear guidance on what is required to protect the due process rights of an accused. Where appropriate, the proposed rules contain citations to the appellate case law that establishes the principle outlined. These rules make imposing contingent confinement a less daunting task for convening authorities, thereby adding to the overall effectiveness of a punitive fine and enforcement provision.

VI. Conclusion

Over the past five years, we have seen a demonstrable increase in the numbers of financial crimes, including larceny of government property and financial fraud,

⁷² *Rascoe*, 31 M.J. at 550.

⁷³ BENCHBOOK, *supra* note 9, paras. 8-3-20 to 8-3-28; *see also* MCM, *supra* note 6, R.C.M. 1002 ("Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment.").

⁷⁴ *See infra* Appendix B.

⁷⁵ MCM, *supra* note 6, R.C.M. 1107(d)(1) ("The convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased. The convening or higher authority may not increase the punishment imposed by a court-martial.").

⁷⁶ *See supra* note 43.

⁷⁷ MCM, *supra* note 6, R.C.M. 405.

committed against the United States by servicemembers.⁷⁸ With these increases, we can expect the number of courts-martial to increase proportionally. We must ensure the financial sanctions provided in the RCM are suited to adequately address these crimes.

Larceny of government property and similar financial crimes are serious crimes that need to be prosecuted diligently. But, Soldiers committing these crimes rarely pose the same sort of threat to our community as do those committing offenses involving drugs, violence, or sexual assault. While confinement may be best suited to punish those sorts of offenders, it may not be the best punishment for those committing financial crimes. Often, lengthy terms of confinement are not warranted for the purpose of protecting society from those convicted of financial crimes. Instead, effective financial sanctions must be available to effectively punish Soldiers for committing financial crimes.

As the hypothetical posed in the introduction suggests, forfeitures alone are often an inadequate financial sanction to punish a Soldier relative to the amount of money stolen. This is especially true in cases where the accused has received tens of thousands of dollars in unauthorized pay or allowances. Because forfeitures are a prospective sanction, their penological effect falls short in punishing Soldiers who are discharged from the service shortly after their conviction. Often, the more effective way to punish a Soldier convicted of a financial crime is through imposition of a punitive fine. A punitive fine, however, is only as effective as the government's ability to enforce it.

The fine enforcement provision found in RCM 1003(b)(3) could be a powerful enforcement tool for a punitive fine. But, the rules authorizing a fine enforcement provision are ambiguous and unclear. Textual ambiguities in the rule creates confusion on its legal effect. Furthermore, a lack of procedural rules and implementing guidelines makes the procedural due process required to execute contingent confinement appear uncertain and cumbersome. Consequently, convening authorities often mitigate or disapprove a punitive fine and/or contingent confinement. This weakens the effectiveness of a punitive fine and weakens our justice system.

Adoption of the recommended amendments provided in the appendices would clarify the fine enforcement provision and give convening authorities clear guidance on how to execute contingent confinement. This clear guidance would improve the effectiveness of an adjudged punitive fine and provide convening authorities the tools necessary to enforce the only effective punishment available that specifically addresses the unjust enrichment received by those committing financial crimes against the government. These recommendations would strengthen our judicial system, leading to the fair, just, administration of justice in cases of financial fraud against the government.

⁷⁸ See *supra* note 1.

Appendix A

Proposed Language to Replace the Current RCM 1003(b)(3)

The following is proposed language to replace the current RCM 1003(b)(3):

(3) *Fine.* Any court-martial may adjudge a fine in lieu of, or in addition to forfeitures. Special and summary courts-martial may not adjudge any fine or combination of fine and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case. *To enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid on the date ordered by the convening authority, the person fined shall be confined until such time as the fine is paid. Such confinement shall be served in addition to any confinement adjudged, if any. Confinement under this provision is not a punishment for the crime committed, but an enforcement provision authorized upon the convening authority's finding that the accused's failure to pay was willful and not due solely to the accused's indigence. In no way shall this confinement discharge the accused of his liability to the United States under the fine imposed.* The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial.

Modified language is shown in *italics*.

Appendix B

Proposed Language to Replace the Current RCM 1113(e)(3)

The following is proposed language to replace the current RCM 1113(e)(3):

(3) Execution of Fine Enforcement Provision.

(a) In general. Confinement may not be executed for failure to pay a fine if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigence, unless the *General Court-Martial Convening Authority exercising jurisdiction over the accused at the time confinement is considered* determines, after giving the accused notice and opportunity to be heard, that *confinement is necessary to compel the accused to pay his fine, and* there is no other punishment adequate to meet the Government's interest in appropriate punishment.

