

Rules and Law Governing Flyers, Cleansed Charge Sheets, and Flimsies

Danielle Tarin*

Introduction

“Flyers” (also spelled “fliers”¹), “cleansed charge sheets,” and “flimsies”² are terms military law practitioners use to describe the plain sheet of paper that trial counsel give to the court members listing the final form of the charges and specifications upon which the members will determine the guilt or innocence, and/or the sentence, of the accused.³ Case law indicates that generally U.S. Army courts-martial refer to these documents as “flyers” or “fliers”; U.S. Navy and Marine Corps courts-martial refer to them as “cleansed charge sheets”; and U.S. Air Force courts-martial refer to them as “flimsies.” In this article, I refer to these documents generally as “flyers.”

Flyers play a critical role in the military justice system. As explained below, counsel and the military judge use the flyer during voir dire to question the members; the flyer serves as a guide for members in determining whether trial counsel have met their burden of proof and thus identifies the offenses of which the members will ultimately acquit or convict the accused; and the flyer aids the members during their deliberations as they identify which portions of the offenses, if any, to except or substitute. Because of their critical role at trial and sentencing, improper use of flyers can generate significant appellate risk, leading courts to set

aside convictions and sentences alike.⁴ Over time, rules and law governing flyers have developed to provide practitioners several guideposts to mitigate this risk. This article summarizes those guideposts for military law practitioners, distilling the rules and law regarding the timing, functions, contents, and form of flyers. These rules and law evince that, to mitigate appellate risk, counsel must ensure flyers’ contents are accurate, complete, and final before ultimately presenting it to the members.

Timing

Before the military judge calls the members, trial counsel must prepare the flyer and present it to defense counsel to resolve any objections defense counsel might have to the flyer.⁵ Then, trial counsel presents the flyer to the military judge, who will review it and ask defense counsel whether they object to the flyer.⁶ If defense counsel has no objections, trial counsel should ensure that defense counsel states—on the record—that it has no objections.⁷ If defense counsel has objections, the military judge will rule on those objections, and trial counsel should ensure that both the objections and the rulings are on the record to preserve the record for appeal.⁸

Once the military judge approves the flyer, trial counsel must mark the flyer as an appellate exhibit and include the flyer in each court member’s packet or, if the military judge so instructs, distribute the flyer directly to the court members.⁹ To avoid potential appellate issues, trial counsel

* Prosecutor, Office of the Chief Prosecutor for Military Commissions, Northern Virginia.

¹ See, e.g., *United States v. Keenan*, 39 M.J. 1050, 1051 (A.C.M.R. 1994).

² In *United States v. Brooks*, No. 27957, 1990 WL 8416, at *1 n.1 (A.F.C.M.R. Jan. 19, 1990), the Air Force Court of Military Review explained the origin of “flimsy.”

In the days before typewriters or reproduction machines, preparing the paperwork necessary for a court-martial was an onerous task; it included laborious copying of originals of Charge Sheets, orders, and records of trial. Inventive soldier-scribes soon discovered that when the original was written using excellent ink on fine paper, other very thin sheets could be laid over the original and a small amount of moisture carefully applied. With a certain amount of good luck, several copies might be secured—a primitive form of a “copying machine.” Since these copies were created on very flimsy onionskin, they became known as “flimsies.”

³ *United States v. Parker*, 59 M.J. 195, 199 (C.A.A.F. 2003) (describing the “flyer” as “the document that would be presented to the members summarizing the charges and specifications”); *United States v. Jefferson*, 44 M.J. 312, 314 n.1 (C.A.A.F. 1996) (“The flyer is a plain sheet of paper listing the Charges and specifications without giving the personal data or the preferral/referral data of the charge sheet.”); *United States v. Glenn*, 29 M.J. 696, 698 n.1 (A.C.M.R. 1989) (describing the flyer as a document that “is presented to the members and sets forth the final form of the charges and specifications upon which the accused is to be tried”); *Brooks*, 1990 WL 8416, at *1 n.1; WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 163 (rev. 2d ed. 1920).

