



# CRIMINAL LAW DESKBOOK

## **Volume IV**

Current as of 3 August 2012

**Special Topics in Military Justice**

The Judge Advocate General's School, US Army  
Charlottesville, Virginia

## **FOREWORD**

The Criminal Law Department at The Judge Advocate General's Legal Center and School, US Army, (TJAGLCS) produces this deskbook as a resource for Judge Advocates, both in training and in the field, and for use by other military justice practitioners. This deskbook covers many aspects of military justice, including Substantive Military Justice (Volume I), Pre- and Post-Trial Procedure (Volume II), Trial and Evidence (Volume III), and Special Topics in Military Justice (Volume IV). Military justice practitioners and military justice managers are free to reproduce as many paper copies as needed.

The deskbook is neither an all-encompassing academic treatise nor a definitive digest of all military criminal caselaw. Practitioners should always consult relevant primary sources, including the decisions in cases referenced herein. Nevertheless, to the extent possible, it is an accurate, current, and comprehensive resource. Readers noting any discrepancies or having suggestions for this deskbook's improvement are encouraged to contact the TJAGLCS Criminal Law Department. Current departmental contact information is provided at the back of this deskbook.

CRIMINAL LAW DESKBOOK  
VOLUME IV

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See the CRIMINAL LAW DESKBOOK VOL. I (SUBSTANTIVE MILITARY JUSTICE) for: pleadings, scope of criminal liability, inchoate offenses, military offenses, conventional offenses, and defenses.

See the CRIMINAL LAW DESKBOOK VOL. II (PRE AND POST TRIAL PROCEDURE) for: overview of the military justice system, unlawful command influence, professional responsibility, Victim/Witness Assistance Program (VWAP), SHARP & domestic abuse, jurisdiction, nonjudicial punishment – Article 15, UCMJ, summary court, speedy trial, pretrial restraint and pretrial confinement reviews, self-incrimination, right to counsel and IAC, search and seizure, discovery, Article 32, pretrial advice, pretrial agreements, court-martial personnel, production, pleas, post-trial, appeals and writs, post-conviction, and double jeopardy.

See the CRIMINAL LAW DESKBOOK VOL. III (TRIAL AND EVIDENCE) for: case construction, trial notebooks and checklists, interviewing witnesses, preparing witnesses, negotiations, motions, voir dire and challenges, opening story, direct, using evidence, cross exam, objections, experts, instructions, findings, sentencing, arguments, evidence, classified evidence, and confrontation clause.



# CYBER LAW



**TAB A**  
Is Currently Under Construction

A stylized illustration featuring a building with a red and white striped awning on the left. A silhouette of a person's head and hand is overlaid on the right side. A large, bold, black letter 'B' is centered in the foreground.

**B**

# URINALYSIS

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**AUGUST 2012**

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# URINALYSIS

## Outline of Instruction

### I. INTRODUCTION.

#### A. References.

1. U.S. DEP'T OF DEF., DIR. 1010.1, MILITARY PERSONNEL DRUG ABUSE TESTING PROGRAM (9 Dec. 1994) (C1, 11 Jan. 1999).
2. U.S. DEP'T OF DEF., INSTR. 1010.16, TECHNICAL PROCEDURES FOR THE MILITARY PERSONNEL DRUG ABUSE TESTING PROGRAM (9 Dec. 1994).
3. U.S. DEP'T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM (2 Feb. 2009) (Rapid Action Revision, 2 Dec. 2009) [hereinafter AR 600-85].
4. Army Center for Substance Abuse Programs, Drug Testing Branch, Alexandria, VA. <http://www.acsap.army.mil/>. Telephone: (703) 681-5566.

### II. SCIENTIFIC ASPECTS OF URINALYSIS PROGRAM.

#### A. What Urinalysis Test Proves.

1. Urine test proves only past use; it proves that drug or drug metabolites (waste products) are in the urine.
2. Urine test does not prove:
  - a. Impairment.
  - b. Single or multiple usages.
  - c. Method of ingestion.
  - d. Knowing ingestion. In the past ten years, there have been dramatic changes regarding the use of the permissive inference for proof of “knowing” ingestion. Previously, the presence of an amount of drug metabolite allowed a permissible inference that the accused knowingly consumed a particular drug. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988). The government’s burden was made considerably heavier (to raise the permissible inference) after *United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999), *supplemented on reconsideration*, 52 M.J. 386 (C.A.A.F. 2000). The CAAF later backed off of this heavier burden in *United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001). In *Green*, the CAAF emphasized the importance of the Military Judge as the “gatekeeper to determine whether . . . expert testimony has established an adequate foundation with respect to reliability and relevance.” *Id.* at 80. Some of the more troubling “factors” announced by the court in *Campbell* are not mandatory but may still be applicable in urinalysis cases dealing with novel testing methods or procedures. *Id.* at 80.

#### B. Drugs Tested.

1. Marijuana (THC metabolite)

2. Cocaine (BZE metabolite)
  3. Other drugs tested (some only upon request):
    - a. LSD – removed from the testing program in 2006. Still periodically screened for under the “prevalence program.”
    - b. Opiates (morphine, codeine, 6-MAM metabolite of heroin)
    - c. PCP
    - d. Amphetamines; including designer amphetamines MDMA, MDA, MDEA
    - e. Oxymorphone/Oxycodone
    - f. Anabolic steroids – testing only done by UCLA.
- C. Drug Metabolites.
1. Marijuana.
    - a. Main psychoactive ingredient is delta 9-tetrahydrocannabinol (short name: delta-9 THC).
    - b. Main metabolite (waste product) of delta-9 THC is delta 9-tetrahydrocannabinol-9-carboxylic acid (short name: 9-carboxyl THC). This is the metabolite tested for within DOD.
    - c. 9-carboxyl THC is not psychoactive, and is not the only metabolite. 10-90% percent of the total number of metabolites are 9-carboxyl THC.
    - d. 9-carboxyl THC is found in urine only when human body metabolizes marijuana; the human body cannot naturally produce 9-carboxyl THC.
  2. Cocaine.
    - a. Main metabolite is benzoylecgonine (BZE).
      - (1) This is the metabolite tested for within DOD.
      - (2) BZE is found in urine when human body metabolizes cocaine; it cannot be naturally produced by human body, but can be produced by introducing cocaine directly into urine (no metabolizing needed).
    - b. Secondary metabolite is ecgonine methyl ester (EME).
      - (1) This metabolite is not tested for within DOD.
      - (2) EME dissipates from the body more quickly than BZE.
      - (3) EME is found in urine when human body metabolizes cocaine; it cannot be naturally produced by human body and cannot be produced by introducing cocaine directly into urine.
- D. Army Testing Procedures. *See* AR 600-85, Appendix E for full procedures.
1. Unit Prevention Leader (UPL).
    - a. Prepares urine sample bottle by placing Soldier’s social security number, Base Area Code (BAC), and date on bottle.
    - b. Prepares DD Form 2624 (chain of custody form) listing up to 12 samples on form.
    - c. Prepares urinalysis ledger listing all samples.

- d. Directs the Soldier to verify his information on the bottle label, unit ledger, and DD form 2624. The Soldier will then initial the bottle label. His/her initials are verification.
  - e. Removes a new collection bottle from the box in front of the Soldier and replace it with the Soldier's military ID card. The UPL will then affix the label to the bottle, in full view of both the Soldier and the observer, and hand it to the Soldier.
2. Observer.
    - a. Directly observes Soldier provide a sample of at least 30 mL (approximately half the specimen bottle) and place cap on bottle. (The observer must see urine leaving the Soldier's body and entering the specimen bottle).
    - b. Return with the Soldier to the UPL's station. The observer will keep the bottle in sight at all times.
    - c. Observes Soldier return the bottle to UPL.
  3. UPL/Observer/Soldier.
    - a. UPL affixes red tamper evident tape seal across the bottle cap and then initials the bottle label.
    - b. UPL places the specimen in the collection box, removing the Soldier's ID card.
    - c. Observer signs the unit ledger in front of both the observer and UPL and Soldier to verify he/she complied with the collection process and directly observed the Soldier provide the sample and maintained eye contact with the specimen until it was placed in the collection box.
    - d. Soldier will then sign the unit ledger in front of the observer and UPL verifying that he/she provided the urine in the specimen bottle and that he/she observed the specimen being sealed with tamper evident tape and placed into the collection box.
    - e. UPL will return the Soldier's ID card and release him/her from testing.
    - f. Once the UPL accepts a completed sample the specimen chain of custody begins. The specimens are sent to the drug testing laboratory.
  4. Drug Testing Coordinator.
    - a. Receives samples from UPL (usually the same day as the sample collection). Ensures samples and forms are in proper order and signs chain of custody form.
    - b. Ensures bottles are sealed and mails them to laboratory for testing.
- E. Testing Facilities Used by Army.
1. Army Forensic Toxicology Drug Testing Laboratory, Tripler Medical Center, Honolulu, HI. Telephone: (808) 433-5176.
  2. Army Forensic Toxicology Drug Testing Laboratory, Fort Meade, MD. Telephone: (301) 677-7085.
  3. The Army also utilizes other DoD testing facilities.
- F. Urinalysis Tests Used.

1. Laboratory tests:
  - a. Screening test: immunoassay (KIMS Technology) or “Enzyme Multiplied Immunoassay Technique” (E.M.I.T. - Syva Co.) depending on the drug being tested.
    - (1) Used at Army and Air Force laboratories. Civilian samples are tested at Fort Meade, MD.
    - (2) Test attaches chemical markers to metabolites and measures transmission of light through sample. Every positive screened twice.
    - (3) Test is not 100% accurate, but screens out most negatives.
  - b. Confirming test: gas chromatography/mass spectroscopy (GC/MS).
    - (1) Used at Army and Air Force laboratories.
    - (2) GC test measures period of time molecules in sample take to traverse a tube; drug metabolites traverse tube in characteristic period of time.
    - (3) MS test fragments molecules in sample and records the fragments on spectrum. Metabolite fragments are unique.
    - (4) Test is 100% accurate.

G. Cut-off Levels. DOD and urine testing laboratories have established “cut-off” levels. Samples which give test results below these cut-off levels are reported as negative. A sample is reported as positive only if it gives test results above the cut-off level during both the screening (every positive screened twice) and the confirming test. Source: DoD Standard Drug Testing Panel, *available at* <http://tricare.mil/tma/ddrp/Program-Policy-Archives.aspx>.

1. Cut-off levels for screening tests (EMIT and IA):

<i>Drug</i>	<i>ng/ml</i>
Marijuana (THC)	50
Cocaine (BZE)	150
Amphetamine/Methamphetamine	500
Designer Amphetamines (MDMA, MDA, MDEA)	500
Opiates	
Morphine/Codeine	2000
Oxycodone/Oxymorphone	100
6-monoacetylmorphine (heroin)	10
Phencyclidine (PCP)	25

2. Cut-off levels for GC/MS test:

<i>Drug</i>	<i>ng/ml</i>
Marijuana (THC)	15
Cocaine (BZE)	100
Amphetamine/Methamphetamine	100
Designer Amphetamines (MDMA, MDA, MDEA)	500

Opiates	
Morphine	4000
Codeine	2000
Oxycodone/Oxymorphone	100
6-monoacetylmorphine (heroin)	10
Phencyclidine (PCP)	25

H. Drug Detection Times.

1. Time periods which drugs and drug metabolites remain in the body at levels sufficient to detect are listed below. Source: U.S. Army Drug Oversight Agency & Technical Consultation Center, Syva Company, San Jose, California, telephone: 1-800-227-8994 (Syva).

<i>Drug</i>	<i>Approximate Retention Time</i>
Marijuana (THC) (Half-life 36 hours)	
Acute dosage (1-2 joints)	2-3 days
Marijuana (eaten)	1-5 days
Moderate smoker (4 times per week)	5 days
Heavy smoker (daily)	10 days
Chronic smoker	14-18 days (may exceed 20 days)
Cocaine (BZE) (Half-life 4 hours)	2-4 days
Amphetamines	1-2 days (2-4 days if heavy use)
Barbiturates	
Short-acting (e.g. Secobarbital)	1 day
Long-acting (e.g. Phenobarbital)	2-3 weeks
Opiates	2 days
Phencyclidine (PCP)	14 days

2. Factors which affect retention times:
  - a. Drug metabolism and half-life.
  - b. Donor's physical condition.
  - c. Donor's fluid intake prior to test.
  - d. Donor's method and frequency of ingestion of drug.
3. Detection times may affect:
  - a. Probable cause. Information concerning past drug use may not provide probable cause to believe the Soldier's urine contains traces of drug metabolites, unless the alleged drug use was recent.

- b. Jurisdiction over reservists. Reservists may not be convicted at a court-martial for drug use unless use occurred while on federal duty. *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990) (urine sample testing positive for cocaine less than 36 hours after reservist entered active duty was insufficient to establish jurisdiction). *But see United States v. Lopez*, 37 M.J. 702 (A.C.M.R. 1993) (court, in dicta, questioned the validity of *Chodara* and stated that body continues to “use” drugs as long as they remain in the body).

### III. COMMANDERS’ OPTIONS.

- A. Courts-Martial. Court-martial procedures are complex and the Military Rules of Evidence apply.
- B. Nonjudicial Punishment.
  1. Nonjudicial punishment procedures are relatively simple. *See* U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 3 (3 Oct. 2011) [hereinafter AR 27-10].
    - a. Military Rules of Evidence do not apply. AR 27-10, para. 3-18j.
    - b. Burden of proof is beyond a reasonable doubt. AR 27-10, para. 3-18l.
  2. Reservists. Reservists may not receive nonjudicial punishment under Article 15 for drug use unless use occurred while on federal duty. *See* Article 2(d)(2) (reserve component personnel may be involuntarily recalled to active duty for nonjudicial punishment only with respect to offenses committed while on federal duty) and *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990).
- C. Administrative Separations.
  1. All Soldiers who are identified as illegally abusing drugs will be **processed** for administrative separation. AR 600-85, para. 10-6. Mandatory processing does not mean mandatory separation. Commander may recommend retention if warranted.
  2. Rules at administrative separations are simpler than at a courts-martial. *See* U.S. DEP’T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (2 Oct. 2006) [hereinafter AR 15-6].
    - a. Military Rules of Evidence do not apply. AR 15-6, para. 3-7a.
    - b. Burden of proof is a preponderance of the evidence. AR 15-6, para. 3-10b.
  3. Reservists. Reservists may be separated for drugs even though use did not occur while on federal duty. *See* U.S. DEP’T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS (13 Mar. 2007) (Rapid Action Revision, 13 Sept. 2011) and U.S. DEP’T OF ARMY, REG. 135-175, SEPARATION OF OFFICERS (28 Feb. 1987) (Rapid Action Revision, 4 Aug. 2011).

### IV. CONSTITUTIONALITY OF URINALYSIS PROGRAM.

- A. Probable Cause Urinalysis.
  1. A urinalysis test is constitutional if based upon probable cause. Mil. R. Evid. 312(d) and 315.
  2. A positive urinalysis provides probable cause to seize hair sample for drug testing. *United States v. Bethea*, 61 M.J. 184 (C.A.A.F. 2005).

3. A warrant or proper authorization may be required.
    - a. *Schmerber v. California*, 384 U.S. 757 (1966). Warrantless blood alcohol test was justified by exigent circumstances.
    - b. *United States v. Pond*, 36 M.J. 1050 (A.F.C.M.R. 1993). Warrantless seizure of urine to determine methamphetamine use was not justified by exigent circumstances because methamphetamine does not dissipate quickly from the body.
- B. Inspections.
1. A urinalysis is constitutional if it is part of a valid random inspection. Mil. R. Evid. 313(b); *United States v. Gardner*, 41 M.J. 189 (C.M.A. 1994). The fact that the results of urinalysis inspections are made available to prosecutors did not make the inspection an unreasonable intrusion. (*Note*: This ruling has not been challenged since the U.S. Supreme Court's decision in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), which found a similar policy unconstitutional). *See also Skinner v. Railway Labor Executives*, 489 U.S. 602 (1989) (urine tests of train operators involved in accidents are reasonable searches) and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (urine testing of employees who apply to carry firearms or be involved in drug interdiction does not require a warrant). *Chandler v. Miller*, 520 U.S. 305 (1997) (to conduct urinalysis without probable cause, must show "special need").
  2. Authority to order urinalysis inspections. *United States v. Evans*, 37 M.J. 867 (A.F.C.M.R. 1993). Commander of active duty squadron to which accused's reserve unit was assigned had authority to order urinalysis inspection. *But see United States v. DiMuccio*, 61 M.J. 588 (A.F. Ct. Crim. App. 2005) (Commander of 162nd FW, a national guard unit, had no authority to order accused to submit to urinalysis because accused was at the time in "Title 10" status vice "Title 32" status even though accused was still part of 162nd FW); *United States v. Miller*, 66 M.J. 306 (C.A.A.F. 2008) (where urinalysis which was the product of an order issued by a civilian Air Reserve Technician who did not have command authority to issue the order, and thus was not incident to command, was unlawful).
  3. Subterfuge under Mil. R. Evid. 313(b).
    - a. Report of Offense. *United States v. Shover*, 45 M.J. 119 (C.A.A.F. 1996). Marijuana was planted in an officer's briefcase. During the investigation to find the "planter," the commander ordered a urinalysis. The accused tested positive for methamphetamines. Although the test triggered the subterfuge rule of Mil. R. Evid. 313(b), the government met its clear and convincing burden. The primary purpose for the inspection was to end the finger pointing and hard feelings caused by the investigation. The judge ruled the primary purpose was to "resolve the questions raised by the incident, not to prosecute someone." The CAAF affirmed.
    - b. Knowledge of subordinates.
      - (1) *United States v. Taylor*, 41 M.J. 168 (C.M.A. 1994). Urinalysis test results were properly admitted, even though the urinalysis inspection followed reports that accused had used drugs and even though accused's section was volunteered for inspection on basis of reports. Commander who ordered inspection was ignorant of reports. *But see United States v. Willis*, No. 96-00192, 1997 WL 658748 (N-M. Ct. Crim. App. Feb. 21, 1997) (unpublished).