(b) Action on fine and enforcement provision. *A fine is effective on the date ordered executed.*⁷⁹ Upon taking action, the convening authority may approve, disapprove, or otherwise mitigate any sentence providing for a fine.⁸⁰ This approval, disapproval, or mitigation must also address any fine enforcement provision included in the sentence. The convening authority may require the fine be paid immediately, or at a reasonable date as determined within the discretion of the convening authority.⁸¹ Requests for additional time in satisfying a punitive debt, as well as supporting evidence for this request, are proper matters for the accused to submit within his clemency matters under RCM 1105.⁸²

(c) Notice. *The accused must be notified of the date a fine is ordered due, and that if the fine is not paid in full by such date, additional confinement may be ordered until the fine is paid.*⁸³

(d) Opportunity to be heard. *Upon receiving notice that the convening authority may direct the accused be confined until such period as an adjudged fine is paid, the accused may request an opportunity to be heard to explain his failure to pay.*

(e) Authority directing indigence hearing. *If an accused requests an opportunity to be heard, the General Court-Martial Convening Authority exercising jurisdiction over the accused⁸⁴ shall appoint a neutral and detached hearing officer to conduct a non-adversarial fact-finding hearing.*⁸⁵

(f) Personnel.

(i) Hearing Officer. *The convening authority directing the hearing shall detail a commissioned officer to serve as the hearing officer. The hearing officer will conduct the hearing and make of report of findings and recommendations.*

(ii) Defense Counsel. *If requested, the accused shall have the right to be represented by military counsel certified in accordance with Article 27(b).*⁸⁶

⁷⁹ UCMJ art. 57 (2012).

⁸⁰ MCM, *supra* note 6, R.C.M. 1107; *see also* UCMJ art. 60 (2012).

⁸¹ *United States v. Phillips*, 64 M.J. 410, 412 (C.A.A.F. 2007).

⁸² MCM, *supra* note 6, R.C.M. 1105(b)(1).

⁸³ *United States v. Rascoe*, 31 M.J. 544, 550 (N.M.C.M.R. 1990).

⁸⁴ The authority to transform a fine enforcement provision into confinement lies with the officer exercising general court-martial jurisdiction over the accused at the relevant time, not necessarily the original convening authority. *Id.* at 568.

⁸⁵ In *United States v. Tuggle*, the court questioned the impartiality of the hearing officer when the appointed hearing officer's primary duty position was the chief of military justice: It is essential that the hearing be objectively neutral, much like a military magistrate. 34 M.J. 89, 90 (C.M.A. 1992).

⁸⁶ *United States v. Palenius*, 2 M.J. 86, 93 (C.M.A. 1977).

(iii) Others. The convening authority directing the hearing may, as a matter of discretion, detail or request an appropriate authority to detail:

- (A) Counsel to represent the United States
- (B) A reporter; and
- (C) An interpreter

(g) Scope of indigence hearing. A hearing under this provision shall be convened to first determine the underlying reason for an accused's inability to pay a fine. Paramount to this hearing is the determination into whether an accused's inability to pay a debt is willful and recalcitrant, or is otherwise due solely to indigence. The accused shall bear the burden of demonstrating that, despite good faith efforts, he has been unable to pay the fine because of indigence.⁸⁷

(h) Procedure.

(i) Notice. The hearing officer will notify the accused of his rights to counsel and of the date, time, and location of the hearing. The hearing officer will provide the accused with a reasonable amount of time to prepare matters to be presented by the accused.

(ii) Mode of hearing. A fine enforcement hearing under this rule is a non-adversarial fact finding hearing. At this indigence hearing, the accused shall bear the burden of demonstrating that, despite good faith efforts, he has been unable to pay the fine because of indigence. This burden rests with the accused, and must be demonstrated by a preponderance of the evidence.⁸⁸

(i) Indigence determination. The hearing officer will make a report of findings with respect to the indigence of the accused. In considering whether the accused's failure to pay was due to indigence, the hearing officer should consider the following criteria:

- ◆ the accused's income, earning capacity, and financial resources;
- ◆ the burden that the fine will impose upon the accused, any person who is financially dependent on the accused, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the accused, relative to the burden that alternative punishments would impose;
- ◆ any pecuniary loss inflicted upon others as a result of the offense;
- ◆ whether restitution is ordered or made and the amount of such restitution;
- ◆ the need to deprive the accused of illegally obtained gains from the offense;
- ◆ the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence; and
- ◆ whether the accused can pass on to consumers or other persons the expense of the fine.⁸⁹

(i) Finding of willful failure to pay. If the hearing officer determines that an accused's failure to pay was willful or recalcitrant, confinement may be imposed with no further consideration.⁹⁰ In these cases, confinement serves only as a tool to enforce payment of the fine and the accused shall be confined until such time as the fine is paid, not to exceed the length of time announced as part of the fine

⁸⁷ United States v. Palmer, 59 M.J. 362, 364 (C.A.A.F. 2004).

