

THE ADVOCATE



A Journal For Military Defense Counsel

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Project: The Guilty Plea Checklist

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United States Army Defense Appellate Division

TABLE OF CONTENTS

	Page
Opening Statements	2
Guilty Plea Checklist	3
Introduction	3
Table of Contents	4
Checklist	5
Annotations	22
On The Record	75

OPENING STATEMENTS

Overview

The Advocate begins Volume 15 with a new cover logo and some changes in format. The history of our logo is described on the inside rear cover. Our table of contents will now be found inside The Advocate rather than on the cover. Finally, beginning with our next issue there will be a "Last Minute Developments" page for use when important information which we think is of interest to our readership comes to our attention shortly before our publication deadline.

* * *

This special issue of The Advocate consists of the Defense Appellate Division's Guilty Plea Checklist. We have received numerous requests for the checklist since it was first prepared in 1981. This checklist has been thoroughly revised and updated through March 1983. It is separately paginated to permit changes to be issued from time to time in subsequent volumes of The Advocate.

* * *

The Advocate welcomes contributions from our readers, including both civilians and officers of our sister services. This issue contains On the Record submissions from Air Force and Navy/Marine Corps courts-martial. They are certain to entertain.

* * *

The heavy caseload before the Army Judiciary continues to delay publication of The Advocate. We regret this inconvenience.

Staff Changes

Captain Warren G. Foote leaves The Advocate to become a Commissioner for the Army Court of Military Review. He is replaced as "Side-Bar" Editor by Captain Frank J. DiGiammarino, who has had considerable trial experience with the 1st Armored Division. Captain Edmund S. Bloom, Jr. is our new Special Features Editor, replacing Captain Brenda L. Lyons who has also become a Commissioner to the Army Court of Military Review. Captain John Lukjanowicz leaves the staff after two years of dedicated service, and is replaced as an Associate Editor by Captain Michael D. Graham.



DEPARTMENT OF THE ARMY
UNITED STATES ARMY LEGAL SERVICES AGENCY
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REPLY TO
ATTENTION OF

JALS-DA

13 May 1983

SUBJECT: Project: Guilty Plea Checklist

DISTRIBUTION

1. In response to numerous requests since its first publication, the Guilty Plea Checklist used by the Defense Appellate Division is reprinted in this special issue. While it is primarily a guide for appellate counsel when reviewing records of trials involving guilty pleas, it also contains general information applicable to contested cases.
2. The Checklist does not presume to address every contingency which the trial practitioner might face. However it should serve as a handy reference for the vast majority of situations confronting trial defense counsel. In addition, it should familiarize defense counsel with the matters scrutinized by both appellate defense counsel and the courts, thereby assisting trial defense counsel in their protection of their clients' interests.
3. In future issues of The Advocate we will update the Checklist. We certainly solicit the views of our readers as to additional topics which should be addressed. Through such cooperation, our clients cannot help but benefit from the highest quality, continuing representation through all levels of their court-martial proceedings.

A handwritten signature in cursive script, reading "Wm G Eckhardt".

WILLIAM G. ECKHARDT
Colonel, JAGC
Chief, Defense Appellate Division .

GUILTY PLEA CHECKLIST

TABLE OF CONTENTS

	<u>PAGE</u>	
	<u>CHECKLIST</u>	<u>ANNOTATION</u>
A. Appellate Rights	II	A
B. Promulgating Order	II	B
C. SJA Review (Guilty and Not Guilty Plea Cases)	III	C
D. <u>Goode</u> Service, Rebuttal, Waiver and Post-trial Matters	IV	D
E. Action and Deferment	V	E
F. Jurisdiction	VI	F
G. Right to Counsel	VI	G
H. Choice of Trial Forum	VI	H
I. Trial Procedure	VI	I
J. Charges and Arraignment	VII	J
K. Plea Inquiry	VII	K
L. Providence of Guilty Pleas	VIII	L
M. Pretrial Agreement	XII	M
N. Findings and Multiplicity	XII	N
O. Assembly of the Court and Voir Dire	XIII	O
P. Sentencing: Matters in Aggravation and Rebuttal	XIII	P
Q. Sentencing: Matters in Extenuation and Mitigation	XIV	Q
R. Trial Counsel's Argument	XV	R
S. Defense Counsel's Argument	XVI	S
T. Instructions on Sentence	XVI	T
U. Deliberations and Announcement of Sentence	XVII	U
V. Record of Trial and Authentication	XVII	V

PART I: GUILTY PLEA CHECKLIST

A. Appellate Rights

1. Do the allied papers indicate that the accused was advised by the DC of his appellate rights?
2. a. Do the allied papers contain an executed "request for appellate DC" form?
b. Do the allied papers indicate that the accused will retain civilian appellate counsel?
c. Does the appellate request form, or any communication from the accused, list any errors/matters to be raised on appeal?

B. Promulgating Order (CMO)

1. Does the CMO have the same date as the action of the CA who published it?
2. Are all the orders convening the court which tried the case correctly cited in the CMO?
3. Are the appellant's name, rank or grade, SSN, organization, and armed force correctly shown in the CMO?
4. Are all charges and specifications, including amendments, upon which the appellant was arraigned correctly shown in the CMO?
5. Are the pleas, findings, and sentence copied verbatim in the CMO?
6. Does the CMO correctly indicate the number of previous convictions considered?
7. Does the CMO show the date the sentence was adjudged?
8. Does the CMO correctly show the sentence announced?
9. Is the action of the CA copied verbatim from the record to the CMO?
10. Is the CMO signed by CA or subordinate "by direction"?

C. SJA Review (Guilty and Not Guilty Plea Cases)

1. For additional checklist see attached article from February 1976, Army Lawyer (P. C-3 to C-8) and Section D, below.
2. Did review omit listing any specifications?
3. Correct maximum imposable sentence stated?
4. Are the pleas and findings correctly stated?
5. Did the SJA rely only on the record to sustain a finding of guilty?
6. Did the SJA recognize and discuss defenses not formally raised by appellant at trial, but which are raised by evidence?
7. Did the SJA include a discussion of legal and factual sufficiency as to each legal issue/affirmative defense raised?
8. Were MJ or court members clemency/suspension recommendations noted in review?
9. Inconsistent statement/recommendation as to sentence?
10. Disparate sentences in closely related cases discussed?
11. Was review "changed" after DC submitted Goode rebuttal?

D. Goode Service, Rebuttal, Waiver, and Post-Trial Matters

1. If civilian DC/more than one DC, did MJ determine who would file Goode response?
2. Was the SJA's post-trial review served on the correct DC?
3. Was the SJA's review properly served on a substituted DC accepted by accused?
4. Did SJA serve the post-trial review on DC that the accused had claimed inadequate/expressed dissatisfaction?
5. Did DC have copy of record to prepare Goode response?
6. Waiver. Did DC fail to correct or challenge any matters in the post-trial review that are erroneous, inadequate or misleading?
7. Was DC's response contrary to best interests of client? Breach of attorney-client relationship?
8. If new review and action required and trial DC unavailable for Goode response, were accused and appellate DC served with review?

E. Action and Deferment

1. Does the action by the CA differ from the SJA recommendation without including a written explanation?
2. Forfeitures.
 - a. Are forfeitures based on the pay scale in effect on the date the sentence was adjudged? Do SPCM forfeitures exceed \$367 per month if trial after 1 October 1981; exceed \$382 after October 1982?
 - b. Are partial forfeitures applied to pay only?
 - c. Are there forfeitures in excess of 2/3 pay for 6 months without an approved discharge or unsuspended confinement for period of forfeitures?
 - d. Are TF approved for accused no longer in confinement?
 - e. Do the partial forfeitures specify the amount that will be forfeited per month?
 - f. If no confinement is adjudged/approved, did CA improperly apply forfeitures prior to execution of the sentence?
3. Has the CA converted the sentence to a non-equivalent punishment?
4. Does the sentence, as approved, exceed the sentence in companion cases?
5. Does any suspension extend beyond accused's period of enlistment?
6. Is the action properly taken/dated after authentication?
7. Are there any ambiguities or irregularities in the CA action?
8. Does CA action exceed the limits of the pretrial agreement as interpreted by parties at trial?
9. Did CA improperly order the sentence executed?
10. Does delay in CA action cause appellant any prejudice?
11. Did CA/subordinate commander grant immunity to a witness whose pretrial statement/testimony was used against the accused during sentencing?
12. Did accused receive administrative credit for illegal pretrial confinement?
13. Deferment. If CA denied a request for deferment of any confinement, did he state reasons in writing, after considering all relevant factors? If deferment granted, were unreasonable conditions placed upon the accused? If rescinded, did CA abuse discretion?

F. Jurisdiction

1. Does the convening order show the proper CA?
2. Did the CA personally select MJ, counsel and court members?
3. Are all convening and amending orders of court to which charges were referred entered in the record?
4. Are all persons named in the convening orders and the accused accounted for as present or absent?
5. Was accused under 17 at the time of trial?
6. Was accused under 18 and in Army with parental consent at time of trial?
7. Was accused held for trial after expiration of his enlistment?
8. If National Guard, was active duty properly ordered and/or approved by state authorities?
9. Is there subject matter jurisdiction?
10. Were the charges withdrawn and re-referred?
11. a. Was less than a quorum detailed or present at any meeting requiring the presence of court members?
b. If trial with EM, were less than 1/3 of the members EM at anytime during the trial?
12. Does the record show that after each session, adjournment, recess, or closing during the trial, the parties to the trial were accounted for when the court reopened?
13. If the military judge or any member present at assembly was thereafter absent, was such absence the result of challenge, physical disability, or order of the convening authority based on good cause as shown in the record of trial?
14. New members appointed after arraignment?
15. a. Did any court member, the MJ, counsel for either side, the investigating officer, or the SJA serve in any other capacity related to the trial; for example, as the accuser or a witness for the prosecution?
b. If any of the above, did appellant waive such disqualification?
16. Was accused tried in absentia?
17. Is there in personam jurisdiction?

G. Right to Counsel

1. Was the appellant properly advised of his rights to detailed counsel or individual military counsel, and civilian counsel at his own expense?
2. Was the accused denied a continuance to retain civilian/military counsel?
3. Was there a multiple representation of co-accused/witness by the same counsel?

H. Choice of Trial Forum

1. If trial by MJ alone, was there a request in writing?
2. Did appellant know the identity of the MJ when the request was prepared?
3. Did MJ advise appellant of his right to trial by court members and voting procedures?
4. Did MJ advise enlisted appellant of his right to court with 1/3 EM?
5. If trial with EM, was it requested in writing?
6. Did any enlisted court member belong to the same unit as appellant?

I. Trial Procedure

1. Does the record show place, date, and hour of each Article 39(a) session, the assembly and each opening and closing of the court thereafter?
2. Were the reporter and interpreter (if any) sworn or previously sworn? Reporter not accuser?
3. Were the MJ, TC, and DC properly certified?
4. Was a properly certified DC or civilian counsel present during all open sessions of the court?
5. Were the members of the court, MJ and the personnel of the prosecution and defense sworn or previously sworn?

J. Charges and Arraignment

1. Was accused tried over objection, upon unsworn charges?
2. Do specifications demonstrate jurisdictional basis for trial and offenses?
3. Does each specification allege or reasonably imply every essential element of the offense (compare forms in App 6c, MCM)?
4. Were all specifications referred to trial by CA?
5. Was accused arraigned on charges that had been previously withdrawn?
6. Motions. a. Did MJ defer ruling on motions in limine?
 b. Was accused curtailed in making motions?
7. a. Any offenses multiplicitious?
 b. Stand in relationship of greater and lesser offenses?
 c. Did DC move to dismiss multiplicitious specifications?
8. Any evidence charges/trial result of prosecutorial vindictiveness?

K. Plea Inquiry

1. Was inquiry outside presence of court members?
2. Adequate Care inquiry conducted by MJ?
3. Did the MJ explain that the plea authorized conviction without further proof?
4. Was the appellant an active participant in a dialogue between himself and the MJ?
5. Did inquiry include explanation of each element of the offense?
6. Where issue raised, did MJ explain difference between responsibility as a principal and as an aider and abettor?
7. Did the MJ explain the maximum sentence authorized on conviction and that appellant could receive such a sentence?
8. Did the MJ explain that the plea waived specifically enumerated constitutional rights and any motions to suppress?
9. Did the MJ make specific inquiry into the factual predicate supporting the plea?
10. Did the MJ resolve inconsistencies discovered during inquiry?
11. a. Did the MJ inquire into potential defenses?
b. Did the MJ rely solely on the DC for responses concerning existence of potential defenses?
12. Did the MJ find that:
 - a. There was a knowing and conscious waiver of rights by the accused?
 - b. That the plea was voluntary?
 - c. That the appellant understood the meaning and effect of the plea?
 - d. That the admission of the plea was based on factual guilt?
13. Did MJ impose any conditions on acceptance of plea (waiver of motions/naming drug supplier, etc.)?
14. If MJ rejected guilty plea, did MJ recuse himself?

L. Providence of Guilty Pleas

1. If the accused set up matters/stated facts inconsistent with the plea, did the MJ resolve the inconsistency/require accused to personally recant?
2. Did the military judge discuss possible defenses raised by the providence inquiry?
 - a. Intoxication. Did any of the offenses require specific intent, knowledge, or a specific state of mind?
 - b. Agency. Did accused buy drugs to assist another?
 - c. Innocent Possession. Did accused claim a lawful purpose?
 - d. Impossibility. Impossible for accused to do what he had a duty to do?
 - e. Insanity. Do the facts suggest that accused had a mental disease or defect?
 - f. Claim of right. In larceny or wrongful appropriation case, did accused believe he had a right to use the property?
 - g. Duress. Did the accused commit the offense to prevent physical harm to himself or another?
 - h. Mistake of Fact. Would accused's conduct have been lawful if facts were as he reasonably believed them to be?
 - i. Lack of criminal intent. Did accused state he did act to teach friend a lesson, as a joke, etc.?
 - j. Self-defense raised?
 - k. "Color of law." Did accused believe he was acting in behalf of CID, CO, etc.?
 - l. Did accused claim he "inadvertently" violated the law?
 - m. Drugs. Substance sold not a controlled substance?
 - n. Entrapment raised?
3. Was the accused confused over the collateral consequences of his plea?

4. Did the accused fail to admit an element of the offense?
 - a. Dishonorable. In bad check case, did the accused admit that his failure to maintain sufficient funds was dishonorable?
 - b. Prejudicial to good order and discipline. In Art. 134 case did the accused formally admit this element?
 - c. Aider & abettor. If accused tried as an aider and abettor, did MJ explain law of principals?
 - d. Conspiracy and attempts. Did MJ cover all elements of substantive offense?
 - e. Duty to act/obey. If accused is charged with affirmative duty, did inquiry show that it was possible for accused to comply?
 - f. Variance between crime charged and admitted?
5. Did anyone or anything coerce accused into pleading guilty?
6. Does the specification state an offense?
7. Did the accused suffer from a misapprehension of the maximum punishment at the time of the plea?
 - a. Did the military judge explain the maximum sentence authorized on conviction and that appellant could receive such a sentence?
 - b. Did the military judge correctly state the maximum punishment?
 - c. If not, does the record affirmatively reflect that accused was aware that actual maximum sentence might be less than that stated by military judge, and nonetheless, persist in his plea?
 - d. If the record does not so reflect, do all of the circumstances indicate that the misapprehension of the maximum sentence was a substantial factor in accused's decision to plead guilty?
 - e. Multiplicitous offenses? If so, is the plea provident in light of new maximum sentence.
8. Is the accused innocent/not guilty as a matter of law?
9. Was DC seriously deficient in advising the accused of applicable law?
10. Did the accused believe that certain pretrial motions which are ordinarily waived by a guilty plea would be preserved for appellate review? Was a conditional guilty plea entered?

11. Did the MJ refuse accused's request to change plea from G to NG after findings but before sentencing?
12. Did MJ participate in the plea bargaining process?
13. Do the allied papers indicate matter inconsistent with plea?
14. Was accused or any of the court personnel under influence of drugs or alcohol, insane, etc. at time of trial?
15. Does the pretrial agreement contain invalid provisions?
16. Has accused attacked providence of plea in post-trial affidavits?

M. Pretrial Agreement

1. Did MJ ascertain whether a pretrial agreement (PTA) existed?
2. If a PTA exists, did the MJ assure on the record:
 - a. that accused understood meaning and effect of each condition of the pretrial agreement by questioning accused?
 - b. that his understanding of the PTA comported with the understanding of TC and DC regarding each condition of the PTA by questioning them?
 - c. that accused understood the sentence limitations imposed by the PTA by questioning accused?
 - d. that no sub rosa agreements exist?
3. Does PTA require accused/co-actor to testify against another?
4. Does PTA inhibit exercise of appellate rights?
5. Does PTA prohibit motions, objections, etc?
6. Did PTA waive Article 32 investigation? Witnesses?
7. Does PTA contain ancillary restrictive/invalid provisions?
8. Did TC/SJA attempt to withdraw PTA during course of trial?
9. Is PTA ambiguous?
10. Did the PTA attempt to preserve pretrial motions/create a conditional guilty plea?
11. If MJ alone, did MJ delay looking at the sentence portion of the PTA until after he had determined sentence?

N. Findings and Multiplicity

1. Were findings entered as to all specifications and charges?
2. Were multiplicitious specifications dismissed?

O. Assembly of the Court and Voir Dire

1. Was rank used as a device for deliberate exclusion of court members?
2. a. Are at least three members present for a SPCM or at least five members present for GCM?
b. Were a substantial number of members absent without CA approval?
3. Was counsel allowed adequate voir dire?
4. Did any member exhibit "inelastic attitude" during voir dire?
5. Was appellant given peremptory challenge?
6. Did any court members have knowledge of prior convictions not admitted at trial?
7. Are all court members on orders to sit?
8. Are 1/3 of the court members present enlisted members (EM) if trial with EM was requested?

P. Sentencing: Matters in Aggravation and Rebuttal

1. Are Article 15's properly completed in all respects?
2. Have the records of prior Article 15's been maintained in accordance with law and regulations?
3. Are prior court-martial convictions based on offenses occurring more than 6 years before the trial for the current offense?
4. a. Do all prior conviction forms reflect final review?
b. Are the forms properly completed?
5. Do summary court-martial convictions reflect compliance with Booker (requisite written consent/waivers)?
6. Did MJ question accused to establish Booker admissibility?
7. Do specifications in previous convictions and Article 15 records state an offense?

8. a. Have the entries in the personnel records been made in accordance with law and regulations?
- b. Were personnel records reflecting civilian misconduct/convictions properly admitted?
9. Were all forms properly authenticated?
10. Were accused's admissions during the providence inquiry used in aggravation?
11. Did government witness recommend a specific sentence?
12. Did government rebuttal evidence exceed proper rebuttal?

Q. Sentencing: Matters in Extenuation and Mitigation

1. Did MJ personally advise the accused of his rights to allocution (present sworn or unsworn testimony, to remain silent)?
2. Did DC fail to offer available evidence in mitigation?
3. Were character witnesses improperly denied?
4. Did MJ preclude/limit the accused from testifying about the offenses of which accused had been found guilty?
5. Did MJ deny DC request to admit evidence that would have been admissible if offered by TC?
6. Was a summary court-martial/Article 15 used to impeach a defense witness?
7. Was there any improper cross-examination of accused/defense witness?