⁴ See, e.g., *United States v. Kaiser*, 58 M.J. 146, 148–49 (C.A.A.F. 2003) (setting aside findings of guilt and the sentence because the military judge erred in providing a flyer to the panel that included specifications to which the accused plead guilty, “in the absence of any specific request to that effect made by [the accused] on the record”).

⁵ See U.S. DEP’T OF THE ARMY, PAM. 27-9, *MILITARY JUDGES’ BENCHBOOK* 13, 28, 39, 57, 84, 1027, 1042, 1111–14, 1120, 1130–38 (1 Jan. 2010) [hereinafter *BENCHBOOK*]; NAVY-MARINE CORPS TRIAL JUDICIARY TRIAL GUIDE 59 (May 2, 2012) [hereinafter *NAVY-MARINE CORPS TRIAL JUDICIARY TRIAL GUIDE*] (“Before calling the members, the military judge should discuss with counsel any preliminary matters, trial procedures, and evidentiary issues that can be considered prior to assembly,” including “[c]leansed charge sheet (any defense objection?)[.]”).

⁶ *BENCHBOOK*, *supra* note 5, at 13, 28, 39, 57, 84, 1027, 1042, 1111–14, 1120, 1130–38.

⁷ Interview with Colonel Francis Gilligan, Judge Advocate Gen., U.S. Army (Retired), in McLean, Va. (Mar. 21, 2013).

⁸ *Id.*

⁹ See *NAVY-MARINE CORPS TRIAL JUDICIARY TRIAL GUIDE*, *supra* note 5, at 66 (“MJ: [If the cleansed charge sheet has not already been provided to the members] (Trial counsel), please distribute a copy of the charge sheet to the members.”); *BENCHBOOK*, *supra* note 5, at 13, 1027; *AIR FORCE TRIAL GUIDE* 6 (Jan. 27, 2011) [hereinafter *AIR FORCE TRIAL GUIDE*].

should ensure that each court member—and defense counsel—have the same flyer and that the flyer is the final flyer approved by the military judge.¹⁰ After the parties and the military judge finalize the flyer, the military judge will call the members and begin voir dire.

A 2000 decision by the Army Court of Criminal Appeals (ACCA) demonstrates why trial counsel should ensure that each court member and defense counsel have the same flyer and that the flyer is the final flyer approved by the military judge. In *United States v. Norton*, the military judge merged two specifications for sentencing and excepted certain language from the charge sheet.¹¹ Before sentencing, the finalized flyer was marked as an appellate exhibit and placed at each member’s seat. The members then adjudged the sentence. While appealing the sentence, defense counsel discovered that, in its copy of the flyer, the two specifications were not merged and the excepted language had not been removed.¹² The ACCA ordered a rehearing on the sentence, reasoning that it could not “rule out the possibility that the erroneous version of the Flyer was placed before at least one member of the sentencing court.”¹³ Trial counsel can avoid similar appellate issues by focusing on the details at even the flyer stage of the trial.¹⁴

Functions

The flyer serves three critical functions at trial and sentencing.

First, trial counsel, defense counsel, and the military judge may use the flyer during voir dire to question the members. In questioning the members, they may seek to determine, for example, whether any member has an “inelastic attitude” toward the accused, the charges against the accused, or, in the case of sentencing, the convictions of the accused and the potential penalties he faces for those convictions.¹⁵

¹⁰ See *United States v. Norton*, No. 9801832, 2000 WL 35801727 (A. Ct. Crim. App. May 31, 2000) (remanding case for resentencing and new action because the court could not rule out the possibility that an erroneous version of the flyer was placed before at least one member of the sentencing court, where defense counsel discovered after trial that its copy of the flyer differed from trial counsel’s copy).

¹¹ *Id.* at *1–3.

¹² *Id.* at *5.

¹³ *Id.*

¹⁴ See Lieutenant Colonel Lawrence M. Cuculic, *Trial Advocacy—Success Defined by Diligence and Meticulous Preparation*, ARMY LAW., Oct. 1997, at 4, 9.