- (2) *United States v. Campbell*, 41 M.J. 177 (C.M.A. 1994).  
Urinalysis test results were improperly admitted where urinalysis inspection was conducted because first sergeant heard rumors of drug use in unit and selected accused to be tested based on his suspicions. Judge erred in finding that government proved, by clear and convincing evidence, that inspection was not subterfuge for criminal search.
  - c. Primary Purpose. *United States v. Brown*, 52 M.J. 565 (A. Ct. Crim. App. 1999). Several members of unit allegedly were using drugs. Because of this, the commander ordered random 30% inspection. The commander's primary purpose was because he "wanted to do a large enough sampling to validate or not validate that there were drugs being used in his company, and he additionally was very concerned about the welfare, morale, and safety of the unit caused by drugs." This met the primary purpose test of Mil. R. Evid. 313(b).
  4. Targeting Soldiers for inspection. *United States v. Moore*, 41 M.J. 812 (N-M. Ct. Crim. App. 1995). Military judge improperly excluded urinalysis results where accused was placed in nondeployable "legal" platoon after an Article 15, and regimental commander inspected accused's platoon more frequently than others. Commander did not target. More frequent tests were based on disciplinary problems.
- C. Consent Urinalysis.
1. A urinalysis is constitutional if obtained with consent. Mil. R. Evid 314(e).
  2. Consent must be voluntary under totality of the circumstances. *United States v. White*, 27 M.J. 264 (C.M.A. 1988).
    - a. Consent is involuntary if commander announces his intent to order the urine test should the accused refuse to consent. Mil. R. Evid. 314(e)(4).
    - b. Consent is voluntary if the commander does not indicate his "ace in the hole" (authority to order a urinalysis). *United States v. White*, 27 M.J. 264 (C.M.A. 1988). *See also United States v. Whipple*, 28 M.J. 314 (C.M.A. 1989). Consent was voluntary where accused never asked what options were and commander never intimated that he could order him to give a sample. *See also United States v. Vassar*, 52 M.J. 9 (C.A.A.F. 1999) (permissible to use trickery to obtain consent as long as consent was not coerced).
    - c. If Soldier asks "what if I do not consent?"
      - (1) *United States v. Radvansky*, 45 M.J. 226 (C.A.A.F. 1996). Totality of the circumstances, not a bright-line rule, controls consent to urinalysis in the face of a command request. Notwithstanding First Sergeant's comment that accused could "give a sample of his own free will or we could have the commander direct you to do so," accused voluntarily consented to urinalysis. The mere remark that a commander can authorize a search does not render all subsequent consent involuntary.
      - (2) *But see United States v. White*, 27 M.J. 264 (C.M.A. 1988). Consent is involuntary if commander replies that he or she will order urine test.

- d. Consent is voluntary if commander meaningfully explains the consequences of a consent sample versus a fitness for duty or probable cause sample. *United States v. White*, 27 M.J. 264, 266 (C.M.A. 1988) (dicta). See also *United States v. McClain*, 31 M.J. 130 (C.M.A. 1990).
3. Probable cause may cure invalid consent. *United States v. McClain*, 31 M.J. 130 (C.M.A. 1990). Urinalysis was inadmissible where consent was obtained involuntarily even though commander had probable cause to order urinalysis. However, the Court stated that probable cause to order urine test may provide an alternative basis upon which to admit urine sample obtained through invalid consent where:
    - a. Commander deals directly with accused in requesting consent, and would have authorized seizure of urine based on probable cause but for belief that he or she had valid consent; or,
    - b. Commander actually orders urinalysis based on probable cause, but relaying official asks for consent (which later is found to be invalid).
  4. Requesting consent is not interrogation under Article 31, UCMJ, or the Fifth Amendment. *United States v. Schroeder*, 39 M.J. 471 (C.M.A. 1994). Civilian police officer apprehended accused for suspected use of drugs and later asked if he would consent to a urinalysis. This question was not custodial interrogation under the Fifth Amendment.
  5. Attenuation of taint from prior unwarned admissions. *United States v. Murphy*, 39 M.J. 486 (C.M.A. 1994). Accused's consent to urinalysis test was not tainted by prior admissions obtained prior to rights warnings. Prior questioning was not coercive and consent was given voluntarily.
  6. *Consent. It's OK to Trick.* *United States v. Vassar*, 52 M.J. 9 (C.A.A.F. 1999). NCO told accused he needed to consent to urinalysis because of a head injury. Permissible to use trickery to obtain consent as long as it does not amount to coercion.
- D. Medical Urinalysis. A urinalysis is constitutional if conducted for a valid medical purpose. Mil. R. Evid. 312(f).
1. *United States v. Fitten*, 42 M.J. 179 (C.A.A.F. 1995). Forced catheterization of accused did not violate the Fourth Amendment or Mil. R. Evid. 312(f) where it was medically necessary to test for dangerous drugs because of accused's unruly and abnormal behavior. Diversion of a part of the urine obtained from medical test to drug laboratory to build case against accused was permissible. *But see United States v. Stevenson*, 66 M.J. 15 (C.A.A.F. 2008), which overrules *Fitten* "... to the extent that [it] . . . stand[s] for the proposition that there is a *de minimus* exception to the Fourth Amendment or to Mil. R. Evid. 312."
  2. In the Army, most medical tests may only be used for limited purposes. AR 600-85, para. 10-12, and Table 10-1.
- E. Fitness for Duty Urinalysis.
1. A commander may order a urinalysis based upon reasonable suspicion to ensure a Soldier's fitness for duty even if the urinalysis is not a valid inspection and no probable cause exists. Results of such tests may only be used for limited purposes. *United States v. Bair*, 32 M.J. 404 (C.M.A. 1991). See AR 600-85, para. 10-12(a)(1).

2. Reasonable suspicion required for a fitness for duty urinalysis is the same as reasonable suspicion required for a “stop and frisk” under the Fourth Amendment. *United States v. Bair*, 32 M.J. 404 (C.M.A. 1991).

F. Use in Rebuttal.

1. *United States v. Graham*, 50 M.J. 56 (C.A.A.F. 1999). Military Judge erred in allowing single rebuttal question by trial counsel about a prior positive marijuana result four years earlier, of which accused was acquitted in court-martial, after accused stated he was “flabbergasted” at having tested positive. *Accord United States v. Roberts*, 52 M.J. 333 (C.A.A.F. 2000). *But see United States v. Tyndale*, 56 M.J. 209 (C.A.A.F. 2001).
2. *United States v. Matthews*, 53 M.J. 465 (C.A.A.F. 2000). The CAAF holds that extrinsic evidence may not be used to rebut good military character.

G. Results of Violation of Constitution.

1. Administrative Separations. Evidence obtained in violation of the Constitution is admissible, unless it was obtained in bad faith (*i.e.* the officials conducting the urinalysis knew it was unlawful). A urinalysis conducted in bad faith is admissible only if the evidence would inevitably have been discovered. AR 15-6, para. 3-7c(6).
2. Nonjudicial Punishment under Article 15. Evidence obtained in violation of the Constitution is admissible. AR 27-10, para. 3-18j. However, Soldier may demand trial by court-martial. AR 27-10, para. 3-18d.
3. Court-martial. Evidence obtained in violation of the Constitution is inadmissible. *See Mil. R. Evid.* 311.

**V. LIMITED USE POLICY.**

A. Limited Use.

1. Under the limited use policy, the results of the following tests may not be used as a basis for an Article 15 or court-martial or to determine the “character of service” in an administrative separation action. AR 600-85, para. 10-14c.
  - a. Competence for Duty Tests. AR 600-85, para. 10-12a(1).
  - b. Medical Tests. The limited use policy applies to tests obtained as a result of Soldier’s emergency medical care for an actual or possible drug overdose, unless such treatment resulted from apprehension by military or civilian law enforcement officials. AR 600-85, para. 10-12a(3).
2. If drug use discovered during a limited use test is introduced during an administrative separation, the Soldier must receive an honorable discharge.
3. The limited use policy does not preclude use of limited use tests in rebuttal or initiation of disciplinary action based on independently derived evidence. AR 600-85, para. 10-12d(1).
4. A fitness for duty urinalysis or medical test may serve as the basis for administrative action, to include requesting a second urinalysis. In *United States v. Williams*, 35 M.J. 323 (C.M.A. 1992), the exclusionary rule did not preclude admission of accused’s incriminating statements or consensual second urinalysis even though the questioning and the request for the second urinalysis were based upon prior positive fitness for duty urinalysis. The taint from the fitness for duty urinalysis was sufficiently attenuated.

- B. Full Use. The limited use policy does not apply to the types of tests listed below. These tests may be used at courts-martial, Article 15 proceedings, and administrative separations:
1. Probable cause tests.
  2. Inspections.
  3. Consent tests. In *United States v. Avery*, 40 M.J. 325 (C.M.A. 1994), the accused was not entitled to protection of Air Force limited use policy, which precludes the use of certain evidence derived from a service member's voluntary self-identification as a drug abuser. The accused voluntarily consented to a urinalysis after his wife revealed his drug use to his chain of command. The accused never admitted using drugs.
  4. Medical tests which are **not** covered by the limited use policy described above.
    - a. Obtained as a result of Soldier's emergency medical care for an actual or possible drug overdose, where the treatment resulted from apprehension by military or civilian law enforcement officials. AR 600-85, para. 10-12a(3).
    - b. Routine tests directed by a physician which are not the result of suspicion of drug use and not taken in conjunction with ASAP. AR 600-85, para. 10-12a(3).
- C. Command Directed Tests. Be wary of the term "command directed" urinalysis. The ability or inability to use the test results for UCMJ or separation purposes depends on the type of test, not on whether or not it is labeled command directed. In *United States v. Streetman*, 43 M.J. 752 (A.F. Ct. Crim. App. 1995), the accused was convicted of marijuana use. The court held that the letter reissuing the original inspection order but labeled as "Commander Directed" (Air Force equivalent to fitness for duty) and ordering accused to submit to drug testing did not transform prior legitimate random urinalysis inspection into a fitness for duty test that would preclude the admission of drug test results.

## VI. PROSECUTING URINALYSIS CASES.

- A. Procedures for Taking Test.
1. Observation During Testing. *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989). Direct observation of female officer providing sample by female enlisted person at a distance of eighteen inches did not make collection of urine unreasonable.
  2. Refusal to Provide Sample. *United States v. Turner*, 33 M.J. 40 (C.M.A. 1991). Accused's submission of toilet water as urine sample did not constitute obstruction of justice, but could have been charged as disobedience of an order.
  3. Inspection of AWOL (UA) Personnel.
    - a. Soldiers who are absent without leave may be subjected to compulsory urinalysis testing pursuant to command policy to inspect the urine of such Soldiers. *Cf. United States v. Bickel*, 30 M.J. 277 (C.M.A. 1990) (compelling Soldiers who previously tested positive for drug use to submit to second urinalysis is a proper inspection).
    - b. Such an inspection must be conducted in accordance with command policy.

- (1) *United States v. Daskam*, 31 M.J. 77 (C.M.A. 1990). Accused, who was late for duty, was not an unauthorized absentee within meaning of policy requiring unauthorized absentees to submit to urinalysis; test of accused's urine was not a proper inspection.
  - (2) *United States v. Patterson*, 39 M.J. 678 (N.M.C.M.R. 1993). Testing of Soldier returning from unauthorized absence was not a proper inspection because it was not conducted in accordance with instruction requiring such inspections. Commander who ordered test did so based on the "seriousness" of the absence, rather than on a random basis.
4. Retesting Soldiers. Requiring retesting, during next random urinalysis, of all Soldiers who tested positive during previous urinalysis is a proper inspection.
    - a. *United States v. Bickel*, 30 M.J. 277 (C.M.A. 1990). Commander's policy letter which required retesting of Soldiers who were positive on previous urinalysis was proper.
    - b. *United States v. Ayala*, 69 M.J. 63 (C.A.A.F. 2010). Commander's policy letter required "all members whose urine tests positive for illegal drugs to provide another sample for testing by the end of the first duty day following receipt of a positive test result." Despite the SJA's advice that stated the policy would "decrease litigation risks and costs, and potentially aid in swifter judicial action," the commander's stated intent of promoting "security, military fitness, and good order and discipline . . . and not a criminal investigative tool," showed that the policy was a proper inspection under Mil. R. Evid. 313.
  5. Retesting Samples. Selection of negative samples for additional testing is improper unless done on a random basis. *United States v. Konieczka*, 31 M.J. 289 (C.M.A. 1990). Installation alcohol and drug control officer's decision to select urine sample which had pre-tested negative for further testing at drug laboratory based on belief that sample might test positive constituted unreasonable inspection.
  6. Deviations in Procedures.
    - a. Deviations from regulations generally do not affect admissibility of test results. *United States v. Pollard*, 27 M.J. 376 (C.M.A. 1989); *United States v. Timoney*, 34 M.J. 1108 (A.C.M.R. 1992).
    - b. Gross deviations from urinalysis regulation may allow exclusion of positive test results. *United States v. Strozier*, 31 M.J. 283 (C.M.A. 1990).
    - c. Accused randomly selected by computer for urinalysis testing as allowed by the applicable Air Force Instruction. Method was proper even if there were minor administrative deviations. *United States v. Beckett*, 49 M.J. 354 (C.A.A.F. 1998).
- B. Proving Knowing Ingestion of Drugs.
1. To be guilty of wrongful use of drugs the accused must know that (1) he or she consumed the relevant substance; and, (2) the substance was contraband. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988).

2. Presence of drug metabolite in urine permits permissible inference that accused knowingly used drug, and that use was wrongful. *United States v. Green*, 55 M.J. 76, 81 (C.A.A.F. 2001); *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988); *United States v. Alford*, 31 M.J. 814 (A.F.C.M.R. 1990).
3. Permissive inference of wrongfulness may be sufficient to support conviction despite defense evidence that ingestion was innocent. *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987) (permissive inference overcame accused's suggestion that wife may have planted marijuana in his food without his knowledge).
4. Ensure that the instruction on permissive inference as to knowledge and wrongfulness is not crafted in such a manner as to make it a mandatory presumption. A permissive inference is constitutional; a mandatory presumption is not. *United States v. Brewer*, 61 M.J. 425 (C.A.A.F. 2005) (instruction that military judge gave was confusing to the extent that it appeared to shift the burden to the accused to assert one of the three exceptions as to wrongfulness; findings and sentence set aside).
5. *United States v. Pope*, 69 M.J. 328 (C.A.A.F. 2011). Military Judge abused his discretion in admitting a green detoxification drink under the doctrine of similar physical evidence, and by not giving a limiting instruction that the exhibit was entered into evidence for illustrative purposes only. The appellant had these types of drinks in her possession prior to the urinalysis in question, but none were recovered from the appellant directly. Government investigators purchased a similar drink on the economy. The only difference between this drink and the drinks that the appellant previously possessed was that the appellant's drinks did not have a label. The trial counsel introduced the green drink as a demonstrative exhibit and also introduced expert testimony that these detoxification drinks, combined with drinking large volumes of water, can cause the metabolite concentrations to decrease, resulting in a negative urinalysis test.

C. Use of Expert Testimony.

1. Expert testimony required at court-martial. Expert testimony is required to prove wrongful use of drugs; results of test alone (paper case) are inadequate. *United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001); *United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999), *supplemented on reconsideration*, 52 M.J. 386 (C.A.A.F. 2000); *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987).
  - a. Expert testimony must establish not only that the drug or metabolite was in the accused's body but that the drug or metabolite is not naturally produced by the body or any other substance but the drug in question. *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986). In addition, for the permission inference of wrongfulness, the government may have to satisfy the three prongs of *United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999), *supplemented on reconsideration*, 52 M.J. 386 (C.A.A.F. 2000) (at least in cases where novel testing procedures or methods were used).
  - b. Judicial notice is generally an inadequate substitute for expert testimony. *United States v. Hunt*, 33 M.J. 345 (C.M.A. 1991). *But cf. United States v. Green*, 55 M.J. 76, 81 (C.A.A.F. 2001); *United States v. Phillips*, 53 M.J. 758, 763 (A.F. Ct. Crim. App. 2000) (Chief Judge Young, concurring, argues that military judges should be able to take judicial notice of certain adjudicative facts in urinalysis cases).
  - c. Stipulations may be an adequate substitute for expert testimony.

- (1) *United States v. Ballew*, 38 M.J. 560 (A.F.C.M.R. 1993). A stipulation of expected testimony that expert would testify that accused ingested cocaine was not a confessional stipulation. No providency inquiry was required before the stipulation could be received.
  - (2) *United States v. Hill*, 39 M.J. 712 (N.M.C.M.R. 1993). Evidence was insufficient to support conviction of use of marijuana where stipulations of fact, documentary evidence, and testimony failed to link positive urine sample to accused.
- d. Expert evidence other than that used to meet the three-prong standard needs to meet evidentiary requirements of reliability and relevance. *United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999), *supplemented on reconsideration*, 52 M.J. 386 (C.A.A.F. 2000), *citing Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993); *Kumho Tire C., Ltd. v. Carmichael*, 526 U.S. 137, 153–55 (1999). Although the three-prong standard announced in *Campbell* was watered-down in *United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001), it may still be required in cases where novel testing methods or procedures were used.
2. Experts at counsel table. *United States v. Gordon*, 27 M.J. 331 (C.M.A. 1989). Government urinalysis expert may remain in courtroom to assist in explaining testimony while another government expert testifies about lab testing procedures.
  3. “Non-expert” expert. *United States v. Smith*, 34 M.J. 200 (C.M.A. 1992). Allowing undercover agent to testify that he had never tested positive for drugs although he was often exposed to them was permissible to rebut accused’s defense of passive inhalation.
  4. Use and Choice of Experts. *United States v. Short*, 50 M.J. 370 (C.A.A.F. 1999). Defense counsel asked for an expert who was not employed by the DOD drug lab to assess chain of custody and procedures and to assist with scientific evidence. The defense also raised a passive inhalation defense. Military judge denied defense request to provide assistance. Defense failed to show that the case was not “the usual case.” Accused is not entitled to independent, non-government expert unless there is a showing that the accused’s case is not “the usual case.” Available government expert from lab was sufficient to provide expert testimony on passive inhalation/innocent ingestion.
- D. Sixth Amendment Confrontation Clause issue. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that a “testimonial” statement can only be admitted against an accused if the declarant is present at trial or there has been a prior opportunity for cross-examination. For further treatment of this issue, see CRIMINAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, CRIMINAL LAW DESKBOOK, VOL. III, TAB T, SIXTH AMENDMENT - CONFRONTATION CLAUSE (2012).
- E. Negative Urinalysis Results. A urine sample containing drug metabolites in concentrations below the regulatory cut-off level for positive results will be declared negative, even though the sample may indicate drug use.

1. Negative test results are usually inadmissible. *United States v. Johnston*, 41 M.J. 13 (C.M.A. 1994). Judge did not abuse discretion by excluding defense evidence of urinalysis test which was negative for the presence of marijuana three days after last charged use of marijuana. Admission of results of a negative, defense conducted, radioimmunoassay (RIA) test would have been too confusing. The proper testing methodology was GC/MS, and the RIA test showed the presence of marijuana (but below the cut-off level). The C.M.A. stated that the Mil. R. Evid. should be used to determine if negative test results are admissible and overruled *United States v. Arguello*, 29 M.J. 198 (C.M.A. 1989) (which prevented the government from using negative test results because such use was contrary to regulation).
  2. Use of negative test results is permitted in the Coast Guard. *United States v. Ryder*, 39 M.J. 454 (C.M.A. 1994), *rev'd on other grounds*, 515 U.S. 177 (1995). Government's introduction of "negative" test results, which showed presence of marijuana, but at amount below cut-off, was not plain error. Results were used to corroborate testimony of witnesses who saw accused smoke marijuana and Coast Guard Regulation did not prohibit use of such test results.
- F. Using Positive Test Results as Rebuttal Evidence.
1. *United States v. Graham*, 50 M.J. 56 (C.A.A.F. 1999). Accused testified that he was "flabbergasted" at having tested positive. Military Judge erred in allowing single rebuttal question by trial counsel about a prior positive marijuana result four years earlier, of which accused was acquitted in court-martial. The CAAF held that the prior positive marijuana result was not logically relevant: statistical probability is unknown as to whether accused might test positive twice within four years and there is no necessary logical connection between testing positive twice and being flabbergasted. *Accord United States v. Roberts*, 52 M.J. 333 (C.A.A.F. 2000). *But see United States v. Tyndale*, 56 M.J. 209 (C.A.A.F. 2001).
  2. *United States v. Matthews*, 53 M.J. 465 (C.A.A.F. 2000). Accused tested positive for marijuana and was later given a command-directed urinalysis. At trial, the accused raised a good military character defense. The CAAF set aside the findings and sentence. The appellant was found guilty of a single specification of wrongful use of marijuana (between 1 and 29 April 1996). She testified that she did not use marijuana and that she did not know why she tested positive. The government then asked to use a subsequent command-directed urinalysis (conducted on 21 May 1996) for impeachment. The trial judge admitted the evidence for impeachment and ruled it was also admissible under Mil. R. Evid. 404(b) to show her prior use was knowing and conscious. The lower court found that her testimony raised the issue of innocent ingestion, but that it did not directly contradict that she knowingly used marijuana during the charged period. However, the lower court did find that the second urinalysis was relevant to the appellant's credibility and to rebut evidence of her good military character. The CAAF disagreed, finding that extrinsic evidence may not be used to rebut good military character.
- G. *See generally* Captain David E. Fitzkee, *Prosecuting a Urinalysis Case: A Primer*, ARMY LAW., Sept. 1988, at 7, and Major R. Peter Masterton and Captain James R. Sturdivant, *Urinalysis Administrative Separation Boards in Reserve Components*, ARMY LAW., Apr. 1995, at 3.