⁸⁸ *Id.* at 365.

⁸⁹ *Rascoe*, 31 M.J. at 563 (modeling its own criteria to the federal criteria for fine enforcement provision found in 18 U.S.C. §§ 3572, 3614 (2012)).

⁹⁰ *Bearden v. Georgia*, 461 U.S. 660, 673 (1983).

enforcement provision.⁹¹ An accused's confinement under this paragraph shall not discharge him of liability to pay the adjudged fine. The accused will remain liable for the fine until such time as it is paid, or otherwise remitted.⁹²

(ii) Finding of indigence. Upon finding that the accused's inability to pay a fine is due to indigence, the hearing officer must next determine whether the accused has made sufficient bona fide efforts to acquire the resources to pay the fine. In determining whether the accused has made sufficient bona fide efforts to acquire the resources to pay the fine, the hearing officer may consider conduct taken by the accused to liquidate assets as compared to any efforts by the accused to remove assets from his control or to hide assets.⁹³ Good faith efforts do not require an accused's family to liquidate assets so that the accused may pay a fine.⁹⁴

(a) No bona fide efforts were made. If the hearing officer determines that an accused failed to make sufficient bona fide efforts to acquire the resources to pay, confinement may be imposed with no further consideration.⁹⁵ In these cases, confinement serves only as a tool to enforce payment of the fine and the accused shall be confined until such time as sufficient bona fide efforts are made to acquire the resources to pay the adjudged fine.⁹⁶ An accused's confinement under this paragraph shall not discharge him of liability to pay the adjudged fine. The accused will remain liable for the fine until such time as it is paid, or otherwise remitted.⁹⁷

(b) Sufficient bona fide efforts were made. If the hearing officer determines that an accused has made sufficient bona fide efforts to acquire the resources to pay, but was unable to pay due to indigence, the hearing officer must consider and recommend to the convening authority, whether, in light of the nature of the offense and characteristics of the accused, there is any other punishment adequate to meet the Government's interest in appropriate punishment and deterrence.⁹⁸ There shall be a presumption that alternative means of punishment can serve the Government's interest given the variety of punishments available under the UCMJ.⁹⁹

(c) Recommendations of the hearing officer. The hearing officer will forward a report of his findings and recommendations to the convening authority.

(d) Decision by convening authority. The convening authority may adopt the findings and recommendations of the hearing officer or substitute findings of fact.¹⁰⁰ The convening authority may order the execution of a fine enforcement provision only if alternative punishments would be inadequate to meet the Government's interest in appropriate punishment. An accused's confinement under this paragraph shall become a substitute punishment for the adjudged fine and shall be limited to the period announced as part of the sentence. Upon serving confinement under this paragraph, the fine will be discharged.

Modified language is shown in *italics*.

⁹¹ *Rascoe*, 31 M.J. at 551.

⁹² *Id.* at 558 (citing *Bearden v. Georgia*, 461 U.S. 660, 673 (1983)).

⁹³ *Palmer*, 59 M.J. 365 (reviewing several of the enforcement hearing officer's findings in assessing the accused's contention that he acted in good faith to pay the fine). These findings provide good examples of conduct *not* amounting to "good faith efforts." *Id.*

⁹⁴ *United States v. Tuggle*, 34 M.J. 89, 91 (C.M.A. 1992).

⁹⁵ *Rascoe*, 31 M.J. at 558 (citing *Bearden v. Georgia*, 461 U.S. 660, 673 (1983)).

⁹⁶ *Id.* at 551.

⁹⁷ *Id.*

⁹⁸ *Id.* at 558.

⁹⁹ *Id.*

¹⁰⁰ To facilitate appellate review of such actions, the convening authority should include in his action executing contingent confinement: his findings of fact as to accused's indigence status; accused's opportunity to acquire funds to pay fine; accused's efforts to acquire funds to pay fine; alternative measures considered; and, if those alternatives are inadequate to meet penological interests of Government in punishment and deterrence, statement as to why they are inadequate. *Id.* at 544.