



Bridging the Gap

Judge Rob Shuck

Circuit Judge, 4th Judicial Circuit



PREPARING YOUR SENTENCING CASE: INSTRUCTIONS

In nearly every contested panel trial,¹ when I read from the Military Judge's Benchbook Instruction 2-6-7:

MJ: Counsel, I intend to give the standard sentencing instructions. Do counsel have any requests for any special instructions?

<At this point, I am often met with blank stares for both tables and a scurry of activity at the counsel table.>

A simple way to be prepared the next time your military judge asks this standard question is to read and fill out the applicable *Other Instructions*,²

"[Panel members] in selecting a sentence, you should consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings. Thus, all the evidence you have heard in this case is relevant on the subject of sentencing. You should also consider evidence admitted as to the nature of the offense(s) to of which the accused stands convicted, plus: [insert possible Wheeler³ factors]."

1. Make sure the record brief is complete and up-to-date. In my experience, there is something *always* wrong with the record brief. Soldiers will carefully review, and correct these record briefs before selection boards. At least the same care and attention to detail must be given to a record brief given to a panel or military judge. Most record briefs are a great source of Wheeler factors (age, combat service, length of service, awards, GT score, etc.).

2. A factor may be listed in the instructions given to the panel, but you can add substance to that factor during your sentencing argument. E.g., the military judge said you should consider PFC ACCUSED's age of XX, let me tell you why PFC ACCUSED's age is important in deciding his/her sentence. E.g., youthful indiscretion, accused is of advanced age and in poor health, etc.

3. The Accused's uniform is also a possible Wheeler factor. Make sure the awards listed on his/her uniform match what is annotated on the record brief! I have noticed discrepancies. Panels also notice.

4. Review the documents and provide context. A big danger exists when documents/photos/coins/etc. are admitted without objection, or the military judge relaxes the rules of evidence. Counsel forget to provide the necessary context for those objects. I reviewed many "bewildering" materials placed in pre-sentencing documents (also known as "Good Soldier Books") lacking corresponding testimony or other explanation. Pretrial practice tip: show the proposed evidence to a paralegal or attorney working in your office and ask them what they think about it. If he or she responds, "Why am I looking at this?" or "What is this?" then its relevance to your sentencing case is not self-evident.



Approved by CTJ/9 Dec 2019

¹ Thanks to a fellow military judge's best practice tip, I now anticipate counsel will provide input on Instruction 2-6-11 well in advance of a panel trial. Of course, counsel are also encouraged to consider and provide input for *findings* instructions in advance of trial.

² Electronic Military Judge's Benchbook, Instruction 2-6-11 (2019).

³ [United States v. Wheeler, 17 U.S.C.M.A. 274 \(1967\)](#) The Benchbook factors are examples of Wheeler factors. More factors may be available based upon the facts of the case.