## VII. DEFENDING URINALYSIS CASES.

- A. Defenses.

1. Passive inhalation. For this defense to be successful, a Soldier generally must have been exposed to concentrated drug smoke in a small area for a significant period of time. *See* Major Wayne E. Anderson, *Judicial Notice in Urinalysis Cases*, ARMY LAW., Sept. 1988, at 19.
2. Innocent ingestion.
  - a. *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987). Accused suggested wife planted marijuana in his food without his knowledge.
  - b. *United States v. Prince*, 24 M.J. 643 (A.F.C.M.R.1987). Accused's wife allegedly put cocaine in his drink without his knowledge to improve his sexual performance.
  - c. *United States v. Robertson*, 39 M.J. 211 (C.M.A. 1994). Accused's roommate testified that she put cocaine in beer which accused unwittingly drank. Government improperly cross-examined roommate on prior arrest for conspiracy and attempted burglary, but error was harmless.
3. Innocent inhalation.
  - a. *United States v. Perry*, 37 M.J. 363 (C.M.A. 1993). Accused's explanation that he unwittingly smoked a filtered cigarette laced with cocaine 28 hours before test was not credible, given expert's testimony that (1) accused would have to ingest an almost toxic dose of cocaine to achieve the 98,000 ng/ml test result his sample yielded, and (2) cocaine mixed with a cigarette would not work since cocaine will not vaporize or pass through a filter. Erroneous admission of evidence that accused acted as informant was harmless.
  - b. *United States v. Gilbert*, 40 M.J. 652 (N.M.C.M.R. 1994). Accused allegedly borrowed cigarettes from a civilian which, unknown to the accused, contained marijuana. At trial, the civilian refused to answer questions about what the cigarettes contained. Defense counsel was ineffective for not seeking to immunize the civilian.
4. Innocent absorption through contact with drugs on currency: unlikely to be a successful defense. *See* Mahmoud A. ElSohly, Ph.D., *Letter to the Editor: Urinalysis and Casual Handling of Marijuana and Cocaine*, 15 J. Analytical Toxicology 46 (1991).
5. Use of hemp related products. Hemp products come from the same plant as marijuana. *See* The Art of Trial Advocacy, *Tips in Hemp Product Cases*, ARMY LAW., Dec. 1998, at 30. Note: AR 600-85, para. 4-2p, prohibits the ingestion of products containing hemp and hemp oil.
6. Switched Samples ("chain of custody" broken).
  - a. *United States v. Gonzales*, 37 M.J. 456 (C.M.A. 1993). Where observer had no recollection of how the urine was transferred from one container to another, but testified that the urine was never out of her sight, military judge properly overruled chain of custody objection.
  - b. *United States v. Montijo*, No. 30385, 1994 WL 379793 (A.F.C.M.R. June 28, 1994) (unpublished). Government was not required to establish chain of custody for sample bottle from the time of its manufacture until its use.
7. Laboratory Error.

- a. *Unites States v. Manuel*, 43 M.J. 282 (C.A.A.F. 1995). Urinalysis test results were improperly admitted where laboratory failed to retain accused's positive urine sample after test was completed. Regulation requiring retention of sample conferred substantive right upon accused. Conviction set aside.
  - b. Problems at Fort Meade Laboratory. On 24 July 1995, the commander of the Fort Meade Forensic Toxicology Drug Testing Laboratory discovered that lab technicians had violated procedures by switching quality control samples. All positive test results were still scientifically supportable, since the GC/MS tests were not affected.
8. Good Military Character. *United States v. Vandelinder*, 20 M.J. 41, 47 (C.M.A. 1985). Good military character is pertinent to drug charges against an accused because it may generate reasonable doubt in the fact-finder's mind.
  9. Specific Instances of Non-Drug Use to Rebut Permissive Inference. In *United States v. Brewer*, 61 M.J. 425 (C.A.A.F. 2005), the defense requested four witnesses to testify that they knew MSgt Brewer and that they had never seen MSgt Brewer smoke marijuana as part of the defense "mosaic" innocent ingestion defense. The military judge denied the proffered witness testimony ruling that this was improper character evidence under Mil. R. Evid. 405, as specific instances of conduct of non-use. The CAAF held that the military judge erred in denying the requested witnesses because it was relevant. Findings and sentence set aside.
- B. Defense Requested Tests.
1. Tests for EME metabolite of cocaine.
    - a. The government is not required to perform the test for EME metabolite when requested by defense if the sample tested positive for BZE and the chain of custody is not contested. *United States v. Metcalf*, 34 M.J. 1056 (A.F.C.M.R. 1992); *United States v. Pabon*, No. 29878, 1994 WL 108866 (A.F.C.M.R. Mar. 25, 1994) (unpublished), *aff'd*, 42 M.J. 404 (C.A.A.F. 1995).
    - b. Positive test result for BZE (metabolite tested for within DOD) is sufficient to support conviction for wrongful use of cocaine; test for EME metabolite unnecessary. *United States v. Thompson*, 34 M.J. 287 (C.M.A. 1992).
    - c. If tests for BZE and EME metabolites conflict, results may be insufficient to support conviction for wrongful use of cocaine. *United States v. Mack*, 33 M.J. 251 (C.M.A. 1991). Test results inadequate where test for BZE was positive and test for EME was negative.
  2. Tests for contaminants. *United States v. Mosley*, 42 M.J. 300 (C.A.A.F. 1995). Military judge did not abuse his discretion by ordering retest of accused urine sample for BZE, EME, and raw cocaine. Such tests fall into a "middle ground" where military judges are not required to order such testing, but do not abuse their discretion if they do.
  3. Blood tests and DNA tests. *United States v. Robinson*, 39 M.J. 88 (C.M.A. 1994). Military judge did not abuse discretion in denying defense request for "secretor test" to show accused was not source of positive sample where defense was unable to show discrepancies in collection or testing of sample.

4. Polygraphs. *United States v. Scheffer*, 523 U.S. 303 (1998). *Per se* rule against admission of polygraph evidence (Mil. R. Evid. 707) in court martial proceedings did not violate the Fifth or Sixth Amendment rights of accused to present a defense to charge that he had knowingly used methamphetamine. *Per se* rule serves several legitimate interests, such as ensuring that only reliable evidence is introduced at trial. *See also United States v. Williams*, 39 M.J. 555 (A.C.M.R. 1994) (Mil. R. Evid. 707 is unconstitutional), *set aside*, 43 M.J. 348 (C.A.A.F. 1995) (accused waived issue of admissibility of polygraph because he did not testify). *But see United States v. Wheeler*, 66 M.J. 590 (N-M. Ct. Crim. App. 2008).
5. Hair.
  - a. *United States v. Bush*, 47 M.J. 305 (C.A.A.F. 1997). Accused was convicted of use of cocaine. The CAAF held that mass-spectrometry hair analysis evidence was sufficiently reliable to be admitted into evidence in court-martial to establish cocaine use, even though there was some disagreement between experts about the procedure. *See also United States v. Cravens*, 56 M.J. 370 (C.A.A.F. 2002).
  - b. *United States v. Nimmer*, 43 M.J. 252 (C.A.A.F. 1995). Military judge precluded defense from introducing negative hair test results, because the test would not have ruled out a one-time use of cocaine. Case remanded for re-litigation of this issue using the proper standard of *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
  - c. *See* Major Keven Jay Kercher, *Time for Another Haircut: A Re-look at the Use of Hair Sample Testing for Drug Use in the Military*, 188 MIL. L. REV. 38 (2006); Major Samuel J. Rob, *Drug Detection by Hair Analysis*, ARMY LAW., Jan. 1991, at 10. *See also United States v. Adens*, 56 M.J. 724 (A. Ct. Crim. App. 2002); *United States v. Cravens*, 56 M.J. 370 (C.A.A.F. 2002).

C. Experts.

1. Defense consultants. *United States v. Kelly*, 39 M.J. 235 (C.M.A. 1994). Defense counsel did not demonstrate necessity of presence of defense urinalysis consultant at trial where he had telephonic access to expert consultant and did not identify any irregularity in test.
2. Expert witnesses. *United States v. George*, 40 M.J. 540 (A.C.M.R. 1994). Military judge improperly precluded defense expert from testifying that the presence of cocaine on everyday objects may have led to contamination of the urine sample.
3. Choice of Experts. *United States v. Short*, 50 M.J. 370 (C.A.A.F. 1999). Accused not entitled to independent, non-government expert unless there is a showing that the accused's case is not "the usual case."

D. Use of Negative Urinalysis Results.

1. Negative test results are generally not admissible. *United States v. Johnston*, 41 M.J. 13 (C.M.A. 1994). The military judge did not abuse his discretion by excluding defense evidence of a urinalysis test which was negative for the presence of marijuana three days after the last charged use of marijuana. Admission of test results would have been too confusing.

2. The defense may use negative test results only if relevant to the charged use. *United States v. Baker*, No. 28887, 1993 WL 502185 (A.F.C.M.R. Nov. 30, 1993) (unpublished). The military judge properly excluded evidence that the accused gave a urine sample which tested negative for use of illegal drugs where the sample was given over a month outside the charged period. The defense failed to show the relevance of the negative test.
- E. After *United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999), *supplemented on reconsideration*, 52 M.J. 386 (C.A.A.F. 2000), the best defense may be a good offense. Raising the bar for the government has opened the door for defense to be successful in attacking the government's case primarily on the second prong of *Campbell*. *But see United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001) (stating that the three-prong standard in *Campbell* is not mandatory).
- F. *See generally* Captain Joseph J. Impallaria, *An Outline Approach to Defending Urinalysis Cases*, ARMY LAW., May 1988, at 27, and Major R. Peter Masterton and Captain James R. Sturdivant, *Urinalysis Administrative Separation Boards in Reserve Components*, ARMY LAW., Apr. 1995, at 3.

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## ARTICLE 120 TRIALS – OUTLINE

This document attempts to highlight issues that must be considered in the trial and defense of Article 120 adult sexual assault cases. Much of the information here applies to *all* complex trials, and readers are directed to specific areas of trial practice in the Combined Deskbook, Volume III. As with all trial practice pointers, the recommendations here are not rules, but guidelines. Every trial is unique, and flexibility is important in successful litigation.

### I. THE VICTIM – the most important witness, but *never* the *only* witness

The victim is a primary source of information about any crime. In non-stranger sexual assaults, it is common that only two people were present for the sexual activity. The victim is a walking crime scene and eyewitness. Eliciting every possible detail from the victim, and forming a government case to communicate the events and make them believable requires sensitivity, careful interviewing and planning.

**A. Interviewing** – Listen. Develop Rapport. Never condescend. Elicit factual, emotional, and sensory detail. NEVER interview alone: have a “prover” with you;

--TC must interview: rarely first interview;

- establish rapport: trust is crucial, must be personal connection;
- say you are “sorry this happened to you”
- never lie to victim : gain & maintain trust; explain Military Justice system & victim role in it, early & often
- never make promise you cannot surely keep (e.g.: “conviction likely”; “you won’t have to testify”)
- never condescend : treat every victim as an equal
- explain actions taken & about to be taken; explain key decisions

--TC get to victim before DC;

- full interview usually not needed; create relationship, explain system; get only details missing from CID reports/interviews;
- never let DC be first to explain system to your victim

{DC: get to victim first (often possible!);

-full interview not needed, though possible; explain system from defense perspective first: huge advantage}

## -- In-depth interviewing

-Timing of the interview depends on quality of existing investigation; if thorough, sensitive interview by law enforcement or a forensic interviewer, defer until rapport established

- avoid multiple factual interviews; victim is re-traumatized each time she must tell another stranger about this intimate and frightening event.

- trauma victims remember new details over time; interview late in process can be helpful

-- *Begin* by believing the victim.

-follow with complete investigation

- quality investigation will reveal:

- corroborative details

- rare false report

- background of offender & victim

- most victim recantation caused by insensitive or doubting interviews or perception that system not invested in case

- never cross-examine victim, unless real evidence of truly false (rather than incomplete) allegation

- lies about collateral facts are common; ask: "what were you thinking (or feeling) when you said X?" is better than "why did you tell us a lie?"

- listen more than you talk; supply no information (e.g.: "I know that "X" happened. What happened next?"); assumptions misdirect victim, may lead to "compliant" response that is not accurate; suggestive

-law enforcement reports are an opinion of the writer, unless direct quotes; never assume inconsistency only from a report

-Study and apply accepted interviewing methods

-FETI: Army CID's Forensic Experiential Trauma Interview:

- designed around scientific principles on formation & recall of traumatic memories;

- elicits great detail w/out confrontation

- elicits lots of sensory & emotional evidence

- Cognitive Interview is effective at eliciting details beyond a “who, what, when, where, and how.” Uses “context reinstatement” among other techniques

- goal of victim interview: learn everything the victim is “able to remember” (a phrase which reduces pressure of recall, reducing guessing) about events before, during, and after the sexual act.

  - feelings

  - thoughts

  - sensory impressions (smell, touch, taste, sounds)

  - emotions of victim before, during, after

- Expand time frame of the interview to include all interactions between the victim and the offender.

- learn victim’s history; background in life, military; humanize her at trial

- What sounds wrong? Explore statements that seems odd: victim will have explanation, or at least reason for activity or statement; “What you were thinking when . . .” is better than “Why did you do [say] that?”

- Understand the emotions, reactions, and motivations that caused the unexpected behavior.

- Unusual sounds, feelings, smells, sexual practices can improve credibility b/c not the “story” a liar would invent; [e.g.: tampon thrown on floor of otherwise immaculate house was not removed voluntarily]

Collateral Misconduct: e.g.: underage drinking, drug use,

- no promises : commander’s decision; explain parameters of CM;

- assure victim TC only interested in the sexual crime against her; encourage truthful disclosure of “wrong” or embarrassing facts

- Deferral? : DoD suggests commanders defer CM until after SA trial.

-avoids victim punishment, then offender non-punishment, BUT

-bad trial strategy: automatic impeachment (“she only claimed assault to avoid punishment for drinking”); discuss w/ victim resolving CM pre-trial (punishments usually minimal), eliminating self-interest claim; *never* punish CM for any sex-related “crime” (forced sex is *not* adultery or fraternization!)

{**Defense Counsel:** Interview the victim. Always.

-- “equal access” to witnesses (RCM 703)

--victim may refuse interview, or set limits/conditions; *U. S. v. Irwin*, 30 M.J. 87 (C.M.A. 1990);

-- judge *might* compel an interview. *U.S. v. Doyle*, 17 C.M.R. 615 (AFCMR 1954).

-- usually friendly, fact-gathering opportunity. Learn victim’s intelligence, confidence, and how she will appear to a panel

--confrontational interview only rarely

-reveals cross-examination questions.

-alienates/terminates interview

--plan interview to elicit facts supporting defense theory

--Gain concessions for cross-examination

--ask questions too dangerous to ask at trial: often get good answers

-ask for victim’s feelings about the accused: neutral or favorable answer (often they were once friends) assists plea negotiations, sentencing.

--if the victim refuses to talk to the defense:

-can move for judicial order under equal access

-may be good cross-examination by itself}

**B. Victimology:** a sexual assault is a highly traumatic experience. It can be useful to think of it as an assault that has a sexual element. Military panels are familiar with the results of trauma. Use that knowledge to your advantage in fighting the assumptions the panel may bring to a case.

1. Reactions to Trauma: There are as many reactions to a traumatic event as there are victims (or observers) of that event. In the military, we have experience with varied reactions to battle trauma, ranging from stoic acceptance to emotional breakdown. Yet society has created rigid behavioral expectations for a sexual trauma victim, often called “rape myths,” and military panels seem to share them. Victim behavior which differs from these expectations often affects how jurors assess victim credibility. Overcoming these normative expectations is a key trial skill for Trial Counsel. Both lay witnesses and experts can help with this task. Many explanations for counter-expectational behavior also make logical sense once they are explained. The explanation process begins with voir dire and continues through evidence and closing argument.

a. Victims Rarely Fight Back (or Scream):

-“Frozen fear” : common in trauma situations; manifested by passivity and silence

-includes: “fear” of the physical power of an attacker

- shock that a friend would assault (& *betray*) them,

-shock of sudden assault

-inability to focus on events

b. Victims rarely report assault immediately : Only 30% of military sexual assaults are reported to anyone.<sup>1</sup> A majority are reported from hours to days later. Reasons (sensible if elicited carefully):

-Confusion (about what happened and whether it was illegal),

-guilt (self-blame if victim was drinking, engaging in flirting or prior sexual relations with the offender, or voluntarily travelled to an isolated place where the assault took place), or –

- concern that others will doubt account (including knowledge that police or the chain of command did not take other reports seriously)

-“don’t be a snitch” mentality

-unit pressure

-repercussions of reporting on career,

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<sup>1</sup> 2010 DoD 2010 Workplace and Gender Relations Survey of Active Duty Members, p. 35.  
[http://www.sapr.mil/media/pdf/research/DMDC\\_2010\\_WGRA\\_Overview\\_Report\\_of\\_Sexual\\_Assault.pdf](http://www.sapr.mil/media/pdf/research/DMDC_2010_WGRA_Overview_Report_of_Sexual_Assault.pdf)

- concern about cost of complaint to offender;
- rationalizing that assault was not criminal;

--[trial: prompt report = credible; late report = normal; why is it logical? If historically little command action/support, is that logical? If others were treated badly by unit, is that logical? Use the developed emotional reactions of your victim to explain the late report. Have her testify to her reasons. Even strange reasons can support credibility. Some explanation is mandatory.]

c. Not all victims cry

- trauma victims often become stoic, internalize to cope
- strength under pressure is a military value
- common outward reaction of victims of both battle stress and sexual assault.
- time passes before trial; human beings cope.
- any emotion possible at trial: tears, “flat affect (wooden, non-reactive), looking “normal.”

2. Behavior outside of Normative Expectations (Rape Myths)

a. Myth: Only strangers rape : less prevalent now than in past, BUT

--corollary: non-stranger sexual assault is something *less than “rape”* & therefore not as important

-- civilian: 82% rapes of women, 85% rapes of men committed by non-strangers.<sup>2</sup>

--Military: 97% of violent sex crimes committed by acquaintances; [NOTE: only 21% by a family member or significant other (boyfriend, date).]<sup>3</sup>

b. Myth: Rapists always use weapons and cause physical injury :

- Few non-stranger sexual assaults leave visible injury.
- Weapon is a concept.