R. Trial Counsel's Argument

1. Did TC argue facts:
 - a. not supported by evidence before the court?
 - b. elicited solely during providence inquiry?
2. Did TC refer to witnesses who did not testify?
3. Did TC argue evidence for purposes other than for which it was admitted?
4. If TC argued a specific intent greater than that encompassed by the charges, did appellant admit the intent or was it proved by the evidence?
5. Did TC ask court members to put themselves in the place of the victim?
6. Did TC appeal to class or race prejudice of the court?
7. Did TC suggest a specific sentence for the appellant?
8. Did TC argue that he was expressing the views of the CA?
9. Did TC express contempt for court members who would not render a severe sentence?
10. Did TC misstate the law?
11. Did TC comment on appellant's silence?
12. Did TC comment on military-civilian relations?
13. Did TC argue general deterrence to exclusion of all other factors?
14. Did TC cite legal authority to court members?
15. Did TC argue his own personal opinions?
16. Did TC use language to inflame the passions of the members?
17. Did TC urge that higher ranking witnesses are more credible than lower ranking witnesses?
18. Did TC argue accused lied/committed perjury?

S. Defense Counsel's Argument

1. Did DC argue directly or indirectly for a punitive discharge without client's express consent?
2. Did DC fail to argue?

T. Instructions on Sentence

1. Did the MJ instruct on the correct maximum imposable punishment?
2. Multiplicity.
 - a. Did the MJ instruct on multiplicity when required?
 - b. Drug offenses. Did MJ instruct that possession was multiplicitious with transfer and sale offenses?
3. Did MJ tailor instructions to the evidence adduced in extenuation and mitigation?
4. Did MJ instruct that confinement or hard labor automatically reduces appellant to lowest enlisted grade?
5. Where BCD authorized by Section B, para. 127c, MCM (multiple offenses/ prior convictions), did MJ so instruct?
6. Did MJ instruct on voting procedures:
 - a. That votes would be by secret written ballot?
 - b. That balloting would be on each proposed sentence in its entirety beginning with the lightest?
 - c. That adoption of the sentence required concurrence of 2/3 of the members present?
 - d. That any sentence which includes confinement at hard labor in excess of ten years requires the concurrence of 3/4 of the members present?
7. Were any instructions requested by the defense denied?
8. Did MJ instruct that court could consider that accused lied?

U. Deliberations and Announcement of Sentence

1. Any extraneous/outside influence applied to court members/MJ?
2. Did the President properly announce the sentence?
3. Did the President use wording which did not reflect the intent of the court?
4. Reconsideration.
 - a. If an illegal sentence was announced, did judge correct by instructing the members so that they could reconsider?
 - b. If there is reconsideration, did the judge instruct that punishment could not be increased? But could be decreased?
 - c. Did MJ limit reconsideration to illegal portion of sentence?
 - d. If member requested reconsiderations, did MJ properly instruct?
5. Any ambiguity in the sentence?
6. Did MJ consider providence responses in sentencing?
7. Did MJ examine quantum portion of PTA prior to announcing sentence?
8. Did MJ secure accused's/counsel's concurrence as to effect of PTA limitations on sentence adjudged?

V. Record of Trial and Authentication

1. Is the record complete/verbatim? Testimony/exhibits missing or summarized?
2. Recording malfunction?
3. Were any side-bar/out-of-court conferences not reported?
4. Has government rebutted prejudice from substantial omissions?
5. Authentication.
 - a. Has the presiding MJ or proper substitute authenticated the record of trial?
 - b. When someone other than MJ authenticates, is the MJ genuinely unavailable for a lengthy period of time?
6. Was accused served with copy of record immediately after authentication?

7. Certificates of Correction.
 - a. Was notice given to parties and hearing held for substantive changes after authentication?
 - b. Procedures for requesting and filing on appeal followed?
8. Did anyone make any unauthorized corrections/insertions to the record?

PART II: ANNOTATIONS

A. Appellate Rights

1. See Wiles, 3 M.J. 380 (CMA 1977) (affidavits used to show no advice); Palenius, 2 M.J. 86 (CMA 1977) (discusses the full range of rights and duties of defense counsel); Sterling, 5 M.J. 601 (NCMR 1978) (circumstances under which trial defense counsel may be relieved of post-trial responsibilities of representation).
2. Grostefon, 12 M.J. 431 (CMA 1982) (when accused specifies error(s), at a minimum, appellate DC must invite CMR attention to those issues and CMR must acknowledge consideration of issue(s) in its opinion. Unless withdrawn by accused, 12 M.J. at 435, appellate DC must also identify the issues in CMA petition).
3. In Knight, 15 M.J. 195 (CMA 1983), the Court discussed the duties of appellate defense counsel in cases in which issues are raised on the appellate rights form and in correspondence with appellate counsel. The Court specified several issues to "highlight the issues identified by the accused" and ordered briefs thereon. The findings of guilty of one charge and its specification were set aside and the case was remanded to ACMR for further review.
4. In Hullum, 15 M.J. 261 (CMA 1983) the Court discussed the duties of appellate counsel in cases in which non-frivolous issues exist, but are not raised on the appellate rights form or in correspondence from the accused. The Court held that merely because an argument is not frivolous is not to say that it must be raised by appellate counsel. In the Court's view, appellate counsel are to be measured by the same standard as trial lawyers: was the appeal handled with the competency reasonably expected of an appellate advocate in the military justice system. The Court then found that appellate counsel's failure to argue the appropriateness of the sentence was a violation of that standard where the accused claimed at trial and in a petition for clemency that his absence was the result of duress and the military judge had recommended suspension of the bad-conduct discharge.

B. Promulgating Order

- 1-9. Paragraph 90, MCM, requires the convening authority to issue an order promulgating the result of trial whether there was a conviction or an acquittal; pages A15-1 and A15-2, MCM, contain forms applicable to the convening authority's promulgating order; AR 27-10, Chapter 12, contains in depth discussion of required contents of promulgating order.

Convening authority disqualified from acting in defendant's case where, at behest of trial counsel, convening authority withdrew charges against two others to allow them to become witnesses against defendant. Flowers, 13 M.J. 571 (ACMR 1982). But see Andreas, 14 M.J. 483 (CMA 1983) (GCMCA not disqualified because of invalid promise of transactional immunity to civilian witness made by SJA serving SPCMCA); Newman, 14 M.J. 474 (CMA 1983) (grant of testimonial immunity to defense witness does not disqualify convening authority).

C. SJA Review (Guilty and Not Guilty Plea Cases)

1. See attached Army Lawyer (AL) reprinted at p.p. C-3 to C-8, infra article and Section D on Goode response. Jacobs, CM 440880 (ACMR 7 Dec 81) (SJA had inconsistent recommendations in review as to sentence. No waiver by lack of TDC comment. Sentence reassessed to lowest recommendation.).
2. Taylor, SPCM 16238 (ACMR 29 Oct 81) (can't affirm offense omitted in review; new review or dismiss specification).
3. See AL checklist #22. Briar, 13 M.J. 209 (CMA 1982) (where review stated maximum was death in a noncapital case, no Goode waiver; sentence ordered reassessed)

No duty on SJA to advise CA that discharge authorized by Section B, para. 127c, MCM (multiple offenses/prior convictions). Lopez, SPCM 16722 (ACMR 14 May 82).

4. Johnson, CM 440249 (ACMR 20 Mar 81) (no waiver where, in contested case, review stated that accused pled guilty). But see Shaw, 14 M.J. 966 (ACMR 1982) (waiver of advice that accused found guilty of charge which was dismissed).
5. Curtis, 1 M.J. 297 (CMA 1976); Crittenden, 2 M.J. 941 (ACMR 1976) (CA must be given accurate summary of evidence and guidelines to allow him to determine guilt or innocence anew). Watson, SPCM 17061 (ACMR 31 Aug 1982) (Delineation of elements of offense may be necessary in SJA review, but only in a complex case). See Shaw, supra, for criticism of ill-considered reviews.
6. See Akers, 14 M.J. 768 (ACMR 1982) (failure to discuss defenses on merits); Crittenden, supra.
7. New review required where SJA did not discuss law of principles. Burroughs, 12 M.J. 380 (CMA 1982). See Crittenden, supra.
8. See AL checklist #32; Veney, 6 M.J. 794 (ACMR 1978) (no waiver in failure of DC to rebut review's omission of MJ's recommendation for suspension of BCD); accord Liddell, SPCM 16679 (ACMR 18 Nov 81). But see Barnes, CM 442841 (ACMR 11 Jan 83) (failure of review to discuss MJ's "equivocal" recommendation for clemency waived).
9. Jacobs, CM 440880 (ACMA 7 Dec 81) (lack of DC Goode objection did not waive error because "manifestly unfair to the appellant to expect the convening authority to act intelligently on the basis of such an ambiguous review." Ambiguity resolved in favor of accused and lowest SJA sentence recommendation approved).
10. Olinger, 12 M.J. 458, 462 (CMA 1982) (SJA should articulate reasons for his sentence recommendations where there are highly disparate sentences in closely related cases).
11. Where cover sheet of review may have been "corrected" after DC's Goode rebuttal, new review and action ordered. Grant, CM 437847 (ACMR 29 Feb 1980).

11. (continued)

Where "new matter" is included in addendum to review, addendum must be served on TDC for compliance with Goode. Narine, 14 M.J. 55 (CMA 1982); Nance, 15 M.J. 588 (ACMR 1983)

Where addendum to SJA review (after TDC's Goode comments) noted that defendant failed polygraph exam and where this fact was used to bolster government's case, new review ordered. No waiver because 1) prejudicial error and 2) no indication that addendum was served on TDC. McCray, CM 440167 (ACMR 26 Feb. 1982).

12. SJA review deficient where it failed to advise CA that defendant had petitioned for clemency. Prejudice likely where MJ supported petition. Phillips, SPCM 16657 (ACMR 19 Aug. 1982). See Nance, supra.

sentences of a specified class of offenders?

Synopsis of the Record

- 6. Is any item of personal data omitted or erroneously stated, particularly;
 - the character and length of pre-trial restraint
 - awards and decorations
 - character of the accused's service?

Summary of the Evidence

- 7. Does the summary of the evidence adequately and accurately reflect the accused's theory of defense, the evidence supporting that theory, and prosecution evidence favorable to the defense?
- 8. Is the accused's testimony on the merits accurately summarized?

Discussion

- 9. In a contested case, does the review properly set forth the elements of the offense and does it relate the facts to those elements?
- 10. Does the review discuss the elements of an offense of which the appellant was acquitted?
- 11. If the accused was found guilty of a lesser included offense than the offense charged, does the review set forth the elements of the lesser included offense rather than the more serious offense?
- 12. Are any defenses raised by the accused discussed and are legal guidelines provided to assess the merits of those defenses?
- 13. Does the review discuss all defense motions?
- 14. Does the review properly advise that evidence of the accused's character offered on the merits shows the "probability of his innocence"?
- 15. If any witness testified pursuant to a pretrial agreement, grant of immunity,

CHECKLIST OF SJA REVIEW ERRORS

Preliminary Matters

- 1. Is the record properly authenticated and does the date of authentication precede the date of the post-trial review?
- 2. Did any witness testify pursuant to a pretrial agreement, grant of immunity, or a grant of any type of clemency by the convening authority, a subordinate commander, the staff judge advocate, or trial counsel?
- 3. Did the staff judge advocate or convening authority testify as to any matter?
- 4. Did the officer who prepared the review have any prior participation in the proceeding or a related proceeding?
- 5. Has the convening authority made any "policy statements" indicative of a fixed attitude toward the treatment of the

or other grant of clemency, is the convening authority so advised in the review?

- 16. Does the review suggest that the convening authority is bound by the court's findings as to the credibility of witnesses or other factual issues?
- 17. Is the convening authority consistently advised that he must be convinced of guilt beyond a reasonable doubt?
- 18. Does the staff judge advocate give reasons to support his opinions on the sufficiency of the evidence or on the merits of other contested issues?
- 19. Are the staff judge advocate's opinions supported by the evidence?
- 20. Does the review correctly reflect the accused's plea and is it consistent throughout the review?
- 21. In a guilty plea case, does the review indicate that the judge had difficulty in obtaining a provident plea?

Clemency

- 22. Does the review state the correct maximum punishment?
- 23. If the military judge ruled that any of the charges and specifications were multiplicitous does the review so state?
- 24. Is all evidence and testimony favorable to the accused fully summarized in the review?
- 25. Does the review properly reflect the accused's attitude toward rehabilitation and retention in the Army?
- 26. If the appellant submitted any clemency letters or petitions after trial are they appended to and discussed in the review?
- 27. Does the review suggest that a previous Article 15 or court-martial conviction was properly considered, when in fact such records were not admissible at trial?
- 28. Does the review offer in aggravation evidence declared inadmissible at trial

or never offered at trial because it was deemed inadmissible?

- 29. Are any prior juvenile, civilian or military arrests or convictions which were not introduced at trial discussed?
- 30. Does the review refer to any post-trial misconduct?
- 31. Does the post-trial interview summary contain any opinion as to the accused's attitude which requires rebuttal?

Recommendations As To Sentence

- 32. Did the military judge, a court member, trial counsel, accused's unit commander, or an intermediate commander recommend any form of clemency including: referral to court not authorized to adjudge BCD, suspension of BCD, administrative elimination, or disapproval of the discharge? If so, does the review mention the recommendation and does it summarize it fairly?
- 33. Does the review properly advise the convening authority of his powers to sentence and does it refrain from suggesting an inflexible policy consideration as to sentence?
- 34. In a guilty plea case, does the recommendation as to sentence conform to the pretrial agreement. If not, is any departure fully discussed and justified?

Miscellaneous

- 35. Does the review contain any indication of racial bias?
- 36. In your review of the record of trial have you discovered any legal errors or irregularities not brought out at trial?

Notes

1. The post-trial review must be based on an authenticated record. Para. 82f, *MCM United States v. Hill*, 22 USCMA 419, 47 CMR 397 (1973)
2. a. Disqualification by reason of convening authority giving a witness a favorable pretrial agreement in exchange for testimony. *United States v. Albright*, 9 USCMA 628, 26 CMR 408 (1958)

United States v. Diaz, 22 USCMA 52, 46 CMR 52 (1972)
United States v. Sierra Albino, 23 USCMA 63, 48 CMR 534 (1974)—subordinate commander entered pretrial agreement with witness
United States v. Hurd, 49 CMR 671 (ACMR 1974)

b. Disqualification by reason of convening authority's or subordinate's grant of immunity to a witness

United States v. Maxfield, 20 USCMA 496, 43 CMR 336 (1971)—acting convening authority's grant of immunity bars review by convening authority upon return
United States v. Williams, 21 USCMA 292, 45 CMR 66 (1972)—failure of SPCM convening authority to refer charge against the witness can amount to a grant of immunity
United States v. Chavez-Rey, 23 USCMA 412, 50 CMR 294 (1975)—subordinate commanders made promises of immunity and clemency

c. Disqualification by reason of offer of clemency in exchange for testimony of witness

United States v. Dickerson, 22 USCMA 489, 47 CMR 790 (1973)—subordinate commanders agreed to refer witness's charges to non-BCD special court and to suspend any confinement
United States v. Espiet-Betancourt, 23 USCMA 533, 50 CMR 672 (1975)—convening authority disqualified by subordinate commander's offer of Article 15 punishment to witnesses
United States v. Ward, 23 USCMA —, 50 CMR — (1975)—staff judge advocate offered witnesses Article 15 punishment

3. Staff judge advocate or the convening authority may be disqualified by his testimony at trial.

United States v. McGlenny, 5 USCMA 507, 18 CMR 131 (1955)
United States v. Taylor, 5 USCMA 523, 18 CMR 147 (1955)
United States v. Choice, 23 USCMA 329, 49 CMR 663 (1975)—test is that of objective reasonableness. Is the reviewing authority put in the position of weighing his testimony against other conflicting or contradictory evidence.
United States v. Rumpfelt, 49 CMR 54 (1975) staff judge advocate disqualified by reason of his testimony on speedy trial motion. *But see U.S. v. Choice, supra.*

4. a. Trial counsel can not prepare the review

United States v. Coulter, 3 USCMA 657, 14 CMR 75 (1954)
United States v. Metz, 16 USCMA 140, 36 CMR 296 (1966)
United States v. Davis, 47 CMR 13 (1973)—acting SJA was detailed previously as trial counsel.

b. No person who has acted as a member, military judge, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in a case may later prepare the review

United States v. Thomas, 8 USCMA 798, 14 CMR 216 (1964)

United States v. Turner, 7 USCMA 38, 21 CMR 164 (1956)

United States v. Valenzuela, 7 USCMA 45, 21 CMR 171 (1956)

United States v. Hardy, 11 USCMA 521, 29 CMR 337 (1960)

United States v. Mallicote, 13 USCMA 374, 32 CMR 374 (1962)

United States v. Jolliff, 22 USCMA 95, 46 CMR 95 (1973)

5. The convening authority may be disqualified because he has expressed a fixed attitude toward the treatment of a specific class of offenders

United States v. Wise, 6 USCMA 472, 20 CMR 188 (1955)—convening authority announced he would not suspend or remit punitive discharges.

United States v. Howard, 23 USCMA 187, 48 CMR 939 (1974)—convening authority issued statement indicating a firm determination to approve the adjudged sentence of drug offenders.

United States v. Lacey, 23 USCMA 334, 49 CMR 738 (1975)—larceny offenders should be eliminated from Army as a matter of policy.

6. a. Pretrial Confinement

United States v. Barker, 44 CMR 610 (ACMR 1974)

b. Decorations and Awards

United States v. Morigeau, 41 CMR 714 (ACMR 1970)

c. Character of Service

United States v. Evans, 49 CMR 675 (ACMR 1974)

7. While there is no requirement that the review strike an exact balance, it is inadequate if defense evidence is so briefly summarized that the convening authority is not on notice of the accused's theory of defense and the evidence supporting it.

United States v. Collier, 19 USCMA 580, 42 CMR 182 (1970)—omitted testimony of officer who stated he would not believe government's witness under oath but would believe the accused.

United States v. Cruse, 21 USCMA 286, 45 CMR 60 (1972)

United States v. Chandler, 22 USCMA 73, 46 CMR 73 (1972)—testimony of prosecution witness inaccurately summarized.

United States v. Samuels, 22 USCMA 238, 46 CMR 238 (1973)—review omitted testimony relevant to key issue of identification.

United States v. Lindsey, 23 USCMA 9, 48 CMR 265 (1974)

United States v. Smith, 23 USCMA 98, 48 CMR 659 (1974)—failed to discuss criminal background of government's witness and failed to discuss testimony of a defense witness who corroborated accused's testimony.

United States v. Scaife, 23 USCMA 234, 49 CMR 287 (1974)—failed to indicate that no witness or the victim could identify the accused and persisted in using the accused's name as the perpetrator when discussing the facts surrounding the commission of the offense.