¹⁵ See, e.g., *United States v. Keenan*, 39 M.J. 1050, 1051–52 (A.C.M.R. 1994) (noting that, during voir dire, defense counsel referred to the flyer and asked the members whether anyone had an “inelastic attitude that feels that all soldiers who are convicted of negligent homicide in which alcohol is a factor should be punitively discharged”); see also BENCHBOOK, *supra* note 5, at 84, 1042 (“MJ: . . . Please take a moment to read the charges on the flyer provided to you and to ensure that your name is correctly reflected

Second, the flyer lists the charges and specifications the accused contests, so it identifies for the members the elements that trial counsel must prove before the members may find the accused guilty. The flyer thus not only serves as a guide for the members in determining whether trial counsel has met its burden of proof, but also identifies the offenses of which the members will ultimately acquit or convict the accused—even if the charge sheet differs.¹⁶ Thus, in *United States v. Lucas*, language from the charge sheet had been omitted from the final flyer given to the members. The Navy-Marine Corps Court of Criminal Appeals (NMCCA) treated the omitted language “as if the members had excepted it from the specification” and entered “a finding of ‘not guilty’ to those words.”¹⁷ As another court has explained, members convict the accused “of the offense described in the flyer”—not the offense described on the charge sheet.¹⁸ And where the members must determine the accused’s sentence, the flyer likewise identifies for the members the only offenses for which they may punish the accused.

Third, the flyer also aids the members as they identify what parts of the offenses to except or substitute, if any, in accordance with Rule for Courts-Martial (RCM) 918(a)(1) and Rule for Military Commissions (RMC) 918(a)(1). Rule for Courts-Martial 918(a)(1) and RMC 918(a)(1) permit the members to find the accused “guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any.”¹⁹ Thus, members may take the flyer with them into the deliberating room and physically mark the flyer to indicate which portions, if any, of the offenses they have decided to except or substitute.

These functions of the flyer demonstrate its critical role in the military justice system. Given this critical role and to

on (one of) the convening order(s).”); AIR FORCE TRIAL GUIDE, *supra* note 9, at 24, 59 (same).

¹⁶ See *United States v. Lucas*, No. 200600564, 2007 WL 1704184, at *7 (N.M. Ct. Crim. App. May 15, 2007) (treating language alleged in the original charge sheet but not in the cleansed charge sheet “as if the members had excepted it from the specification” and entering “a finding of ‘not guilty’ to those words”); see also BENCHBOOK, *supra* note 5, at 1132 (“MJ: Your duty as court members is to determine whether the accused is guilty of any of the offenses on the flyer . . .”).

¹⁷ *Lucas*, 2007 WL 1704184, at *7.

¹⁸ *United States v. Lane*, No. 20031033, 2005 WL 6520481, at *1 (A. Ct. Crim. App. Oct. 27, 2005) (explaining that the members convict the accused “of the offense described in the flyer”—not the offense described on the charge sheet).

¹⁹ MANUAL FOR COURTS-MARTIAL, UNITED STATES R.C.M. 918(a)(1) (2012) (“General findings as to a specification may be: guilty; not guilty of an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; not guilty only by reason of lack of mental responsibility; or, not guilty. Exceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it.”); MANUAL FOR MILITARY COMMISSIONS, UNITED STATES R.M.C. 918(a)(1) (2012) [hereinafter MMC].

mitigate appellate risk, trial counsel must strive to ensure that each flyer's contents are accurate, complete, and final before ultimately presenting it to the members.