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<sup>2</sup> Centers for Disease Control, National Intimate Partner & Sexual Violence Survey, 2010. Further breakdown of female rapes: 51.1% Current or former intimate partner, 12.5% family member, 2.5% Person of Authority, 40.8% acquaintance (more than 100% due to multiple perpetrators in an incident.)

<sup>3</sup> Army Gold Book 2010, pp. 125-26. <http://www.ria.army.mil/docs/GoldBook.pdf>

- most common weapon in military sexual assaults = *alcohol*
- offenders use least force necessary, often only a threat;
- often only an obvious difference in size and strength.

-- normative belief (myth): lack of physical resistance = implicit consent; see "Victims Fight Back (or Scream), supra;

**[trial:** use statutory language: "Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent."<sup>4</sup>

c. Myth: Women often lie about being raped: this myth remains strong in the military; actual number of military false allegations untested, unknown; reliable civilian studies find *only* 2% to 10%.<sup>5</sup>

--frequent battleground issue: address in voir dire, by experts

d. Myth: Rape victims assume the risk of being raped ("asking for it") :

- drinking too much
- wearing revealing clothes,
- dancing like young people dance
- innocent flirting

-**[trial:** "A current or previous dating or social or sexual relationship by itself or the manner of dress of the person . . . shall not constitute consent."<sup>6</sup> Start here. Show that victim's behavior was the norm for her age & cohort; "nobody buys a 'rape dress' and nobody 'asks to be raped.'"]

--**[trial:** address myths directly, in voir dire and in argument. Emphasize judicial instructions ("only facts of this case are relevant," "you will be violating your oath if you *assume* someone wanted forcible sex b/c of how they dress or dance")

### 3. Recantation/non-cooperation:

--criminal justice process:

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<sup>4</sup> Art. 120 – definition of consent

<sup>5</sup> Lisak, David, et. al., False Allegations of Sexual Assault: an Analysis of Ten Years of Reported Cases, 26(12) Violence Against Women 1318 (2010).

<sup>6</sup> Art. 120 – definition of consent

- adds to victim trauma
- demands time and energy
- is slow.
- delays recovery focusing the victim on the event through interviews, Article 32 hearings, motion hearings, and trial preparation.

--expressions of doubt by investigators, trial counsel, the command or fellow soldiers may cause victim to “give up” the process, recant, or stop communicating.

--family, friends, others in military unit may add pressure

-financial concerns (in familial rape) may also result in recantation.

-primary reason victims recant is fear

4. Inconsistent statements – the *norm* in cases of trauma; seen by juries as indicator of falsity

-- truth-tellers more likely to be inconsistent than liars; liars consciously try to repeat same story; truth-tellers reconstruct the event for each statement, rarely in identical language;

-- trauma victims rarely remember events chronologically

-- “normalize” -- try to make sense of the attack, explaining away the pain or severity of the incident;

-- cognitive avoidance: damping down the worst part of the trauma

-- self-blame, or alternative explanations that make the betrayal less traumatic

--accounts shift as victim becomes more objective

5. **Military victim profile** : 95% female; 60% less than 1.5 years service; 68% age 18-22. Alcohol used by victim or offender in at least 63% of cases. Sixty percent of crimes committed on Friday, Saturday, Sunday.<sup>7</sup>

--Vulnerability – This military victim profile mirrors civilian college profile;

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<sup>7</sup> Army Gold Book, supra, note 3, pp. 124-25.

--Military victims often have limited support:

-“free” from parental control or guidance;

-limited time for close friendships in new place

- new and “alien” culture designed, in part, to reduce independence.

-lots of free time

-readily available alcohol

--offenders select vulnerable victims; *remind* panel of this logical fact

- consider post-crime vulnerabilities of trauma victims

-self-medication with alcohol or drugs

-further isolated by shock, fear, shame, and self-blame

-Victims cope with trauma in unexpected ways

**C. SHARP Program** – the Sexual Harassment and Assault Response Program provides extensive support services to victims, including expedited medical treatment, expedited transfer on request, referral to psychological treatment, legal representation on request, and continuing Victim Advocate support. See Volume I, Tab-E.

**D. Victim Witness Liaison Officer** – Every SJA office has a Victim Witness Liaison Officer whose job is to guide victims and witnesses through the trial process. The VWLO is designed as Trial Counsel support, unavailable to Defense Counsel. See Victim Witness Assistance Program, Volume I – Tab D.

**E. Sexual Assault Response Teams** – Use of multi-disciplinary teams to investigate and prosecute sexual crimes has proven value. The military rarely creates, joins, or uses MDTs (called SARTs in the adult context).

--proven aid to investigation, prosecution and victim care

-- rarely formed or joined in military

-- minimum membership: prosecutor, SANE, DSS, medical, CID/police, VA

-- cross-training of needs/services available –

-- trust among colleagues allows assessment of what each can offer prosecution and what additional information may be available or needed

-- requires active TC involvement; many civilian jurisdictions have established SART;

-- Sexual Assault Review Board required at installations: same composition, but historical review function; can easily be adjusted to preview cases;

## II. The Investigation – of an assaultive crime

A. **First Responders** : train to: believe victim; gather only basic crime data, deferring to single forensic interview; know medical systems; support victim; seek SARC & VA & TC immediately

B. **Continuing investigation** : unified approach best (see SART, above); single interview by trained interviewer; input fr/ TC, CID, VA, SANE; interview everyone who knows victim, offender, or incident

C. The **crime scene** :

--document everything

-photos of all rooms, state of furniture, clothes; include all places of contact betw/ victim & offender, not only scene of sex

- diagram of all relevant areas

- return to scenes with victim, if willing, post-interview (or as part of Cognitive Interview)

D. **Physical evidence**

1. SAFE – encourage Sexual Assault Forensic Exam; don't insist; use 96 hours window for evidence; military hospitals give SAFE priority<sup>8</sup>

2. Clothing – seize, even if washed; remember bedding; no time limits

3. Photos – document everything & everywhere; external building photos (more pieces of evidence look like a better case), neutral locations where victim & offender met, spent time; work locations of v & o

4. Cellphone, facebook, computer photos of the crime

4. Demonstrative evidence – *create* diagrams of all scenes; lists of items seized or tested

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<sup>8</sup> cite

5. Offender – offender sex crime kit; clothing (Search Warrant?); document offender’s room, even if no contact there (more information is always better)

6. Electronic evidence – cell phone, computer, ipad; video cameras (barracks or commercial); cell tower info on locations (within 30 days)

7. Social networking: photos, comments on Facebook, etc.; Tweets? Text messages?

**E. Scientific Evidence** : get the DNA! (USACIL has new staff dedicated to Sexual Assault)

– insist on DNA where likely, even with admission (you usually don’t want to place the offender’s statement in evidence) : consult or learn where it may be found; even late reports or washed clothing can yield DNA;

-- hairs, fibers

-- transfer of evidence goes both ways! – look for victim’s DNA, hair, fibers on the offender; search warrant or consent needed for Offender sex crimes kit;

**F. Behavioral Evidence** : how did victim & offender act after the event?

-- normal behavior? Delay, inconsistent or incomplete statements, fear, depression, trying to normalize life (cheerful, contact w/ offender, dating); denial, rationalization

-- changes in activity, eating, work performance

-- offender change in relationship to victim (if any before crime)

-- “strange” behavior likely to support report of crime (why would she suddenly act like that?) –sleep problems; hypervigilance; outbursts of anger; unusual irritability; exaggerated startle response; inability to recall details of the event.

NOTE: all of these are listed as possible symptoms of PTSD in DSM IV-R.

**G. Offender background:** focus on offender behavior with this victim, with other women (e.g.: regular harassment, in all forms, indicates an attitude toward women, relevant to claim of consent or mistake (“You think all women are objects not worthy of respect, and that colored your actions”));

-get all discipline from all prior assignments; any harassment or SA complaints, pursued or otherwise; find & interview those complainants

- ask unit mates, co-workers, friends how offender talks about women, about this victim, about sex (locker room talk);
- how did offender arrange to meet victim
- was there really a “relationship”?
- cellphone, facebook, twitter, chat room postings about women, or this victim

### III. Witnesses – someone knows what happened. Investigation is the key for DC & TC.

- key witness: first disclosure: all aspects of victim emotion, behavior, detail, reasons for delay; why choose this person (logical disclosure instead of police?)
- anyone who saw any part of the incident itself; interview all of them, even those favoring victim, or accused
- evidence limited only by your interviews; someone in unit knows the dirt, and probably the facts
- ask the victim; ask her friends who would know about the offender
- ask the offender who would know about the victim
- always ask at prior assignments. Misconduct? Sexual Harassment?
- civilian record check on arrests even if no convictions;
- former significant others are a great source; sex offenders frequently have personal violence history

### IV. Experts

A. **Medical:** most effective if a SART protocol is in place & followed: reduce victim trauma, keep actors within purpose of their roles; exchange information on how to conduct medical exam & interview, how to collect evidence; cross-train actors;

- SANE : nurse first, with *training* in evidence collection; *primary purpose* is treatment of the patient, not agent of police; hospital protocols *require* sex crime kit procedure upon request; see, TCAP sample SANE direct<sup>9</sup>

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<sup>9</sup> Find the TCAP direct here:

<https://www.jagcnet2.army.mil/8525751500569745/0/FFA5EBE7D55BD8BE852575A900500B97?opendocument&noly=1>

-- Medical hearsay: holistic treatment of patient's physical *and* psychological injuries is the norm; future treatment plan requires identity of threat; *how* med people testify makes difference for admission. Read U.S. v. Gardinier, 65 M.J. 60, 65-66 (CAAF, 2007) for how *not* to examine SANE; see TCAP direct exam of SANE:  
<https://www.jagcnet2.army.mil/8525751500569745/0/FFA5EBE7D55BD8BE852575A900500B97?opendocument&noly=1>

-- social work : treatment of mental health requires information on nature of assault and identity of offender

## **B. Trauma victim behavior –**

--“Rape Trauma Syndrome” – not in DSM IV-R, but recognized widely; *U.S. v. Houser*, 36 M.J. 392 (CMA 1993) : extensive explanation of “stages” of “rape trauma model”; expert need not meet or treat victim;

-- counter-normative behavior : (“counter-intuitive” behavior); congruence with issues in rape trauma syndrome, but without the label; many different professions can testify from experience w/ victims; need not meet or treat victim;

-- PTSD : many victims meet diagnosis; BUT many do not: DSM IV-R is very specific; must use a psychologist or psychiatrist; if victim meets criteria, may resonate w/ panels re: battle-stress PTSD; see ATTACHMENT A for PTSD criteria, a useful listing of victim reactions to trauma;

-- explain delay – this is more common than not; self-blame, concern others will not believe, or will not act, or will protect the assailant; concern about repercussions with mutual friends of victim & offender (including in the military unit); not wanting to ruin “friend’s” life; shame in society; being labeled as promiscuous;

-- explain inconsistency, explain newly remembered details

-- EXPERTS:

--ER social worker – victim behavior (disjointed, incomplete account of things, remembering omitted details, reluctance to discuss, flat affect, all counter-normative behavior is typical of victim of trauma); cannot testify victim *is* trauma victim, but argue that consistency leads to no other conclusion; avoids attack on “special interest in sex crimes” for sexual assault counselors, SANEs, etc.; panel members know trauma, even if they do not think of sexual assault in same category; better if opinion NOT based on particular victim;

-- Psychologists/psychiatrists : see *U.S. v. Houser*, supra; may also testify re: PTSD; can be non-treating expert re: rape trauma; PTSD diagnosis needs treatment of this victim;

-- police officer with experience in sexual assault

-- rape crisis counselor with hundreds of experiences

-- rape crisis workers, counselors, administrators; be sure they know both experience & theory, or teach them; subject to bias claim, but have lots of experience, may have academic knowledge;

-- SANE: treatment, medical hearsay witness; can be expert on victim behavior; may confuse roles; if treated victim, cross-exam re: actions of this victim can be bad for government, good for DC; suggest using neutral, non-treating behaviors expert;

**C. Toxicology** – alcohol-related cases: what can they tell you? What can't they tell you? Limited by incomplete info re: amount, concentration of alcohol consumed. May open door to victims drinking experience, amount consumed, prior behavior when intoxicated? Who do you want to cross-examine the alcohol expert?

{**DC**: ask past behavior questions here or elsewhere; get toxicology to talk about blackout (memory loss fr/ alcohol, but ability to talk, consent) vs. passout (unconscious); past history of drinking or drug use may be relevant to *affect* of alcohol on victim on later crime date}

#### **D. Scientific evidence**

1. Melendez-Diaz: confrontation right requires government to call witnesses who tested materials, if results are to be used in evidence; *experts* may testify to meaning of machine-generated results. Complicated area, see Evidence Outline, Deskbook vol. III-tab xx, p. xx).

2. DNA: TC: if you have it, get it tested, use it. Juries expect it, like it; “why not?” defense if untested; argue “what did you expect him to say, with DNA proving sex?” Can avoid using offender statement to prove sexual act element (you want offender on the stand).

{**DC**: sometimes good for you. Never stipulate to it. Can be useful cross-exam witness: talk to examiner}

-- where was it?

- other way to be there? Transfer during innocent visit?
- any past sex w/ accused, that could explain it?
- cannot tell age of DNA
- tiny sample (5 cells) gives result
- can not tell what biological source (body fluid or skin cells) yielded DNA<sup>10</sup>}

E. **“Military”**: {DC: never forget good soldier, if your client can manage it;}

V. **Offenders** --- 14% of new recruits have already committed sexual assault without being caught<sup>11</sup>

A. **Motivation** – involves a “fulfillment of the offender’s needs” – identify them.

--Deviant arousal: sexualizing typically non-sexual events, emotions or contexts ; interest in rape, not sexual relations

--Character trait motivation :

-narcissism

-lack of empathy, remorse, guilt (anti-social personality)

-beliefs of offender devalue rights of others (e.g.: devaluation of value of women in general, or in military)

--entitlement : above the rules of society

B. **Evidence of planning**

--there are no coincidences

-document & prove every step he took since first interaction with victim, however long ago

-how does activity with victim differ from activity w/ other friends

--What *choices* did offender make? How do they indicate lack of mistake?

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<sup>10</sup> TCAP sample DNA & Forensic Biology predicate questions:  
<https://www.jagcnet2.army.mil/8525751500569745/0/D1394EC4B11BF10C852576BF006554EE?opendocument&noly=1>

<sup>11</sup> Lisak, etc XXXXX

--offenders pick vulnerable victims (lonely, young, drunk, isolated) : how did offender know that victim was vulnerable?

C. **Force** – how is it manifested? How was it applied?

--superior rank or authority

--physical size

--threat

--incapacitation; alcohol, drugs

D. How did offender **manipulate** the audience (i.e.: fellow soldiers, chain of command, law enforcement, jury panel). “Nice is a behavior choice, not a character trait.” Offenders know that being “nice” makes it hard for people to believe he is a rapist.

--“nice” is not a character trait: therefore it cannot be subject of character testimony – but often is; argue for expert on offender behavior to rebut claim that MRE 404 allows character testimony about :

--popularity with women (“I wouldn’t need to rape”) – see Motivation, supra

--general kindness, willingness to help people – is this “societal grooming” to prepare for the day he is caught?

--show each “nice” act advanced the crime: nice to victim, nice to others in the bar, nice to bartenders (creating witnesses), even to police investigating

--argue that “nice” hides true character, which is manipulative, predatory, improperly motivated criminal

E. **Pretext phone call** (or e-mail or text) from victim to offender; be sensitive to emotional cost to victim; offender may acknowledge victim’s incapacity, may apologize; plan carefully: what will call accomplish?

F. **Offender** as witness: *presume* he will testify; *prepare* cross-examination

--always interview; often admits sex, blames victim; lies may contradict provable facts; see pretext phone call, above

--obtain concessions

-wanted to have sex with victim;

-prepared to have sex

-intended to get her alone

-did she say "no"? how often?; what changed?

-did she say "yes"?; directly, or inferentially?

-from what did you infer "yes," rape myths?

-level of intox. (vomit?, needed assistance walking, removing clothes?),

--was she unconscious?

-who made first contact? Details; when did plan to have sex begin

-limits of prior interaction w/ victim; really a "date"? or just a pick-up; how well did they know each other

## G. Defenses:

-Consent:

-[see questions above, obtain concessions]

-how did he know she "wanted him"?

-did he use force?

-“Rough sex” defense common & ridiculous (“sex is for pleasure or procreation. Getting strangled sounds like a lot of fun, huh?”)

-Mistake Of Fact as to Consent:

-by statute prior to 28 June 2012;

- in 2012 Art. 120, do not presume it applies; see Jagcnet./Criminal Law Dept./Sexual Assault Materials/Article 120 Analysis of Mistake of Fact; <https://www.jagcnet2.army.mil/852577C10047F4D7>

-requires *both* subjective and objective mistake; *U.S. v. Willis*, 41 M.J. 435, 437-38 (CAAF 1995)

-does he endorse rape myths; can counter them on cross (“so everyone who wears a short dress wants to have sex with you?”)

-Blackout/passout : in “substantial incapacity” alcohol cases, a defense that victim appeared able to consent, and did consent, but was unable to remember due to alcohol consumption (blackout), rather than unconscious (passout). Common defense is that victim initiated or consented, but does not remember.

-fragmentary blackout : events are encoded, but alcohol inhibits recall later : can be “fixed” with appropriate cues

-*en bloc* blackout : memories never encoded; can never be recalled

--response to defense: expert testimony is *irrelevant* unless someone can present evidence that victim *was* blacked out; absent detailed information on amount of alcohol, concentration, timing, eating, past experience of victim with alcohol, no expert can diagnose victim; lay people (e.g.: accused) cannot diagnose blackout;

-judges (& TC) routinely allow these experts w/out challenge; (one judge took judicial notice of blackout!); TC: file a motion to exclude; see discussion in Prosecuting Alcohol Facilitated Sexual Assault, infra.

VI. **Trial techniques: read Prosecuting Alcohol-Facilitated Sexual Assault, [http://www.ndaa.org/pdf/pub\\_prosecuting\\_alcohol\\_facilitated\\_sexual\\_assault.pdf](http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf)** ; it contains a thorough exploration, with examples of approaches and examinations in these common cases

**Offender-focused prosecution:**

-do not let focus turn to the victim; use voir dire: victim not on trial, no one deserves to be raped, cannot presume sex from dress, drinking, dancing

-liabilities of victim are opportunities for offender; focus on what offender did, how offender exploited vulnerabilities of victim;

-did offender cause or contribute to delayed report by direct or veiled threats of harm or affecting military status?;

-communicate to jury who offender appeared to be, then who he actually was

**Personalize the victim:**

-explanations more accepted when vulnerabilities understood;

-“Likeability” of victim irrelevant legally, but important to jury; practice w/ victim to enhance likeability; personal history helps; military demeanor crucial;

A. **Triple direct** (victim): elicit the key facts three times, none cumulative

-- just the facts

-- the facts as explaining real evidence (clothing, diagram)

-- the personal, emotional, reactions & feeling connected to the crime

B. **Corroboration**

– Start with the victim/witness statements/testimony about the event.

- Prove everything, however small, that you can to show that fact was correct. The more of the witness’ account is shown to be accurate, the more the rest of the account is believable.