- United States v. Savina*, 23 USCMA 414, 50 CMR 296 (1975)
United States v. Gittings, 48 CMR 967 (ACMR 1974)—106 record pages of defense testimony reduced to 6 lines in review whereas 60 pages of prosecution evidence occupied 47 lines.
8. Proper summarization of the accused's testimony is vital.
United States v. Evans, 49 CMR 674 (ACMR 1974)—review refers to confession and other incriminating statements but fails to delineate the substance of those statements or the circumstances under which they were made.
United States v. Gaines, 49 CMR 701 (ACMR 1974)—misstatement by taking the accused's testimony out of context.
9. The review must properly set forth the elements of the offense in a contested case
United States v. Samuels, 22 USCMA 238, 46 CMR 238 (1973)
United States v. Donoho, 46 CMR 691 (ACMR 1972)
United States v. Carman, 46 CMR 1292 (ACMR 1973)
United States v. Morgan, 50 CMR 589 (ACMR 1975) (Judge O'Donnell's dissent) review should discuss aider and abetter theory where accused convicted on that theory.
10. A review which discusses the evidence or elements of an offense of which the appellant was acquitted is clearly misleading.
United States v. Lindsey, 23 USCMA 9, 48 CMR 265 (1974)
United States v. Graham, 46 CMR 947 (ACMR 1972)
11. Prejudicially misleading for the review to discuss elements of more serious offense than that found.
United States v. Boyd, 23 USCMA 90, 48 CMR 598 (1974)—accused convicted of assault whereby grievous bodily harm was intentionally inflicted yet the review advised that he was convicted of assault with intent to commit murder.
United States v. Williams, 23 USCMA 342, 49 CMR 746 (1975)—accused charged with assault with intent to commit murder, pled guilty to assault with a means likely to produce grievous bodily harm. Review merely noted plea as "G/with exceptions."
12. Failure of the review to cover such defenses and to provide guidance as to their resolution renders the review incomplete.
United States v. Smith, 23 USCMA 98, 48 CMR 659 (1974)—failure to discuss self defense.
United States v. Burston, 23 USCMA 478, 50 CMR 497 (1975)—failed to cover entrapment issue.
United States v. Childs, 43 CMR 514 (ACMR 1970)—self defense.
United States v. Webb, 46 CMR 1083 (1972)—review erroneously advised that mistake of fact was not a defense to uttering checks with intent to defraud, sets forth a erroneous standard of law.
- United States v. Robinson*, 47 CMR 159 (ACMR 1978)—failure to discuss and to provide guidelines *re* insanity and self defense.
United States v. Gaines, 49 CMR 699 (ACMR 1974)—failure to discuss defense of innocent possession which has direct bearing on element that possession of heroin must be conscious and knowing.
13. Prejudicial error for review to delete discussion of motions relating to search and seizure, speedy trial, admissibility of oral statements.
United States v. Nelson, 23 USCMA 258, 49 CMR 433 (1975)—failure to discuss search and seizure motion may be prejudicial.
United States v. Stevens, 46 CMR 907 (ACMR 1972)—failure to discuss search and seizure motion not prejudicial since it was not a key issue.
United States v. Huddleston, 50 CMR 199 (ACMR 1975)—failure to discuss speedy trial motion may be prejudicial.
14. Character evidence admitted prior to findings tend to show a "probability of innocence." Paragraph 138f(2), *MCM*
United States v. Jewell, CM 430817 (ACMR 25 October 1974)—error to advise that character evidence was merely extenuation and mitigation and that no evidence was offered on the merits where defense introduced character evidence prior to findings.
15. Failure to include in the review information bearing upon the credibility of a key government witness deprives the accused an independent determination on the issue of credibility.
United States v. Nelson, 23 USCMA 258, 49 CMR 433 (1975)—failure to advise that witness testified pursuant to a grant of immunity.
United States v. Maisonet, CM 431593 (ACMR 8 April 1975)—failure to advise that two prosecution witnesses received Chapter 10 discharges the day after they testified. This information had a bearing on their credibility.
16. Error for the review to suggest that the convening authority can not disagree with the court on the credibility of the accused or witnesses.
United States v. Grice, 8 USCMA 166, 23 CMR 390 (1957)
United States v. Fields, 9 USCMA 70, 25 CMR 332 (1958)
United States v. Boland, 49 CMR 795 (ACMR 1975)—convening authority properly advised as to age of victims.
17. Convening authority should be aware that he must be satisfied of guilt beyond a reasonable doubt.
United States v. Jenkins, 8 USCMA 274, 24 CMR 84 (1957)—used standard of whether there was some evidence to support findings.
United States v. Fields, 9 USCMA 70, 25 CMR 332 (1958)
But see United States v. Owens, 15 USCMA 591, 36 CMR 89 (1966)
United States v. Wright, 49 CMR 828 (ACMR 1975)

18. The staff judge advocate must give reasons for his opinions as to the merits of contested issues and the sufficiency of the evidence.
United States v. Bennie, 10 USCMA 159, 27 CMR 233 (1959)
United States v. Hooper, 11 USCMA 128, 28 CMR 352 (1960)
United States v. Cruse, 21 USCMA 286, 45 CMR 60 (1972)
United States v. Smith, 23 USCMA 98, 48 CMR 659 (1974)
19. There must be evidence of record supporting the staff judge advocate's opinion.
United States v. Iturralde—Aponte, 47 CMR 759 (ACMR 1973)—SJA opined that evidence sufficient since accused was aggressor and therefore did not act in self defense. In fact, evidence showed the victim was the aggressor.
20. Prejudicial error for review to misadvice as to the nature of the plea.
United States v. Parks, 17 USCMA 87, 37 CMR 351 (1967)
United States v. McIlveen, 23 USCMA 357, 49 CMR 761 (1975)—review advised that accused's provident plea of guilty established his guilt of an offense, when in fact accused had pled not guilty.
United States v. Garcia, 23 USCMA 479, 50 CMR 498 (1975)
21. Review should note if the judge has difficulty accepting a guilty plea
United States v. Hill, 44 CMR 478 (ACMR 1971)
22. The convening authority must be correctly advised as to the maximum punishment.
United States v. Knoche, 46 CMR 458 (ACMR 1972)
United States v. Bruce, 46 CMR 968 (ACMR 1972)
United States v. DuPuis, 48 CMR 49 (ACMR 1973)
23. If the military judge rules the charges multiplicitous the review must advise the convening authority of this restriction on his discretion in determining an appropriate sentence.
United States v. Love, 46 CMR 741 (ACMR 1972)
24. Since the accused's best chance for reduction of the adjudged sentence is at the convening authority level, information favorable to the accused and known to the staff judge advocate should be included in the review.
United States v. Stevenson, 21 USCMA 426, 45 CMR 200 (1972)—in a disrespect case, error for the review not to advise that the officer involved was removed from his command shortly after the incident.
United States v. Roeder, 22 USCMA 312, 46 CMR 312 (1973)—review stated that accused testified he assaulted victim after victim made "bad remarks" about the accused's wife. This was not sufficient where the accused on extenuation and mitigation specified the exact nature of those remarks which were highly inflammatory.
- United States v. Edwards*, 23 USCMA 202, 45 CMR 955 (1974)
United States v. Wurm, 50 CMR 352 (ACMR 1975)—accused charged with transfer of heroin. Pled guilty. Failure of review to discuss facts and the statement of accused's attorney in extenuation left the incorrect impression that the accused was a dealer.
25. If the review suggests that the accused did not want to be retained in the Army, check to be sure that is his true intent.
United States v. Pinto, 47 CMR 460 (ACMR 1973)
United States v. Grant, 49 CMR 779 (ACMR 1975)—error for review to refer to excess leave request as indicative of lack of desire to remain in the service.
26. Failure to append and discuss letters and petitions from the accused in error.
United States v. Oliver, 42 CMR 906 (ACMR 1970)
United States v. Bellamy, 47 CMR 321 (ACMR 1973)
27. It is error for the review to advise the convening authority that he can consider evidence ruled inadmissible at trial.
United States v. Turner, 21 USCMA 356, 45 CMR 130 (1972)—inadmissible Article 15.
United States v. Grublak, 47 CMR 371 (ACMR 1973)
United States v. Naringi, SPCM 9391 (ACMR 18 March 1972)—review mentions inadmissible court motions conviction
28. It is error for the review to discuss derogatory evidence available at trial but which was not offered because it was inadmissible or otherwise.
United States v. Schaffer, 46 CMR 701 (ACMR 1972)—review referred to evidence seized in an illegal search.
United States v. Parker, 46 CMR 737 (ACMR 1972)
29. a) Error to include reference to prior juvenile or civilian arrests.
United States v. Stam, 50 CMR 91 (ACMR 1975)
- b) Accused must be afforded opportunity to rebut evidence of juvenile or civilian convictions *United States v. Stam*, 50 CMR 91 (ACMR 1975)
But see J. Ferguson's dissent in United States v. Luzzi, 18 USCMA 221, 32 CMR 221 at 22 (1969)
United States v. Holliman, 6 CMR 734 (ACMR 1972)
30. When the review includes reference to post-trial matters that can reasonably influence the reviewing authority to treat the accused less leniently than he might otherwise, the accused is entitled to rebut.
United States v. Morris, 9 USCMA 368, 26 CMR 148 (1958)
United States v. Littleton, 23 USCMA 279, 49 CMR 454 (1975)
United States v. Goode, 23 USCMA 367, 50 CMR 1 (1975)
United States v. Jonas, 50 CMR 399 (ACMR 1975)—accused convicted of possession of marihuana. Review appended as clemency matter a report by drug counselor that appellant's use of marihuana had declined since trial.

31. Post-trial review.
United States v. Brassel, 47 CMR 305 (ACMR 1973) Post trial interviewer remarked "Neither accused appears to appreciate the significance of the offense for which they pleaded guilty."
United States v. Mullaney, 44 CMR 534 (ACMR 1971)—review stated that accused appeared to be high during the interview.
32. The review must contain any recommendation by a person whose recommendation is likely to be weighed by the convening authority.
United States v. Boatner, 20 USCMA 376, 43 CMR 216 (1971)—immediate commander.
United States v. Parker, 22 USCMA 358, 47 CMR 10 (1973)—unit commander's recommendation against elimination.
United States v. Blake, 23 USCMA 362, 49 CMR 821 (1975)—military judge's recommendation for suspension of BCD.
United States v. Cain, 23 USCMA 363, 49 CMR 822 (1975)—court members recommended clemency.
United States v. Oliver, 42 CMR 906 (ACMR 1970)—failure to note trial counsel's recommendation for clemency.
United States v. Acosta, 46 CMR 583 (ACMR 1972)—battalion commander (This case contains an extensive list and summary of similar cases).
United States v. Tucker, 49 CMR 174 (ACMR 1974)—unit commander's recommendation for trial by non-BCD special court.
33. The accused is entitled to individualized sentence consideration.
United States v. Howard, 23 USCMA 187, 48 CMR 939 (1974)
United States v. Lacey, 23 USCMA 334, 49 CMR 738 (1975)
United States v. Kimble, CM 433192 (ACMR 25 August 1975)—error for review to state "The U.S. Army was not able to prevent this crime from happening but we can show others who may be so inclined that crime does not pay when they are caught."
34. Approved sentence must conform to the pretrial agreement.
United States v. Cox, 22 USCMA 69, 46 CMR 69 (1972)
United States v. Goode, 23 USCMA 367, 50 CMR 1 (1975)—any departure must be discussed in the review and the accused must be afforded the opportunity to rebut.
- Miscellaneous*
35. Even the barest appearance at racial bias must be eliminated from the review.
United States v. Silas, 23 USCMA 371, 50 CMR 5 (1975)—review speculated that witnesses' testimony was motivated by their racial identification with the accused.
36. The staff judge advocate has the responsibility of discussing the legal effect of any error or irregularity in the proceedings. Paragrapy 85b, *MCM*

D. Goode Service, Rebuttal, Waiver, and Post-Trial Matters

Generally. For a discussion of Goode cases, the waiver doctrine, and substitution of DC, see article in Army Lawyer, Feb 1979, p.1. Note the Goode requirement applies to reviews of trials, "new" trials, "other" trials, and rehearings, but not to the SJA advice on disposition to take after remand from appellate courts, Dowell, 12 M.J. 768 (ACMR 1981). Also, in the Army, the SJA need not respond to Goode rebuttals. Rodriguez, 9 M.J. 829 (ACMR 1980). Contra Boston, 7 M.J. 954 (AFCMR 1979). However, if the SJA does prepare a response to the CA, the addendum must be correct and error is tested for prejudice. Edwards, 12 M.J. 781 (ACMR 1982) (SJA recommended sentence be approved based on an acquitted specification); McCray, CM 440167 (ACMR 26 Feb 1982) (Addendum to review in reply to Goode rebuttal mentioned accused failed a polygraph examination. Prejudicial error in attempting to support guilty findings not waived because addendum not served on DC); accord Williams, CM 441046, (ACMR 30 Apr 82) (SJA Addendum to DC rebuttal clemency plea implied accused guilty of "intent to sell drugs" of which acquitted. Held error requiring sentence relief).

1. Robinson, 11 M.J. 218 (CMA 1981) (in multiple DC cases, MJ must establish on the record which counsel will file Goode response. If undetermined, all DC should be served); Clark, 11 M.J. 70 (CMA 1981) (where civilian and military TDC, failure to serve available civilian TDC, a new review/action must be ordered); Torres, CM 442197 (ACMR 6 Aug. 1982) (Similarly to Clark); Elliot, 11 M.J. 1 (CMA 1981) (where new review/action ordered in CONUS, failure to serve civilian TDC in Germany, a second review and action must be ordered). But see Kincheloe, 14 M.J. 40 (CMA 1982) and Babcock, 14 M.J. 34 (CMA 1982) for discussion of TDC's responsibilities.
2. Goode, 1 M.J. 3 (CMA 1975) (copy of SJA's review must be served on accused's counsel to give opportunity to challenge or correct any matter on which he wishes to comment within 5 days). Robinson, 11 M.J. 218 (CMA 1981) (copy of SJA's review must be served on accused's civilian DC, where counsel does not delegate his right to be served to military DC. Edwards, 9 M.J. 94 (CMA 1980) (must serve military DC if still on active duty); Mitchell, CM 438245 (ACMR 7 Jul 81) (where review sent to wrong counsel (IDC still on active duty) new review ordered). If TDC unavailable, but SJA review contains certificate erroneously stating that review was served, new review may be required. (On these facts, held: No prejudice.) Shelkey, CM 441328 (ACMR 12 July 1982).
3. Brown, 5 M.J. 454 (CMA 1978) (the substitute DC must contact accused and establish an attorney-client relationship with him before he can be properly served with Goode review and represent accused in post-trial review proceedings); Iverson, 5 M.J. 440 (CMA 1978) (SJA review must be served on accused's DC who has actual preexisting attorney-client relationship with the accused). But cf. Lolagne, 11 M.J. 556 (ACMR 1981) (DC released from active duty and substitute DC unable to contact accused; court ruled accused, by failing to keep Army informed of his address, waived objection to substitute DC).

4. Franklin, 3 M.J. 785 (ACMR 1977) (when the accused expresses dissatisfaction with his DC, it is error to serve the post-trial review on that attorney). Accord Stith, 5 M.J. 879 (ACMR 1978) (inadequate representation claim; must renew attorney-client relationship for service to be valid); Combest, CM 440228 (ACMR 15 Dec 1981) (accused wrote letter to CA with complaints).
5. Cruz, 5 M.J. 286 (CMA 1978) (DC must have access to record).
6. Waiver. The USCMA has declared that after DC has been served with a copy of the post-trial review, his failure to correct or challenge any matters in the post-trial review which are erroneous, inadequate or misleading "will normally be deemed a waiver of any error in the review." United States v. Goode, 1 M.J. 3, 6 (CMA 1975). Accord United States v. Morrison, 3 M.J. 408 (CMA 1977); United States v. Barnes, 3 M.J. 406 (CMA 1977); United States v. Myhrberg, 2 M.J. 534 (ACMR 1976).

However, the waiver will not be applied where to do so would result in a miscarriage of justice or seriously affect the fairness, integrity or public reputation of the proceedings. United States v. Veney, 6 M.J. 794 (ACMR 1978); United States v. Allen, 3 M.J. 725 (ACMR 1977); United States v. Thompkins, 2 M.J. 1249 (AFCMR 1976); United States v. Myhrberg, *supra*; United States v. Robinson, 1 M.J. 72 (AFCMR 1975). See also United States v. Johnson, CM 440249 (ACMR 20 Mar 1981) (where MJ ruled plea improvident and required trial, un rebutted post-trial review erroneously reporting a provident guilty plea could not be waived because of possible substantial miscarriage of justice). No waiver where TDC did not comment on SJA's failure to note that defendant had petitioned for clemency and MJ supported petition. Phillips, SPCM 16657 (ACMR 19 Aug. 1982).

Also, no waiver by failure to object to CA/SJA disqualification to review case. Cruz, 2 M.J. 731 (AFCMR 1976) rev'd on other grounds, 5 M.J. 286 (CMA 1978); Decker, SPCM 15935 (ACMR 8 Oct 1981) (SJA had recommended clemency for prosecution witness).

Remember, Goode waiver "pertains only to deficiencies in the post-trial review, not to trial errors." McMaster, 15 M.J. 525, 527 n.2 (ACMR 1982); Medina, CM 440806 (ACMR 4 Dec 1981).

7. Schreck, 10 M.J. 226 (CMA 1981) (even inadvertent turning against client requires corrective action); Ridley, 12 M.J. 675 (ACMR 25 Nov 1981); Pratt, 9 M.J. 458 (NCOMR 1980) (DC responded client uncooperative and wanted discharge).
8. Robinson, 11 M.J. 218 (CMA 1981) (appellate DC should assist in finding local DC to act or, if accused consents, should file Goode response).

E. Action and Deferment

1. Paragraph 85c, MCM (written statement of reasons required whenever CA takes action different from SJA's recommendation). See Harris, 10 M.J. 276 (CMA 1981) (written justification must give detailed accounting why CA disagreed with SJA); Dixon, 9 M.J. 72 (CMA 1980); Keller, 1 M.J. 159 (CMA 1975). If no justification is provided by CA or it is insufficient, the remedy is to remand for new SJA review and new CA action. Phillips, 2 M.J. 523 (ACMR 1976), or to give effect to the SJA recommendation, Dow, 1 M.J. 250 (CMA 1976).
2. a. Wright, 47 CMR 309 (ACMR 1973) (amount of forfeitures calculated at time of sentence even if there is pay raise before CA's action). See also Sargent, SPCM 15333 (ACMR 26 Nov. 1980).
b. Krampf, 9 M.J. 593 (AFCMR 1980) (allowances not subject to forfeitures unless approved sentence is forfeiture of all pay and allowances); Bright, 3 M.J. 514 (AFCMR 1977) (if total forfeitures not adjudged, it is error to approve sentence and have forfeitures apply to allowances); Howard, 2 M.J. 1078, 1078 n.1 (ACMR 1976) (partial forfeitures may not apply to allowances).
c. Paragraph 6-19f, AR 190-47. Scott, CM 439236 (ACMR 14 Nov 80) (policy enforced). See also Stroud, 44 CMR 480 (ACMR 1971); Skinner, 37 CMR 588 (ABR 1966).
d. Para. 88g, MCM. White Mountain, CM 439235 (ACMR 3 Apr 80) (reducing TF to forfeiture of 2/3 pay).
e. Johnson, 32 CMR 127 (CMA 1962) (failure to include words "per month" results in a forfeiture for one month). Accord Johnson, SPCM 15635 (ACMR 29 Apr. 1981).
f. If a sentence as approved by CA does not include confinement or if the sentence to confinement is to be suspended, any approved forfeitures may not be applied until the sentence is ordered into execution. Art. 57(a), UCMJ, paras. 126h(5), 88d(3), MCM. See Hall, 3 M.J. 969 (NCFMR 1977) (CA remitted confinement, but then erroneously applied forfeitures prematurely to pay becoming due on or after the date of his action; forfeitures must wait until sentence is ordered executed); Ferguson, 44 CMR 701 (NCFMR 1971) (forfeitures may not be applied prior to ordering into execution a sentence which includes no unsuspended confinement). With respect to forfeitures generally, see paras. 126h(2) and (5), MCM.
3. Bullington, 13 M.J. 184 (CMA 1982) (where BCD not lawfully adjudged, CA's conversion of BCD to 2 months CHL cannot cure error); Williams, 6 M.J. 803 (ACMR 1979) (CA can only change sentence to something within level of court's sentencing power, and sentence may not be more severe than original). Compare Loft, 10 M.J. 266 (CMA 1981) (where only reasonable interpretation of CA's action was approval of bad-conduct discharge, supervisory authority did not increase punishment by approving bad-conduct discharge) with Lower, 10 M.J. 263 (CMA 1981) (ambiguities in a CA's action improperly corrected).
4. Kent, 9 M.J. 836 (AFCMR 1980); Evans, 6 M.J. 577 (ACMR 1978). Olinger, 12 M.J. 458 (CMA 1982) (CMR may review highly disparate sentence; no miscarriage of justice found).