Contents

The flyer lists the charges and specifications (or, for sentencing, the offenses for which the accused was convicted) in their "cleansed," or final, form. Trial counsel must present a flyer that includes only those specifications for which trial counsel has evidentiary support.²⁰

Trial

The Accused Pleads Not Guilty to All Charges and Specifications

If the accused contests all the charges and specifications, trial counsel should copy the charges and specifications—in their final form—exactly as they exist on the charge sheet. If trial counsel fails to include any language on the flyer that existed in the final charge sheet, an appellate court could enter a finding of not guilty as to the omitted language. In *Lucas*, for example, the flyer omitted the words "and MCO P1100.72C (Military Personnel Procurement Manual), dated 10 February 2004" in Specification 1 under Charge III.²¹ That language was part of the charge against the accused; it had not been withdrawn by trial counsel or dismissed by the military judge. But because "it was not before the members when they deliberated and rendered their verdict," the U.S. Navy-Marine Corps Court of Criminal Appeals treated that language "as if the members had excepted it" and "enter[ed] a finding of 'not guilty' to those words."²² To avoid a similar result, trial counsel must ensure that the flyer lists the charges and specifications as they exist on the final charge sheet.

Because the flyer must list the charges and

specifications as they exist in their final form, trial counsel should omit from the flyer any charges or specifications that the military judge dismissed.²³ Similarly, if (after defense counsel moves for a finding of not guilty when the government or the defense rests) the military judge finds the accused not guilty in part, trial counsel should prepare a new flyer to avoid confusing the members.²⁴ And if a court authorized a rehearing for certain offenses, trial counsel likewise should list only the offenses for which the court authorized rehearing, plus new charges and specifications, if any.²⁵

²³ *United States v. Norton*, No. 9801832, 2000 WL 35801727, at *2-5 (A. Ct. Crim. App. May 31, 2000) (The military judge merged two specifications for sentencing and excepted certain language from the charge sheet. Before sentencing, the finalized flyer was marked as an appellate exhibit and placed at each member's seat. The members then adjudged the sentence. While appealing the sentence, defense counsel discovered that, in its copy of the flyer, the two specifications were not merged and the excepted language had not been removed. The Army Court of Criminal Appeals could not "rule out the possibility that the erroneous version of the Flyer was placed before at least one member of the sentencing court" and thus ordered a rehearing on the sentence.); *United States v. Williams*, No. 9700228, 1999 WL 35021386, at *5 n.5 (A. Ct. Crim. App. July 6, 1999) ("The flyer that went to the court members, Appellate Exhibit I, appropriately deleted the dismissed specifications and renumbered the remaining offenses."); *United States v. Glenn*, 29 M.J. 696, 697-98 (A.C.M.R. 1989) (noting that the military judge required a new flyer where he dismissed Charge II and its specification but permitted the Government to proceed on the lesser included offense of assault consummated by a battery); *cf. United States v. Ezell*, 24 M.J. 690, 692-93 (A.C.M.R. 1987) (The Government charged the accused with rape and aggravated assault. The military judge dismissed the aggravated assault charge. After trial, the parties learned that a flyer with the dismissed offense "was inadvertently distributed to three of the court members." Relying on affidavits of the members indicating that they did not consider the aggravated assault charge, the court concluded that the flyer did not affect the members' deliberations and affirmed the findings of guilt and the sentence.).

²⁴ *See* BENCHBOOK, *supra* note 5, at 129 ("Depending upon the complexity of the changes resulting from a partial finding of not guilty, the MJ should direct the members to amend their copies of the flyer or direct preparation of a new flyer."); COAST GUARD TRIAL GUIDE 166-67 (10 Jan. 2013) (recommending that the military judge direct trial counsel to prepare a new cleansed charge sheet if the military judge found the accused not guilty in part); AIR FORCE TRIAL GUIDE, *supra* note 9, at 95; *cf. United States v. Seymore*, 19 M.J. 608, 608-09 (A.C.M.R. 1984) ("Unbeknownst to the parties and the military judge, a flyer had been distributed to the court members [that] reflected an assault and battery charge of which appellant had been acquitted." The accused moved for a mistrial. The military judge instructed the members to disregard the charge and denied the defense motion. On appeal, the Army Court of Military Review concluded that the military judge did not abuse his discretion in denying the defense motion, reasoning that the military judge noted the misconduct was "uncharged," "involved a relatively minor offense," and "instructed the members to disregard it.").