-Examples: lighting – if the victim says there was a streetlight, prove that it was working through government records. If the victim says she walked with the offender by a certain route, find those who saw them on the route. If she says that the offender’s car had a tree-shaped air freshener, prove that.

-Argue: corroborative facts show that the rest of her testimony is true.

C. **What sounds strange?** What looks strange? The “un-normal” things in a case are often the most persuasive. If the victim’s statement contains something that sounds odd, that fact can be the most persuasive. – Is there a sensory impression that has no connection with reality? “How could anyone make that up?” is the question to ask the jury. Accounts which sound like rape myths are questionable.

D. **Why do you believe the victim?** Craft your case to support those reasons, communicate them to jury; *act* like you believe: never look doubtful of victim statements; when explaining counter-normative behavior, present as normal, not an exception; do not use “he said-she said” – it suggests both stories are equal.

E. **Why do you doubt the victim?** Someone on jury will share concerns; craft case, including experts, to explain “problems” in logical, common-sense way; argue behavior of “trauma victims” rather than “sexual assault victims.” Normalize the counter-normative facts.

F. **Protect the victim:**

-object as necessary; do not give up objecting to objectionable questions;  
plan (sometimes brief) reasons why objection is valid

-MRE 412 [See Combined Deskbook, Volume II, Tab R -section VII.]

-- TC: always file for protection of victim – MRE412 (even though DC's burden)

-- {DC : notice required for 412; use “constitutional right of the accused” for admissibility; *U.S. v. Gaddis*, 70 M.J. 248, 256 (2012).

--412 evidence may support Mistake of Fact defense, *if* the accused knew of the “other sexual behavior”}

### G. Attack the accused:

-planning

-awareness of/ exploitation of victim vulnerabilities

-lack of remorse

-failure to support victim after event

-change in attitude toward victim (before complaint)

{-DC: “wouldn't you stop talking to (be mad at) her when she falsely accused you?”}

-seek out “similar crimes” for adult (MRE 413), child (MRE 414) cases;

-- if admitted, proof of any crime charged;

-- presumptive admissibility

--discover other misconduct, esp. sexual assault or harassment

### H. Victim Advocate privilege: (new 2012) MRE 514 : [See Combined Deskbook, Volume II, Tab R, section IX.]

-- privilege lost if VA tells TC (or anyone else not a VA)

-- *may* apply to VWLO; but VWLO is agent of TC; avoid disclosure that destroys the privilege

### I. Charging decisions : [See Appendix A to this Tab – Analysis of 2012 Art. 120]

-- avoid decisions filtered through rape myths, recantation, inconsistency

- actively consider prosecutorial discretion; charge the crime, not the personality of victim or offender
- what crime? Know “sexual act” and “sexual contact”
  - Rape: hardest elements to prove; panel “knows” what rape means, but usually wrong; necessarily invokes rape myths
  - Sexual Assault : less colloquial; easier elements to prove; max. punishment still high;
  - Agg. Sexual Contact – like “rape” harder to meet elements
  - Abusive Sexual Contact – lower max. punishment, but lesser culpability; easier elements to prove;
- Substantial incapacity : always hard to prove;
  - if victim can describe sexual act (contact), charge SA bodily harm;
  - 2012: “knew or should have known”; rarely charge “knew;”
  - “Should have known” = objective standard, eliminates “mistake” defense; “Knew” is subjective;

## **J. Language**

- “victim” : Art. 120 uses “person”
  - DC should object to “victim” as conclusory of guilt; argue “willing participant”
- “accused” is standard term; TC can try “offender,” but also conclusory
- “he said, she said”
  - TC : NEVER; your case contains so much more than just ‘she said’, and you cannot know that “he” will say anything; emphasize all the corroboration you found in the investigation;
- “date rape” sounds like some less important crime; panels see it that way; dispel this idea in voir dire, opening, evidence, closing; it’s an assault, not a date; “I’m going on a date with a man who’s going to rape me!”

## **K. Voir Dire**

- dispel rape myths : address each one, refer to MJ instructions

– You must get in the face of the panel members and tell them that they have normative beliefs that need to be jettisoned. If you don't they *will* rely on them.

--e.g.: “Everyone comes to a jury panel with ideas about what “rape” means, or how a rape victim should act, or what a rapist looks like. Do you agree that a rapist can look like anyone? Do you agree that being a good fighting soldier is not necessarily a predictor of personal behavior? Sometimes, people will rely on their own societal beliefs when deciding a case, rather than relying on the evidence, especially if the evidence is complicated. Can you promise that you will be totally objective and look only at proven facts, without making assumptions about behavior if they are unsupported by proven facts? Do you recognize that if you substitute your own ideas about rape or rape victims for the instructions the judge gives to you, that would be violation of your oath in this case?”

-e.g.: “some people think that if the victim does not immediately report a sexual assault, that she was not assaulted? If you learned that most victims do not report right away, would you be willing to consider that information objectively?”

e.g.: “Would you be less likely to convict someone of \_\_\_\_\_ if the victim and the accused knew each other (had dated each other, etc.)? Do you think that only strangers commit \_\_\_\_\_? If the Military Judge instructed you that a prior dating relationship was not a sign of consent to a later encounter, would you follow that instruction?”

--rape is NOT sex gone wrong; it is an act of power & control;

--unsympathetic victim:

-nobody deserves to be raped;

-e.g.: “can you be objective even if you don't like the victim or if you don't approve of her lifestyle?”

See, Educating Juries in Sexual Assault Cases,

<http://www.aequitasresource.org/EducatingJuriesInSexualAssaultCasesPart1.pdf>

VII. **Sentencing** – too often ignored; [See Combined Deskbook, Volume III, Tab Q]

-- prepare from early in the case

-- **TC**: know RCM 1001

-RCM 1001(b)(4): impact on victim!;

- testimony by victim, close friends,

- psychologists/social workers/ academics, re: long term impact of sexual crimes *United States v. Hollingsworth*, 44 M.J. 688 (C.G. Ct. Crim. App. 1996) (child victim)

-- aggravation : other similar acts; sexual harassment, other crimes (esp. if while a soldier); *but see United States v. Lowe*, 56 M.J. 914 (N-M. Ct. Crim. App. 2002)(limiting past harassment of other victims)..

-- **DC :**

-- mitigation : take cue from death cases – anything can mitigate; mom, dad;; church, civic deeds; imagine everything – interview client, friends

-GOOD SOLDIER book

- extenuation : confession? Cooperation? Imperfect self-defense;

- call witnesses : avoid relaxation of rules (RCM 1001(c)(3)) – it's a gift to TC; *read* RCM 1001(e)(2); ask for stipulations;

## **ATTACHMENT A**

### **DSM-IV-R DEFINITION OF PTSD**

[Note that in an individual case, these symptoms may not *all* be present, and a PTSD diagnosis does not fit. Many of the reactions listed are common reactions to traumatic events of any kind]

A. The person experiences a traumatic event in which both of the following were present:

1. the person experienced or witnessed or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others;
2. the person's response involved intense fear, helplessness, or horror.

B. The traumatic event is persistently re-experienced in any of the following ways:

1. recurrent and intrusive distressing recollections of the event, including images, thoughts or perceptions;
2. recurrent distressing dreams of the event;
3. acting or feeling as if the traumatic event were recurring (eg reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those on waking or when intoxicated);
4. intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event;
5. physiological reactivity on exposure to internal or external cues that symbolise or resemble an aspect of the traumatic event.

C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma) as indicated by at least three of:

1. efforts to avoid thoughts, feelings or conversations associated with the trauma;
2. efforts to avoid activities, places or people that arouse recollections of this trauma;
3. inability to recall an important aspect of the trauma;
4. markedly diminished interest or participation in significant activities;
5. feeling of detachment or estrangement from others;
6. restricted range of affect (e.g. unable to have loving feelings);
7. sense of a foreshortened future (e.g. does not expect to have a career, marriage, children or a normal life span).

D. Persistent symptoms of increased arousal (not present before the trauma) as indicated by at least two of the following:

1. difficulty falling or staying asleep;
2. irritability or outbursts of anger;
3. difficulty concentrating;
4. hypervigilance;
5. exaggerated startle response.

E. The symptoms on Criteria B, C and D last for more than one month.

F. The disturbance causes clinically significant distress or impairment in social, occupational or other important areas of functioning.]



**TAB D. IMPROPER SUPERIOR-SUBORDINATE RELATIONSHIPS**  
**& FRATERNIZATION**

**I. REFERENCES.**

A. Army References.

1. Dep't of Army, Reg. 600-20, Personnel--General: Army Command Policy (18 Mar 2008). (Rapid Action Revision (RAR) Issue Date: 27 April 2010)
2. Manual for Courts-Martial, United States [hereinafter MCM].
3. Dep't of Army, Pam. 600-35, Personnel--General: Relationships Between Soldiers of Different Rank (21 Feb 2000).

B. Navy, Marine Corps, and Air Force References.

1. OPNAVINST 5370.2C, Navy Fraternization Policy (26 Apr 2007).
2. Marine Corps Manual 1100.4 (as amended by HQMC, ALMAR 185/96, 130800Z May 96, subject: Marine Corps Manual (MCM) Change 3) and MARCORMAN 1100.4 (13 May 96).
3. Department of Air Force Instruction 36-2909, Personnel: Professional and Unprofessional Relationships (13 Aug 2004, Incorporating Change 1, 8 July 2010).

**II. INTRODUCTION.**

A. Three Separate Concepts.

1. Improper Superior – Subordinate Relationships.
2. Fraternization.
3. Sexual Harassment.

B. A Spectrum of Misconduct.

**III. IMPROPER SUPERIOR - SUBORDINATE RELATIONSHIPS.**

A. **History:**

1. Task Force found disparate treatment between Services.
2. New policy announced by Secretary Cohen on 29 Jul 98.
3. Not effective immediately; gave Services 30 days to provide draft new policies to DoD. Essence of guidance now included within AR 600-20, paras 4-14 through 4-16.
4. Does NOT cover all senior / subordinate relationships.
5. Directs Service Secretaries to prohibit by policy:
  - a. Personal relationships, such as dating, sharing living accommodations, engaging in intimate or sexual relations, business enterprises, commercial solicitations, gambling and borrowing between officer and enlisted regardless of their Service; and

- b. Personal relationships between recruiter and recruit, as well as between permanent party personnel and trainees.

B. **The Old Army Policy.** Previous AR 600-20 (30 Mar 88), para 4-14. Two Part Analysis:

1. Part One: "Army policy does not hold dating or most other relationships between soldiers (sic) [of different ranks] as improper, barring the adverse effects listed in AR 600-20." Old DA Pam 600-35, Para. 1-5(e). Therefore, Army policy did not prohibit dating (even between officers and enlisted Soldiers), *per se*.
2. Part Two:
  - a. "Relationships between soldiers (sic) of different rank that involve, or give the appearance of, partiality, preferential treatment, or the improper use of rank or position for personal gain, are prejudicial to good order, discipline, and high unit morale. It is Army policy that such relationships will be avoided." Old AR 600-20, paragraph 4-14.
  - b. "Commanders and supervisors will counsel those involved or take other action, as appropriate, if relationships between soldiers (sic) of different rank
    - (1) Cause actual or perceived partiality or unfairness.
    - (2) Involve the improper use of rank or position for personal gain.
    - (3) Create an actual or clearly predictable adverse impact on discipline, authority or morale." Old AR 600-20, para 4-14a.

**Key Note:** Old AR 600-20 was not a punitive regulation. The revised paragraphs ARE PUNITIVE.

C. **The Current Army Policy.** Changes to AR 600-20, paras 4-14, 4-15 and 4-16.

1. Now a **THREE** Part Analysis:
  - a) Part 1: Is this a "strictly prohibited" category?
  - b) Part 2: If not, are there any adverse effects?
  - c) Part 3: If not "strictly prohibited" and there are no adverse effects, then the relationship is not prohibited.
2. Para 4-14: Relationships between military members of different rank.
  - a. "Officer" includes commissioned and warrant officers.
  - b. Applies to relationships between Soldiers, and between Soldiers and members of other services.
  - c. Is gender-neutral.
  - d. (THIS IS PARA 4-14b.) The following relationships between Soldiers of **different ranks** are prohibited:
    - (1) Relationships that compromise or appear to compromise the integrity of supervisory authority or the chain of command;
    - (2) Relationships that cause actual or perceived partiality or unfairness;

- (3) Relationships that involve or appear to involve the improper use or rank or position for personal gain;
- (4) Relationships that are, or are perceived to be, exploitative or coercive in nature; and
- (5) Relationships that cause an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission.

NOTE: Subparagraphs (1) and (4) are new additions to the three adverse effects looked for under the old policy's analysis.

e. (THIS IS PARA 4-14c.) Certain types of personal relationships between **officers and enlisted** personnel are prohibited. Prohibited relationships include:

- (1) Ongoing business relationships (including borrowing or lending money, commercial solicitations and any other on-going financial or business relationships), **except**:
  - (a) Landlord / tenant; and
  - (b) One time transactions (such as car or home sales).
  - (c) All ongoing business relationships existing on the effective date of this prohibition, that were otherwise in compliance with the former policy, were not prohibited until 1 Mar 00 ("grace period").
  - (d) This prohibition does not apply to USAR / ARNG Soldiers when the ongoing business relationship is due to the Soldiers' civilian occupation or employment.
- (2) Personal relationships, such as dating, shared living accommodations (other than as directed by operational requirements), and intimate or sexual relationships.
  - (a) This prohibition does not affect marriages (change as of 13 May 2002)
  - (b) Otherwise prohibited relationships (dating, shared living accommodations [other than directed by operational requirements] and intimate or sexual relationships), existing on the effective date of this prohibition, that were not prohibited under prior policy, were not prohibited until 1 Mar 00.
  - (c) Relationships otherwise in compliance with this policy are prohibited under this policy solely because of the change in status of one party to the relationship (such as commissioning). The couple does have one year to either terminate the relationship or marry within one year of the actual **start date** of the program or before the change in status occurs, whichever is later.

- (d) Reserve Component (RC)/RC exclusion when the personal relationship is primarily due to civilian acquaintanceship, unless on active duty (AD) or full-time National Guard duty (FTNGD) other than annual training (AT).
      - (e) AD/RC exclusion when the personal relationship is primarily due to civilian association, unless on AD or FTNGD other than AT.
    - (3) Gambling. NO EXCEPTIONS.
      - (a) An NCAA basketball pool with a monetary buy-in is prohibited when there is a mix of officer and enlisted personnel participants. There is no prohibition against gambling between officers.
      - (b) An NCAA bracket competition with a certificate or trophy to the winner even with officer and enlisted personnel participants is permissible.
      - (c) Remember the Joint Ethics Regulation (JER), § 2-302 also addresses gambling. While it may not be prohibited under AR 600-20, it may violate the JER.
    - (4) These prohibitions are not intended to preclude normal team-building associations between Soldiers, which occur in the context of activities such as community organizations, religious activities, family gatherings, unit social functions or athletic teams or events.
    - (5) All Soldiers bear responsibility for maintaining appropriate relationships between military members. The senior military member is usually in the best position to terminate or limit relationships that may be in violation of this paragraph, but all Soldiers involved may be held accountable for relationships in violation of this paragraph.
  - 3. Para 4-15: Other Prohibited Relationships.
    - a. Trainee / Soldier. Any relationship between IET trainees and permanent party Soldiers (not defined) not required by the training mission is prohibited. This prohibition applies regardless of the unit of assignment of either the permanent party Soldier or the trainee.
    - b. Recruit / Recruiter. Any relationship between a permanent party Soldier assigned or attached to USAREC, and potential prospects, applicants, members of the Delayed Entry Program or members of the Delayed Training Program, not required by the recruiting mission, is prohibited. The prohibition applies regardless of the unit of assignment or attachment of the parties involved.
  - 4. Para 4-16: Paragraphs 4-14b, 4-14c and 4-15 are punitive. Violations can be punished as violations of Article 92, UCMJ.
- D. **Commander's Analysis:** How does the commander determine what's improper?
- 1. JAs must cultivate the idea that commanders should consult with OSJA.

2. Use common sense. "The leader must be counted on to use good judgment, experience, and discretion. . . ."
3. Keep an open mind. Don't prejudge every male/female relationship. Relationships between males of different rank or between females of different rank can be as inappropriate as male/female relations. "[J]udge the results of the relationships and not the relationships themselves." DA Pam 600-35.
4. Additional scrutiny should be given to relationships involving (1) direct command/supervisory authority, or (2) power to influence personnel or disciplinary actions. "[A]uthority or influence . . . is central to any discussion of the propriety of a particular relationship." DA Pam 600-35. These relationships are most likely to generate adverse effects.
5. Be wary that **appearances of impropriety** can be as damaging to morale and discipline as actual wrongdoing.

E. **Command Response.**

1. The commander has a wide range of responses available to him and should use the one that will achieve a result that is "warranted, appropriate, and fair." Counseling the Soldiers concerned is usually the most appropriate initial action, particularly when only the potential for an appearance of actual preference or partiality, or an appearance without any adverse impact on morale, discipline or authority exists.
2. Adverse Administrative Actions: Order to terminate, relief, re-assign, bar to re-enlistment, reprimand, adverse OER/NCOER, administrative separation.
3. Criminal Sanctions: Fraternalization, disobey lawful order, conduct unbecoming, adultery.

F. **Commander's Role.**

1. Commanders should seek to prevent inappropriate or unprofessional relationships through proper training and leadership by example. AR 600-20, para. 4-14(f).
2. Don't be gun-shy. Mentoring, coaching, and teaching of Soldiers by their seniors should not be inhibited by gender prejudices. Old AR 600-20, para. 4-14 (e)(1).
3. Training. DA Pam 600-35.

**IV. FRATERNIZATION AND RELATED OFFENSES**

A. General.

1. Fraternalization is easier to describe than define.
2. There is no stereotypical case. Examples include sexual relations, drinking, and gambling buddies.

B. Fraternalization. UCMJ art. 134.

1. The President has expressly forbidden officers from fraternizing on terms of military equality with enlisted personnel. MCM, pt. IV, ¶ 83b.
2. Elements: the accused
  - a) was a commissioned or warrant officer;

- b) fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;
    - c) knew the person(s) to be (an) enlisted member(s); and
    - d) such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and
    - e) under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
  - 3. "Hard to define it, but I know it when I see it."
  - 4. Article 134 has also been successfully used to prosecute instances of officer-officer fraternization, *United States v. Callaway*, 21 M.J. 770 (A.C.M.R. 1986), and even enlisted-enlisted relationships. *United States v. Clarke*, 25 M.J. 631 (A.C.M.R. 1987), *aff'd*, 27 M.J. 361 (C.M.A. 1989).
  - 5. Maximum punishment: dismissal/dishonorable discharge, total forfeitures and two years confinement. MCM, pt. IV, ¶ 83e.
  - 6. Custom.
    - a) The gist of this offense is a violation of the custom of the armed forces against fraternization; it does not prohibit all contact or association between officers and enlisted persons.
    - b) Customs vary from service to service, and may change over time.
    - c) Custom of the service must be proven through the testimony of a knowledgeable witness. *United States v. Wales*, 31 M.J. 301 (C.M.A. 1990).
  - 7. Factors to Consider in Deciding How to Dispose of an Offense.
    - a) Nature of the military relationship;
    - b) Nature of the association;
    - c) Number of witnesses;
    - d) Likely effect on witnesses.
- C. Failure to Obey Lawful General Order or Regulation. UCMJ art. 92.
- 1. Elements. MCM, pt. IV, ¶ 16b(1).
    - a) There was in effect a certain lawful general order or regulation;
    - b) the accused had a duty to obey it; and
    - c) the accused violated or failed to obey the order or regulation.
  - 2. Maximum punishment: dismissal/dishonorable discharge, total forfeitures and two years confinement. MCM, pt. IV, ¶ 16e(1).
  - 3. Applications.
    - a) Applicable to officers and enlisted.