5. No suspension may extend beyond current enlistment or period of service. Para. 88e, MCM; Hartz, 49 CMR 628 (ACMR 1974).
6. Hill, 47 CMR 398 (CMA 1973) (error tested for prejudice).

Examples:

Hilliard, 12 M.J. 601 (ACMR 1981) (sentence to perform extra duty cannot exceed three months; Warnsley, SPCM 16043 (ACMR 31 Jul 81) (CA cannot suspend any part of sentence until action taken); Dailey, SPCM 15671 (ACMR 28 Jul 81) (detention of pay cannot be ordered into execution until sentence ordered executed, not date of action; duration of detention must be clearly set forth in action); Finch, CM 440840 (ACMR 10 Jul 81) (where approved sentence includes unsuspended punitive discharge or CHL of one year, CA cannot order sentence executed until completion of appellate review).

7. Generally, where action ambiguous, ACMR may return for modification (para 89b, MCM) or resolve in favor of accused. Reper, SPCM 16777 (ACMR 1982) (where action approved CHL 3 months but in next sentence suspended CHL in excess 3 months, only CHL 3 months affirmed). See e.g., Hines, CM 439051 (ACMR 27 Feb 81) (sentence must state the amount of forfeitures per month in dollar amounts). See also Loft, supra; Lower, supra.
8. Crockett, CM 440412 (ACMR 13 Apr 81); Bond, CM 439172 (ACMR 19 Jan 81); Harris, 50 CMR 225 (ACMR 1975) (action of CA exceeded terms of pretrial agreement by providing for too long a suspension of confinement).

Understanding of parties at trial controls interpretation of agreement. If CA does not comply with trial understanding court must order compliance or allow accused to withdraw guilty plea. Cifuentes, 11 M.J. 385 (CMA 1981). Accord Bellefeville, CM 441049 (ACMR 28 Oct. 1981) (despite PTA language, stated understanding of parties at trial controls).

Where DD adjudged and PTA said CA would disapprove DD and DC said BCD could be approved but accused disagreed, MJ ruling that BCD could not be approved was law of case binding on CA. BCD set aside. Reynolds, CM 440305 (ACMR 29 May 1981), citing Richardson, 2 M.J. 436 and James, 8 M.J. 637.

If CA fails to comply with PTA after app. review completed, file extraordinary writ. Mills, 12 M.J. 1, 4 (CMA 1981).

9. Art. 71(c), UCMJ; Finch, CM 440840 (ACMR 10 Jul 81) (CA cannot order sentence executed that contains unsuspended discharge/confinement for 1 year or more; portion of order purporting to order sentence executed set aside).
Jackson, CM 441392 (ACMR 17 May 82) (CA could approve CHL for one year and then order sentence executed after suspending CHL in excess eight months).
10. See generally, Morales, SPCM 14929 (ACMR 20 Apr. 81) (delay in CA action caused appellant to serve extra confinement beyond GP agreement); Banks, 7 M.J. 92 (CMA 1979) (must show prejudice from post-trial delay); Johnson, 10 M.J. 213 (CMA 1981). Apparently the Gray test will be applied. Gray, 47 CMR 484 (CMA 1973).

Note. On 15 March 1982, CMA granted review in Sutton, 13 M.J. 111, on whether 321-day delay was prejudicial.

11. Smith, 1 M.J. 83 (CMA 1979) (disqualifies CA).
12. Larner, 1 M.J. 371 (CMA 1976); Malia, 6 M.J. 65 (CMA 1978); White, 38 CMR 9 (CMA 1967).
13. Deferment, Sitton, 5 M.J. 394 (CMA 1978) (discusses whether denial of deferment is mooted on appeal); Occhi, 2 M.J. 60 (CMA 1976) (CA has exclusive authority to defer sentence); Corley, 5 M.J. 558 (ACMR 1978) (a convicted soldier seeking deferment of confinement has burden of persuasion to show his entitlement to relief requested). But see Brownd, 6 M.J. 338 (CMA 1979) (if petitioner shows no substantial risk of either flight or of further criminal activity, then release should be granted). See also Yoakum, 8 M.J. 763 (ACMR 1980); Petersen, 7 M.J. 981 (ACMR 1979); Thomas, 7 M.J. 763 (ACMR 1979).

Summary denial of a deferment request is not an abuse of discretion where the defense failed to carry its burden of demonstrating deferment appropriate because only clemency matters were submitted. Alicea-Baez, 7 M.J. 989 (ACMR 1979). See Beck v. Kuyk, 9 M.J. 714 (AFCMR 1980) for an adequate request and denial. Seriousness of offense, severity of sentence, or drug threat sufficient grounds for deferment denial. Trotman v. Haebel, 12 M.J. 27 (CMA 1981).

Conditions. C/A may place conditions on the grant of deferment. Pearson v. Cox, 10 M.J. 317 (CMA 1981) (CA incorrectly analyzed para. 88f, MCM); accord, Porter, 12 M.J. 546 (ACMR 1981) (deferment prohibited accused from returning to state where crime committed).

Rescission. Burden on accused to establish rescission was a clear abuse of discretion by CA. Brunson v. Gracey, 12 M.J. 851 (CGCMR 1982).

F. Jurisdiction

1. Cases, 6 M.J. 950 (ACMR 1979) (power to convene courts is not personal in nature but constitutes a part of the functions of the office that the commander occupies; no one other than those designated by the President has the power to convene a general court and no one, except the President, having this authority can delegate or transfer it to another). See also Greenwell, 42 CMR 62 (CMA 1970) (Navy case); Ortiz, 36 CMR 3 (CMA 1965) (Marine case).
2. Newcomb, 5 M.J. 4 (CMA 1978) (CA cannot delegate authority to personally detail the military judge and counsel); Ryan, 5 M.J. 97 (CMA 1978) (CA cannot delegate power to appoint or detail court members). Sands, 6 M.J. 666 (ACMR 1978) (requirement of personal selection does not extend to assigning particular cases to particular panels of court members). Saunders, 6 M.J. 731 (ACMR 1978) (Government is entitled to rely on a presumption of regularity in its affairs (including CA's personal selection of court members, MJ, and counsel) absent showing to the contrary).
3. E.g., Ware, 5 M.J. 24 (CMA 1978) (no jurisdiction where order modifying original convening order not reduced to writing until appeal).
4. MCM, paragraph 4a (composition of court-martial); paragraph 4ld (effective absence of member); paragraph 6lc (trial counsel should announce presence or absence of parties or members for the record). Reversible error to proceed to trial with 40% of court members absent. Colon, 6 M.J. 73 (CMA 1978).
5. Garback, 50 CMR 673 (ACMR 1975) (enlistment of a 17 year old without consent of his parents is voidable only upon application of his parents within 90 days of the enlistment; rule also applies to a soldier who enlisted with parent's consent, but extended his enlistment before 18th birthday, without their consent, if parents do not apply to have extension voided within 90 days).
6. See Garback, supra.
7. See generally Fitzpatrick, 14 M.J. 394 (CMA 1983), and Douse, 12 M.J. 473 (CMA 1982) and cases cited therein.
8. Peel, 4 M.J. 28 (CMA 1977) (retention, without authority from state officials, of a national guardsman beyond his training term on active duty is not allowable in order to retain court-martial jurisdiction); Self, 8 M.J. 519 (ACMR 1979) (when a national guardsman becomes focus of criminal investigation and report for suspension of favorable personnel action has been filed before the date he was scheduled to leave active duty, he may properly be kept on active duty pending resolution of the investigation and/or trial).
9. Relford, 401 U.S. 355 (1971) (offense committed by serviceman on military post that violates the security of a person or property is service connected and may be tried by a court-martial); O'Callahan, 395 U.S. 258 (1969) (where the only service connection is that the offense was committed by a service member, the offense is not service connected). Lockwood, 15 M.J. 1 (CMA 1983) (discusses factors relevant to determination of court-martial jurisdiction -- appears to broaden jurisdiction significantly). Adams, 13 M.J. 728 (ACMR 1982) (No jurisdiction if incest occurs off-post in U.S. and no service connection. However, if occurs abroad, since there is no civilian authority to try defendant, there is court-martial jurisdiction). See also Trottier, 9 M.J. 337 (CMA 1980) (involvement of service personnel with the commerce of

drugs is service connected per se); Petitti, 14 M.J. 754 (ACMR 1982) (off-post communication of a threat); Masuck, 14 M.J. 1017 (ACMR 1982) (off-post forgery). For extensive discussion of military versus civilian jurisdiction, see Newak, 15 M.J. 541 (AFCMR 1982) (Miller, J., concurring).

The pleading requirement of Alef, 3 M.J. 414 (CMA 1977) is a procedural rule which may be waived, but the substantive issue of jurisdiction may not be waived and may be raised on appeal after a guilty plea even if not raised below. Adams, 13 M.J. 728 (ACMR 1982) (CONUS off-post sex offenses dismissed). See George, 14 M.J. 990 (NCOMR 1982).

10. Walsh, 47 CMR 927 (CMA 1973) (withdrawal of the charge and referral to a higher court is prejudicial error unless done with good cause; error goes to sentencing not jurisdiction); Benitez, 38 CMR 607 (ABR 1967) (arbitrary and unfair withdrawal of the charge from a special court and referral to a general court prejudiced the accused). See also Hardy, 4 M.J. 20 (CMA 1977) (reason for withdrawal must be stated on the record); Williams, 29 CMR 275 (CMA 1960) (CA's belief that a court-martial's previously adjudged sentences have been too lenient is not good cause); Shrader, 50 CMR 767 (AFCMR 1975) (good cause requires serious and weighty reasons and failure to object waives error). But see Jackson, 1 M.J. 242 (CMA 1976) (additional charge justifies withdrawal and re-referral to a different court); Meckler, 6 M.J. 779 (CMR 1978) (failure to state reasons not jurisdictional).
11. See Assembly of the Court, Section O.
12. Greenwell, 31 CMR 146 (CMA 1961) (if court members absent after arraignment, record must show reason, and must fall within provisions of the Code or a rehearing is required; if absent after arraignment there is no presumption of regularity); Tarbert, CM 441246 (ACMR 30 July 1982) (If enlisted members serve, even on enlisted person's court-martial, and defendant did not sign request for such members, jurisdiction fails).
13. See Greenwell, supra; Boysen, 29 CMR 147 (CMA 1960) (good cause to remove a MJ during trial means some sort of critical situation); Garcia, SPCM 17806, ___ M.J. ___ (ACMR 11 Mar 1983) (CA's excuse of member after assembly must be justified on record if TDC objects). But c.f. Smith, 3 M.J. 490 (CMA 1975) (convening authority need not show good cause for changing MJ between 39(a) session and trial).
14. After arraignment, court personnel may be changed. Ellison, 13 M.J. 90 (CMA 1982). (Concurring in Peebles, 2 M.J. 404 (ACMR 1975), rev'd other grounds, 3 M.J. 177 (CMA 1977), rejecting Staten and Johnson holdings that personnel could not be changed). But see Garcia, supra.
15. Conley, 4 M.J. 327 (CMA 1978) (MJ disqualified as witness for prosecution when used his own expertise as documents examiner in rendering verdict); Miller, 3 M.J. 326 (CMA 1977) (presence of disqualified member on court is not jurisdictional error; it is a defect curable by challenging member and appointing replacement if quorum is affected; court member who acted as convening authority disqualified); Arron, 1 M.J. 1052 (NCOMR 1976) (court member who is potential government witness is disqualified); Catt, 1 M.J. 41 (CMA 1975) (DC who writes pretrial advice is not disqualified where

accused was aware of his participation in advice but specifically requests him as counsel); Hurt, 24 CMR 34 (CMA 1957) (member who serves as defense counsel at pretrial investigation is disqualified); Wilson, 23 CMR 120 (CMA 1957) (where prior conviction admitted into evidence contains law officer's signature, he becomes a prosecution witness and is disqualified); Payne, 3 M.J. 354 (CMA 1977) (TC can't act as legal advisor to Art. 32 IO).

16. Trial in absentia. Peebles, 3 M.J. 177 (CMA 1977) (absence after arraignment must be voluntary and knowing).

Trial in absentia after arraignment authorized even if MJ did not advise accused of that possibility. Bystrzycki, 8 M.J. 540 (NCOMR 1979). But error for MJ to tell court absence unauthorized. Minter, 8 M.J. 867 (NCOMR 1980).

17. McDonagh, 14 M.J. 415 (CMA 1982) (amendments to Art. 2, UCMJ, held retroactive to those offenses not peculiarly military in nature, i.e., where status is not an element).

NOTE: Of limited applicability is the question of jurisdiction over certain offenses when the accused has reenlisted after their commission. Art. 3(a), UCMJ. See Clardy, 13 M.J. 308 (CMA 1982) for full discussion of rule. See also Horton, 14 M.J. 96 (CMA 1982). N.B.: Horton states rule of Clardy concerning application of Art. 3(a) to "short-term" discharges applies to discharges after 12 Jul 82, the date of the Clardy decision, but Clardy applies the rule as of the date of the Court's mandate in the case, 26 Jul 82. Compare Clardy, 13 M.J. at 317, with Horton, 14 M.J. at 98. See Mosley, 14 M.J. 852 (ACMR 1982) for discussion of application of Art. 3(a) to statute with extraterritorial application.

G. Right to Counsel

1. Note. Military Justice Amendments of 1981 have severely restricted the right to requested individual military counsel. See generally paras. 5-7 and 6-11, AR 27-10, for limitations and procedure.

Jorge, 1 M.J. 184 (CMA 1975) (even though accused has chosen individual military counsel, MJ has a duty to advise the accused on the record that he has the right to be represented by civilian counsel); Copes, 1 M.J. 182 (CMA 1975) (the MJ has an obligation to ascertain on the record that the accused is aware of his rights to select any military lawyer from the armed forces); Fellows, 5 M.J. 674 (ACMR 1978) (even though the accused has chosen to be represented by civilian counsel, the MJ still has duty to advise the accused on the record that he has right to choose any military lawyer to represent him providing that lawyer is available). Ettleson, 13 M.J. 348 (CMA 1982) (statutory right to IDC to be applied broadly). But see Wallace, 14 M.J. 1019 (ACMR 1982) (burden on defense to show that decision to deny request for individual military counsel incorrect); West, 13 M.J. 800 (ACMR 1982) (When request for IDC turned down because of unavailability, MJ's duty is not to make determination of availability or to substitute judgment for that of IDC's commanding officer, but rather to review the command decision to see if it was reasonable); Harris, SPCM 16789 (ACMR 16 June 1982) (If attorney-client relationship already exists between defendant and requested IDC, then request for IDC should be decided on the "good cause" standard rather than the "reasonable availability" standard because the former applies to severance of such a relationship).

2. Kinard, 45 CMR 74 (CMA 1970) (it must be an extremely unusual case when accused is forced to forego civilian counsel and go to trial with assigned military counsel rejected by him). But see Perry, 14 M.J. 856 (ACMR 1982) (request for continuance to obtain individual Air Force counsel located more than 100 miles away with whom no attorney-client relationship established not based upon substantial right and therefore denial of request not improper). Case law on securing a continuance to obtain counsel discussed in 11 The Advocate 243 (1979).

Radford, 14 M.J. 322 (CMA 1982) discusses the responsibility of the defense counsel who believes his client has committed perjury. In that case, MJ should have sua sponte inquired into accused's desire to obtain new counsel.

3. Davis, 3 M.J. 430 (CMA 1977) (where one attorney is to represent two co-accused, MJ must advise co-accused as to their rights to independent counsel of undivided loyalty). Accord Testman, 7 M.J. 525 (ACMR 1979). Dunavent, 11 M.J. 69 (CMA 1981), and Breese, 11 M.J. 17 (CMA 1981) (conflict is presumed, subject to rebuttal, when MJ fails to conduct a suitable inquiry into a possible conflict). But see Russaw, SPCM 17400, ___ M.J. ___ (ACMR 11 Mar 1983) (MJ's duty to inquire into potential conflict triggered only if he knows or should know of the conflict); Jeancoq, 10 M.J. 713 (ACMR 1981) (DC represented government witness).

H. Choice of Trial Forum

1. Dean, 43 CMR 52 (CMA 1971) (request made in writing is a jurisdictional prerequisite to a trial by judge alone; failure requires reversal and new trial). But see Calhoun, 14 M.J. 588 (NMCMR 1982) (absence of accused's signature from written request not jurisdictional defect).

While there is no absolute right to trial by judge alone, judge who refuses request may be reversed for abuse of discretion. Butler, 14 M.J. 72 (CMA 1982) (reversed because MJ denied request without stating reasons, thereby rendering review of propriety of denial impossible).

There is no requirement for sua sponte recusal of MJ who served as magistrate to review accused's pretrial confinement. See Reeves, 12 M.J. 763 (ACMR 1981), for general discussion of MJ/magistrate relationship.

2. Stearman, 7 M.J. 13 (CMA 1979) (failure to fill in the name of the military judge on the request for trial by judge alone is not jurisdictional error so long as the record reflects that the accused knew who would be presiding in his case).
 3. Campbell, 47 CMR 965 (ACMR 1973) (MJ must insure that accused understood waiver of right to trial by members).
 4. Stegall, 6 M.J. 176 (CMA 1979) (MJ's failure to advise accused of his right to a court with one-third enlisted members is not fatal error if accused has stated on the record that he understood the difference between trial by judge alone and a jury trial and accused is assisted by counsel).
- Beard, 7 M.J. 452 (CMA 1979) (DC can respond to MJ questions about EM rights).
5. White, 45 CMR 357 (CMA 1972) (written request for enlisted personnel is jurisdictional prerequisite for trial by officer and enlisted members); Williams, 50 CMR 219 (ACMR 1975) (proper written request admitted at first trial where a mistrial was declared may be orally reinvoked at second trial). Enlisted members may be appointed in absence of written request, but they may not serve on court-martial in absence of request. Robertson, 7 M.J. 507 (ACMR 1979).
 6. See Art. 25(c)(1), UCMJ.

I. Trial Procedure

1. See generally MCM, pages A8-3 and A8-7.
2. Paragraph 6ld, MCM, (record must demonstrate that oaths were administered previously or show swearing). See Stafford, SPCM 17641, ___ M.J. ___ (ACMR 14 Mar 83) (in absence of evidence that reporter not sworn, presumption of regularity applied).
3. Ware, 5 M.J. 24 (CMA 1978) (where no written, accurate convening order is in record there is no showing of jurisdiction for court-martial).
4. See generally paragraph 6b, MCM.
5. See paragraph 6ld, MCM.
6.
 - a. Trial judge should not limit TDC's cross-examination of a government witness to defendant's prejudice. Jefferson, CM 440968 (ACMR 28 June 1982).
 - b. Voucher rule has not been repudiated in situations where the government has obtained testimony to support its theory of the case. Young, SPCM 16961 (ACMR 22 June 1982).
 - c. Victim committed perjury by saying she had never smoked marijuana. TC discovered the falsehood during trial and not only failed to tell TDC or judge but also perpetuated falsehood by asking another witness if victim smoked marijuana. Held: Because misrepresentation material, waiver inapplicable and conviction reversed. Logan, 14 M.J. 637 (ACMR 1982).
7.
 - a. Failure to object to error at trial is not waived in "cases involving error which could result in a manifest miscarriage of justice or otherwise seriously affect the fairness, integrity, or public reputation of the judicial proceedings." Borland, SPCM 17471 (ACMR 9 Aug. 1982).
 - b. Failure to object to judge's omission of multiplicity instructions is not waived. Waters, SPCM 17314 (ACMR 23 July 1982).
 - c. MJ's incorrect calculation of maximum sentence in a guilty plea is not waived by failure to object. Wright, CM 442207 (ACMR 29 July 1982).