²⁵ BENCHBOOK, *supra* note 5, at 1120 ("MJ: Trial Counsel, does the flyer reflect only the offenses for which a full rehearing has been authorized?"); *id.* at 1122 ("There may be references to a 'prior trial' or 'first trial.' . . . You will not be told of the results of that prior trial; your duty as court members is to determine whether the accused is guilty of any of the offenses on the flyer, and if guilty, adjudge an appropriate sentence, based only on what legal and competent evidence is presented for your consideration in this trial."); *id.* at 1130 ("MJ: Trial Counsel, does the flyer reflect only the offenses for which a full rehearing has been authorized and the new charge(s) and specification(s)? NOTE 52: If the rehearing involves matters reheard for sentence only, those matters should not be disclosed until completion of findings. Accordingly, those matters should not be listed on the flyer until sentencing.").

²⁰ *United States v. Hall*, 29 M.J. 786, 792 (A.C.M.R. 1989) (holding "it was error for the trial counsel to present a flyer to the court-martial which contained specifications for which he did not have evidence to introduce to support those specifications"); *see United States v. Parker*, 59 M.J. 195, 199-201 (C.A.A.F. 2003). In *Parker*, the flyer included a specification alleging that the accused raped Ms. AL in 1995. According to the Court of Appeals for the Armed Forces (CAAF), this inclusion obligated the Government to prove the offenses occurred in 1995. Because the Government failed to fulfill this obligation, the CAAF concluded that the military judge erred in failing to grant the motion to dismiss this specification.

²¹ No. 200600564, 2007 WL 1704184, at *7 (N-M. Ct. Crim. App. May 15, 2007); *see Lane*, 2005 WL 6520481, at *1 (concluding that the members convicted the accused of the offense described in the flyer—not the charge sheet—where the flyer omitted the allegation in the charge sheet that the accused's "service was terminated by apprehension").

²² *Lucas*, 2007 WL 1704184, at *7; *see* BENCHBOOK, *supra* note 5, at 1109 ("Regardless of the forum, the fact finder will likely not know anything about the offenses except what is on the flyer.").

Generally, the flyer should exclude any charges or specifications that “reflect provident guilty pleas if” the accused contests other offenses.²⁶ Two exceptions to this general rule exist. The flyer may include charges or specifications reflecting provident guilty pleas only if (1) the accused requests it *on the record* or (2) the guilty plea was to a lesser included offense and the prosecution intends to prove the greater offense.²⁷

If the accused asks the military judge to include on the flyer the charges and specifications to which he plead guilty, trial counsel should ensure this request is on the record. In *United States v. Hamilton*, the accused was tried by special court-martial composed of officer and enlisted members.²⁸ He pleaded (1) guilty to, and was convicted of, aggravated assault and (2) not guilty to, and was convicted of, failure to obey a lawful general regulation.²⁹ On appeal, the accused challenged the second conviction, arguing that the military judge erred in informing the members of his guilty plea. The record did not indicate whether the accused asked the military judge to inform the members of his guilty plea. The

²⁶ BENCHBOOK, *supra* note 5, at 28, 1037; *accord* AIR FORCE TRIAL GUIDE, *supra* note 9, at 6; *United States v. Kaiser*, 58 M.J. 146, 148–49 (C.A.A.F. 2003); *see* BENCHBOOK, *supra* note 5, at 1132 (“Because charges referred for a sentence rehearing only are not to be brought to the attention of the members prior to sentencing, a new flyer must be prepared to include those charges.”).