- b) Most effective when used to charge violations of local punitive general regulations (for example, regulations prohibiting improper relationships between trainees and drill sergeants).

4. **Remember:** AR 600-20 re: improper relationships is NOW a punitive regulation.

D. Conduct Unbecoming an Officer. UCMJ art. 133.

1. Elements.

- a) Accused did or omitted to do certain acts; and
- b) That, under the circumstances, the acts or omissions constituted conduct unbecoming an officer and gentleman.

2. Only commissioned officers and commissioned warrant officers may be charged under article 133. Maximum punishment: dismissal, total forfeitures and confinement for a period not in excess of that authorized for the most analogous offense for which punishment is prescribed in the Manual, e.g., two years for fraternization.

E. Sexual Harassment.

- 1. Charged under Article 93 as Cruelty and Maltreatment.
- 2. Other offenses may be possible given the facts and circumstances of the case such as extortion, bribery, adultery, indecent acts or assault, communicating a threat, conduct unbecoming, and conduct prejudicial to good order/discipline.

V. **CASE LAW**

*United States v. Pitre*, 63 M.J. 163 (2006). The court held that simple disorder with a trainee is an LIO of Article 92, violation of a lawful general regulation, having a relationship not required by the training mission.

*United States v. Fuller*, 54 M.J. 107 (2000). Appellant was convicted of numerous offenses stemming from his sexual relations with subordinate female members of his unit. The CAAF granted review on the issue of whether the evidence was legally sufficient to sustain a conviction for cruelty and maltreatment of one of the victims. The evidence showed that while assigned to an inprocessing unit where the appellant was her platoon sergeant, the victim voluntarily went to the appellant's apartment with a friend, drank 10-12 oz. of liquor, kissed appellant, and got undressed and engaged in repeated sexual intercourse with appellant and another platoon sergeant. Additionally, the victim stated that in her decision to have sexual intercourse with the appellant, she never felt influenced by his rank and that he never threatened her or her career. Finally, the CAAF concluded that the evidence did not support a finding that the victim showed any visible signs of intoxication prior to the sexual intercourse with appellant. Although the CAAF found that the evidence was not legally sufficient to sustain a conviction for cruelty and maltreatment, they did find that it supported a conviction for the lesser-included offense of a simple disorder in violation of Article 134, UCMJ, since the appellant's conduct was prejudicial to good order and discipline or service discrediting. In mentioning that "appellant's actions clearly would support a conviction for violation the Army's prohibition against improper relationships between superiors and subordinates...", the CAAF cited to the current version of Army Regulation 600-20 (15 Aug[sic] 1999). The court, however, did not address the fact that the appellant's conduct occurred in 1996, when the regulation was not punitive and that therefore he could not have been found guilty for failure to obey a general regulation under Article 92, UCMJ.

*United States v. Brown*, 55 M.J. 375 (2001). ISSUES: The CAAF considered the issues, inter alia, of: 1) whether the trial court erred by admitting the Air Force's pamphlet on discrimination and sexual harassment for the members to consider on findings and sentencing; and 2) whether the charges of conduct unbecoming an officer were supported by legally sufficient evidence. FACTS: The appellant, a captain and an Air Force nurse, was convicted of conduct unbecoming an officer for his comments to and physical contact with three co-workers over a ten month period. Appellant was married, had one child, and had served nearly ten years on active duty. All victims were female and, like the appellant, were company grade officers and Air Force nurses. All the victims worked in the operating room with the appellant at some point. The physical contact for which appellant was convicted included placing his hand on the other nurses' hair, thighs, knees, and buttock. The verbal conduct for which appellant was convicted included persistent compliments on their hair, eyes, and physical appearance and questions about their weight, whether they were happily married, whether they had a boyfriend, if they had ever had an affair, and in the case of one nurse, what type of bathing suit she wore and if women masturbated. Additionally, he asked them for their home phone numbers and asked them out for dates. Some of the victims showed their displeasure with appellant's physical contact with them by moving away from the appellant, and one told the appellant that she did not like the way he touched her. Contrarily, none of the complainants made their disapproval of the appellant's verbal comments known to him or to anyone in their chain-of-command.

HOLDING: The CAAF ruled that the military judge did not abuse his discretion when he admitted the nonpunitive Air Force Pamphlet (AFP) 36-2705, Discrimination and Sexual Harassment (28 February 1995) over defense objection. In so ruling, the CAAF agreed with the military judge that the AFP was relevant to establish notice of the prohibited conduct and the applicable standard of conduct in the Air Force community to the appellant. Additionally, the CAAF stated that in cases where evidence of the custom of the service is needed to prove an element of an offense, it is likely that the probative value will outweigh the prejudicial effect. With regard to the sufficiency of the evidence, the CAAF focused on the fact that government relied on the AFP to establish the applicable standard of conduct. When considering the standards in the AFP, combined with the facts of the case, the CAAF concluded that the government had to show that: "(1) appellant's conduct was 'unwelcomed'; (2) it consisted of verbal and physical conduct of a sexual nature and (3) it created an intimidating, hostile, or offensive work environment that was so severe or pervasive that a reasonable person would perceive that work environment as hostile or abusive, and the victim of the abuse perceived it as such." The CAAF went on to analyze the verbal comments and physical contact by the appellant separately. In finding the evidence legally insufficient to support appellant's convictions for the verbal comments, the CAAF noted that the record was clear that none of the victims ever informed the appellant that any of his remarks were unwelcome. While the AFP does not require a recipient of sexual remarks to tell the speaker that the remarks were unwelcome, the CAAF felt that a recipient's action or inaction in response to the remarks is relevant in determining whether the speech was unwelcome. The CAAF further noted from the record that the working atmosphere of the parties regularly accepted conversations involving physical appearance and sexual matters. This atmosphere cut against a finding that the appellant's comments created a work environment that was "hostile or abusive." However, the CAAF affirmed the convictions for the physical contact, concluding that it was not reasonable for the appellant "to assume that [the victims] would consent to physical contact of an intimate nature absent some communication of receptivity or consent."

*United States v. Carson*, 55 M.J. 656 (Army Ct.Crim.App. 2001). Appellant was convicted, contrary to his pleas, of maltreatment of subordinates (five specifications) and indecent exposure (three specifications). Appellant was the supervising desk sergeant in a military police station. While on duty appellant ordered a female MP to “physically search his crotch,” and he repeatedly exposed his penis to three of his subordinate female MP Soldiers. The appellant challenged the maltreatment conviction stemming from his conduct with one of the victims, stating that his conduct did not result in “physical or mental pain or suffering” by this alleged victim. The victim of the challenged conviction testified that she never asked appellant to see his penis, that she was bothered and shocked when he exposed himself, and that she considered herself a victim. In holding that proof that the victim suffered “physical or mental pain” was not required in order to support a conviction for maltreatment of a subordinate, the ACCA relied on the fact that neither the UCMJ nor the Manual of Courts-Martial contained this requirement. In making this determination, ACCA expressly overruled its earlier contrary holding in *United States v. Rutko*, 36 M.J. 798 (A.C.M.R. 1993). *Affirmed by United States v. Carson*, 57 M.J. 410 (C.A.A.F. 2002)

*United States v. Matthews*, 55 M.J. 600 (C.G.Ct.Crim.App. 2001). Contrary to his pleas, appellant was convicted of attempted forcible sodomy, maltreatment by sexual harassment, indecent assault, and solicitation to commit sodomy. The charges arose from allegations of a subordinate female enlisted sailor who claimed that while she was on TDY with the appellant, he sexually assaulted her and attempted to force her to perform oral sodomy on him while they were in his hotel room. Contrarily, the appellant testified that it was the alleged victim who had initiated the sexual interaction, that the sexual foreplay was mutual, and that he never used force on her. Evidence presented at trial established that the appellant had sixteen years on active duty and had amassed an outstanding record and reputation for devotion to duty and honesty. In sharp contrast, several witnesses stated that they had little or no confidence in the alleged victim’s truthfulness or integrity, and that she was a poor duty performer. The service court felt that this case boiled down to a swearing contest between the two parties, therefore, the issue of each of their credibility was paramount. In overturning the appellant’s convictions for attempted forcible sodomy, maltreatment by sexual harassment, and indecent assault, the court relied heavily on the disparate opinion and reputation testimony concerning the two involved parties. The majority gave little weight to the testimony of medical and psychiatric experts who treated the alleged victim and found her credible and her reaction to the assault consistent with post-traumatic stress disorder. The court noted that these experts had assumed the accuracy of the facts related by the alleged victim and also pointed to the defense forensic psychiatrist who was skeptical of the alleged victim’s account of events. The majority was quick to point out that under the facts of the case, the appellant was guilty of violating the service’s general regulation against fraternization, but that he was never charged with that crime.

*United States v. Goddard*, 54 M.J. 763 (N.M.Ct. Crim.App. 2000). Contrary to his pleas, the appellant was convicted of maltreatment and fraternization in violation of Articles 93 and 134, UCMJ. The charges resulted from a one time consensual sexual encounter with his female subordinate on the floor of the detachment’s administrative office. In setting aside the maltreatment conviction, the service court cited the CAAF’s decision in *U.S. v. Fuller*, 54 M.J. 107 (2000), in which it concluded that, “a consensual sexual relationship between a superior and a subordinate, without more, would not support a conviction for the offense of maltreatment.” The court did, however, approve the lesser-included offense of a simple disorder in violation of Article 134, UCMJ. The fact that the sexual encounter took place in the detachment’s administrative office, that after the sexual encounter was over the appellant instructed the victim leave the office in a manner that ensured that other personnel would not see her, and that the

victim lost respect for and avoided the appellant because she had been briefed that such relationships were improper, all led the court to conclude that appellant's conduct was prejudicial to good order and discipline.

*United States v. Sanchez*, 50 M.J. 506 (A.F.Ct.Crim.App. 1998). Accused cannot be convicted of both conduct unbecoming (Art. 133) and fraternization (Art. 134) when the misconduct alleged in the specifications is identical; fraternization gets dismissed. Those fraternization allegations not alleged in conduct unbecoming specifications remain. Court cites *United States v. Harwood*, 46 M.J. 26, 28 (1997) in support.

*United States v. Hawes*, 51 M.J. 258 (1999). CAAF affirmed Air Force Court's decision to set aside fraternization conviction and to reassess the appellant's sentence without ordering a rehearing. CAAF agreed that the fraternization offense was "relatively trivial" when compared to other misconduct.

*United States v. Mann*, 50 M.J. 689 (A.F.Ct.Crim.App. 1999). Sexual relationship is not a prerequisite for fraternization. Evidence was legally and factually sufficient to support conviction for fraternization. No interference with accused's access to witnesses where order prohibiting accused from contact with his fraternization partner did not prohibit accused's counsel from such contact. A.F. court finds no unlawful command influence or unlawfulness with the order.

*United States v. Rogers*, 54 M.J. 244 (2000). Evidence legally sufficient to sustain Art. 133 conviction for the offense of conduct unbecoming an officer by engaging in an unprofessional relationship with a subordinate officer in appellant's chain of command. AF Court holds there is no need to prove breach of custom or violation of punitive regulation.

## APPENDIX AR 600-20 FRATERNIZATION (EXTRACT)

**Rapid Action Revision (RAR) Issue Date: 27 April 2010**

### **4-14. Relationships between Soldiers of different rank**

*a.* The term "officer," as used in this paragraph, includes both commissioned and warrant officers unless otherwise stated. The provisions of this paragraph apply to both relationships between Army personnel (to include dual-status military technicians in the Army Reserve and the Army National Guard) and between Army personnel and personnel of other military services. This policy is effective immediately, except where noted below, and applies to different-gender relationships and same-gender relationships.

*b.* Relationships between Soldiers of different rank are prohibited if they—

- (1) Compromise, or **appear** to compromise, the integrity of supervisory authority or the chain of command.
- (2) Cause actual or **perceived** partiality or unfairness.
- (3) Involve, or **appear** to involve, the improper use of rank or position for personal gain.
- (4) Are, or are **perceived** to be, exploitative or coercive in nature.
- (5) Create an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission.

*c.* Certain types of personal relationships between officers and enlisted personnel are prohibited. Prohibited relationships include—

(1) Ongoing business relationships between officers and enlisted personnel. This prohibition does not apply to landlord/tenant relationships or to one-time transactions such as the sale of an automobile or house, but does apply to borrowing or lending money, commercial solicitation, and any other type of on-going financial or business relationship. Business relationships which exist at the time this policy becomes effective, and that were authorized under previously existing rules and regulations, are exempt until March 1, 2000. In the case of Army National Guard or United States Army Reserve personnel, this prohibition does not apply to relationships that exist due to their civilian occupation or employment.

(2) Dating, shared living accommodations other than those directed by operational requirements, and intimate or sexual relationships between officers and enlisted personnel. This prohibition does not apply to—

*(a)* Marriages. When evidence of fraternization between an officer and enlisted member prior to their marriage exists, their marriage does not preclude appropriate command action based on the prior fraternization. Commanders have a wide range of responses available including counseling, reprimand, order to cease, reassignment, administrative action or adverse action. Commanders must carefully consider all of the facts and circumstances in reaching a disposition that is appropriate. Generally, the commander should take the minimum action necessary to ensure that the needs of good order and discipline are satisfied.

*(b)* Situations in which a relationship that complies with this policy would move into non-compliance due to a change in status of one of the members (for instance, a case where two enlisted members are dating and one is subsequently commissioned or selected as a warrant officer). In relationships where one of the enlisted members has entered into a program intended to result in a change in their status from enlisted to officer, the couple must terminate the relationship permanently or marry within either one year of the actual start date of the program, before the change in status occurs, or within one year of the publication date of this regulation, whichever occurs later.

(c) Personal relationships between members of the National Guard or Army Reserve, when the relationship primarily exists due to civilian acquaintanceships, unless the individuals are on active duty (other than annual training), on full-time National Guard duty (other than annual training), or serving as a dual status military technician.

(d) Personal relationships between members of the Regular Army and members of the National Guard or Army Reserve when the relationship primarily exists due to civilian association and the Reserve component member is not on active duty (other than annual training), on full-time National Guard duty (other than annual training), or serving as a dual status military technician.

(e) Prohibited relationships involving dual status military technicians, which were not prohibited under previously existing rules and regulations, are exempt until one year of publication date of this regulation.

(f) Soldiers and leaders share responsibility, however, for ensuring that these relationships do not interfere with good order and discipline. Commanders will ensure that personal relationships that exist between Soldiers of different ranks emanating from their civilian careers will not influence training, readiness, or personnel actions.

(3) Gambling between officers and enlisted personnel.

d. These prohibitions are not intended to preclude normal team building associations that occur in the context of activities such as community organizations, religious activities, Family gatherings, unit-based social functions, or athletic teams or events.

e. All military personnel share the responsibility for maintaining professional relationships. However, in any relationship between Soldiers of different grade or rank, the senior member is generally in the best position to terminate or limit the extent of the relationship. Nevertheless, all members may be held accountable for relationships that violate this policy.

f. Commanders should seek to prevent inappropriate or unprofessional relationships through proper training and leadership by example. Should inappropriate relationships occur, commanders have available a wide range of responses. These responses may include counseling, reprimand, order to cease, reassignment, or adverse action. Potential adverse action may include official reprimand, adverse evaluation report(s), nonjudicial punishment, separation, bar to reenlistment, promotion denial, demotion, and courts martial. Commanders must carefully consider all of the facts and circumstances in reaching a disposition that is warranted, appropriate, and fair.

#### **4–15. Other prohibited relationships**

a. *Trainee and Soldier relationships.* Any relationship between permanent party personnel and initial entry training (IET) trainees not required by the training mission is prohibited. This prohibition applies to permanent party personnel without regard to the installation of assignment of the permanent party member or the trainee.

b. *Recruiter and recruit relationships.* Any relationship between permanent party personnel assigned or attached to the United States Army Recruiting Command and potential prospects, applicants, members of the Delayed Entry Program (DEP), or members of the Delayed Training Program (DTP) not required by the recruiting mission is prohibited. This prohibition applies to United States Army Recruiting Command Personnel without regard to the unit of assignment of the permanent party member and the potential prospects, applicants, DEP members, or DTP members.

c. *Training commands.* Training commands (for example, TRADOC and AMEDDC) and the United States Army Recruiting Command are authorized to publish supplemental regulations to paragraph 4–15, which further detail proscribed conduct within their respective commands.

#### **4–16. Fraternization**

Violations of paragraphs 4–14b, 4–14c, and 4–15 may be punished under Article 92, UCMJ, as a violation of a lawful general regulation.



# COMMISSIONS



**TAB E**  
Is Currently Under Construction



# PROTECTION OF MILITARY INSTALLATIONS/ SAUSA



**TAB F**  
Is Currently Under Construction



# **MEDIA**



**TAB G**  
Is Currently Under Construction



# CAPITAL LITIGATION



**TAB H**  
Is Currently Under Construction



## TAB I. MENTAL RESPONSIBILITY

### I. INTRODUCTION.

A. **Mental Responsibility.** Refers to the criminal culpability of the accused based on his mental state at the time of the offense and includes the complete defense commonly known as the “insanity defense” and the more limited defense of “partial mental responsibility.”

B. **Competency to Stand Trial.** Refers to the present ability of the accused to stand trial. An accused may not be tried unless mentally competent. *Godinez v. Moran*, 509 U.S. 389, 396 (1993). To try a mentally incompetent accused is a violation of due process. *Medina v. California*, 505 U.S. 437, 453 (1992).

C. **Sanity Boards.** Provision under Rule for Courts-Martial (RCM) 706 governing the process inquiring into the mental capacity or mental responsibility of an accused.

### II. REFERENCES.

A. Manual for Courts-Martial, United States (2008 ed.).

B. TM 8-240, Military Mental Health Law (29 Sept. 1992).

C. Major Timothy P. Hayes, Jr., *Post-Traumatic Stress Disorder on Trial*, 190-191 MIL L. REV. 67 (2007).

D. Major Jeremy Ball, *Solving the Mystery of Insanity Law: Zealous Representation of Mentally Ill Servicemembers*, ARMY LAW., Dec. 2005, at 1.

E. Captain Charles Trant, *The American Military Insanity Defense: A Moral, Philosophical, and Legal Dilemma*, 99 MIL. L. REV. 1 (1983).

F. Major Rita Carroll, *Insanity Defense Reform*, 114 MIL. L. REV. 183 (1986).

G. Lieutenant Colonel Donna M. Wright, “*Though this be madness, yet there is some method in it*”: *A Practitioners Guide to Mental Responsibility and Competency to Stand Trial*, ARMY LAW., Sep. 1997, at 18.

H. Major Jeff Bovarnick and Captain Jackie Thompson, *Trying to Remain Sane Trying an Insanity Case: United States v. Captain Thomas S. Payne*, ARMY LAW., June 2002 at 13.