J. Charges and Arraignment

1. Article 30(a), UCMJ; para. 29e, MCM; Koepke, 36 CMR 40 (CMA 1965) (accused may not be tried upon unsworn charges over his objection); Autrey, 12 M.J. 547 (ACMR 1981) (substantial compliance sufficient). Schroder, SPCM 16208 (ACMR 19 Jan. 1982) (Where accuser swore to charges but failed to sign the charge sheet before day of trial, there had been "substantial compliance"). See Logan, 13 M.J. 821 (ACMR 1982) (changes in specifications not substantial enough to require reswearing; even if they were, defect waived by guilty plea).
2. Alef, 3 M.J. 414 (CMA 1977) (specification should describe jurisdictional basis on its face and state Relford factors); King, 6 M.J. 553 (ACMR 1978), pet. denied, 7 M.J. 61 (Alef requirements are not jurisdictional; failure to object to defects at trial waives issue on appeal).
3. Krebs, 43 CMR 327 (CMA 1971) (omission of element of specification is not fatal if the accused affirmatively states that he understands what has been omitted during providence inquiry); Green, 7 M.J. 966 (ACMR 1979) (omission of essential element of specification not fatal if it is clearly raised by implication from specification taken as a whole); Quarrels, 50 CMR 514 (NCOMR 1975) (omission of an essential element is not fatal if element is raised by fair implication from the specification taken as a whole).

Specific examples:

- a. Failure to allege "wrongfully" in attempted drug specification is fatal. Showers, 45 CMR 647 (ACMR 1972); Brice, 38 CMR 134 (CMA 1967).
 - b. Graft specification must allege accused's official duty. Eckert, 8 M.J. 835 (ACMR 1980).
 - c. Allegation of striking superior, noncommissioned officer held insufficient. Where an act may be committed lawfully, specifications must allege unlawfulness, in order to show mens rea. Shelton, CM 441165 (ACMR 13 Jan. 1982).
 - d. Sufficient charge of destruction of property under Art. 108 must allege that the item was "military property." However, insufficient allegation may be sufficient to allege Art. 109 offense instead. Dean, SPCM 17369 (ACMR 14 June 1982). See also Schiavo, 14 M.J. 649 (ACMR 1982).
 - e. Specifications insufficient if the attempted wrongful impersonation alleged is a mere false representation or "mere bravado." Held: sufficient specifications because defendant's act of telling military police that he was CID agent attempting to buy codeine went beyond mere bravado because it was an act calculated to avoid defendant's apprehension on drug charges. Adams, SPCM 17372 (ACMR 11 Aug. 1982).
4. Error to convict on specification CA dismissed pursuant to pretrial advice and never referred to trial. Motes, 40 CMR 876 (ACMR 1969); Graves, CM 439178 (ACMR 28 Mar 80).

5. Withdrawal of charges in return for guilty plea does not preclude reinstatement after plea set aside, unless reprosecution basically unfair (e.g., witnesses now unavailable) or prosecutorial vindictiveness; and new charges may be added. Cook, 12 M.J. 448 (CMA 1982).
6. Motions in limine.
 - a. See Cofield, 11 M.J. 422 (CMA 1981); Wright, 13 M.J. 824 (ACMR 24 May 82) (MJ refusal to rule on motion to exclude prior conviction for impeachment waived by DC's failure to make offer of proof as to proposed testimony by accused).
 - b. Bethke, 13 MJ. 71 (CMA 1982) (where DC withdrew motion to preserve PTA, limited hearing on the merits of motion ordered).
7.
 - a. See Item 2, Section N (findings and multiplicity); Item 10, Section Q (sentencing); Item 2, Section T (instructions).
 - b. E.g., Croon, 1 M.J. 635 (ACMR 1975) (disobedience occurred from disrespectful language; disrespect dismissed).
 - c. Appellate courts will dismiss multiplicitious specifications attacked at trial. Huggins, 12 M.J. 657 (ACMR 1981). But see Tyler, 14 M.J. 811 (ACMR 1982) (guilty plea to multiplicitious specifications pursuant to pretrial agreement waives issue if no objection at trial), pet. granted with summary reversal, 15 M.J. 285 (CMA 1983) (specification dismissed as lesser included offense). See Item 2, Section N, listing cases wherein multiplicitious specifications were dismissed even in the absence of defense objection.
 - d. Pleading is improper if it is duplicitous — i.e., it alleges more than one offense in one specification (the opposite of multiplicitious). Marshall, SPCM 16652 (ACMR 31 Aug. 1982).
8. See Bass, 11 M.J. 545 (ACMR 1981); Williams, 12 M.J. 1038 (ACMR 1982).
9. Significant changes in allegations require reswearing (although none necessary where specifications changed from "habit-forming narcotic" to "dangerous drug"). Logan, 13 M.J. 821 (ACMR 1982).

K. Plea Inquiry

1. Paragraph 70b, MCM (procedure if plea of guilty is entered).
2. Care, 40 CMR 247 (CMA 1969) (requires inquiry outside presence of members advising accused of elements of the offense, waiver of constitutional rights, fact that accused believes he is guilty, and establishing on record factual predicate for plea of guilty); Reeder, 46 CMR 11 (CMA 1972) (MJ has duty to resolve inconsistencies in defendant's statement); Michener, 46 CMR 427 (ACMR 1972) (MJ is required to inquire into possibility of defenses raised by facts). But cf. Crouch, 11 M.J. 128 (CMA 1981).
3. See 1 and 2 supra.
4. See 1 and 2 supra. Timmins, 45 CMR 249 (CMA 1972) (if defense raised, MJ must elicit accused's assurance that defense does not apply).
5. Pretlow, 13 M.J.85 (CMA 1982) (conspiracy — elements of object offense not explained or made known to accused; guilty plea improvident). De Los Santos, 7 M.J. 519 (ACMR 1979) (elements of the offense need not be separately listed if clearly established by questioning and advice to the accused); accord Sheehan, CM 442324, ___ M.J. ___ (ACMR 16 Feb 83); Luby, 14 M.J. 619 (AFCMR 1982); Footman, 13 M.J. 827 (ACMR 1982). Williams, 6 M.J. 611 (ACMR 1978) (MJ has duty to explain elements of the offense).
6. Craney, 1 M.J. 142 (CMA 1975). But see Crouch, 11 M.J. 128 (CMA 1981).
7. Brewster, 7 M.J. 450 (CMA 1979) (substantial error in advice as to sentence may render plea improvident). But see Walls, 9 M.J. 88 (CMA 1980) (if circumstances show accused would have pleaded guilty in any case, misunderstanding as to sentence may not render plea improvident).
8. See Care, supra. Although CMA apparently approved conditional guilty pleas to preserve appellate issues in Schaffer, 12 M.J. 425, 428 (CMA 1982), the CMRs hold such pleas to be improvident because the issue is not preserved for review. Higa, 12 M.J. 1008 (ACMR 1982); Peters, 11 M.J. 875 (NMCMR 1981).
9. Bethea, 3 M.J. 526 (AFCMR 1977) (MJ has duty to inquire into factual matter inconsistent with plea of guilty and may not rely on accused to agree with legal conclusions); Buske, 2 M.J. 465 (ACMR 1975), and Goins, 2 M.J. 458 (ACMR 1975) (mere solicitation of legal conclusions from accused is not sufficient for Care inquiry). See Timmins, supra.

Green, SPCM 16428 (ACMR 10 June 1982) (Statements made during providence inquiry, inconsistent with plea, but consistent with lesser offense, support guilty finding only to lesser offense); Elliott, CM 442132 (ACMR 27 July 1982) (Judge must establish facts sufficiently to show intent in specific intent crime. Failure to do so renders plea improvident to that crime, although not to general intent lesser included offense); Auman, 14 M.J. 641 (ACMR 1982) (Because there is no absolute right to plead guilty, it is not an abuse of discretion for MJ to refuse further consultation between TDC and defendant when questioning has failed to show presence of intent, and to refuse to accept plea). See also Matthews, 13 M.J. 501 (ACMR 1982) (capital case -- no absolute constitutional right to plead guilty).

10. See Article 45(a), UCMJ. See also Moglia, 3 M.J. 216 (CMA 1977); Shackelford, 2 M.J. 17 (CMA 1976) (plea must be rejected if the accused sets up matter inconsistent with plea of guilty and fails or refuses to retract it). Accord Gonzales, 9 M.J. 897 (AFCMR 1980); Cf. Luebs, 20 USQMA 475, 43 CMR 315 (1971) (guilty plea may be provident although accused was too intoxicated to remember events); But see Martinez, 14 M.J. 647 (ACMR 1982) (Where knowledge is an element of offense, and defense of voluntary intoxication exists, and defendant's sole basis for pleading guilty is a bystander's statement of defendant's actions, trial judge must conduct further inquiry to show factual basis for plea and that plea was informed).
11.
 - a. See Section L, Providence of Guilty Pleas.
 - b. Military judge has responsibility for legal sufficiency of Care inquiry, not defense counsel. See Section L.
12. See generally paragraph 70b, MCM.
13. Johnson, 12 M.J. 673 (ACMR 1981) (error for MJ to require naming drug dealer).
14. When MJ had accepted guilty plea, error for MJ not to recuse himself or direct trial with members after accused withdrew plea. Bradley, 7 M.J. 332 (CMA 1979). But no need for recusal where plea rejected as improvident. Cooper, 8 M.J. 5 (1979). Also, no need for recusal where MJ tried co-accused. Lewis, 6 M.J. 43 (CMA 1979).

L. Providence of Guilty Pleas

1. Article 45(a), UCMJ requires plea to be in accord with actual facts. Moglia, 3 M.J. 216 (CMA 1977). MJ inquiry must establish that accused believed he was guilty and that facts as revealed by accused objectively support the plea. Davenport, 9 M.J. 364 (CMA 1980). See Watkins, 14 M.J. 803 (ACMR 1982) (providence of guilty plea determined by accused's statements taken as a whole, not the "last word"); Spencer, 14 M.J. 668 (ACMR 1982) (facts as revealed left no doubt as to accused's understanding of the elements).

Edgerton, CM 440817 (ACMR 21 Oct. 81) (where accused states facts inconsistent with plea, MJ must get accused personally to recant. Getting accused to agree with DC/TC theory is not enough). Compare Beard, SPCM 16641 (ACMR 16 Nov. 1981) (plea improvident where accused denied conduct was prejudicial to good order even though MJ admitted evidence proving prejudicial nature; MJ failed to get accused to recant) with Melancon, 11 M.J. 753 (NMCMR 1981) ("inconsistent" statement that accused did not believe he was disrespectful does not improvidence plea where statement was self-serving and it is clear that accused's words were disrespectful). See also Stener, 14 M.J. 972 (ACMR 1982) (plea improvident where accused denies conduct prejudicial, etc.); but see Hatley, 14 M.J. 890 (NMCMR 1982) (MJ found conduct prejudicial, etc., as a matter of law).

Failure to recall events because of intoxication does not render plea improvident. Luebs, 43 CMR 315 (CMA 1971). Accord Olson, 7 M.J. 898 (AFCMR 1979). But see Martinez, 14 M.J. 647 (ACMR 1982).

2. Where accused's responses suggest possible defense, MJ must explain elements of defense and secure factual basis to assure defense is not available. Jennings, 1 M.J. 414 (CMA 1976). Michaels, 3 M.J. 846 (ACMR 1977) (the mere possibility of a defense does not improvidence plea); Accord Barnes, 12 M.J. 779 (ACMR 1981).
 - a. Whelehan, 10 M.J. 566 (AFCMR 1980) (plea improvident as to specific intent element); Martinez, *supra*. But cf. Baysinger, 11 M.J. 896 (AFCMR 1981) (read as a whole, only possibility of defense raised). But, failure to recall events does not improvidence plea. Luebs, 43 CMR 315 (CMA 1971).
 - b. Buske, 2 M.J. 465 (ACMR 1975) (plea improvident because of inadequately explored agency defense); Martin, CM 442751 (ACMR 11 Mar 83) (no inquiry into agency; plea improvident despite receipt of apparent profit -- accused maintained it was gratuity).
 - c. Russell, 2 M.J. 433 (ACMR 1975) (plea improvident because accused asserted innocent possession). Accord Martinez, SPCM 15852 (ACMR 28 Aug 1981) (returning marijuana to owner, citing Rowe, 11 M.J. 11 (CMA 1981)).
 - d. Young, 6 M.J. 975 (ACMR 1979) (plea to violating order improvident absent facts showing it would have been possible for accused to obey); Irving, 2 M.J. 967 (ACMR 1976) (plea improvident when accused charged with AWOL said he was sick and could not return); Lee, 14 M.J. 633 (ACMR 1982) (insufficient efforts to overcome auto breakdown).

- e. Compare Peterson, 1 M.J. 972 (NCOMR 1976) (statement by accused that "devil made me do it" raised mental responsibility defense sufficient to improvidence plea) with George, 6 M.J. 880 (ACMR 1979) (where there was no suggestion that pedophilia was a mental disease or defect, plea not improvident where MJ brought matter to the attention of accused and DC).
- f. Smith, 14 M.J. 68 (CMA 1982) (claim of right available as defense to robbery); but see Cunningham, 14 M.J. 539 (ACMR 1982) (applicable only property of definite value). Sanders, 7 M.J. 913 (ACMR 1979) (plea to wrongful appropriation improvident where accused had rented trailer and agreement provided for charges after late return).
- g. Palus, 13 M.J. 179 (CMA 1982) (plea improvident where no inquiry into defense of duress); Jemmings, 1 M.J. 414 (CMA 1976) (plea improvident where accused said he acted to protect lives of family). But, must be coercion to commit a criminal act. Roby, 49 CMR 544 (CMA 1975) (plea to AWOL improvident where accused feared being beaten if he returned to unit). See Barnes, 12 M.J. 779 (ACMR 1981) (defense not raised where robbery committed because threat was part of demand to pay a debt and not to commit a crime). Accord Montford, 13 M.J. 829 (ACMR 1982).
- h. Jack, 10 M.J. 572 (AFCMR 1980) (plea provident since mistake of fact was unreasonable).
- i. Roark, 31 CMR 64 (CMA 1965) (took property to teach friend to safeguard property).
- j. Sirles, CM 440258 (ACMR 9 Oct 81) (inadequate inquiry into self-defense).
- k. Anderson, SPCM 16016 (ACMR 18 Dec 1981) (mistake of fact that he was assisting the CID in investigating blackmarketing made plea improvident).
- l. Sovitsky, CM 440023 (ACMR 14 Dec 81) (plea to crossing border without pass improvident where accused said he fell asleep on train).
- m. Factual defense makes plea improvident. Collier, 3 M.J. 932 (ACMR 1977) (plea to attempted transfer of heroin improvident where accused sold sugar); McKnight, 13 M.J. 974 (ACMR 1982) (plea to making false official statement improvident where accused under no obligation to make statement); Hunr, SPCM 16847 (ACMR 22 Feb 1982) (plea to attempted sale of LSD improvident when accused stated substance was not LSD). Plea to robbery improvident where accused only attempted robbery and did not take items until victim had voluntarily abandoned them. (Holding probably limited to the unusual facts of the case.) Cunningham, 14 M.J. 639 (ACMR 1982).
- n. Vanzandt, 14 M.J. 332 (CMA 1982) (extensive discussion of entrapment — key is accused's predisposition; government's suspicions irrelevant); Dejong, 13 M.J. 721 (NCOMR 1982) (MJ must elicit accused's attitude regarding entrapment when raised).
- o. Letter protesting innocence written to President Reagan one day before plea does not affect the providence of the plea. Cantrell, SPCM 17552 (ACMR 10 Sep. 1982).

3. Accused's ignorance of the collateral consequences do not render plea improvident unless major and (a) result from terms of PTA and induced by MJ or (b) MJ fails to correct misunderstanding. Bedania, 12 M.J. 373 (CMA 1982) (required administrative discharge did not make plea improvident and MJ has no duty to inquire). Accord Miles, 12 M.J. 377 (CMA 1982). Sena, 6 M.J. 775 (ACMR 1978) (fact accused did not know that he would not be paid in confinement after his ETS does not improvidence a plea as pay is collateral matter). But grossly incorrect advice equates to counsel inadequacy. Cf. Strader v. Garrison, 611 F.2d 61 (4th Cir. 1979) (guilty plea improvident where induced by grossly inadequate advice from DC as to parole eligibility date).

Eligibility for parole consideration is collateral and, thus, MJ need not discuss it with accused in the providence inquiry. Hannan, CM 438946 (ACMR 12 Jan. 1982). Possibility of administrative discharge even though plea agreement requires that there be no punitive discharge is collateral. Miles, 12 M.J. 377 (CMA 1982).

4. a. Gibson, 1 M.J. 714 (AFCMR 1975) (plea improvident as accused never admitted that his failure to maintain balance to cover checks was dishonorable). See Harper, Applying the "Mistake of Fact" Defense, 13 The Advocate 408 (1981) (listing "mistakes" that may constitute a defense).
- b. Stener, 14 M.J. 972 (ACMR 1982) (plea improvident where accused denied conduct prejudicial but admitted that "some people" might consider it service discrediting). Cf. Arrington, 5 M.J. 756 (ACMR 1978) (MJ need not inquire into how accused believes conduct is prejudicial). See Hatley, supra (L-1).
- c. Craney, 1 M.J. 142 (CMA 1975) (plea improvident where there is no explanation of law of principals). But cf. Crouch, 11 M.J. 128 (CMA 1981) (failure to explain law of principals not fatal where inquiry "supports" plea).
- d. Pretlow, 13 M.J. 85 (CMA 1982) (plea improvident where elements of robbery in conspiracy charge not covered); distinguishing Crouch, supra).
- e. Young, 6 M.J. 975 (ACMR 1979) (plea to violating order improvident absent facts showing it would have been possible for accused to obey).
- f. See generally Felty, 12 M.J. 438 (CMA 1982).
5. Compare Zuis, 49 CMR 150 (ACMR 1974) (coercive tactics by DC); Rex, 3 M.J. 604 (NCMR 1977) (presence of other charges which should have been barred by former jeopardy rendered plea to other charges improvident) with Munt, 3 M.J. 1082 (ACMR 1977) (compelling considerations alone do not improvidence plea so long as they were not falsely induced. Accused pleaded guilty to avoid likelihood that German authorities would assert jurisdiction).
6. Regan, 11 M.J. 745 (ACMR 1981) (plea to specification which does not state an offense is improvident).