²⁷ MCM, *supra* note 19, R.C.M. 913(a) (providing that if the accused enters mixed pleas, “the military judge should ordinarily defer informing the members of the offenses to which the accused pleaded guilty until after the findings on the remaining contested offenses have been entered”); MMC, *supra* note 19, R.M.C. 913(a); MCM, *supra* note 19, R.C.M. 913(a) Discussion (“Exceptions to the rule requiring the military judge to defer informing the members of an accused’s prior pleas of guilty include cases in which the accused has specifically requested, on the record, that the military judge instruct the members of the prior pleas of guilty” and cases involving guilty pleas to a lesser included offense.); *accord* BENCHBOOK, *supra* note 5, at 28, 1037; AIR FORCE TRIAL GUIDE, *supra* note 9, at 6; *see* MCM, *supra* note 19, R.C.M. 910(g) Discussion (advising that the military judge should ordinarily defer informing members of guilty pleas in mixed plea cases); R.M.C. 910(g) Discussion (same); *Kaiser*, 58 M.J. at 148–49 (“The law in this area is clear—in a mixed plea case, in the absence of a specific request made by the accused on the record, members of a court-martial should not be informed of any prior pleas of guilty until after findings on the remaining contested offenses are made.”); *United States v. Davis*, 26 M.J. 445 (C.M.A. 1988) (concluding that the practice of informing members of guilty pleas provides fertile ground for asserting errors on appeal and serves no useful purpose); *United States v. Rivera*, 23 M.J. 80 (C.M.A. 1986) (holding that the military judge erred in advising the members at the outset of the trial that the accused pleaded guilty to certain of the charged offenses); *United States v. Smith*, 23 M.J. 118 (C.M.A. 1986) (reasoning that no lawful purpose is served by informing members before findings of any charges to which the accused pleaded guilty); *United States v. Hamilton*, 36 M.J. 723 (A.C.M.R. 1992) (“It is inappropriate for the military judge to inform the members that the accused has pleaded guilty to some offenses before trial on the merits of other offenses. . . . Where the members are erroneously informed, the error must be tested for prejudice.”).

²⁸ 36 M.J. at 724.

²⁹ *Id.*

Army Court of Military Review found that if the accused did ask the military judge, he must have done so off the record in the RCM 802 session.³⁰ Deciding not to “guess the contents of the RCM 802 session” and noting that the two offenses were closely related, the Court set aside the finding of guilty on the second offense.³¹ To avoid similar error, trial counsel should preserve on the record a defense request to inform the members of a guilty plea.

Sentencing

Trial counsel must also prepare a flyer for sentencing. This flyer includes only those offenses for which the accused was convicted and for which the members will determine the sentence.³² So, if the accused did not ask the military judge to inform the members of guilty-plea convictions, trial counsel should amend the flyer to include those convictions for sentencing.³³ Also, if a court referred any charges for sentence rehearing, trial counsel should include those charges.³⁴

A properly drafted flyer and appropriate sentencing instructions could prevent prejudicial error where trial counsel misrepresents the accused’s conviction during sentencing arguments. In *United States v. Juhl*, a general court-martial convicted the accused, pursuant to his pleas, of wrongfully using ecstasy, desertion, and breaking restriction.³⁵ Then a panel of enlisted and officer members tried and acquitted the accused of sexual assault. This same panel later determined the accused’s sentence after hearing arguments during the presentencing phase of the proceedings. On appeal, the accused challenged his sentence, arguing (in relevant part) that the trial counsel told the members he pleaded guilty to failing a urinalysis when,

³⁰ *Id.* at 730.

³¹ *Id.*

³² BENCHBOOK, *supra* note 5, at 1112 (“MJ: Trial Counsel, does the flyer reflect only the offenses for which the accused stands convicted?”); *id.* at 1114 (“MJ: The accused stands convicted of, but unsentenced for, the offenses listed on the flyer. These proceedings are being held so that you may determine an appropriate sentence for the accused for the commission of such offense(s).”).

³³ *Id.* at 57 (“If there were findings of guilty of which the members had not previously been informed, they should be advised of such now. An amended flyer containing the other offenses is appropriate.”); *id.* at 1063, 1137; AIR FORCE TRIAL GUIDE, *supra* note 9, at 47 (“If there were findings of guilty which the members had not previously been informed, they should be advised of such now. An amended flyer containing the other offenses is appropriate.”).

³⁴ BENCHBOOK, *supra* note 9, at 1132–34 (“Because charges referred for a sentence rehearing only are not to be brought to the attention of the members prior to sentencing, a new flyer must be prepared to include those charges [for sentencing]. . . . MJ: . . . Trial Counsel has the sentencing flyer, which reflects the court’s findings of guilty and those charges referred for a sentence rehearing, been marked as an appellate exhibit?”).