### III. MENTAL RESPONSIBILITY.

A. **The Old Standard.** Court of Military Appeals adopted the ALI test for insanity in *United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977). “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.” *Frederick*, 3 M.J. at 234.

B. **The Current Standard.** Codified in Article 50a, UCMJ.

1. Definition. It is an **affirmative defense** in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense. RCM 916(k)(1). Article 50a was modeled on 18 U.S.C. § 17.

2. Taken from Insanity Defense Reform Act, Pub. L. No. 98-473, § 402(a), 98 Stat. 2057 (1984).

C. Significant aspects of the current standard.

1. Threshold Requirements.

a) **Severe mental disease or defect.** The affirmative defense requires a “severe” mental disease or defect. *United States v. Martin*, 56 M.J. 97, 103 (C.A.A.F. 2001).

(1) The MCM defines “severe mental disease or defect” negatively. A severe mental disease or defect “does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.” RCM 706(c)(2)(A) (emphasis added).

(2) However, case law indicates that a nonpsychotic disorder may constitute a severe mental disease or defect. *See United States v. Benedict*, 27 M.J. 253 (C.M.A. 1988) (discussing pedophilia).

(3) Compare with Benchbook Instruction 6-4: “[A] severe mental disease or defect does not, in the legal sense, include an abnormality manifested only by repeated criminal or otherwise antisocial conduct or by nonpsychotic behavior disorders and personality disorders.”

(4) **Ultimate Opinion Testimony.** In 1986, the President rescinded adoption of Fed. R. Evid. 704(b), which prohibits expert testimony offering an opinion on the issue of a defendant’s mental state or condition where such constituted an element or defense to a charged offense. Ultimate opinion testimony is admissible. *See, e.g., United States v. Combs*, 39 M.J. 288 (C.M.A. 1994). Testimony as to the ultimate opinion (diagnosis of severe mental disease or defect) does not, however, always equate to lack of mental responsibility. *United States v. Jones*, 46 M.J. 535 (N-M. Ct. Crim. App. 1997), *rev’d on other grounds*, 50 M.J. 46 (C.A.A.F. 1998) (summary disposition), *on remand*, 1999 WL 356311 (N-M. Ct. Crim. App. May 7, 1999) (unpublished).

b) As a result of severe mental disease or defect, accused unable to appreciate nature and quality *or* wrongfulness of the act. *Martin*, 56 M.J. at 103.

D. Procedure.

1. The defense must give notice of the defense of lack of mental responsibility before the beginning of trial on the merits. RCM 701(b)(2). Reciprocal discovery may apply. RCM 701(b)(3) and (4).

2. Burden and standard of proof.

a) **Burden on the accused by clear and convincing evidence.** *Martin*, 56 M.J. at 103. A career Army Judge Advocate convicted, *inter alia*, of 29 specifications of larceny, alleged at trial and on appeal that he was not mentally responsible for his criminal misconduct because he suffered from bipolar disorder. Though the defense presented over 20 expert and lay witnesses (the accused did not testify), none of these witnesses described unusual or bizarre behavior on the dates of the alleged offenses.

b) The constitutionality of shifting the burden. *See United States v. Martin*, 48 M.J. 820, 825 n.9 (A. Ct. Crim. App. 1998); *United States v. Freeman*, 804 F.2d 1574 (11th Cir. 1986), citing *Leland v. Oregon*, 343 U.S. 790 (1952).

3. **Instructions on mental responsibility.** The military judge has a *sua sponte* duty to instruct upon mental responsibility during final instructions if the defense is raised by the evidence. RCM 920(e)(3). Chapter 6, DA PAM 27-9. The defense can get a preliminary instruction (6-3) when some evidence has been adduced which tends to show insanity of accused. The MJ is not required to instruct the panel regarding the consequences to the accused of a not guilty only by reason of lack of mental responsibility verdict. *See Shannon v. United States*, 512 U.S. 573 (1994).

4. Bifurcated voting procedures. RCM 921(c)(4). *See also* DA PAM 27-9, 6-4 and 6-7 (procedural instructions on findings). Because of their complexity, the voting instructions should be given in writing.

a) First vote on whether accused is guilty.

b) If accused found guilty, the second vote is on mental responsibility.

5. RCM 1102A. Not guilty only by reason of lack of mental responsibility. Within 40 days of verdict, court-martial must conduct a hearing. UCMJ art. 76b. RCM 1102A sets out the procedural guidelines for the hearing.

a) Before the hearing, the judge or convening authority shall order a psychiatric or psychological examination of the accused, with the resulting psychiatric or psychological report transmitted to the military judge for use in the post-trial hearing. RCM 1102A(b). *See also* 18 U.S.C. § 4243 (post-trial psychiatric examination).

b) The convening authority *shall* commit the accused to a suitable facility until person is eligible for release IAW UCMJ, art. 76b(b). UCMJ, art. 76b(b)(1).

c) Accused must prove that his release would not create a substantial risk of bodily injury or serious damage to property of another due to a mental disease or defect. If he fails to meet that burden, the GCMCA may commit the accused to the Attorney General, who turns the person over to a state or monitors the person until his release would not create a substantial risk of bodily injury or serious damage to another's property.

(1) If the accused is found not guilty by reason of lack of mental responsibility for an offense involving bodily injury to another or serious damage to property of another, or substantial risk of such property or injury, the standard is clear and convincing evidence.

(2) Any other offense, standard is preponderance of the evidence.

d) **Right to Counsel.** RCM 1102A(c)(1) provides that an accused shall be represented by counsel.

6. Discovery of Evidence Post-Trial indicating Lack of Mental Responsibility. *See United States v. Harris*, 61 M.J. 391 (C.A.A.F. 2005). *Good discussion of issues surrounding discovery, post-trial, of evidence of lack of mental responsibility.*

#### IV. PARTIAL MENTAL RESPONSIBILITY.

A. **The Old (pre-2004 Amendment) Manual Standard.** A mental condition not amounting to a general lack of mental responsibility under subsection RCM 916(k)(1) is not a defense, *nor is evidence of such a mental condition admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense.* RCM 916(k)(2). The old standard tried to prohibit a partial mental responsibility defense.

1. The CMA rejected the old RCM 916(k)(2) because it doubted the rule's constitutionality and found that the legislative history of the federal model lacked any Congressional intent to preclude defendants from attacking *mens rea* with contrary evidence.

2. Psychiatric testimony or evidence that serves to negate a specific intent is admissible. *Ellis v. Jacob*, 26 M.J. 90 (C.M.A. 1988); *see United States v. Berri*, 33 M.J. 337 (C.M.A. 1991); *United States v. Mansfield*, 38 M.J. 415, 419 n.5 (C.M.A. 1993); *see also United States v. Cameron*, 907 F.2d 1051 (11th Cir. 1990); *United States v. Pohlot*, 827 F.2d 889 (3d Cir. 1987); *United States v. Gold*, 661 F. Supp. 1127 (D.D.C. 1987); *United States v. Frisbee*, 623 F. Supp. 1217 (N.D. Cal. 1985).

**B. The Current (post-2004 Amendment) Manual Standard.** A mental condition not amounting to a lack of mental responsibility (i.e., a finding of not guilty only by reason of lack of mental responsibility) is not an affirmative defense, but may be admissible to determine whether the accused entertained the state of mind necessary to prove an element of the offense. In other words, partial mental responsibility is not an affirmative defense, but it is a deficiency of the government proof of a necessary element (e.g., specific intent).

1. Instruction on Partial Mental Responsibility. DA PAM 27-9, instruction 6-5. The affirmative defense of insanity and the defense of partial mental responsibility are separate defenses, but the panel members may consider the same evidence with respect to both defenses. With regard to partial mental responsibility, the burden never shifts from the government to prove, beyond a reasonable doubt, that the accused entertained the mental state necessary for the charged offense.

2. However, not all psychiatric evidence is now admissible. The evidence still must be relevant and permitted by UCMJ art. 50a.

a) General intent crime. The psychiatric evidence must still rise to the level of a "severe mental disease or defect." The insanity defense cannot be resurrected under another guise. UCMJ art. 50a.

b) Specific intent crime. The psychiatric evidence must be relevant to the *mens rea* element.

## V. INTOXICATION.

**A. Voluntary Intoxication.** RCM 916(l)(2). Voluntary intoxication from alcohol or drugs may negate the elements of premeditation, specific intent, knowledge, or willfulness. Voluntary intoxication, by itself, will not reduce unpremeditated murder to a lesser offense. *United States v. Morgan*, 37 M.J. 407 (C.M.A. 1993). Voluntary intoxication not amounting to legal insanity is not a defense to general intent crimes.

**B. Involuntary Intoxication.** Generally, involuntary intoxication is a defense to a general or specific intent crime. *See United States v. Hensler*, 44 M.J. 184 (C.A.A.F. 1996). *But see United States v. Ward*, 14 M.J. 950 (A.C.M.R. 1982) (involuntary intoxication not available when accused knowingly used marijuana, but did not know it also contained PCP).

**C.** *See generally* Major Eugene Milhizer, *Weapons Systems Warranties: Voluntary Intoxication as a Defense Under Military Law*, 127 MIL. L. REV. 131 (1990).

## VI. COMPETENCY TO STAND TRIAL.

**A. Current Standard.** "No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them [sic]

or to conduct or cooperate intelligently in the defense of the case.” RCM 909(a). *See also* 18 U.S.C. § 4241(d). The accused is presumed to have capacity to stand trial. RCM 909(b).

**B. Old Standard.** “No person may be brought to trial by court-martial unless that person possesses **sufficient mental capacity** to understand the nature of the proceedings against that person and to conduct or cooperate intelligently in the defense of the case.” MCM, RCM 909 (1984).

**C. Differences between the standards.**

1. Mental disease or defect required (need not be “severe”).
2. “Unable to understand” vs. “sufficient mental capacity.”

**D. Cases.**

1. The real issue is whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has rational as well as factual understanding of the proceeding against him. It is not enough that he is oriented to time and place and has some recollection of events. *United States v. Proctor*, 37 M.J. 330, 336 (C.M.A. 1993) (quoting *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam)).
2. “The question is whether the accused is possessed of sufficient mental power, and has such understanding of his situation, such coherency of ideas, control of his mental facilities, and the requisite power of memory, as will enable him to testify in his own behalf, if he so desires, and otherwise to properly and intelligently aid his counsel in making a rational defense.” *United States v. Lee*, 22 M.J. 767, 769 (A.F.C.M.R. 1986).
3. *United States v. Schlarb*, 46 M.J. 708 (N-M. Ct. Crim. App. 1997). The accused did not establish a lack of mental capacity to stand trial where she testified clearly and at length on four occasions, showing a clear understanding of the proceedings.
4. *Indiana v. Edwards*, 554 U.S. 164 (2008). The Constitution permits judges to take realistic account of the particular defendant’s mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. Therefore, a defendant who is mentally competent to stand trial may still be denied the right to represent themselves, depending on the vagaries of the mental disease or illness.

**E. Compared to Amnesia.**

1. Amnesia is not equivalent to a lack of capacity. “An inability to remember about the crime itself does not necessarily make a person incompetent to stand trial.” *Lee*, 22 M.J. at 769; *see also United States v. Barreto*, 57 M.J. 127 (C.A.A.F. 2002). The ability of an accused to function is absolutely critical to the fairness of a criminal trial. In deciding whether an accused can function, a military judge can apply factors set out in *Wilson v. United States*, 391 F.2d 460 (D.C. Cir. 1968): (1) the extent to which the amnesia affects the accused’s ability to consult and assist his lawyer; (2) the extent to which the amnesia affects the accused’s ability to testify on his own behalf; (3) the extent to which the evidence could be extrinsically reconstructed, in view of the accused’s amnesia; (4) the extent to which the Government assisted the accused and defense counsel in reconstruction; (5) the strength of the Government case; and, (6) any other facts and circumstances that would indicate whether the accused had a fair trial.
2. *United States v. Axelson*, 65 M.J. 501 (A. Ct. Crim. App. 2007). A failure to recall facts pertaining to an offense does not preclude an accused from pleading guilty so long

as, after assessing the Government's evidence against him, he is convicted of his own guilt.

F. Procedure. UCMJ art. 76b and RCM 909.

1. **Interlocutory question of fact.** After referral, military judge *may* conduct an incompetence determination hearing either *sua sponte* or on request of either party. RCM 909(d).
2. Defense has the burden of proof by a preponderance of the evidence.
3. Military judge *shall* conduct the hearing if sanity board completed IAW RCM 706 before or after referral concluded the accused is not competent.
4. Military judge determines whether the accused is competent to stand trial. *United States v. Proctor*, 37 M.J. 330 (C.M.A. 1993); *Short v. Chambers*, 33 M.J. 49 (C.M.A. 1991).
5. Once a sanity board is requested, the military judge must consider the sanity board report before ruling on the accused's capacity to stand trial. *United States v. Collins*, 41 M.J. 610 (A. Ct. Crim. App. 1994).

G. **Hospitalization of the accused.** An accused who is found incompetent to stand trial shall be hospitalized by the Attorney General for a reasonable period of time, not to exceed 4 months, to determine whether his condition will improve in foreseeable future, and for an additional reasonable period of time. The additional period of time ends when: the mental condition improves so that trial may proceed, or, charges are dismissed.

1. Upon a finding of incompetence, if the convening authority agrees, there is no discretion regarding commitment. *United States v. Salahuddin*, 54 M.J. 918 (A.F. Ct. Crim. App. 2001); *see also* RCM 909(e)(3) and 18 U.S.C. § 4241(d).
2. The four-month time period may be extended. To justify extended commitment, the Government must prove by clear and convincing evidence that "a substantial probability exists that the continued administration of antipsychotic medication will result in a defendant attaining the capacity to permit the trial to proceed in the foreseeable future." *United States v. Weston*, 260 F. Supp. 2d 147, 154 (D.D.C. 2003) (approving a year-long extension from the case below in (3)(a)).
3. Involuntary Medication.
  - a) *United States v. Weston*, 255 F.3d 873 (D.C. Cir. 2001). Defendant indicted for the murders and attempted murder of federal law enforcement officers. A court-appointed forensic psychiatrist diagnosed defendant with paranoid schizophrenia, the severity of which rendered him incompetent to stand trial. Because he refused treatment with antipsychotic medication, he was simply placed in solitary confinement under constant supervision. The government sought a court order authorizing the involuntary administration of medication to render him competent to stand trial. The Circuit Court held that there was no basis to believe that defendant's worsening condition rendered him more dangerous, given his near-total incapacitation. However, the court affirmed the District Court's decision that the government's interest in administering antipsychotic drugs overrode his liberty interest and that restoring his competence in this way did not violate his right to a fair trial.
  - b) *Sell v. United States*, 539 U.S. 166 (2003). Defendant was charged with fraud. A federal magistrate found him incompetent to stand trial and ordered his

hospitalization to determine whether he would attain capacity to allow his trial to proceed. Sell refused to take antipsychotic drugs. The magistrate found involuntary medication appropriate because Sell was a danger to himself and others, that medication was the only way to render him less dangerous, that any serious side effects could be ameliorated, that the benefits to him outweighed the risks, and that the drugs were substantially likely to return Sell to competence. The District Court, although determining that the Magistrate's conclusion regarding Sell's dangerousness was clearly erroneous, nonetheless affirmed the decision because it found that the medication was the only viable hope of rendering Sell competent and was necessary to serve the government's interest in adjudicating his guilt or innocence. The Circuit Court affirmed, finding that the government had an essential interest in bringing Sell to trial, that treatment was medically appropriate, and that the medical evidence indicated a reasonably probability that Sell would fairly be able to participate in his defense. The Supreme Court vacated and remanded the case. Determining that forced medication solely for trial competency purposes may be rare, the Court held that the Constitution permits involuntary medication to render a mentally ill defendant competent to stand trial on serious criminal charges if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the trial's fairness, and, taking account of less intrusive alternatives, is necessary to significantly further important governmental trial-related interests.

c) *United States v. Bush*, 585 F.3d 806 (4th Cir. 2009). The court finds that the government must establish all of the *Sell* factors by clear and convincing evidence. The court also held that even where a defendant has been in an institution longer than the maximum punishment for the underlying offense, the government still has an important interest in bringing the defendant to trial. Certain consequences that convictions bring (such as firearms restrictions) are important governmental interests justifying continued prosecution and potential involuntary medication.

4. **Recovery.** If the accused has recovered and is competent to stand trial, the director of the facility notifies the GCMCA and sends a copy of the notice to accused's counsel. GCMCA must take prompt custody of the accused if the accused is still in a military status. The director of the facility may retain custody of the person for not more than 30 days after transmitting the required notifications.

a) **No Recovery.** If person does not improve (18 U.S.C. § 4246). If the director of the facility where the accused is confined certifies that the accused is presently suffering from a mental disease or defect and his release would create a substantial risk of bodily injury to another person or serious damage to property, the director notifies the GCMCA. The district court then conducts further hearings.

H. **Waiver.** *Moore v. Campbell*, 344 F.3d 1313 (11th Cir. 2003). The Eleventh Circuit Court of Appeals looked at whether a defendant in a capital case can forfeit his right to competency – a case of first impression. Moore attempted suicide during his capital murder trial. After treatment at a hospital and subsequent examination by a psychiatrist, Moore appeared at trial, which resumed on 31 August. From 27 August until the evening of 1 September, Moore had refused anything to eat or drink, resulting in dehydration. The state court found Moore was competent to stand trial and that he took a “calculated and concerted effort to disrupt his murder trial.” The state court also found Moore's asserted incompetence similar to a defendant whose behavior results in exclusion from a trial. Reviewing the state court proceedings during a federal *habeas*

petition, the Court of Appeals determined that the “state court’s determination that a capital defendant in Alabama can forfeit his right to be competent – that is mentally present – at trial” was not contrary to or an unreasonable application of clearly established Supreme Court precedent, if only because the issue has not been yet decided by the Supreme Court.

I. **Post-trial.** The convening authority may not approve a sentence while the accused lacks the mental capacity to cooperate and understand post-trial proceedings. RCM 1107(b)(5). Likewise, an appellate authority may not affirm the findings when the accused lacks the ability to understand and cooperate in appellate proceedings. RCM 1203(c)(5). *See Thompson v. United States*, 60 M.J. 880 (N-M. Ct. Crim. App. 2005) (holding that appellant demonstrated lack of mental capacity to assist in appeal; appeal stayed).

## VII. THE SANITY BOARD.

### A. Sanity Board Request.

1. Who can request? Any commander, investigating officer, trial counsel, defense counsel, military judge, or member. R.C.M. 706(a).
  - a) Request goes to CA (before referral) and MJ (after referral).
  - b) A sanity board should be granted if request is not frivolous and is made in good faith. *United States v. Nix*, 36 C.M.R. 76, 80-81 (C.M.A. 1965); *United States v. Kish*, 20 M.J. 652 (A.C.M.R. 1985).
  - c) It may be prudent for trial counsel to join in the motion. *See United States v. James*, 47 M.J. 641 (A. Ct. Crim. App. 1997) (finding that a mental status evaluation was not an adequate substitute for a sanity board).
2. Failure to direct a sanity inquiry.
  - a) Though ultimate result may be “favorable” to the government, failure to timely direct a sanity board can result in lengthy appellate review. *United States v. Breese*, 47 M.J. 5 (C.A.A.F. 1997).
  - b) **“A low threshold is nonetheless a threshold which the proponent must cross.”** *United States v. Pattin*, 50 M.J. 637, 639 (A. Ct. Crim. App. 1999) (finding that the military judge’s refusal to order a sanity board was not error where it appeared the motion for a sanity board was merely a frivolous attempt to get a trial delay).
3. Sanity Board Order asks the following questions:
  - a) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect?
  - b) What is the clinical psychiatric diagnosis?
  - c) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his conduct?
  - d) Does the accused have sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense?
4. Composition of the sanity board.
  - a) One or more persons.
  - b) Physician or clinical psychologist.