7. a. Care, 40 CMR 247 (CMA 1969).
- b. See generally Para. 127c (table of maximum punishments); 126d (sentencing for officers); 81d (sentencing on rehearing); 101a(2) (same), MCM; Articles 18, 19, 20, UCMJ (jurisdictional limits of courts-martial).
- c. Walls, 9 M.J. 88 (CMA 1980) (if circumstances show accused would have pleaded guilty in any case, misunderstanding as to sentence may not render plea improvident).
- d. Hunt, 10 M.J. 222 (CMA 1981) (under the circumstances, including quantum of pretrial agreement, misapprehension of the maximum impossible punishment held insubstantial). Compare Castrillon-Moreno, 7 M.J. 414 (CMA 1979) (appellant believed sentence was 10 years, correct sentence was 2 years — held substantial) with Marbury, 4 M.J. 823 (ACMR 1978) (Appellant believed sentence was 6-8 years, correct sentence was 4 years — held insubstantial).
- e. Hedlund, 7 M.J. 271 (CMA 1979); Frangoules, 1 M.J. 467 (CMA 1976).
- f. Felty, supra, (where accused admitted escape, plea to escape from custody not improvident where escaped from confinement).
8. Leverette, 9 M.J. 627, 630 n.5 (ACMR 1980) (plea improvident if accused innocent as matter of law); Cook, 7 M.J. 623 (NCOMR 1979)(same). But technical variance does not make plea improvident. Felty, supra; Brock, 13 M.J. 766 (AFCMR 1982) (date of inception of AWOL).
9. Dusenberry, 49 CMR 536 (CMA 1975) (absent serious derelictions in advise, accused is bound by his attorney's assessment of law & facts, and plea is not improvident). See also #3, supra.
10. Although CMA has apparently approved conditional guilty pleas, Schaffer, 12 M.J. 425, 428 (CMA 1982), CMRs have held conditional guilty pleas are not authorized because suppression motions are waived by plea. Mallett, 14 M.J. 631 (ACMR 22 Mar 1982). Plea improvident because MJ advised accused his suppression motion would be preserved. Higa, 12 M.J. 1008 (ACMR 1982); Peters, 11 M.J. 875 (NCOMR 1981). But cf. Jackson, 7 M.J. 647 (ACMR 1979)(otherwise provident plea not improvident because DC did not advise accused of waiver on appeal); Williams, 41 CMR 426 (ACMR 1969) (suppression motion not waived by plea where LO so advised accused). See Bethke, 13 M.J. 71 (CMA 1982) (where MJ's inquiry reasonable implied that assertion of motions would risk pretrial agreement, and motions withdrawn, case returned for litigation of motions).
11. Young, 2 M.J. 472 (ACMR 1975)(refusal to allow change of plea does not improvidence plea absent facts inconsistent with plea) (counsel should examine for A/E on abuse of discretion).
12. Caruth, 4 M.J. 924, aff'd 6 M.J. 184 (CMA 1979) (mere MJ discussion of sentencing philosophy does not improvidence plea).

13. Compare Turner, 11 M.J. 784 (ACMR 1981) (Art. 32 considered in determining providence) with Heslin, CM 439758 (ACMR 26 June 1981) (Under Care, providence determined at trial and evidence outside record not considered, citing Davenport, 9 M.J. 364, 367 (CMA 1980), with two exceptions: adequacy of counsel, Davis, 3 M.J. 430, 431 n.1 (CMA 1977); and where plea conflicts with "true facts," Johnson, 1 M.J. 36 (CMA 1975) (Article 32 established different AWOL period)). See Joseph, 11 M.J. 333 (CMA 1981) (allegations of fact contrary to trial assertions will not be considered); Miles, 12 M.J. 377 (CMA 1982).
14. Sanders v. United States, 373 U.S. 1, 14-20 (1963) (even where record discloses no irregularities, rehearing required where allegation defendant under influence drugs at trial). Accord Doyle v. State, 411 A.2d 907 (RI 1980) (accused smoked marihuana on day entered plea); Waters, 35 CMR 580 (ABR 1965) (CA directed a rehearing where post-trial hearing established DC drinking during trial). But cf. Ridley, 12 M.J. 675 (ACMR 1981) (evidence that accused hospitalized for drug overdose after trial insufficient absent personal assertion from accused he had taken drugs).
15. See also Section M. Invalid provision does not affect providence so long as offending clause is not enforced. Bedania, 12 M.J. 373, 375 n.2 (CMA 1982).

In cases of multiple representation, if objection made at trial, MJ must inquire and give defendant chance to show possible conflicts. However, if no objection at trial, defendant must show that an actual conflict of interest adversely affected representation. Taylor, 13 M.J. 740 (ACMR 1982). See Russaw, SPCM 17400, ___ M.J. ___ (ACMR 14 Mar 1983) (MJ only under duty to advise of conflict if he knows or should know of conflict).
16. Post-trial affidavits will not disturb plea where providence inquiry regular on its face. Miles, 12 M.J. 377 (CMA 1982) (and cases cited therein); Zieran, 15 M.J. 511 (ACMR 1982).

M. Pretrial Agreement

1. Green, 1 M.J. 453 (CMA 1976) (requires inquiry into pretrial agreements, sentence limits, etc.; failure to conduct a plea bargain inquiry affects providency); Elmore, 1 M.J. 262 (CMA 1976) (concurring opinion is enforced by Green, supra; accused must show understanding of each condition); Wilson, 4 M.J. 687 (NCOMR 1977) (noncompliance with Green requires reversal). Compare King, 3 M.J. 458 (CMA 1977) (full compliance with Green is required) with later cases of Crawford, Hinton, Passini, infra and Item 2d, below (only requiring adequate compliance).
2. a. See Green, supra; Elmore, supra. Crawford, 11 M.J. 336 (CMA 1981) (short inquiry adequate where DC and accused understood terms).
 - b. Troglin, 44 CMR 237 (CMA 1972) (bans sub rosa agreements); Dyer, 5 M.J. 643 (AFCMR 1978) (proceedings in revision may be used to correct defective Green/King inquiry). Cameron, 12 M.J. 598 (ACMR 1981) (DC guilty of fraud on court by not acknowledging existence of sub rosa agreement that TC would withdraw PTA and add additional charges if motions made). Williams, 13 M.J. 843 (ACMR 1982) (Where there is a sub rosa clemency agreement conditional on accused's giving testimony and not on his plea of guilty, and there is dispute over whether TC required to recommend clemency or merely to consider recommending clemency, terms of agreement interpreted in accused's favor).
 - c. Williamson, 4 M.J. 708 (NCOMR 1977) (counsel should object to indicate noncomportment when MJ goes over agreement with accused). See also Griego, 10 M.J. 385 (CMA 1981); Hinton, 10 M.J. 136 (CMA 1981); Passini, 10 M.J. 108 (CMA 1981) (comportment questions by MJ not required; TC and DC have duty to speak up during MJ's inquiry into meaning of PTA).
 - d. See Green/King, supra; Hinton, supra (establishing on the record that accused has read PTA and discussed it with his counsel is apparently sufficient for everything but sub rosa agreements).
 - e. Note: Where MJ fails to inquire concerning sub rosa agreements (and does not ask the comportment questions), ACMR will usually direct TC and DC to submit affidavits when the error is raised. See Rosario, 13 M.J. 552 (ACMR 1982). Also, TC and DC have duty to speak up, Passini, supra, and DC guilty of fraud if does not acknowledge sub rosa agreement. Cameron, 12 M.J. 598 (ACMR 1981). See also Dinkel, 13 M.J. 400 (CMA 1982) (if misunderstanding existed, TDC would have apprised MJ).

3. Spady, CM 439825 (ACMR 30 Dec 80) (SJA disqualified from post-trial review where one defendant's pretrial agreement required testimony against co-actor). See also Donati, 34 CMR 15 (CMA 1963); Kennedy, 8 M.J. 577 (ACMR 1979), pet. denied, 9 M.J. 6 (CMA 1980). But see Andreas, 14 M.J.483 (CMA 1982) (invalid grant of transactional immunity to civilian witness by SJA of SPCMCA); Newman, 14 M.J. 474 (CMA 1982) (no disqualification of CA when testimonial immunity given to defense witness).
4. Mills, 12 M.J. 1 (CMA 1981) (full appellate review of court-martial convictions required by Congress).
5. Holland, 1 M.J. 58 (CMA 1975). But see Morales, 12 M.J. 888 (ACMR 1982) (successful motion to dismiss a specification released government from PTA in accordance with parties' interpretation of PTA); Bethke, 13 M.J. 71 (CMA 1982)(MJ advice reasonably interpreted as indicating risk to PTA if motions asserted; motions withdrawn; case returned for litigation of motions).
6. Article 32 waiver valid when proposed by accused and DC, Schaffer, 12 M.J. 425 (CMA 1982), but waiver may be improper if a command policy or prosecutorial overreaching exists. Accord Bilbo, 13 M.J. 706 (NMCMR 1982).

Waiver of overseas witness in PTA valid where MJ inquires into provision. West, 13 M.J. 800 (ACMR 1982).
7. Invalid provision does not affect providence as long as not enforced. Bedania, 12 M.J. 373 (CMA 1982). Dawson, 10 M.J. 142 (CMA 1981) (post-trial misconduct clause is void). Accord Connell, 13 M.J. 156 (CMA 1982). See Gibson, 13 M.J. 687 (NMCMR 1982) (Dawson retroactive; PTA enforced); accord Osborne, 13 M.J. 582 (NMCMR 1982).
8. See generally Shepardson v. Roberts, 14 M.J. 345 (CMA 1982), for discussion of government withdrawal from PTAs; see also Cameron, 12 M.J. 598, 600 n.2 (ACMR 1981) (unilateral withdrawal by government not authorized under ACMR interpretation of PTA).
9. Cifuentes, 11 M.J. 385 (CMA 1981) (understanding of parties at trial controls interpretation of meaning and effect of PTA). Any ambiguity in PTA resolved in accused's favor. Buchheit, 46 CMR 856 (ACMR 1972); Sheppard, 4 M.J. 659 (ACMR 1977).
10. See Section L, Item 10.
11. See Green, *supra*; Robago, 10 M.J. 610 (ACMR 1980) and Walters, 5 M.J. 829 (ACMR 1978) (MJ should not examine quantum portion of PTA prior to sentencing); Sallee, 4 M.J. 681 (NMCMR 1977) (error for judge to base sentence on pretrial agreement sentence limits).
12. Defendant may enforce pretrial agreement. Stewart, CM 441916 (ACMR 30 June 1982).

N. Findings and Multiplicity

1. The failure to announce findings on the record is error, but not necessarily prejudicial. See, e.g., Ridgeway, SPCM 15447 (ACMR 27 May 1981) (no prejudice where MJ inadvertently neglected to enter formal findings despite his avowed intention to do so); Barnes, 50 CMR 625 (NCOMR 1975) (failure of court to make findings as to 3 specifications was not prejudicial where each specification was the only specification under three different charges and the accused pled guilty to these specifications and charges; however, result would be different if there had been more than one specification under the charge or if the offenses had been contested). Cf. Dilday, 47 CMR 172 (ACMR 1973) (failure to reach findings as to the charge or the designation of the wrong UCMJ Article not prejudicial; however, failure of court to announce findings as to a specification is equivalent of no finding; findings and sentence set aside and rehearing may be ordered); Duncan, 16 CMR 346 (ABR 1954) (where court did not expressly find accused guilty of the specific allegations contained in the specification but only made findings with respect to the excepted and substituted words, findings and sentence must be set aside); Massie, 4 CMR 828 (AFBR 1952) (no finding of guilty to the specification having been announced, a finding of not guilty thereto is the only alternative). See also Article 53, UCMJ.

See generally Baker, 14 M.J. 361 (CMA 1982), and Cartwright, 13 M.J. 174 (CMA 1982), for discussion of multiplicity. See also Smith, 14 M.J. 430 (CMA 1982).

2. In following cases, DC did not request dismissal of multiplicitous specification, 3 different results: Multiplicitous specification dismissed and sentence reassessed, Gibson, 11 M.J. 435 (CMA 1981); multiplicitous specification dismissed and sentence not reassessed, Williams, 39 CMR 78 (CMA 1978); multiplicitous specification aff'd where no prejudice. Falls, 41 CMR 317 (CMA 1970).

On motion, after guilty plea, no exigencies of proof remain, and MJ should have required elections between sale and transfer specifications before sentencing. Gamer, CM 441241 (ACMR 18 Nov 81).

Huggins, 12 M.J. 657 (ACMR 18 Nov 81) (multiplicity raises three issues; (1) dismissal of multiplicitous specifications; (2) improvident plea because of misunderstanding as to maximum punishment; and (3) incorrect sentencing instructions. (3) not waived by failure to object).

Where multiplicity raised at trial, appellate courts will dismiss multiplicitous specifications; ACMR will apply waiver if not raised at trial. Huggins, *supra*. E.g., Foster, 13 M.J. 789 (ACMR 1982) (Where timely objection to multiplicity of window peeping as both conduct prejudicial to good order and discipline and as service discrediting, later dismissed. No sentence relief because of severity of other charges); Franklin, SPCM 16821 (ACMR 30 June 1982) (Fraternization merges into sodomy, where the consensual sodomy was the primary aspect of the fraternization). See McMaster, 15 M.J. 525 (ACMR 1982) (failure to object at trial does not waive multiplicity issue when charges essentially the same or one is included within another).

However, CMA has not been applying waiver and has been dismissing specifications that are clearly multiplicitious. See, e.g., Gibson, 11 M.J. 435 (CMA 1981) (attempted rape/assault with intent to rape); Donnelly, 12 M.J. 331 (CMA 1981) (larcenies "constituted" the derelictions of duty); Leader, 13 M.J. 36 (CMA 1982) (communicating a threat and assault with intent to rape as "part and parcel"; Hale, 13 M.J. 42 (CMA 1982) (aggravated assault with pistol dismissed as "included within" robbery); Fail, 13 M.J. 93 (CMA 1982) indecent exposure dismissed as "part and parcel" of indecent assault); Ragin, 13 M.J. 42 (CMA 1982) (attempt to sell drugs dismissed as "duplicate" of drug possession and transfer specifications). Tyler, No. 45,103/AR, pet. granted with summary disposition, 15 M.J. 285 (CMA 1983). Sentence relief may be granted where the same offense is alleged more than once, even though offenses considered multiplicitious for sentencing, as in Gibson, 11 M.J. 435 (CMA 1981).

If what is essentially one transaction is made the basis for unreasonable multiplication of charges, further relief may be warranted even when the sentence has already been reduced because of multiplicity. Sturdivant, 13 M.J. 323 (CMA 1982) (charges dismissed where accused had been convicted of a single marijuana transaction, but the evidence was weak and the multiplication undoubtedly helped convince members that defendant was a "bad character").

O. Assembly of the Court and Voir Dire

1. Daigle, 1 M.J. 139 (CMA 1975) (rank may not be used as a device for excluding court members). See also Yager, 7 M.J. 171 (CMA 1979) (routine exclusion of members below E-3 is permitted).
2. a. Article 16, UCMJ; paragraph 4a, MCM.
b. Colon, 16 M.J. 73 (CMA 1979) (unexcused absence of 40% required reversal); Jackson, CM 439024 (ACMR 31 Mar 81) (unexplained absence of 2 of 14 members insubstantial).
3. Slubowski, 7 M.J. 461 (CMA 1979) (discussion of types of voir dire rights).
4. Test is whether member's attitude will yield to the evidence and instructions. "Inelastic attitude" disqualifies, McGowan, 7 M.J. 205 (CMA 1979), while "predisposition" to adjudge some punishment does not, Tippet, 9 M.J. 106 (CMA 1980). MJ reversed only for clear abuse of discretion. Boyd, 7 M.J. 289 (CMA 1979).
5. Article 41, UCMJ (challenges for cause must be based on good cause; one peremptory challenge for each accused and for trial counsel); paragraph 4a, MCM. See also Lee, 31 CMR 743 (AFBR 1961) (if last challenge causes additional members to be appointed, it is still last peremptory challenge).
Davenport, 14 M.J. 547 (ACMR 1982) (Dictum: Although ACMR cites authority to contrary, states that, in some cases, erroneous denial of challenge for cause may survive peremptory challenge of that member).
Brown, 13 M.J. 890 (ACMR 1982) (If possible, picking law enforcement personnel to serve on courts-martial should be avoided. If unavoidable, must search carefully for bias).
Lenoir, 13 M.J. 452 (CMA 1982) (Where challenge for cause erroneously denied, ACMR's reassessment of sentence not appropriate remedy).
6. Warborg, 36 CMR 188 (CMA 1966) (knowledge by members of prior convictions not admitted in evidence is prejudicial). But see Watson, CM 441667, ___ M.J. ___ (ACMR 28 Feb 83) (knowledge of prior misconduct of accused by members not found prejudicial).
7. Herrington, 8 M.J. 194 (CMA 1980) (members's absence is not equal to removal and orders are not required to place the member back after his absence); Gladdin, 1 M.J. 12 (CMA 1975) (post-trial orders confirming oral orders placing a member on the court are subject to rebuttal and discovery by appellate defense counsel); Harnish, 31 CMR 29 (CMA 1961) (court members on order for accused's trial but not on orders for the proper court may not hear a case); Robertson, 7 M.J. 507 (ACMR 1979) (initial orders may appoint enlisted members so long as they serve only pursuant to accused's written request for trial with EM). But see Garcia, SPCM 17806, ___ M.J. ___ (ACMR 11 Mar 83) (if CA excuses member after assembly and TDC objects, good cause must be established on the record).

8. Art. 25(c)(1), UCMJ. See Section H.

P. Sentencing: Matters in Aggravation and Rebuttal

See generally Vickers, 13 M.J. 403 (CMA 1982), for discussion of policies governing types of evidence admissible in aggravation.

1. Haynes, 10 M.J. 694 (ACMR 1981) (opinion details all relevant case law to date concerning properly completed DA Form 2627's); Beaudion, 11 M.J. 838 (ACMR 1981) (incomplete Article 15 inadmissible but waived by lack of trial objection).

Under M.R.E., failure to object to Article 15 form that does not reflect legal review waives defect. McGary, 12 M.J. 760 (ACMR 1981).

2. See Kern, SPCM 15845 (ACMR 20 May 1981) (Article 15 inadmissible), citing AR 27-10, para. 3-15c(3)(d), which provides that records of nonjudicial punishment for offenses occurring during a soldier's first three years of service must be removed from the soldier's records upon separation from the service, the setting aside of all punishments, or the passage of two years (subject to adjustment for AWOL's) since the punishment was imposed. Accord Cisneros, 11 M.J. 48 (CMA 1981).
3. Weaver, 1 M.J. 111 (CMA 1975) (in order for conviction more than 6 years old to be admitted, after notice to DC, TC must show and MJ determine that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect). See also Lee, SPCM 15317 (ACMR 30 Dec 1980) (convictions for offenses after offense at current trial are not admissible). Certificate of rehabilitation renders conviction inadmissible under MRE 609(c). However, rule does not apply to sentencing. Stevens, 13 M.J. 832 (ACMR 1982).
4. a. See generally Article 44(b), UCMJ; paragraph 75b(2), MCM (note revised para 75 effective 1 Aug 1981). See also Heflin, 1 M.J. 131 (CMA 1975) (lack of finality of conviction which appears on face of form is a nonwaivable defect); Hines, 1 M.J. 623 (ACMR 1975) (DA Form 20B which lacked the required entry to establish finality was not competent evidence of final conviction). But see Hancock, 12 M.J. 685 (ACMR 1981) (lack of finality waived under M.R.E. by failure to object).
b. Martin, CM 440101 (ACMR 13 Apr. 1981) (where promulgating order exhibit inadmissible for lack of action, DA Form 2-2 also inadmissible since prepared from order). Jaramillio, 13 M.J. (ACMR 1982) (makes no difference whether conviction proved by Items 21/35 of DA Form 2-1, a Form 2-2, an order, or DD Form 493; must prove finality, and Booker compliance for SCM) (time lost entry "trainee" at Retraining Brigade inadmissible).
5. Booker, 5 M.J. 238 (CMA 1977) (where record failed to establish valid waiver of counsel in prior summary courts-martial, they could not be used for enhancement of punishment in subsequent court-martial proceedings); Thornton, CM 439866 (ACMR 27 Feb. 1981) (evidence of prior summary court-martial conviction may be considered so long as the record somewhere, to include allied papers, contains proof that the Booker requirements were met). Gwin, SPCM 16768 (ACMR 8 June 1982) (Error to admit record showing "trainee" status when defendant claimed status was result of summary court-martial in which defendant not informed of right to counsel). Taylor, 12 M.J. 561 (ACMR 1981) (failure to establish compliance with Booker at SCM waived by DC failure to object).

Note. Booker compliance is required even if SCM considered only as evidence of past performance. Taylor, supra.