³⁵ No. 20100836, 2012 WL 5522457, at *1 (A. Ct. Crim. App. Oct. 31, 2012).

in fact, he pleaded guilty to wrongfully using ecstasy.³⁶

The ACCA concluded that although trial counsel did misspeak, his misstatement did not materially prejudice the accused's substantial rights. The Court reasoned that (1) the sentencing flyer "reflected [only] the offenses" the accused was convicted of; (2) the military judge instructed the panel to sentence the accused only for those offenses he was convicted of; and (3) before he misspoke, trial counsel accurately stated that the accused pleaded guilty to wrongfully using ecstasy.³⁷ The Court accordingly affirmed the accused's conviction and sentence. Guided by this case, trial counsel could similarly avoid prejudicial error by properly drafting sentencing flyers and encouraging the military judge to instruct the jury to sentence the accused only for those offenses listed on the flyer.

Form

Once trial counsel identifies the charges and specifications it should include on the flyer, trial counsel should renumber those charges and specifications to avoid alerting the members that other charges and specifications exist.³⁸ In *United States v. Irons*, the Government charged the accused with eighty-six specifications of wrongfully and unlawfully making and uttering checks with the intent to defraud and for procuring unlawful currency or items of value—all violations of Article 123a, Uniform Code of Military Justice (UCMJ).³⁹ The accused pleaded not guilty, and was acquitted, of the first fourteen specifications. For the remaining specifications, he pleaded not guilty to those offenses, but rather guilty to the lesser included offense of dishonorable failure to maintain funds in his account in violation of Article 134, UCMJ.⁴⁰ Pursuant to his plea, he was convicted of the lesser included offense.

On appeal, the accused argued the military judge "erred by failing to require the use of a cleansed charge sheet where the charge sheet before the members set forth unrenumbered

³⁶ *Id.* at *4.

³⁷ *Id.*

³⁸ See generally *United States v. Simpson*, 55 M.J. 674, 679 n.3 (A. Ct. Crim. App. 2001) (noting that the flyer "reflected properly numbered charges and additional charges"); but see *United States v. Brooks*, No. 27957, 1990 WL 8416, at *1 n.2. In *Brooks*, the Government charged the accused with four specifications, two of which the accused contested. The accused pleaded guilty to the other two. The flyer listed only the two charges the accused contested but left the numbers "three" and "four" on the flyer. The defense asked the military judge to delete the numbers "three" and "four" from the flyer, but the military judge refused. On appeal, the accused argued that the military judge erred because the members "must have divined the existence" of the two specifications to which he pleaded guilty. The Air Force Court of Military Review rejected the argument, reasoning that the accused's concern was "pure speculation."

³⁹ 34 M.J. 807, 809 (N.M.C.M.R. 1992).

⁴⁰ *Id.*

specifications which contained language of the greater offense (Article 123a) to which [the accused pleaded] not guilty."⁴¹ The U.S. Navy-Marine Corps Court of Military Review agreed. It reasoned that the flyer "not only alerted the court members to the greater offense to which the [accused pleaded] not guilty and on which the Government did not intend to proceed, but also alerted the court members that there were fourteen specifications that had disappeared from the charge sheet with no explanation."⁴² The Court added that although the military judge intended to explain the "apparent abnormality in the numbers," he failed to do so.⁴³ The Court accordingly ordered a rehearing on the sentence. To avoid a similar result, trial counsel should renumber the offenses on the flyer and, at the very least, request an instruction that the members disregard any offenses not on the flyer and any numbering abnormalities.⁴⁴

Omission of the Flyer as an Appellate Exhibit

The UCMJ requires a complete record of proceedings for every general court-martial in which the sentence includes death, dismissal, discharge, or any other punishment exceeding that which a special court-martial may adjudge.⁴⁵ This requirement "is one of jurisdictional proportion that cannot be waived."⁴⁶ The U.S. Court of Appeals for the Armed Forces has cautioned—albeit in dictum⁴⁷—that an alleged failure to include an exhibit from the record of trial could render the record of trial incomplete and thus incapable of supporting a sentence that includes a punitive discharge or confinement exceeding six months.⁴⁸ A substantial omission raises a presumption of prejudice to the accused that the Government must rebut.⁴⁹ An insubstantial omission does not.⁵⁰ Military courts have routinely held that omitting the flyer as an appellate exhibit from the record of trial constitutes an *insubstantial* omission and thus does not render the record of trial incomplete and does not render a

⁴¹ *Id.*

⁴² *Id.* (emphasis added).