- c) At least one psychiatrist or clinical psychologist.
- d) A provisional license may be enough to qualify a psychologist as a clinical psychologist. *United States v. Boasmond*, 48 M.J. 912 (N-M. Ct. Crim. App. 1998).

5. Conflict of interest. *United States v. Best*, 61 M.J. 376 (C.A.A.F. 2005). Two members of the accused's RCM 706 sanity board had a preexisting psychotherapist-patient relationship with the accused. In a case of first impression, the Army court stated that an actual conflict of interest would exist when prior participation that materially limits his or her ability to objectively participate in and evaluate the subject of an RCM 706 sanity board. The CAAF declined to adopt a presumptive rule that there would be an actual conflict of interest if a mental health provider, who has established a psychotherapist-patient relationship with an accused, also serves as a member in an RCM 706 sanity board. In this case, the CAAF held there was no evidence suggesting that the two members' participation would be materially limited by their prior relationship.

6. The accused's right to a speedy trial is not violated when the government delays the case for a time reasonably necessary to complete a thorough mental evaluation. *United States v. Colon-Angueira*, 16 M.J. 20 (C.M.A. 1983) (fifty-one days reasonable); *United States v. Carpenter*, 37 M.J. 291 (C.M.A. 1993) (the government's negligence or bad faith can be considered in determining whether the sanity board was completed within a reasonable time); *United States v. Pettaway*, 24 M.J. 589 (N.M.C.M.R. 1987) (thirty-six days was reasonable time for a second sanity board); *United States v. Arab*, 55 M.J. 508 (A. Ct. Crim. App. 2001) (140 days was not unreasonable, where the record reflected due diligence by the government).

7. Results of board - limited distribution.

- a) Defense counsel gets full report.
- b) Trial counsel initially only gets answers to the above questions.

## B. The Sanity Inquiry.

1. Compelled Examination. RCM 706.

- a) Article 31, UCMJ, not applicable.
- b) Failure to cooperate in an examination can result in the exclusion of defense expert evidence.

2. Privilege Concerning Mental Examination of an Accused. MRE 302.

- a) The general rule: Anything the accused says (and any derivative evidence) to the sanity board is privileged and cannot be used against him.
- b) This privilege may be claimed by the accused notwithstanding the fact that the accused may have been warned of the rights provided by MRE 305.
- c) Waiver. There is no privilege under this rule when the accused first introduces into evidence such statements or derivative evidence. Privilege applies only to examinations ordered under RCM 706. *See United States v. Toledo*, 25 M.J. 270 (C.M.A. 1987), *aff'd on reconsideration*, 26 M.J. 104 (C.M.A. 1988).

3. Derivative Evidence. In *United States v. Clark*, 62 M.J. 195 (C.A.A.F. 2005), the accused was charged, *inter alia*, with breaking restriction. Dr. Petersen treated the accused for almost a month after his command referred him to mental health. She

concluded that the accused suffered a manic episode during the charged time period. Prior to trial, the defense requested a sanity board. Dr. Marrero was the lone member of the board, and he agreed with Dr. Petersen's diagnosis, but concluded that the accused was mentally responsible. At trial, Dr. Petersen, testifying for the defense, opined that there was a "high likelihood" that the accused suffered from a severe mental disease or defect during the relevant time period and that, as a result of that severe mental disease or defect, would have had a difficult time appreciating the nature and quality or wrongfulness of his conduct. During her testimony, Dr. Petersen acknowledged that she reviewed the sanity board report. The trial counsel renewed his motion to obtain a copy of the report (the MJ earlier denied the same request), which was granted. The CAAF held that it was error to release the statements of accused to Dr. Marrero as the derivative evidence provisions of MRE 302 had not been triggered. As a nonconstitutional error, the government would have to demonstrate that the error did not have a substantial influence on the findings. Given that the government relied heavily upon the testimony of Dr. Marrero, the court was left to conclude that the insanity defense may have succeeded had the military judge not erred in releasing the appellant's privileged statements to the government.

C. Are there substitutes for a sanity board?

1. Yes. "The point is that we do not believe that the drafters selected the sanity board format because they had determined that no other procedure was capable of detecting mental disorders or determining an accused person's mental capacity or responsibility. That being the case, *we believe we should look to the substance of the evaluation performed on the accused rather than on its form.*" *United States v. Jancarek*, 22 M.J. 600, 603 (A.C.M.R. 1986) (emphasis added).

2. *But see United States v. Mackie*, 65 M.J. 762 (A.F. Ct. Crim App. 2007), *aff'd*, 66 M.J. 198 (C.A.A.F. 2008) (finding that the mental health evaluation performed by a staff psychologist as a result of a pretrial suicide gesture was not an adequate substitute because of her inexperience in performing sanity boards); *United States v. James*, 47 M.J. 641 (A. Ct. Crim. App. 1997) (finding that mental status evaluation done by a mental health counselor was not an adequate substitute); *United States v. English*, 47 M.J. 215 (C.A.A.F. 1997) (finding that an examination by doctors for purposes of treatment of the accused was not an adequate substitute because the examination did not address the judicial standards for mental capacity or responsibility).

## VIII. TRIAL CONSIDERATIONS.

A. In addition to a sanity board, an accused is entitled to access to a qualified psychiatrist or psychologist for the purpose of presenting an insanity defense if he establishes that his sanity will be a "significant factor" at the trial. *United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986); *see Ake v. Oklahoma*, 470 U.S. 68 (1985). Significant factor defined:

1. Mere assertion of insanity by accused or counsel is insufficient. *Volson v. Blackburn*, 794 F.2d 173 (5th Cir. 1986).

2. A "clear showing" by the accused that sanity is in issue and a "close" question that might be decided either way is required. *Cartwright v. Maynard*, 802 F.2d 1203 (10th Cir. 1986).

3. Expert must be made part of the "defense team" under MRE 502 to be covered by the attorney-client privilege. *United States v. Toledo*, 25 M.J. 270 (C.M.A. 1987), *aff'd on reconsider.*, 26 M.J. 104 (C.M.A. 1988). *United States v. Mansfield*, 38 M.J. 415 (C.M.A.

1993). A physician, psychotherapist who assists the defense in preparation of a defense may fall within the scope of the attorney-client privilege.

B. *United States v. Collins*, 60 M.J. 261 (C.A.A.F. 2004). The MJ must act when issues of mental responsibility and capacity arise during trial. In this case, the lone member of a sanity board testified in a manner apparently inconsistent with his conclusion in the report that the accused was mentally responsible for his actions. During trial, COL Richmond testified that the accused's actions were consistent with his delusional disorder and that the accused did *not* understand the nature and quality or wrongfulness of his conduct. The MJ did not order further inquiry under RCM 706 and the CAAF held that he should have.

C. **Defense use of statements of the accused to an RCM 706 Board.** *United States v. Schap*, 49 M.J. 317 (C.A.A.F. 1998). The judge did not err when he sustained trial counsel's objection and prevented former sanity board psychiatrist from testifying for defense at trial as to accused's statements and emotions at the time of the offense. The defense was attempting to smuggle the accused's statements in without subjecting him to cross-examination.

D. Once defense offers **expert** testimony of accused's mental condition, a prosecution expert may testify as to the reasons for the expert's conclusions concerning accused's mental state (may not extend to accused's statements unless the accused first introduces his own statement or derivative evidence). MRE 302.

E. **Disclosure of full sanity board report.** *United States v. Cole*, 54 M.J. 572 (A. Ct. Crim. App. 2000), *aff'd*, 55 M.J. 466 (C.A.A.F. 2001) (summary disposition). At trial, the Government moved to compel defense disclosure of entire report under MRE 302(c) because defense was requesting two experts to testify about accused's belief that his actions were necessary to protect his family (as opposed to lack of mental responsibility). The military judge's decision to defer ruling on the government motion, because it was unclear in advance of the testimony whether the experts would testify on the issue of mental responsibility and not just on the second prong of defense of another, was not an abuse of discretion.

1. *United States v. Savage*, 67 M.J. 656 (A. Ct. Crim. App. 2009). The appellant claimed that he was asleep when he stabbed his victim due to a disorder called parasomnia. An RCM 706 inquiry concluded that the appellant was competent to stand trial, that there was a reasonable possibility that the appellant suffered from "parasomnia, or somnambulism that produced an automatism or sleep-related behavior at the time of the assault," and that the appellant may not have been unable to appreciate the wrongfulness of his conduct. The defense provided the government with notice of intent to rely on the defense of lack of mental responsibility. Approximately six weeks later, the defense e-mailed the full RCM 706 report to the trial counsel without an order from the military judge. Six weeks after that, the appellant hired civilian counsel and excused the counsel who e-mailed the report. Eventually the civilian counsel notified the government that the defense would not pursue the defense of lack of mental responsibility, and instead would rely upon partial mental responsibility to negate *mens rea*. Some of those statements were eventually used in cross-examination of the appellant's expert. The ACCA held that MRE 302(c) was violated, but the error was harmless. The defense case-in-chief involved statements from an expert that revealed specific statements made by the appellant captured in the RCM 706 inquiry. The defense could have avoided the government using any portion of the report by not calling experts who authored the report. See *United States v. Clark*, 62 M.J. 195 (C.A.A.F. 2005).

F. Although the rule seems to condition the use of expert testimony by the prosecution on prior use of **experts** by the defense, the Court of Military Appeals rejected such an interpretation,

finding that lay testimony can permit the government to use its experts. *United States v. Bledsoe*, 26 M.J. 97 (C.M.A. 1988); *see also United States v. Matthews*, 14 M.J. 656 (A.C.M.R. 1982).

G. The sanity board report is not admissible under hearsay rules. *United States v. Benedict*, 27 M.J. 253 (C.M.A. 1988).

H. **Sentencing Considerations.** Extenuation and Mitigation. Evidence of the accused's mental condition can be used on sentencing but with caution. *See United States v. Bono*, 26 M.J. 240 (C.M.A. 1988).

I. Guilty Pleas and Sanity Issues.

1. *United States v. Harris*, 61 M.J. 391 (C.A.A.F. 2005). After acceptance of the accused's pleas and announcement of sentence, but before the convening authority took action, the accused was diagnosed with bipolar disorder. At a post-trial Article 39(a) session, the military judge listened to expert testimony from mental health experts who disagreed as to whether the accused suffered from any mental illness. The accused did not testify at this hearing. In his findings of fact and conclusions of law, the military judge stated that the accused "suffered from a bipolar disorder that would equate to a severe mental disease or defect," but that he appreciated the wrongfulness of his actions and was subsequently competent to stand trial. The CAAF disagreed, the majority saying that they did not see how an accused can make an informed plea without knowledge that he suffers from a severe mental disease or defect at the time of the offense. The court also stated that it was not possible for a military judge to conduct the necessary *Care* inquiry without exploring with the accused the impact of any mental health issues on those pleas.

2. *United States v. Shaw*, 64 M.J. 460 (C.A.A.F. 2007). The accused pled guilty to offenses during a guilty plea and findings were entered. During the accused's unsworn statement, he said that prior to the charged offenses he was assaulted by a man wielding a lead pipe and suffered severe injuries to his head and brain. The accused also said that he spent almost a month in the hospital and that he was diagnosed with bipolar syndrome. The CAAF determined that the military judge did not err when he failed to inquire into the accused mental condition because his statements were unsupported by other evidence entered into the record or his behavior during his providence inquiry or unsworn statement. A military judge is only required to inquire into circumstances or statements that raise a possible defense, not circumstances or statements that raise the "mere possibility" of defense. NOTE: the majority opinion recommend that a prudent military judge conduct an inquiry when a significant mental health condition is raised during the plea inquiry; *see also United States v. Falcon*, 65 M.J. 386 (C.A.A.F. 2008) (noting that "[the accused] has provided no authority that a diagnosis of pathological gambling can constitute a defense of lack of mental responsibility."); *United States v. Glenn*, 66 M.J. 64 (C.A.A.F. 2008) (stating that the accused's expert mitigation evidence that he suffered from a mood disorder and his unsworn and unsubstantiated statements that he suffered from bipolar disorder did not raise a substantial basis in law for questioning his guilty plea).

3. *United States v. Handy*, 48 M.J. 590, 593 (A.F. Ct. Crim. App. 1998). During a guilty plea, "[w]hen evidence of an accused's mental health rears its head, the judge should question defense counsel on whether he or she has explored the mental responsibility angle of the case, including whether evidence exists to negate an intent or knowledge element of the offense. The judge should ask the accused if defense counsel has discussed that issue and how it may apply to the particular case. The judge should

accept the guilty plea only if the mental issues are resolved for the record and the accused disclaims any potential mental ‘defense,’ full or partial.”

4. *United States v. Estes*, 62 M.J. 544 (A. Ct. Crim. App. 2005). Appellant argued that remarks made during his unsworn, indicating a hyper-religiosity, should have triggered further inquiry from the Military Judge regarding his lack of mental responsibility and competency. Appellant further argued that the inquiry, together with evidence of appellant’s cannabis addiction, would have demonstrated significant issues of lack of mental responsibility. The Army court, in a carefully reasoned opinion, held appellant failed to show that a different verdict might reasonably have resulted if the trier of fact had evidence of a lack of mental responsibility that was not available for consideration at trial.

5. *United States v. McGuire*, 63 M.J. 678 (A. Ct. Crim. App. 2006). Appellant’s providence inquiry referenced psychiatric treatment and he otherwise acting strangely during his colloquy with the military judge. A previous mental evaluation pursuant to RCM 706 determined that the accused possessed the requisite mental capacity to stand trial and that he did not lack the necessary mental responsibility at the time of the offense. The Army court determined that the military judge was not required sua sponte to order further evaluation of the appellant. With regard to the providence of the appellant’s plea, the court, citing to *Estes*, reaffirmed that not every reference to psychiatric treatment or problems, no matter how vague or oblique, is sufficient to create a substantial basis for questioning a guilty plea.

6. *United States v. Riddle*, 67 M.J. 335 (C.A.A.F. 2009). In a stipulation of fact, the parties agreed that the appellant had a chronic alcohol and marijuana dependence, as well as a bipolar and borderline personality disorder. The military judge was aware of these conditions. The judge knew that before her absence, she was receiving mental health treatment at an “off-post installation that specializes in mental issues, mental and behavioral issues.” The judge also knew that she arrived at the trial from the facility and would return there after trial. During the trial, the military judge asked the appellant if she was feeling OK when she referred to “getting the fishes high” by throwing a marijuana cigarette into a lake. The military judge also asked the appellant a series of questions regarding her mental health and competency at trial. A report of mental health status evaluation was admitted into evidence on sentencing, stating that appellant had attempted suicide twice, but was mentally responsible. Finally, the military judge noted before sentencing that he observed the appellant at trial, and that she was alert, articulate, and cognizant. The CAAF held that her guilty plea was not improvident. A military judge can presume, in the absence of contrary circumstances, that the accused is sane. See *United States v. Shaw*, 64 M.J. 460 (C.A.A.F. 2007). If the appellant’s statement or facts in the record indicate a mental disease or defect, the military judge must determine if that information raises a conflict with the plea or merely a possibility of conflict with the plea. The former requires further inquiry, the latter does not. The CAAF finds that the facts of this case merely raised the possibility of conflict with the plea and the military judge was not required to inquire further. Moreover, the military judge appropriately inquired into her status, and captured his observations in the record.

Like other affirmative defenses, lack of mental responsibility is subject to the rule of waiver. *United States v. Boasmond*, 48 M.J. 912 (N-M. Ct. Crim. App. 1998).

# Criminal Law Faculty

2012 - 2013

## Chair and Professor:

LTC Eric R. Carpenter  
[eric.r.carpenter.mil@mail.mil](mailto:eric.r.carpenter.mil@mail.mil)  
434-971-3341 (DSN 521)  
Subjects: Overview of the Military Justice System; Unlawful Command Influence; Case Construction; Interviewing Witnesses; Opening Story; Direct; Cross Exam; Objections; Media; Capital Litigation

## Vice Chair and Associate Professor:

LtCol Devin A. Winklosky  
[devin.a.winklosky.mil@mail.mil](mailto:devin.a.winklosky.mil@mail.mil)  
434-971-3349 (DSN 521)  
Subjects: Crimes; Charging, Pleadings and Multiplicity

## Associate Professors:

MAJ Aimee Bateman  
[aimee.m.bateman.mil@mail.mil](mailto:aimee.m.bateman.mil@mail.mil)  
434-971-3344 (DSN 521)  
Subjects: Defenses; Urinalysis; Protection of Military Installations/SAUSA; Mental Responsibility, Competence, and Sanity Boards

MAJ Philip M. Staten  
[philip.m.staten.mil@mail.mil](mailto:philip.m.staten.mil@mail.mil)  
434-971-3343 (DSN 521)  
Subjects: Discovery; Production; NJP; Summary Court; Article 32; Appeals and Writs

Mr. James G. Clark  
[james.g.clark101.civ@mail.mil](mailto:james.g.clark101.civ@mail.mil)  
434-971-3347 (DSN 521)  
Subjects: Victim-Oriented Programs; Sexual Crimes and Domestic Violence

MAJ Jeremy Steward  
[jeremy.w.steward.mil@mail.mil](mailto:jeremy.w.steward.mil@mail.mil)  
434-971-3348 (DSN 521)  
Subjects: Jurisdiction/MEJA; Search and Seizure; Cyber Law; ISSRFRT

MAJ Benjamin Grimes  
[benjamin.k.grimes.mil@mail.mil](mailto:benjamin.k.grimes.mil@mail.mil)  
434-971-3342 (DSN 521)  
Subjects: Professional Responsibility; Speedy Trial; Pretrial Restraint and Pretrial Confinement Reviews; Post-conviction

MAJ Sarah Sykes  
[sarah.c.sykes.mil@mail.mil](mailto:sarah.c.sykes.mil@mail.mil)  
434-971-3346 (DSN 521)  
Subjects: Self Incrimination; Right to Counsel and IAC; Commissions

MAJ Rebecca F. Kliem  
[rebecca.f.kliem.mil@mail.mil](mailto:rebecca.f.kliem.mil@mail.mil)  
434-971-3179 (DSN 521)  
Subjects: Using Evidence; Experts; Evidence; Classified Evidence; Confrontation Clause

MAJ Megan Wakefield  
[megan.s.wakefield.mil@mail.mil](mailto:megan.s.wakefield.mil@mail.mil)  
434-971-3345 (DSN 521)  
Subjects: Pretrial Advice; Pretrial Agreements; Court-Martial Personnel; Pleas; Post-trial; Double Jeopardy; Negotiations

MAJ Sean F. Mangan  
[sean.f.mangan.mil@mail.mil](mailto:sean.f.mangan.mil@mail.mil)  
434-971-3276 (DSN 521)  
Subjects: Trial Notebooks and Checklists; Preparing Witnesses; Motions; Voir Dire and Challenges; Instructions; Findings; Sentencing; Arguments



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