6. Sauer, 15 M.J. 113 (CMA 1983) (compelling accused to establish basis of admissibility of Art. 15 violates right against self-incrimination), rev'ing Spivey, 10 M.J. 7 (CMA 1980), and Matthews, 6 M.J. 357 (CMA 1979).
7. No requirement that Art. 15 notification follow form specs for court-martial. Eberhardt, 13 M.J. 772 (ACMR 1982) (Art. 15 form admissible even if specifications would be insufficient for a court-martial, as long as accused apprised of the nature of the misconduct). Accord Atchison, 13 M.J. 798 (ACMR 1982).
8. a. Brister, 12 M.J. 44 (CMA 1981) (reprimand improperly in file not waived by lack of objection); Gurley, CM 442243 (ACMR 30 July 1982) (Art. 15 improperly in files because too old could not be considered in sentencing); Lemieux, SPCM 17112 (ACMR 29 June 1982) (Improper to admit conviction where record did not show its finality).
b. Boles, 11 M.J. 195 (CMA 1981) (reprimand for civilian offenses inadmissible); Cook, 10 M.J. 138 (CMA 1981) (civilian conviction admissible); Krewson, 12 M.J. 157 (CMA 1981) (rules for admissibility of court-martial convictions apply to civilian convictions, finality required); Scott, 12 M.J. 787 (ACMR 1982) (judicial notice taken that time for filing appeal of civilian conviction expired).
9. Barnes, SPCM 15546 (ACMR 8 Apr. 1981) (authentication certificate defective where NCO signed for personnel officer) (waived if no objection); M.R.E. 902(4). Washington, SPCM 16812 (ACMR 28 July 1982) (New sentencing hearing ordered because improper to submit authentication sheet that listed three offenses, when two of the three had own sheets which had been rejected because of illegible signatures); Jaramillio, 13 M.J. 782 (ACMR 1982) (Document showing defendant had been a "trainee" inadmissible in absence of evidence that certificate of authentication was signed by someone who had a duty to maintain record); M.R.E. 902(4); Sauer, supra.
10. Brooks, 43 CMR 817 (ACMR 1971) (accused's responses during providence inquiry may not be considered in determining sentence).
11. Jenkins, 7 M.J. 504 (AFCMR 1979) and cases therein.
12. Rebuttal. See para. 75d, MCM. Armstrong, 12 M.J. 766 (ACMR 1981) (where accused testified he liked Army and wanted to stay in, error to admit evidence he was a poor soldier and committed other acts of misconduct). Accord Freeman, CM 441425 (ACMR 2 Feb 1982). See McLeod, Opening the Door: Scope of Government Evidence On Sentencing, 12 The Advocate 77 (1980).

TC can't use Chapter 10 request to rebut accused's testimony of desire to remain in service. Hughes, 6 M.J. 783 (ACMR 1978). Error to permit government witnesses to recommend a specific sentence. After unsworn statement by accused, error for government witness to give opinion as to truth and veracity in rebuttal. Balzeski, CM 438066 (ACMR 18 Dec. 79); Shewmake, 6 M.J. 710 (NCMR 1978).

Accused, in sentencing hearing, called law enforcement official to show accused's cooperation in drug investigation. On cross, TC brought out accused's admissions to witness of uncharged misconduct. Since accused did not first introduce evidence to show lack of other misconduct, misconduct evidence not admissible in cross or rebuttal because it was merely evidence of bad character. Gambini, 13 M.J. 423 (CMA 1982).

Fact that accused apparently lied on stand may not be used as factor in aggravation, but court may consider lying in deciding if accused can be rehabilitated. Warren, 13 M.J. 278 (CMA 1982).

Q. Sentencing: Matters in Extenuation and Mitigation

1. Hawkins, 2 M.J. 23 (CMA 1976) (where DC silent, the MCM provisions requiring MJ to remind accused of rights to allocution have the force and the effect of law). Cf. Barnes, 6 M.J. 356 (CMA 1979) (advice not required where DC made unsworn statement); Pilgrim, 2 M.J. 1072 (ACMR 1976), pet. denied, 3 M.J. 92 (CMA 1977) (error not prejudicial where accused made sworn statement). See generally Appendix 8b, and paragraph 75, MCM.
2. E.g., Wood v. Georgia, 450 U.S. 261 (1981) (DC has duty to convince court to be lenient; failure to do so is 6th Amend. violation).
3. See August 1981 changes to para. 75e, MCM. Scott, 5 M.J. 431 (CMA 1978); Courts, 9 M.J. 285, 292 (CMA 1980) (presence of material witness required).
4. A court-martial may reconsider findings until the time a sentence is adjudged. Accordingly, an accused should be given considerable leeway in his extenuation and mitigation testimony. Cofield, 11 M.J. 422 (CMA 1981).

Whether para. 75c(1), MCM, may validly preclude accused from presenting matter which "constitute a legal justification or excuse" is pending in Teeter, pet. granted, 13 M.J. 117 (CMA 1982).

5. Morgan, 15 M.J. 128 (CMA 1983) (TDC may force TC to introduce "complete picture" of accused's personnel records, and vice versa; if TC compelled to introduce favorable as well as unfavorable evidence, TC not entitled to rebut favorable evidence); Williams, 12 M.J. 1038 (ACMR 17 March 1982) (if admissible under MCM/AR for TC, also admissible for DC).
6. Cofield, 11 M.J. 422 (CMA 1981) (summary court-martial conviction cannot be used for impeachment); Wilson, 12 M.J. 652 (ACMR 1981) (same for Art. 15).
7. Donnelly, 13 M.J. 79 (CMA 1982) (no prejudicial error in TC cross-exam of defense witness regarding knowledge of prior action of misconduct).

R. Trial Counsel's Argument

See generally attached Army Lawyer article, Improper Trial Counsel Argument; (reprinted at p.p. R-3 to R-7) and Ferrante, Sentencing Arguments: Defining The Limits of Advocacy, 13 The Advocate 268 (1981); Clifton, 15 M.J. 26 (CMA 1983) (not guilty plea case, but complete discussion).

1. a. Young, 8 M.J. 676 (ACMR 1980), pet. denied, 9 M.J. 15 (CMA 1980) (TC's unwarranted inference of fact in argument was sufficiently inflammatory to require sua sponte instruction by MJ).
- b. Richardson, 6 M.J. 654 (NCOMR 1978) (sentence reassessed where TC argued matters elicited solely during providence inquiry); accord Brooks, 43 CMR 817 (ACMR), pet. denied, 43 CMR 413 (CMA 1971); Dorsey, SPCM 15846 (ACMR 17 Aug 81).
2. Tawes, 49 CMR 590 (ACMR 1974) (error to comment on witnesses not called by arguing that more could have been called but were not). See Simmons, 14 M.J. 832 (ACMR 1982) (erroneous argument not prejudicial where BCD given instead of DD and CA reduced CHL from 3 years to 18 months); Shows, 5 M.J. 892 (AFCMR 1978).
3. Collins, 3 M.J. 518 (AFCMR 1977), aff'd, 6 M.J. 256 (CMA 1979) (TC's argument that accused's sale of LSD while assigned to security police organization violated his trust was improper); Wilson, 12 M.J. 653 (ACMR 1981) (TC cannot use Art. 15's to impeach accused's truthfulness).
4. Bethea, 3 M.J. 526 (AFCMR 1977) (TC acted improperly in attributing to accused a specific criminal intent neither admitted by him nor proved by the evidence).
5. Shamberger, 1 M.J. 377 (CMA 1976) (argument of TC suggesting that court members place themselves in place of victim's husband exceeded the bounds of propriety).
6. Begley, 38 CMR 488 (ABR 1967) (it is highly improper for TC to appeal to class (or higher rank) or race prejudice).
7. See Rich, 12 M.J. 661 (ACMR 1981) (TC can argue for specific sentence greater than PTA), and 1 Aug 1981 changes to para. 75f, MCM, not following Razor, 41 CMR 708 (ACMR 1970) (improper for TC to argue for a specific sentence).
8. Lackey, 25 CMR 222 (CMA 1958) (improper to bring to the attention of the court the views of the CA with respect to an appropriate sentence). Para. 75f, MCM. Accord Luby, 14 M.J. 619 (AFCMR 1982) (error cured by MJ instructions).
9. Poteet, 50 CMR 73 (NCOMR 1975) (threatening court members with spectre of contempt or ostracism if they reject TC's appeal for a severe sentence exceeds the bounds of fair argument).
10. Johnson, 1 M.J. 213 (CMA 1975) (trial counsel cannot argue by implication that a plea of not guilty is a matter in aggravation).
11. Gordon, 34 CMR 94 (CMA 1963) (TC may not remark on accused's failure to testify).

12. Cook, 28 CMR 323 (CMA 1959) (appeal to court to predicate verdict on effect of its action on military civilian relations is improper).
13. Geidl, 10 M.J. 168 (CMA 1981) and Lania, 9 M.J. 100 (CMA 1980) (TC may not invite court members to rely solely on deterrence to the exclusion of all other factors).
14. Rinehart, 24 CMR 212 (CMA 1957) and Allen, 29 CMR 355 (CMA 1960) (TC may not refer to MCM or other legal authority in final argument).
15. Houn, 9 M.J. 429 (CMA 1980) (it is improper for TC to give expression of his personal belief).
16. See generally Nelson, 1 M.J. 235 (CMA 1975); Garza, 43 CMR 376 (CMA 1971); Weller, 18 CMR 473 (AFBR 1954); Jernigan, 13 CMR 396 (ABR 1953) (examples of attempting to inflame the passions of court members).
17. Ryan, 44 CMR 63 (CMA 1971); Ruggiero, 1 M.J. 1089 (NCOMR 1977), pet. denied, 3 M.J. 117 (CMA 1977) (TC may not assert that a person has increased credibility because of his higher rank).
18. Cabebe, 13 M.J. 303 (CMA 1982); Warren, 13 M.J. 278 (CMA 1982).

IMPROPER TRIAL COUNSEL ARGUMENT

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Of those functions a defense counsel undertakes in the representation of his client, none is so basic as the duty to assure the accused a fair trial; a proceeding as free from irregularity as possible. In the area of monitoring trial counsel argument, the importance of defense counsel action in the face of improper prosecutorial comment was recently reemphasized in *United States v. Nelson*.¹ The Court of Military Appeals there considered three distinct forms of questionable final argument: reference to the appellant's failure to raise his trial defense theory at the Article 32 investigation, use of inflammatory comments and interjecting inadmissible hearsay to bolster his case. The first problem was held not to constitute an impermissible comment on the accused's right to avoid self-incrimination; the last was grounds for reversal where the military judge erred in overruling defense counsel's timely objection. Trial counsel's comparison of the credibility of a defense witness to Hitler's lying tactics was found to be inflammatory, not based on the record, a statement of personal opinion and "patently erroneous". However, the Court, per Chief Judge Fletcher, found the absence of defense objections to be an indication that the comment had little impact (mitigating the military judge's "perplexing" inaction) and invoked the doctrine of waiver.

The lesson of *Nelson* should not be lost: it is essential to object to improper argument immediately upon its occurrence. An objection must be entered to each form of improper argument as it occurs. To be effective, each objection should identify the offensive comment, at sidebar if appropriate, state the grounds on which it was improper and state the relief defense counsel

deems necessary to correct it.² Deciding what is objectionable requires that counsel be familiar with the case law summarized below, and that defense counsel be attuned to any matter which works to his client's prejudice. Furthermore, *Nelson* indicates³ that all counsel should be intimately familiar with the *Code of Professional Responsibility* and the *ABA Standards Relating to the Prosecution Function and the Defense Function*.⁴ The latter will indicate basic objectionable argument,⁵ including that which calls for disciplinary sanctions.⁶

Adherence to the *Standards Relating to the Prosecution Function* would avoid the problem altogether. As indicated above,⁷ trial counsel risks censure if his argument strays beyond fair bounds. The function of the prosecutor was set down by Mr. Justice Sutherland long ago and bears repeating:⁸

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Ethics and legality aside, the trial counsel who organizes and presents his facts fully and effectively needlessly jeopardizes his case with ill-considered final argument.

The trial judiciary must be alert to possible abuses. "The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his own initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial." ⁹ The *ABA Standards Relating to The Function of the Trial Judge* repeat the basic prohibitions on the closing argument of counsel "to emphasize the trial judge's obligation to enforce these prohibitions against improper argument which carries a high potentiality for prejudice to the interests of justice." ¹⁰ Attention to this matter will have the additional salutary effect of reducing the Court of Military Appeal's perplexity in such matters to a minimum. ¹¹ That Court cited the Supreme Court opinion in *Donnelly v. DeCristoforo* ¹² as the correct approach to curing the error. The instruction given in *DeChristoforo* contained the following elements: ¹³

1. It was emphasized that closing arguments are not evidence.
2. The objectionable remark was repeated.
3. The remark was declared to be unsupported by evidence.
4. The jury was instructed to disregard the statement and consider the case as if it had not been made.

The Court cautioned, however, that some trial occurrences may be too clearly prejudicial to be mitigated by a curative instruction. ¹⁴

The following summary of principle cases is arranged in three categories that will aid in conceptualizing the errors. *Improper* argument contains basic faults such as misstating the evidence or arguing personal beliefs. *Inflammatory* argument may exaggerate a basic fault or appeal to passion and prejudice. "*Illegal*" argument enters some area in which comment is prohibited. These categories are not mutually exclusive; an improper argument may find itself in all three as its severity escalates.

Improper Argument

1. It is improper to misstate evidence, argue facts not supported by evidence or not admitted in evidence.

It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record. . . . *ABA Standards, The Prosecution Function*, §5.9. See also: paragraph 72b, *Manual for Courts-Martial, United States*, 1969 (Revised edition); Disciplinary Rule 7-106(C) (1), *ABA Code of Professional Responsibility*.

United States v. Nelson, 24 U.S.C.M.A. 49, 51 C.M.R. 143, 76-1 JALS 3 (1975); use of inadmissible hearsay to corroborate identity of accused.

United States v. Garza, 20 U.S.C.M.A. 536, 43 C.M.R. 376 (1971); reference to document not admitted in evidence.

United States v. Gerlach, 16 U.S.C.M.A. 383, 37 C.M.R. 3 (1966); trial counsel's argument contradicted stipulation.

United States v. Johnson, 12 U.S.C.M.A. 602, 31 C.M.R. 188 (1962); improper rebuttal of defense sentence argument with matters not in evidence: lack of promotions, failing tests.

2. It is improper to refer to witnesses not present who could or should have been called.

United States v. Tawes, 49 C.M.R. 590 (A.C.M.R. 1974); statement that Government could obtain everyone else present to testify to same facts improper and unprofessional.

United States v. Eggleton, 48 C.M.R. 502 (A.F.C.M.R. 1974); trial counsel comment that defense failed to call accomplice as corroborating witness clearly improper.

3. Neither counsel may cite legal authorities or the facts of other cases, except when arguing before the military judge sitting alone. Paragraph 72b, *MCM, supra*.

United States v. McCauley, 9 U.S.C.M.A. 65, 25 C.M.R. 327 (1958); case defining ele-

ment of charge given to members.

United States v. King, 12 U.S.C.M.A. 71, 30 C.M.R. 71 (1960); facts of cases with severe sentences argued in aggravation of sentence: held to be miscarriage of justice despite waiver.

United States v. Adams, 5 U.S.C.M.A. 563, 18 C.M.R. 187 (1955); laws misstated over defense objection.

4. It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. *ABA Standards, The Prosecution Function*, §5.8(b). See also Disciplinary Rule 7-106(C) (4), *ABA Code of Professional Responsibility*.

United States v. Nelson, supra; "That is the most preposterous story I've ever heard."

United States v. Long, 17 U.S.C.M.A. 323, 38 C.M.R. 121 (1967); trial counsel opined that defendant was unworthy of belief.

5. Trial counsel may not refer to any punishment or quantum of punishment in excess of that which can lawfully be imposed in the particular case by the particular court. Paragraph 75f, MCM, *supra*.

United States v. Davis, 47 C.M.R. 50 (A.C.M.R. 1973); trial counsel compared military maximum sentence of ten years confinement to other jurisdictions where life imprisonment or death could be imposed.

Cf. United States v. Jones, 10 U.S.C.M.A. 532, 28 C.M.R. 98 (1959); on rehearing, court told of original sentence absent reassessment by convening authority; court must know maximum imposable and not basis for limitation.

6. It is improper to use a legitimate pretrial administrative tool for an illegitimate purpose.

United States v. Pinkney, 22 U.S.C.M.A. 595, 48 C.M.R. 219 (1974); accused's application for a Chapter 10 discharge argued to indicate a desire for separation.

7. It is improper to argue that a sentence should be considered in light of probable clemency action by higher authorities.

United States v. Carpenter, 11 U.S.C.M.A. 418, 29 C.M.R. 234 (1960); improper to argue that the convening authority considered clemency matters before referring the case.

United States v. Simpson, 10 U.S.C.M.A. 229, 27 C.M.R. 303 (1959); highly improper to inform panel that any bad conduct discharge would probably be removed by the A.B.C.M.R.

Inflammatory Argument

1. The prosecutor should not use argument calculated to inflame the passions or prejudices of the jury. *ABA Standards, The Prosecution Function*, §5.8(c); *United States v. Long, supra*.

2. Appeals to national, patriotic, local, racial or religious prejudices are improper.

United States v. Garza, supra; prosecutor ran "political trial" implying accused's family followed heinous political philosophy inimical to the United States.

United States v. Boberg, 17 U.S.C.M.A. 401, 38 C.M.R. 199 (1968); murder of a Vietnamese civilian compared to a killing by the Viet Cong.

United States v. Prendergrass, 17 U.S.C.M.A. 391, 38 C.M.R. 189 (1968); accused was called a cowardly example of shameless behavior, protecting his own life while his comrades go to battle and die—clearly inflammatory in absence of any supporting evidence.

United States v. Priest, 46 C.M.R. 368 (N.C.M.R. 1971); promoting disloyalty compared to three assassinations and civil strife in the United States.

3. References to jurors and their families.

United States v. Wood, 18 U.S.C.M.A. 291, 40 C.M.R. 3 (1969); argument invited panel members to imagine child victims of sex assaults as their own sons and daughters—patent attempt to destroy impartiality.

United States v. Wood, supra; trial counsel threatened panel with contempt by their peers and ostracism if they did not disapprove accused's actions by eliminating him.

United States v. Boberg, supra; members were asked whether life sentence would not be appropriate if a brother had been the murder victim.

United States v. Shamberger, No. 30,638 (U.S.C.M.A. 2 April 1976) Trial counsel invited members to put themselves in the place of the rape victim's husband.

4. Trial counsel may not comment upon the probable effect of the court's findings on relations between the military and civilian communities. Paragraph 72b, MCM, *supra*. See *ABA Standards, The Prosecution Function*, §5.8(d).

United States v. Boberg, supra; counsel argued that murder of a Viet Nameese civilian embarrassed the United States and utterly compromised its mission.

✓*United States v. Cook*, 11 U.S.C.M.A. 99, 28 C.M.R. 323 (1959); argument asserted the impact of the murder of a Phillipine national on military—civilian relations.

5. It is improper to associate the accused with other offensive conduct or persons without justification.

United States v. Nelson, supra; defense witness placed in an offensive historical perspective by comparison to Hitler.

United States v. Long, supra; accused's attitude declared to be that the military could go to hell—prison was preferable to Vietnam.

Illegal Argument

•1. Trial counsel may not comment upon the failure of the accused to take the witness stand or the exercise by the accused of his rights under Article 31. Paragraph 72b, MCT.

United States v. Saint John, 23 U.S.C.M.A. 20, 48 C.M.R. 312 (1974); trial counsel may not comment in manner to suggest that defendant's silence may be considered against him, but statement that prosecution witnesses were unchallenged and un rebutted not improper where defense counsel failed to object and argued that defense witnesses were unimpeached.

60. *United States v. Skees*, 10 U.S.C.M.A. 285, 27 C.M.R. 359 (1959); argument that it was for the defendant to say why he could not comply with an order, as suggested by a witness, was an improper comment on accused's failure to testify.