⁴³ *Id.*

⁴⁴ *United States v. Irons*, 34 M.J. 807 (N.M.C.M.R. 1992); but see *Brooks*, 1990 WL 8416, at *1.

⁴⁵ UCMJ art. 54 (c)(1)(A), 10 U.S.C. § 854(c)(1)(A) (2013).

⁴⁶ *United States v. Henry*, 53 M.J. 108, 110–11 (C.A.A.F. 2000).

⁴⁷ *United States v. Gaskins*, 72 M.J. 225, 230 (C.A.A.F. 2013) (characterizing the statement as "not necessary to the holding" in *Henry*, 53 M.J. at 111, and distinguishing a complete record from a verbatim record).

⁴⁸ *Henry*, 53 M.J. at 111; *Gaskins*, 72 M.J. at 230 (calling the *Henry* court's caution into question by noting that an incomplete record and the lack of a verbatim transcript are "separate and distinct errors"); *United States v. Cudini*, 36 M.J. 572, 573 (A.C.M.R. 1992) (citing *United States v. McCullah*, 11 M.J. 234, 236 (C.M.A. 1981)).

⁴⁹ *Cudini*, 36 M.J. at 573 (citing *United States v. Gray*, 7 M.J. 296 (C.M.A. 1979)).

⁵⁰ *Cudini*, 36 M.J. at 573 (citing *McCullah*, 11 M.J. at 237).

sentence vulnerable on appeal.⁵¹

Conclusion

The rules and law governing flyers provide important guideposts to military practitioners to mitigate appellate risks that arise when using flyers at trial and sentencing. Those guideposts can be reduced to the following general practice points.

- Defense counsel should state their objections, or lack thereof, to the flyer on the record. If defense counsel has objections, counsel should ensure the military judge's ruling is on the record.
- Trial counsel should ensure that each court member—and defense counsel—has the same flyer and that the flyer is the final flyer approved by the military judge.
- Trial counsel should present a flyer that includes only those specifications for which trial counsel has evidentiary support.
- Once the military judge approves the flyer, trial counsel should mark it as an appellate exhibit for inclusion in the record of trial.
- If the accused contests all the charges and specifications, trial counsel should copy the charges and specifications—in their final form—exactly as they exist on the charge sheet and omit any charges or specifications the military judge dismissed or acquitted the accused of. If a court authorized a rehearing for certain offenses, trial counsel should list only the offenses for which the court authorized rehearing, plus new charges and specifications, if any.
- Trial counsel may include charges or specifications reflecting provident guilty pleas only if (1) the accused requests it on the record or (2) the guilty plea was to a lesser included offense and the prosecution intends to prove the greater offense.
- Counsel should ensure the flyer at sentencing includes only those offenses for which the accused was convicted and for which the members will determine the sentence.
- At sentencing, counsel should ask the military judge to instruct the jury to sentence the accused only for those offenses listed on the sentencing flyer.
- Once trial counsel identifies the charges and specifications it should include on the flyer, trial counsel should renumber those charges and specifications to avoid alerting the members that other charges and specifications currently exist or previously existed in the case.

⁵¹ *Henry*, 53 M.J. at 111 (citing *United States v. Johnson*, 33 M.J. 1017 (A.C.M.R. 1991)); *United States v. Joseph*, 36 M.J. 846, 849 (A.C.M.R. 1993); *United States v. Williams*, 36 M.J. 785, 789–90 (A.C.M.R. 1993); *Cudini*, 36 M.J. at 573.