United States v. Stegar, 16 U.S.C.M.A. 569, 37 C.M.R. 189 (1967); cross-examination and argument that indicated the accused refused to say anything when first interviewed was prohibited conduct repeatedly condemned by U.S.C.M.A.

Cf. United States v. Tackett, 16 U.S.C.M.A. 226, 36 C.M.R. 382 (1966); error to indicate accused refused to make a pretrial statement until allowed to consult counsel.

United States v. Russell, 15 U.S.C.M.A. 76, 35 C.M.R. 48 (1964); argument that appellant, if completely innocent, would have submitted to a blood test before trial to remove self from suspicion was disregard of accused's right against self-incrimination.

2. It is error to comment on a withdrawn plea of guilty.

✓*Cf. United States v. Daniels*, 11 U.S.C.M.A. 22, 28 C.M.R. 276 (1959); error to impeach with stipulation given pursuant to guilty plea entered at trial since returned for rehearing. See *United States v. Stivers*, 12 U.S.C.M.A. 315 at 318, 30 C.M.R. 315 at 318 (1961).

60.3. General prejudice occurs when command influence is introduced into a trial.

United States v. Allen, 20 U.S.C.M.A. 317, 43 C.M.R. 157 (1971); attempt to read Secretary of the Navy policy on elimination of drug abusers required reversal because no cautionary instruction directing that a commander's policy be ignored can cure prejudice.

✓*United States v. Lackey*, 8 U.S.C.M.A. 718, 25 C.M.R. 222 (1958); reversal required where trial counsel argued that people who brought and referred charges wanted accused eliminated.

4. It is plain error to equate credibility with rank.

✓ *United States v. Ryan*, 21 U.S.C.M.A. 9, 44 C.M.R. 63 (1971); trial counsel called defense witnesses liars and “elevated to a legal axiom [the inference] that the degree of rank carries a corresponding degree of credibility”; argument was plain error.

This case summary does not represent a complete survey of military case law but adequately illustrates the categories of improper comment. An understanding of how the above examples fit the framework of improper, inflammatory or illegal subjects eases identification, avoidance and correction of objectionable argument. It is more important to comprehend how a statement may be objectionable than it is to memorize what has been held to be error. Indeed, the Court of Military Appeals has held that lack of precedent will not excuse a failure to object.¹⁵ Furthermore, that Court’s observation that failure to object may demonstrate a concern that to do so would reflect unfavorably upon the defense¹⁶ is tempered by frequent reference to that failure as an indication of the comment’s minimal impact.¹⁷

Clearly, avoidance of improper subject matter is the ethical responsibility of all counsel. However, the Supreme Court has noted that:

in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation.¹⁸

To that end, defense counsel must be familiar with the bounds of proper comment, be alert to remarks that unfairly prejudice his case, and be ready to object effectively.

Footnotes

1. 24 U.S.C.M.A. 49, 51 C.M.R. 143, 76-1 JALS 3 (1975).
2. Relief may take the form of an appropriately emphatic direction to disregard to the panel, a cautionary warning to trial counsel, a closing instruction repeating that improper counsel argument must be ignored and, ultimately, mistrial.
3. Footnote 2 at 24 U.S.C.M.A. 51, 51 C.M.R. 145.
4. The Code and these Standards are made applicable to counsel in courts-martial by Paragraph 2-32, Army Regulation 27-10.
5. The Prosecution Function, §§ 5.8, 5.9; The Defense Function, § 7.8.
6. The Prosecution Function, § 1.1(e); The Defense Function, § 1.1(f).
7. Note 6, *supra*.
8. *Berger v. United States*, 295 U.S. 78 at 88; *see United States v. Valencia*, 1 U.S.C.M.A. 415, 4 C.M.R. 7 (1952).
9. ABA Standards Relating to The Function of the Trial Judge, § 1.1(a).
10. *Id.*, § 5.5, Commentary, p. 73.
11. *See, United States v. Nelson*, 24 U.S.C.M.A. 49 at 52, 51 C.M.R. 143 at 146.
12. 416 U.S. 637 (1974).
13. *Id.* at 641, 644. *See n. 2, supra*, for other forms of relief.
14. *Id.* at 644. *
15. *United States v. Pinkney*, 22 U.S.C.M.A. 595, 48 C.M.R. 219 (1974). “The lack of a case on point does not exempt counsel from evaluating the legal issues in a trial as they develop, according to generalized principles of law.” At 598, 222.
16. *United States v. Ryan*, 21 U.S.C.M.A. 9 at 11, 44 C.M.R. 63 at 65 (1971).
17. *See, United States v. Nelson, supra n. 1; United States v. Saint John*, 23 U.S.C.M.A. 20, 48 C.M.R. 312 (1974); *United States v. Ryan, supra n. 16; United States v. Wood*, 18 U.S.C.M.A. 29, 40 C.M.R. 3 (1969).
18. *Dunlop v. United States*, 165 U.S. 486 at 498 (1897).

S. Defense Counsel's Argument

1. Webb, 5 M.J. 406 (CMA 1978) (DC argument for suspended sentence improper); Tinch, 43 CMR 565 (ACMR 1970) (DC may not seek imposition of punitive discharge unless expressly requested by defendant and discharge is argued for in lieu of confinement or other punishment).

Current position of ACMR is that it is not error for DC to argue for punitive discharge in lieu of lengthy confinement where there is nothing in the record to indicate argument against the express or implied desires of the accused. Diaz, CM 441855 (ACMR 9 Apr 82) (citing Webb, supra, and Weatherford, 42 CMR 26 (CMA 1970)). Further MJ has no obligation to ask accused if he concurs in DC argument, absent any conflict between it and his express or implied desires, citing Cox, 46 CMR 833 (ACMR 1972)).

2. Cf. Wood v. Georgia, 450 U.S. 261 (1981) (DC has duty to convince court to be lenient; failure to do so is 6th Amend. violation); Palenius, 2 M.J. 86 (CMA 1979). United States Const., Amend. VI.

T. MJ's Instructions on Sentence

1. Paragraphs 81d, 110a(1), 127c, MCM; Articles 18, 19, 20, UCMJ. See also Lewis, 29 CMR 319 (CMA 1960) (misinstruction may be corrected by immediate correction by military judge). Huggins, 12 M.J. 657 (ACMR 1981) (substantial error not waived by failure to object, citing Holsworth and Posnick, infra n.2, and Harden, 1 M.J. 258 (CMA 1976)).
2. a. Paragraph 76a(5), MCM. See also Holsworth, 7 M.J. 184 (CMA 1979) (failure to instruct on multiplicity, even in SPCM, is error); Posnick, 24 CMR 11 (CMA 1957).

b. Possession, transfer and sale of same substance multiplicitious for sentencing even if accused retains a portion of the substance. Waller, 3 M.J. 32 (CMA 1977) (sale of one pill multiplicitious with possession of larger quantity of pills); Irving, 3 M.J. 6 (CMA 1977) (transfer of heroin multiplicitious with possession retained after the transfer); Smith, 1 M.J. 260 (CMA 1976) (attempted sale of pill multiplicitious with possession of larger quantity). Norris, SPCM 16760 (ACMR 30 July 1982) (Simultaneous possession of several drugs multiplicitious for sentencing purposes. Failure to so instruct is error and failure to object by TDC does not waive the error); Hendon, CM 442098 (ACMR 25 Aug 1982) (If different drugs part of same cache and offenses occur at same time, offenses merge); Jernigan, SPCM 16799 (ACMR 19 Feb. 1982) and Waters, SPCM 17314 (ACMR 23 July 1982) (Transfer, possession, sale of same drug multiplicitious); Lattimore, SPCM 17615 (ACMR 16 Aug 1982) (Separate charges of larceny improper where items taken in one transaction). But see generally Smith, 14 M.J. 430 (CMA 1980), for discussion of multiplicity of drug offenses.

Instructional error not waived by DC's failure to object or to request a multiplicity instruction. Huggins, 12 M.J. 657 (ACMR 1982); Siddle, SPCM 16607 (ACMR 18 Dec 1981) (citing Posnick and Holsworth, supra, and Harden, 1 M.J. 258 (CMA 1976) (even in bench trial, MJ incorrect computation of maximum punishment not waived in spite of agreement by DC)).

3. Davidson, 14 M.J. 82 (CMA 1982) (MJ must instruct on pretrial confinement). Morrison, 41 CMR 484 (ACMR 1969); Wheeler, 38 CMR 72 (CMA 1967) (failure to tailor instructions to evidence presented is error). Cook, 29 CMR 395 (CMA 1960) (error not to instruct on mental impairment as mitigating).
4. Article 58(a), UCMJ. See also Koleff, 36 CMR 424 (CMA 1966) (MJ must instruct on automatic reduction provisions).
5. In situations in which BCD can be adjudged only on basis of previous offense and not on severity of current offense, see para. 127c, §B, and fn. 5 to Table of Maximum Punishments, and where no instruction has been requested, MJ need not inform court that 127c, §B, is only basis for authorizing BCD. However, failure to so instruct must be examined with the entire record to ensure that no prejudicial error occurred. Timmons, 13 M.J. 431 (CMA 1982). When error found prejudicial, conversion of BCD to CHL improper. Bullington, 13 M.J. 184 (CMA 1982).

6. See Morrison, supra (failure to instruct on voting procedures is error). Accord Horner, 1 M.J. 227 (CMA 1975); Pryor, 41 CMR 279 (CMA 1970).
7. See T-3, supra.
8. Sentencing authority may consider that accused refused to cooperate as an informant. United States v. Roberts, 445 U.S. 552 (1980). However, sentencing authority may not mete out additional punishment because accused has lied, but may consider lying as a factor in deciding whether or not accused can be rehabilitated. Warren, 13 M.J. 278 (CMA 1982); United States v. Cabebe, 13 M.J. 303 (CMA 1982).

U. Deliberations and Announcement of Sentence

1. See M.R.E. 509 and 606(b); Army Lawyer, Nov 1981, at p. 1 (covers ignoring instructions, command influence, viewing scene of crime, etc.). Hance, 10 M.J. 622 (ACMR 1980) (discusses general rule with exceptions).
2. Schultz, 23 CMR 353 (CMA 1957) (no reasons should be announced as to why particular sentence adjudged). See also paragraph 76c, MCM. See also Justice, 3 M.J. 451 (CMA 1977) (the statement by the president is the announcement not the examination of the worksheet by the parties to trial).

Note: See Jenkins, 12 M.J. 222 (CMA 1982) (error in failing to announce sentence arrived at in secret and statutory percentage of concurrence was nonprejudicial where members properly instructed).

3. Robinson, 15 CMR 12 (CMA 1954) (if president uses wording which does not reflect intent of court, the announcement is not final and members may correct sentence). But see Nicholson, 27 CMR 260 (CMA 1959) (announcement is final if wording, although not expressing actual intent, is in fact the wording agreed upon). Cf. Liberator, 34 CMR 279 (CMA 1964) (mere slip of the tongue).
4. a. Jones, 3 M.J. 348 (CMA 1977) (MJ may correct illegal sentence by instructing the members so that they may reconsider and correct the sentence; however, reconsidered sentence may not increase punishment).
- b. Vazquez, 12 M.J. 1022 (ACMR 1982) (MJ must instruct that sentence can be decreased/entirely reconsidered).

Whether Art. 52(c) prohibits reconsideration of finding of NG or reconsideration of a sentence to authorize increasing it is pending in Wilson, pet. granted, 11 M.J. 140 (CMA 1981), argued 22 Apr 82.

- c. Vazquez, supra.
 - d. Issues as to correct instructions on procedures to reconsider and on resentencing balloting pending in Wilson, pet. granted, 11 M.J. 140 (CMA 1981), argued 22 Apr 82.
 - e. When MJ initiates reconsideration to rectify ambiguous or illegal sentence prior to announcement, reconsideration balloting requirements of paragraphs 76c and d are not required and MJ need not instruct on how to ballot. King, 13 M.J. 838 (ACMR 1982).
5. Ambiguities in sentence resolved in accused's favor. Smith, 43 CMR 660 (ACMR 1971). See Gragg, 10 M.J. 286 (CMA 1981).
 6. Error for MJ to consider providency responses in sentencing. Richardson, 6 M.J. 654 (NCMR 1978); Brooks, 43 CMR 817 (ACMR 1971).

7. Walters, 5 M.J. 829 (ACMR 1978); Robago, 10 M.J. 610, 612 (ACMR 1980) (MJ should not examine quantum portion until after sentence announced); Sallee, 4 M.J. 681 (NCOMR 1977) (error for MJ to base his sentence on PTA limits).
8. Green/King/Crowley "strict" compliance no longer required. See generally Lukjanowicz, The Providency Inquiry: An Examination of Judicial Responsibilities, 13 The Advocate 333 (1981).
9. Although appropriateness of accused's sentence is generally to be determined without comparison to other cases, there is an exception for highly disparate sentences in closely related cases. Olinger, 12 M.J. 458 (CMA 1982); Dorman, CM 441902 (ACMR 23 June 1982); Stiles, CM 442119 (ACMR 10 Aug. 1982). Disparity exception in closely related cases applies to punitive discharges as opposed to retention, as well as to length of confinement. Walker, 13 M.J. 982 (ACMR 1982).
10. Rebuttable presumption of error arises when MJ communicates with members about sentence. Communication occurs when MJ looks at worksheet and sends members back to continue deliberations, without allowing TDC to look at sheet. Here, presumption held rebutted. King, Item 4e, supra.

V. Record of Trial and Authentication

1. Generally. Art. 19, UCMJ requires a complete record. But, a verbatim transcript required for GCM, para. 82b(1), MCM, and SPCM, para. 83a, MCM. See discussion and cases cited in McCullah, 11 M.J. 234 (CMA 1981) (missing exhibit makes R/T incomplete). Boxdale, 47 CMR 351 (CMA 1973) (burden on government to rebut presumption of prejudice from substantial omission).
2. Hall, 6 M.J. 24 (CMA 1978) (significant omissions require sentence be reduced to that of regular SPCM). Averett, 3 M.J. 201 (1977) (R/T not verbatim where 2 pages erased and reconstructed).
3. Gray, 7 M.J. 296 (CMA 1979) (R/T not verbatim where side-bar reconstructed).
4. Eichenlaub, 11 M.J. 239 (CMA 1981) (reconstructed sentence announcement and Green ruling rebutted prejudice); Region, SPCM 16944 (ACMR 9 Aug. 1982) (Where quality of reconstructed portion of a special court-martial is apparent and procedure used and nature of contents greatly minimize the possibility of error, the reconstruction provided a "substantially verbatim transcript" and the presumption of prejudice had been rebutted).
5. a. See Art 54, UCMJ and para. 82f, MCM on authentication.
b. Lott, 9 M.J. 70 (CMA 1980) (PCS of MJ from Okinawa to Virginia is an emergency situation authorizing authentication by TC). Miller, 4 M.J. 207 (CMA 1978); Cruz-Rijos, 1 M.J. 429 (CMA 1975) (temporary/brief absence of MJ does not justify TC authentication); Williams, 3 M.J. 555 (ACMR 1977).
6. Cruz-Rios, 1 M.J. 429 (CMA 1975) (service of record required "well before" action of convening authority. Also, DC needs access to the record to prepare response to SJA review. Cruz, 5 M.J. 286 (CMA 1978).
7. Certificates of correction.
 - a. Anderson, 12 M.J. 195 (CMA 1982) (recognizing right of access by DC to reporter's notes and tapes).
 - b. See also Memo from ACMR Clerk of Court, Subject: Certification of Correction, dated 10 July 1981, setting forth ACMR procedures for submitting certificates of correction during appellate review.
8. Harris, 44 CMR 177 (CMA 1971) (condemning tampering with the record, but applying prejudice test).
9. "[W]hen, after authentication, it becomes necessary for the trial judge to propose substantive changes in the record of trial to accurately reflect the proceedings in the case, pursuant to a Certificate of Correction, he should give notice to all parties, providing an opportunity to be heard on the issues of the proposed correction." United States v. Anderson, 12 M.J. 195 (CMA 1982).

ON THE RECORD

or

*Quotable Quotes from Actual
Records of Trial Received in DAD*

(Defense counsel arguing at a Navy court-martial)

IDC: . . . It's not going to make [the accused's] parents happy [to lock up the accused and throw away the key]: it's certainly not going to make him happy. It's not going to make the people in this courtroom watching happy.

TC: Actually, it will make me happy, Your Honor . . .

* * * * *

(Defense counsel objecting at a Navy court-martial)

DC: I object, your honor, that's a crock!

MJ: What did you say, counsel?

DC: That's a crock.

MJ: Spell that, counsel.

DC: C-R-O-C-K.

MJ: What does that mean, counsel?

DC: Uh-oh!

* * * * *

(Witness testifying at a Coast Guard court-martial)

TC: Have you ever seen marijuana?

WIT: Yes, sir.

TC: Have you ever smelled it?

WIT: Yes, sir.

TC: Have you ever smelled it while it's being smoked?

WIT: Yes, sir

TC: Therefore, are you familiar with marijuana?

WIT: Yes, sir, I used to grow it. Back home before I was in the Coast Guard.

TC: Your Honor, I will not attempt to qualify the witness as an expert on marijuana.

WIT: I'm not sir, I'm not.

* * * * *

(Civilian defense counsel describes his witness at an Air Force court-martial).

CDC: Well, we have also a short witness.

MJ: Just a little short person?

CDC: Yes, about five foot two I think. Actually I haven't seen this witness personally, that's all hearsay, but nonetheless a witness who would not take much of the court's time, I hope, so we would like to, assuming we're in a reasonable time slot, get that witness on as well.

* * * * *

(Argument at a Navy court-martial)

TC: [T]here are two individuals sitting in a car passing a joint back and forth. It's clear that that's a joint possession. . .

* * * * *

Q. How close was his finger from your face?

A. I'd say possibly a foot.

Q. Let the record reflect the witness is saying approximately one foot.

* * * * *

(Military judge prior to announcing sentence)

You indicated you had no excuses, I found no excuses. This was not a mistake. It was criminal action by one who through past training and conduct, clearly knew that it was criminal. You knew the odds, you made the bet, and you didn't beat the point spread.

* * * * *

(Military judge to defense counsel)

From what your client has said, he is becoming a victim of these grossly vulgar four and five year olds.

* * * * *

MJ: I sure wish I knew what you're doing, but I guess you're going to tell me in a little bit.

TC: I'll understand myself in a moment.

MJ: What in the world are you doing, just tell me.

TC: Okay.

MJ: You're starting to worry me.

(IDC approaches the TC's table)

MJ: Don't bug him there counsel, he's got enough problems.

* * * * *

(Military judge after announcing sentence)

I think it's a wasted effort to keep this man on the rolls of the United States Army any longer than necessary and I strongly urge the convening authority to put the accused on excess leave immediately. I frankly don't think that he's worth feeding.

* * * * *

MJ: Private S., do you believe that you were in violation of the regulation by having a switchblade in your possession on the date in question?

ACC: Well, sir, because of the situation itself right where it is confusing to me on the point right, whereas I know that I was wrong for having you know, possession of it myself right, but seeing that it's not mine, you know, like I went out and bought it and I take it from another person because, you know, confusion between other people and that's how you know, you get confused and everything.

* * * * *

Q. How long have you been in that job?

A. About two months, sir.

Q. What did you do before that?

A. I was a computer, sir.

* * * * *

Q. Okay. Now, was there any kind of -- was there anything else on the seat other than those items?

A. Some Lord Calvert

MJ: Some what?

WIT: Some Lord Calvert.

MJ: Some Log Cabin. Now, talk to the members now.

WIT: Lord Calvert.

Q. What's Log Cabin?

A. Liquor, sir.

Member: Did you say Log Cabin?

MJ: Yes.

WIT: Lord Calvert

